



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

~~LIBRARY~~
LRR



HARVARD LAW SCHOOL
LIBRARY

National Reporter System.—State Series.

THE
NORTHEASTERN REPORTER,
VOLUME 75,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MASSACHUSETTS, OHIO, ILLINOIS, INDIANA,
APPELLATE COURT OF INDIANA, AND THE COURT
OF APPEALS OF NEW YORK.

PERMANENT EDITION.

AUGUST 18, 1905—JANUARY 19, 1906.

WITH TABLE OF NORTHEASTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

ST. PAUL:
WEST PUBLISHING CO.
1906.

THE WEST PUBLISHING COMPANY

NEW

THE WEST PUBLISHING COMPANY

AT THE

WEST PUBLISHING COMPANY

THE WEST PUBLISHING COMPANY
PUBLISHED BY THE WEST PUBLISHING COMPANY
AT THE WEST PUBLISHING COMPANY

COPYRIGHT, 1906,
BY
WEST PUBLISHING COMPANY.

THE WEST PUBLISHING COMPANY
AT THE WEST PUBLISHING COMPANY

JUDGES
OF THE
COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ILLINOIS—Supreme Court.

JAMES H. CARTWRIGHT, CHIEF JUSTICE.

JUSTICES.

CARROLL C. BOGGS.

GUY C. SCOTT.

JACOB W. WILKIN.

JOHN P. HAND.

BENJAMIN D. MAGRUDER.

JAMES B. RICKS.

INDIANA—Supreme Court.¹

JOHN H. GILLET, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JAMES H. JORDAN.

JOHN V. HADLEY.

OSCAR H. MONTGOMERY.

LEANDER J. MONKS.

INDIANA—Appellate Court.¹

FRANK S. ROBY, CHIEF JUDGE.

ASSOCIATE JUDGES.

WOODFIN D. ROBINSON.

JAMES B. BLACK.

DAVID A. MYERS.

DANIEL W. COMSTOCK.

ULRIC Z. WILEY.

Division No. 1.¹

JAMES B. BLACK, PRESIDING JUDGE.

ASSOCIATE JUDGES.

WOODFIN D. ROBINSON.

DAVID A. MYERS.

Division No. 2.¹

FRANK S. ROBY, CHIEF JUDGE.

ASSOCIATE JUDGES.

DANIEL W. COMSTOCK.

ULRIC Z. WILEY.

MASSACHUSETTS.—Supreme Judicial Court.

MARCUS P. KNOWLTON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JAMES M. MORTON.

JOHN WILKES HAMMOND.

JOHN LATHROP.

WILLIAM CALEB LORING.

JAMES M. BARKER.²

HENRY K. BRALEY.

HENRY N. SHELDON.²

¹ Beginning November Term, 1905.
² Died October 2, 1905.

² Appointed October 12, 1905.

10/2/46 Boston Law Book Co.

NEW YORK—Court of Appeals.**EDGAR M. CULLEN, CHIEF JUDGE.****ASSOCIATE JUDGES.****JOHN C. GRAY.****IRVING G. VANN.****DENIS O'BRIEN.****WILLIAM E. WERNER.****EDWARD T. BARTLETT.****WILLARD BARTLETT,*****ALBERT HAIGHT.****EMORY A. CHASE.*****FRANK H. HISCOCK.*****OHIO—Supreme Court.****WILLIAM Z. DAVIS, CHIEF JUSTICE.****JUDGES.****JAMES L. PRICE.****WILLIAM B. CREW.****JOHN A. SHAUCK.****AUGUSTUS N. SUMMERS.****WILLIAM T. SPEAR.***** Assigned by the Governor.**

CASES REPORTED.

	Page		Page
Abeel, People v. (N. Y.).....	307	Blodgett v. Stowell (Mass.).....	138
Adamian v. Hassanoff (Mass.).....	126	Board of Com'rs of Morgan County v. Crone (Ind. App.).....	826
Adams, Cronan v. (Mass.).....	101	Board of Com'rs of Morgan County v. Neely (Ind. App.).....	829
Adler, Union Mut. Life Ins. Co. of Portland, Me., v. (Ind. App.).....	1088	Board of Sup'rs of Columbia County, People v., two cases (N. Y.).....	1133
Ætna Life Ins. Co. v. Fitzgerald (Ind. Sup.).....	262	Bolster v. Graves, two cases (Mass.).....	714
Alexander v. McPeck (Mass.).....	88	Bossard's Estate, In re (N. Y.).....	1127
Alfson v. Bush Co. (N. Y.).....	230	Boston, Campbell v. (Mass.).....	96
Allen, Carpenter v. (Mass.).....	622	Boston, Dickihson v. (Mass.).....	68
Alton Light & Traction Co. v. Oliver (Ill.).....	419	Boston, Old Colony R. Co. v. (Mass.).....	134
Amalgamated Woodworkers' Local Union No. 131, Karges Furniture Co. v. (Ind. Sup.).....	877	Boston Dairy Co., Copeland v. (Mass.).....	704
Ambler, Glos v. (Ill.).....	764	Boston Storage Warehouse Co., Fairbanks v. (Mass.).....	737
American Ice Co. v. Catskill Cement Co. (N. Y.).....	1127	Boston & M. R. R., Moody v. (Mass.).....	631
American Telephone & Telegraph Co., Burrall v. (Ill.).....	461	Boston & N. St. Ry., Dunn v. (Mass.).....	75
Anderson Iron & Mfg. Works, Griffiths v. (Ind. App.).....	673	Bosworth v. Stockbridge (Mass.).....	712
Anthony, Brownell v. (Mass.).....	746	Botkins v. State (Ind. App.).....	298
Archambault, Lowell v. (Mass.).....	65	Bouthillier v. Old Colony St. R. Co. (Mass.).....	960
Armstrong v. Stebbins (Ill.).....	1081	Bowman v. Domestic & Foreign Missionary Soc. of Protestant Episcopal Church in United States (N. Y.).....	535
Atchison, T. & S. F. R. Co., People v. (Ill.).....	573	Bowman v. Oirick (Ind. Sup.).....	820
Atlantic Cotton Mills, Aziz v. (Mass.).....	73	Boyd v. Chicago & N. W. R. Co. (Ill.).....	496
Aurora, De K. & R. Electric Traction Co., Wilder v. (Ill.).....	194	Bradford v. Storey (Mass.).....	256
Ayers, Travelers' Ins. Co. v. (Ill.).....	506	Bradley v. State (Ind. Sup.).....	873
Aziz v. Atlantic Cotton Mills (Mass.).....	73	Brady v. Brooklyn Heights R. Co. (N. Y.).....	1127
Bailey, Harlow v. (Mass.).....	259	Brede, City of Chicago v. (Ill.).....	1044
Baker, Hood v. (Ind. App.).....	608	Bridgeman, People v. (Ill.).....	1057
Baldwin v. Rice (N. Y.).....	1096	Brill Co. v. Norton & T. St. R. Co. (Mass.).....	1090
Ball v. Holland (Mass.).....	713	Bristow v. National Wall Paper Co. (N. Y.).....	1127
Baltimore & O. S. W. R. Co. v. Brubaker (Ill.).....	523	Bromwell v. Flowers (Ill.).....	466
Baltimore & O. S. W. R. Co. v. Mullen (Ill.).....	474	Brooklyn Heights R. Co., Brady v. (N. Y.).....	1127
Barber, Scholten v. (Ill.).....	460	Brooklyn Heights R. Co., Davids v. (N. Y.).....	1128
Barber Asphalt Pav. Co., McGee v. (N. Y.).....	1181	Brooklyn Heights R. Co., Monck v. (N. Y.).....	1131
Barker v. Smiley (Ill.).....	787	Brooks, Crane v. (Mass.).....	710
Barmm, Jones v. (Ill.).....	505	Brown v. People (Ill.).....	984
Barnett v. Thomas (Ind. App.).....	868	Brown, People v. (Ill.).....	907
Barnum, McGown v. (N. Y.).....	155	Brown, People v. (Ill.).....	989
Barringer, Montgomery Coal Co. v. (Ill.).....	900	Brown, Whinery v. (Ind. App.).....	605
Barry, Young v. (N. Y.).....	1135	Brownell v. Anthony (Mass.).....	746
Bartholomae, Schaeppi v. (Ill.).....	447	Browning v. Stilwell (N. Y.).....	1128
Bartholomay Brewery Co., Krueger v. (N. Y.).....	1130	Brubaker, Baltimore & O. S. W. R. Co. v. (Ill.).....	523
Bartlett v. State (Ohio).....	939	Bryan, Chicago, I. & L. R. Co. v. (Ind. App.).....	678
Bartlett v. Worcester Consol. St. R. Co. (Mass.).....	706	Bryant, Pittsburg, C., C. & St. L. R. Co. v. (Ind. App.).....	829
Barwe, Grand Lodge A. O. U. W. v. (Ind. App.).....	971	Bub, Staunton Coal Co. v. (Ill.).....	770
Bechdoldt v. Bechdoldt (Ill.).....	557	Bunting's Estate, In re (N. Y.).....	1128
Beckett v. Chicago (Ill.).....	747	Burbach v. Burbach (Ill.).....	519
Bedford, Southern Indiana R. Co. v. (Ind. Sup.).....	268	Burbank v. Hammond (Mass.).....	102
Bedford Quarries Co. v. Turner (Ind. App.).....	25	Burgett, Merica v. (Ind. App.).....	1063
Beam, Crowe v. (Ind. App.).....	302	Burke v. Hullett (Ill.).....	240
Bennett v. Bennett (Ill.).....	339	Burnett, Schaeffer v. (Ill.).....	440
Bennett v. Wellesley, thirty-nine other cases (Mass.).....	717	Burnham v. China Mut. Ins. Co. (Mass.).....	74
Bennett, Keyes v. (Ill.).....	1075	Burnham, Corsiglia v. (Mass.).....	253
Bent v. Butler (Mass.).....	726	Burrall v. American Telephone & Telegraph Co. (Ill.).....	461
Berdel v. Chicago (Ill.).....	386	Bush Co., Alfson v. (N. Y.).....	230
Berry, Best v. (Mass.).....	743	Busiere v. Reilly (Mass.).....	958
Best v. Berry (Mass.).....	743	Butler, Bent v. (Mass.).....	726
Bingham, Steinhardt v. (N. Y.).....	403	Butler, Flynn v. (Mass.).....	730
Bird v. Bird (Ill.).....	760	Butler, Lawrence v. (Mass.).....	726
Birge v. Centralia (Ill.).....	1035	Butler, Oulighan v., two cases (Mass.).....	726
		Calkins v. Calkins (Ill.).....	182
		Campbell v. Boston (Mass.).....	96
		Capital Nat. Bank v. Wilkerson (Ind. App.).....	837
		Carle, Fairbanks v. (Ill.).....	860

	Page		Page
Carlin, Tongert v. (Ind. Sup.).....	887	City of New York, In re (N. Y.).....	156
Carlton, Matthews v. (Mass.).....	637	City of New York v. Metropolitan St. R.	
Carpenter v. Allen (Mass.).....	622	Co. (N. Y.).....	1128
Carroll v. Metropolitan Coal Co. (Mass.)...	84	City of New York v. Tucker (N. Y.)....	1128
Carville v. Commonwealth (Mass.).....	689	City of Rochester v. Fourteenth Ward	
Catskill Cement Co., American Ice Co. v.		Co-op. Bldg. Lot Ass'n (N. Y.).....	692
(N. Y.).....	1127	City of Rochester v. Rochester R. Co.	
Cawley v. Jean (Mass.).....	614	(N. Y.).....	1128
Cella v. Chicago & W. I. R. Co. (Ill.)....	373	City of Rock Island v. Gingles (Ill.)....	468
Centralia, Birge v. (Ill.).....	1035	City of Venice v. Madison County Ferry	
Central Safety Deposit Co. v. Rodman		Co. (Ill.).....	105
(Ill.).....	465	Cleveland v. Martin (Ill.).....	772
Cerro Gordo, Drainage Com'rs of Dist.		Cleveland, O., C. & St. L. R. Co. v. Patter-	
No. 1 v. (Ill.).....	518	son (Ind. App.).....	857
Chambers v. Wampanoag Mills (Mass.)....	1093	Cleveland, O., C. & St. L. R. Co., Standley	
Champaign Nat. Bank, Hinkley v. (Ill.)...	210	v. (Ind. App.).....	674
Chemical Nat. Bank v. Kellogg (N. Y.)....	1103	Clevenger v. Matthews (Ind. App.).....	23
Chicago, Beckett v. (Ill.).....	747	Clevenger v. Matthews (Ind. App.).....	336
Chicago, Berdel v. (Ill.).....	888	Close v. Chicago (Ill.).....	479
Chicago, Chicago Terminal Transfer R.		Cloutier, Desautels v. (Mass.).....	703
Co. v. (Ill.).....	499	Coal Belt Electric R. Co. v. Kays (Ill.)...	498
Chicago, Close v. (Ill.).....	479	Coffin v. Jernegan (Mass.).....	958
Chicago, Connecticut Mut. Life Ins. Co.		Coffin, Newburyport Inst. for Savings v.	
v. (Ill.).....	365	(Mass.).....	81
Chicago, Cratty v. (Ill.).....	343	Cohen v. Wagar (N. Y.).....	691
Chicago, Frank v. (Ill.).....	213	Cohn, Pitzele v. (Ill.).....	392
Chicago, Goodrich v. (Ill.).....	805	Colegrove, People v. (Ill.).....	991
Chicago, Hatterman v. (Ill.).....	980	Coleman, Swick v. (Ill.).....	807
Chicago, Hill v. (Ill.).....	766	Collins Coal Co. v. Hadley (Ind. App.)....	832
Chicago, Hulbert v. (Ill.).....	486	Commissioners of Highways of Town of	
Chicago, Joyce v. (Ill.).....	184	McKee v. Smith (Ill.).....	396
Chicago, McLannan v. (Ill.).....	762	Commonwealth v. R. I. Sherman Mfg. Co.	
Chicago, Malkan v. (Ill.).....	548	(Mass.).....	71
Chicago, Masonic Fraternity Temple		Commonwealth v. Sisson, two cases	
Ass'n v. (Ill.).....	439	(Mass.).....	619
Chicago, Noyes v. (Ill.).....	807	Commonwealth v. Snell (Mass.).....	75
Chicago, People v. (Ill.).....	239	Commonwealth v. Tircinaki (Mass.).....	261
Chicago, Stone v. (Ill.).....	980	Commonwealth, Carville v. (Mass.).....	639
Chicago City R. Co. v. Henry (Ill.).....	758	Congdon v. Delaware, L. & W. R. Co.	
Chicago City R. Co. v. Lowitz (Ill.).....	755	(N. Y.).....	1128
Chicago City R. Co. v. Schmidt (Ill.).....	383	Connecticut Mut. Life Ins. Co. v. Chicago	
Chicago Crayon Co., Chicago Portrait		(Ill.).....	365
Co. v. (Ill.).....	473	Consolidated Traction Co. v. Jordan (Ind.	
Chicago, I. & L. R. Co. v. Bryan (Ind. App.)	678	App.).....	301
Chicago, I. & L. R. Co. v. Hare (Ind. App.)	867	Continental Tel. Const. Co., Streater In-	
Chicago Portrait Co. v. Chicago Crayon		dependent Tel. Co. v. (Ill.).....	546
Co. (Ill.).....	473	Conwell, Stafford v. (Ind. App.).....	600
Chicago, R. I. & P. R. Co. v. People (Ill.)...	368	Cook, Roberts v. (N. Y.).....	1133
Chicago Tel. Co., Hayes v. (Ill.).....	1003	Cooksey's Estate, In re (N. Y.).....	1128
Chicago Terminal Transfer R. Co. v. Chi-		Copeland v. Boston Dairy Co. (Mass.)....	704
cago (Ill.).....	499	Corbin Oil Co. v. Searles (Ind. App.).....	293
Chicago Title & Trust Co., Wheeler v. (Ill.)	455	Corsiglia v. Burnham (Mass.).....	253
Chicago Union Traction Co. v. Jacobson		Cover v. James (Ill.).....	490
(Ill.).....	508	Cowan v. Curran (Ill.).....	322
Chicago Union Traction Co. v. Mee (Ill.)...	800	Cox, Sovereign Camp, Woodmen of the	
Chicago Union Traction Co. v. Rosenthal		World v. (Ind. App.).....	290
(Ill.).....	578	Crane v. Brooks (Mass.).....	710
Chicago Union Traction Co. v. Sawusch		Crane v. Stafford (Ill.).....	424
(Ill.).....	797	Crane Co. v. Smythe (N. Y.).....	1128
Chicago & A. R. Co. v. Jennings (Ill.)...	560	Cratty v. Chicago (Ill.).....	343
Chicago & A. R. Co. v. Walker (Ill.).....	520	Crawford v. Mound Grove Cemetery Ass'n	
Chicago & A. R. Co. v. Walters (Ill.).....	441	(Ill.).....	998
Chicago & E. I. R. Co. v. People (Ill.)....	1021	Creighton v. Roe (Ill.).....	1073
Chicago & E. I. R. Co., Hewes v. (Ill.)...	515	Crescent Ave. in City of New York, In re	
Chicago & N. W. R. Co., Boyd v. (Ill.)...	496	(N. Y.).....	937
Chicago & S. E. R. Co. v. Grantham (Ind.		Griswell, Featherstone Foundry & Machine	
Sup.).....	265	Co. v. (Ind. App.).....	30
Chicago & W. I. R. Co. v. Marshall (Ind.		Cronan v. Adams (Mass.).....	101
App.).....	973	Crene, Board of Com'rs of Morgan County	
Chicago & W. I. R. Co., Cella v. (Ill.)...	373	v. (Ind. App.).....	826
China Mut. Ins. Co., Burnham v. (Mass.)...	74	Cronk, Roberts v. (N. Y.).....	1133
Christensen v. People (Ill.).....	108	Crowe v. Beem (Ind. App.).....	302
Church v. Randall (N. Y.).....	1128	Crucible Steel Co. of America, McMahon	
Cincinnati Traction Co. v. Forrest (Ohio)...	818	v. (N. Y.).....	1131
City of Chicago v. Brede (Ill.).....	1044	Cummins v. Webber (Ill.).....	1041
City of Chicago v. Duffy (Ill.).....	912	Curran, Cowan v. (Ill.).....	322
City of Chicago v. Hogberg (Ill.).....	542	Currier v. Williams (Mass.).....	618
City of Chicago v. McCartney (Ill.).....	117	Outter v. Middlesex County (Mass.).....	954
City of Chicago v. Northwestern Mut. Life			
Ins. Co. (Ill.).....	803	Dallas, Harmon v. (Ind. Sup.).....	824
City of Elkhart v. Murray (Ind. Sup.)....	593	Dallas, Highlands v. (Ind. Sup.).....	824
City of Gibson v. Murray (Ill.).....	319	Dallas, Low v. (Ind. Sup.).....	822
City of Mattoon v. Faller (Ill.).....	387	Dallas, Nichols v. (Ind. Sup.).....	824
City of Mattoon v. Noyes (Ill.).....	1065	Dallas, Slocum v. (Ind. Sup.).....	823

	Page		Page
David v. Brooklyn Heights R. Co. (N. Y.)	1128	Fairbanks v. Boston Storage Warehouse Co. (Mass.)	737
Davies, Green v. (N. Y.)	536	Fairbanks v. Carle (Ill.)	360
Davis, Glos v. (Ill.)	208	Faller, City of Mattoon v. (Ill.)	387
Davis, Tyler v. (Ind. App.)	3	Fall River, Everett v. (Mass.)	946
Davis' Will, In re (N. Y.)	530	Fall River, Hyde v. (Mass.)	953
Dayton & W. Traction Co. v. Marshall (Ind. App.)	824	Fasig, Eddleman v. (Ill.)	977
Degenfelder, People v. (N. Y.)	1132	Featherstone Foundry & Machine Co. v. Criswell (Ind. App.)	30
Dehne, Over v. (Ind. App.)	664	Feeney v. York Mfg. Co. (Mass.)	783
Delaware, L. & W. R. Co., Congdon v. (N. Y.)	1128	Felix, Metropolitan Life Ins. Co. v. (Ohio)	941
Dennis, Heints v. (Ill.)	192	Fey, Forrest v. (Ill.)	789
Dennis-Wickers v. Elmira Heights (N. Y.)	1129	Field v. Kenneweg (Ill.)	986
Dennis & Lovejoy Wharf & Warehouse Co., Phenix Nerve Beverage Co. v. (Mass.)	258	First Nat. Bank, In re (N. Y.)	306
Desautels v. Cloutier (Mass.)	703	Fisher v. People (Ill.)	108
Deuterman, Graham v. (Ill.)	480	Fitzgerald, Aetna Life Ins. Co. v. (Ind. Sup.)	262
Devine, In re (N. Y.)	1129	Fletcher Bros. Co. v. Hyde (Ind. App.)	9
Dewey, Merritt v. (Ill.)	1066	Flowers, Bromwell v. (Ill.)	466
Dexter v. Thayer (Mass.)	223	Flynn v. Butler (Mass.)	780
Diamond Plate Glass Co., Hancock v. (Ind. App.)	659	Flynn v. McDermott (N. Y.)	981
Dickinson v. Boston (Mass.)	63	Folsom v. Harr (Ill.)	987
Dillow, Verble v. (Ill.)	1046	Forbes, Stone v. (Mass.)	141
Dinger v. New York, two cases (N. Y.)	1129	Forrest v. Fey (Ill.)	789
Doell v. Schrier (Ind. App.)	600	Forrest, Cincinnati Traction Co. v. (Ohio)	818
Dolphin v. Worcester Consol. St. R. Co. (Mass.)	635	Foskett, Martin v. (Mass.)	709
Domestic & Foreign Missionary Soc. of Protestant Episcopal Church in United States, Bowman v. (N. Y.)	535	Foster v. International Paper Co. (N. Y.)	983
Donovan v. Purtell (Ill.)	834	Foster, Phinney v. (Mass.)	103
Donovan v. York Mfg. Co. (Mass.)	733	Fountaine v. Wampanoag Mills (Mass.)	738
Douglas Park Bldg. Ass'n v. Roberts (Ill.)	1018	Fourteenth Ward Co-op. Bldg. Lot Ass'n, City of Rochester v. (N. Y.)	692
Dowie v. Priddle (Ill.)	243	Fox v. Manchester (N. Y.)	1118
Downs v. Downs (N. Y.)	1129	Frank v. Chicago (Ill.)	218
Drainage Com'rs of Dist. No. 1 v. Cerro Gordo (Ill.)	516	Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co. (Mass.)	624
Drake v. Lauer (N. Y.)	1129	Freeburg, Reichert Mill. Co. v. (Ill.)	544
Dubuc v. Lazell, Dalley & Co. (N. Y.)	401	Freund v. Freund (Ill.)	925
Duffy, City of Chicago v. (Ill.)	912	Frisch, People v. (Ill.)	904
Dunbar v. Kelly (Mass.)	740	Fuchs v. Tone (Ill.)	1014
Dunlap, Evans v. (Ind. App.)	297	Fulkerson, Elkhart Paper Co. v. (Ind. App.)	283
Dunn v. Boston & N. St. Ry. (Mass.)	75	Fulks v. Wright (Ohio)	55
Durant, Taber-Frang Art. Co. v. (Mass.)	221	Gale, Magnolia Metal Co. v. (Mass.)	219
Durbin v. Northwestern Scraper Co. (Ind. Sup.)	1	Gardner Sav. Bank v. Taber-Frang Art Co. (Mass.)	705
Dyer, Joyce v. (Mass.)	81	Garfield v. Peerless Motor Car Co. (Mass.)	695
Earp v. Lilly (Ill.)	552	Gay v. Ray (Mass.)	138
Easton, Harvey v. (Mass.)	948	George v. Robinson (Ind. App.)	607
East River Electric Light Co., Klein v. (N. Y.)	1130	Germania Life Ins. Co., Kilpatrick v. (N. Y.)	1124
Ebner, Tudor v. (N. Y.)	1134	Gingles, City of Rock Island v. (Ill.)	468
Eddleman v. Fasig (Ill.)	977	Ginzberg, Tracy v. (Mass.)	637
Eddleman v. Union County Traction & Power Co. (Ill.)	510	Gipe v. State (Ind. Sup.)	881
Eddy v. Morgan (Ill.)	174	Glenn v. Lake Erie & W. R. Co. (Ind. Sup.)	282
Eddy v. People (Ill.)	1071	Glos v. Ambler (Ill.)	764
Edwards, Hastings Lumber Co. v. (Mass.)	57	Glos v. Davis (Ill.)	208
Einbighler, Griddle v. (N. Y.)	1130	Glos v. Shedd (Ill.)	887
Elgin, A. & S. Traction Co. v. Wilson (Ill.)	436	Goetz v. State (N. Y.)	1129
Elkhart Paper Co. v. Fulkerson (Ind. App.)	283	Goldberg v. Markowitz (N. Y.)	1129
Elliot v. Worcester Trust Co. (Mass.)	944	Good, In re (N. Y.)	1132
Elmira Heights, Dennis-Wickers v. (N. Y.)	1129	Goodrich v. Chicago (Ill.)	805
Engel v. Union Square Bank (N. Y.)	1129	Goreth v. Shipherd (N. Y.)	1130
Erie R. Co., Keller v. (N. Y.)	965	Gorham v. Milford, A. & W. St. R. Co. (Mass.)	634
Erie R. Co., Thompson v. (N. Y.)	1134	Gould, Tri-City R. Co. v. (Ill.)	493
Evans v. Dunlap (Ind. App.)	297	Graham v. Deuterman (Ill.)	480
Evans v. Southern Tier Masonic Relief Ass'n (N. Y.)	317	Grand Lodge A. O. U. W. v. Barwe (Ind. App.)	971
Evans v. State (Ind. Sup.)	651	Grand Pacific Hotel Co. v. Pinkerton (Ill.)	427
Evanston, Roberts v. (Ill.)	923	Grantham, Chicago & S. E. R. Co. v. (Ind. Sup.)	265
Evanston Yarran Co., Wightman v. (Ill.)	502	Graves, Bolster v., two cases (Mass.)	714
Everett v. Fall River (Mass.)	946	Green v. Davies (N. Y.)	536
Everett v. People (Ill.)	158	Green, Weigel v. (Ill.)	913
Everett Distilling Co., New England Structural Co. v. (Mass.)	85	Greenfield Gas Co. v. Trees (Ind. Sup.)	2
Excelsior Laundry Co., Manning v., two cases (Mass.)	254	Gregg v. Gregg (Ind. App.)	674
Fabens, Lindsey v. (Mass.)	623	Gregory, Willinsky v. (N. Y.)	1135
		Greundling, Senn v. (Ill.)	1020
		Gridley v. Einbighler (N. Y.)	1130
		Griffin v. Miller (Ind. App.)	598
		Griffiths v. Anderson Iron & Mfg. Works (Ind. App.)	673
		Grosse v. People (Ill.)	978

	Page		Page
Grosser, Jackson v. (Ill.).....	1032	Indianapolis, Monaghan v. (Ind. App.)....	33
Groves & S. R. R. Co., Seyferth v. (Ill.)...	522	Indianapolis Mortar & Fuel Co., Warman-Black-Chamberlain Co. v. (Ind. App.)...	672
Hadley, Collins Coal Co. v. (Ind. App.)....	832	Indiana & C. Coal Co. v. Neal (Ind. App.)...	295
Haines, Willets v. (N. Y.).....	1135	Ingersoll, Town of Ulysses v. (N. Y.)...	225
Hale v. New York (N. Y.).....	1130	Inland Steel Co. v. Smith (Ind. App.)....	852
Hammond, Burbank v. (Mass.).....	102	International Paper Co., Foster v. (N. Y.)...	933
Hancock v. Diamond Plate Glass Co. (Ind. App.).....	659	Ireland v. State (Ind. Sup.).....	872
Hanks v. Hanks (Ill.).....	352	Ishphording v. Wolf (Ind. App.).....	598
Hare, Chicago, I. & L. R. Co. v. (Ind. App.)...	867	Jackson v. Grosser (Ill.).....	1032
Harlow v. Bailey (Mass.).....	259	Jackson v. Swart (N. Y.).....	226
Harlow, Wood v. (Mass.).....	259	Jacobs v. People (Ill.).....	1034
Harmon v. Dallas (Ind. Sup.).....	824	Jacobson, Chicago Union Traction Co. v. (Ill.).....	508
Harr, Folsom v. (Ill.).....	987	James v. Lewis (Mass.).....	217
Harrington v. Harrington (Mass.).....	632	James, Coover v. (Ill.).....	490
Harrington v. Harrington (Ind. App.).....	1082	James H. Rice Co., Penn Plate Glass Co. v. (Ill.).....	246
Harris v. People (Ill.).....	1012	Jean, Cawley v. (Mass.).....	614
Hart, Wright v. (N. Y.).....	404	Jennings v. Moore (Mass.).....	214
Hartshorn v. Illinois Valley R. Co. (Ill.)...	122	Jennings, Chicago & A. R. Co. v. (Ill.)...	560
Hartshorn, Peck v. (Mass.).....	133	Jennings, Illinois Cent. R. Co. v. (Ill.)...	457
Harvey v. Easton (Mass.).....	948	Jernegan, Coffin v. (Mass.).....	958
Hassanoff, Adamian v. (Mass.).....	126	J. G. Brill Co. v. Norton & T. St. R. Co. (Mass.).....	1090
Hasterlik v. Olson (Ill.).....	1002	Jones v. Barmm (Ill.).....	505
Hastings Lumber Co. v. Edwards (Mass.)...	57	Jones v. New York Cent. & H. R. R. Co. (N. Y.).....	1130
Hatch, In re (N. Y.).....	153	Jones v. Rockwell (N. Y.).....	1130
Hathaway v. Merchants' Loan & Trust Co. (Ill.).....	1060	Jordan, Consolidated Traction Co. v. (Ind. App.).....	301
Hatterman v. Chicago (Ill.).....	980	Joyce v. Chicago (Ill.).....	184
Hayes v. Chicago Tel. Co. (Ill.).....	1003	Joyce v. Dyer (Mass.).....	81
Hays, Sheets v. (Ind. App.).....	20	Kankakee & S. W. R. Co., People v. (Ill.).....	1063
Heigert v. State (Ind. App.).....	850	Kapaczynski, Wells & French Co. v. (Ill.)...	751
Heinrich, Von Schuckmann v. (N. Y.).....	1135	Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131 (Ind. Sup.).....	877
Heintz v. Dennis (Ill.).....	192	Kays, Coal Belt Electric R. Co. v. (Ill.)...	498
Hemenway, Thompson v. (Ill.).....	791	Keeley v. Sayles (Ill.).....	567
Henderson v. Henderson (Ind. Sup.).....	269	Keith, Ray v. (Ill.).....	921
Henry, Chicago City R. Co. v. (Ill.).....	758	Keller v. Erie R. Co. (N. Y.).....	965
Henry County, Stevens v. (Ill.).....	1024	Kelley, People v. (Ill.).....	1038
Hewes v. Chicago & E. I. R. Co. (Ill.).....	515	Kellogg, Chemical Nat. Bank v. (N. Y.)...	1103
Heymann v. Heymann (Ill.).....	1079	Kelly v. Home Sav. Bank (N. Y.).....	1130
H. H. Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co. (Mass.).....	624	Kelly, Dunbar v. (Mass.).....	740
Hicks v. State (Ind. Sup.).....	641	Kellyville Coal Co. v. Strine (Ill.).....	375
Highlands v. Dallas (Ind. Sup.).....	824	Kemp v. Prather (Ind. App.).....	673
Hill v. Chicago (Ill.).....	766	Kendrick v. Kendrick (Mass.).....	151
Hill, Swing v. (Ind. Sup.).....	658	Kenneweg, Field v. (Ill.).....	986
Hillis v. O'Keefe (Mass.).....	147	Keyes v. Bennett (Ill.).....	1075
Hinkley v. Champaign Nat. Bank (Ill.)...	210	Kiebel v. Leick (Ill.).....	187
Hinman, Wilson v. (N. Y.).....	236	Kilpatrick v. Germania Life Ins. Co. (N. Y.).....	1124
Hogberg, City of Chicago v. (Ill.).....	542	Kincaid v. Vickers (Ill.).....	527
Holland, Ball v. (Mass.).....	713	King, Provident Sav. Life Assur. Soc. v. (Ill.).....	166
Home Building & Loan Ass'n v. McKay (Ill.).....	569	Kinnare, South Chicago City R. Co. v. (Ill.).....	179
Homer, Town of Knightstown v. (Ind. App.).....	13	Klawanski v. People (Ill.).....	1028
Home Sav. Bank, Kelly v. (N. Y.).....	1130	Klein v. East River Electric Light Co. (N. Y.).....	1130
Home Tel. Co., Shaver v. (Ind. App.).....	288	Knotts, O'Brien v. (Ind. Sup.).....	594
Hood v. Baker (Ind. App.).....	608	Koch v. Streuter (Ill.).....	1049
Hooper, People v. (Ill.).....	896	Koehler v. New York Steam Co. (N. Y.)...	538
H. O. Stone & Co. v. Mulvaine (Ill.).....	421	Krause v. Nolte (Ill.).....	362
Howe, Steinhardter v. (N. Y.).....	1134	Krueger v. Bartholomay Brewery Co. (N. Y.).....	1130
Howell, Muren Coal & Ice Co. v. (Ill.)...	469	Kuelling v. Roderick Lean Mfg. Co. (N. Y.)...	1098
Hubbard v. Lamburn (Mass.).....	707	Ladenburg, Moors v. (Mass.).....	145
Hubbard, St. Joseph Mfg. Co. v. (Ind. App.).....	17	Lake Erie & W. R. Co., Glenn v. (Ind. Sup.).....	282
Huddleston, Price v. (Ind. App.).....	972	Lake Shore & M. S. R. Co., Loomis v. (N. Y.).....	228
Huggard, People v. (Ill.).....	371	Lamburn, Hubbard v. (Mass.).....	707
Hulbert v. Chicago (Ill.).....	486	Lamson & Goodnow Mfg. Co., H. H. Franklin Mfg. Co. v. (Mass.).....	624
Hullett, Burke v. (Ill.).....	240	Lancashire Ins. Co., Walker v. (Mass.)...	66
Humphrey, Sayer v. (Ill.).....	170	Lander v. Lander (Ill.).....	487
Hutchins v. Vandalla Levee & Drainage Dist. (Ill.).....	354	Landt v. McCullough (Ill.).....	1069
Hyde v. Fall River (Mass.).....	953		
Hyde, Fletcher Bros. Co. v. (Ind. App.)...	9		
Illinois Cent. R. Co. v. Jennings (Ill.)....	457		
Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co. (Ill.).....	562		
Illinois Valley R. Co., Hartshorn v. (Ill.)...	122		
Indiana Nitroglycerine & Torpedo Co. v. Lippencott Glass Co. (Ind. Sup.).....	549		
Indianapolis, Marion Trust Co. v. (Ind. App.).....	834		
Indianapolis, Marion Trust Co. v. (Ind. App.).....	836		

	Page		Page
Lannen, People v. (N. Y.).....	1182	Massachusetts Institute of Technology, Wells v. (Mass.).....	128
La Porte Carriage Co. v. Sullender (Ind. Sup.).....	277	Massachusetts Institute of Technology, Wilson v. (Mass.).....	128
Laroe v. Northampton St. R. Co. (Mass.).....	255	Matthews v. Carlton (Mass.).....	637
Larrance, Mills v. (Ill.).....	555	Matthews, Clevenger v. (Ind. App.).....	23
Lauer, Drake v. (N. Y.).....	1129	Matthews, Clevenger v. (Ind. App.).....	836
Lawrence v. Butler (Mass.).....	726	Matthews, People v. (Ill.).....	444
Lazell, Dalley & Co., Dubuc v. (N. Y.).....	401	Mawson v. Wermuth (N. Y.).....	1131
Lean Mfg. Co., Kuelling v. (N. Y.).....	1008	Mee, Chicago Union Traction Co. v. (Ill.).....	800
Leathe v. Thomas (Ill.).....	810	Meighan, In re (N. Y.).....	1181
Leaycraft, McClure v. (N. Y.).....	961	Merchants' Loan & Trust Co., Hathaway v. (Ill.).....	1090
Leick, Kiebel v. (Ill.).....	187	Merica v. Burgett (Ind. App.).....	1083
Leighton & Howard Steel Co. v. Snell (Ill.).....	402	Merrick, Syracuse Sav. Bank v. (N. Y.).....	232
Leonard v. Pierce (N. Y.).....	318	Merritt v. Dewey (Ill.).....	1066
Lewis, James v. (Mass.).....	217	Metropolitan Coal Co., Carroll v. (Mass.).....	84
Lilly, Earp v. (Ill.).....	552	Metropolitan Life Ins. Co. v. Felix (Ohio).....	941
Lindsey v. Fabens (Mass.).....	623	Metropolitan Mut. Savings & Loan Ass'n, People v. (N. Y.).....	1182
Lippencott Glass Co., Indiana Nitroglycerine & Torpedo Co. v. (Ind. Sup.).....	649	Metropolitan St. R. Co., City of New York v. (N. Y.).....	1128
Livermore v. Norfolk County (Mass.).....	724	Meyer, Ullsperger v. (Ill.).....	432
Lomax v. Lomax (Ill.).....	1076	Middlesex County, Outter v. (Mass.).....	954
Long Beach Land Co., In re (N. Y.).....	533	Milford, A. & W. St. R. Co., Gorham v. (Mass.).....	634
Loomis v. Lake Shore & M. S. R. Co. (N. Y.).....	228	Miller v. New York & N. S. R. Co. (N. Y.).....	1111
Lovett, Hart & Phipps Co. v. Sullivan (Mass.).....	738	Miller v. Pennington (Ill.).....	919
Low v. Dallas (Ind. Sup.).....	822	Miller v. Warren (N. Y.).....	1131
Lowell v. Archambault (Mass.).....	85	Miller, Griffin v. (Ind. App.).....	598
Lowell Mach. Shop, O'Neill v. (Mass.).....	744	Miller, Major v. (Ind. Sup.).....	159
Lowitz, Chicago City R. Co. v. (Ill.).....	755	Millers Falls Water Supply Dist., Turners Falls Fire Dist. v. (Mass.).....	630
Lyon, People v. (Ill.).....	1017	Mills v. Larrance (Ill.).....	555
Lyons v. Urgalones (Mass.).....	950	Mills v. Potter (Mass.).....	627
Lyons Cemetery Ass'n, In re (N. Y.).....	1180	Minot v. Parker (Mass.).....	149
McCarthy v. R. G. Packard Co. (N. Y.).....	1180	Misochi, Putnam v. (Mass.).....	958
McCartney, City of Chicago v. (Ill.).....	117	Mitchener, Stametz v. (Ind. Sup.).....	579
McCaslin v. State (Ind. App.).....	844	Monaghan v. Indianapolis (Ind. App.).....	33
McClure v. Leaycraft (N. Y.).....	961	Monck v. Brooklyn Heights R. Co. (N. Y.).....	1131
McCreary, Pruyn v. (N. Y.).....	1183	Montgomery Coal Co. v. Barringer (Ill.).....	900
McCullough, Landt v. (Ill.).....	1089	Moody v. Boston & M. R. R. (Mass.).....	631
McCullough, Scott v. (Ohio).....	52	Moore, Jennings v. (Mass.).....	214
McDaniel v. Osborne (Ind. Sup.).....	647	Moors v. Ladenburg (Mass.).....	145
McDermott, Flynn v. (N. Y.).....	931	Morch, O'Connor v. (N. Y.).....	1132
McGee v. Barber Asphalt Pav. Co. (N. Y.).....	1131	Morgan, Eddy v. (Ill.).....	174
McGown v. Barnum (N. Y.).....	155	Morrison, State v. (Ind. Sup.).....	968
McIlvaine v. Steinson (N. Y.).....	1131	Mound Grove Cemetery Ass'n, Crawford v. (Ill.).....	998
McKay, Home Building & Loan Ass'n v. (Ill.).....	569	Muhlik v. New York & H. R. Co. (N. Y.).....	1131
McKay, Ritchey v. (Ind. App.).....	161	Mulford, In re (Ill.).....	345
McKay, Ritchey v. (Ind. App.).....	1090	Mullen, Baltimore & O. S. W. R. Co. v. (Ill.).....	474
McKeever, Penn Collieries Co. v. (N. Y.).....	935	Mullins v. Siegel-Cooper Co. (N. Y.).....	1112
McLannan v. Chicago (Ill.).....	762	Mulvaine, H. O. Stone & Co. v. (Ill.).....	421
McMahon v. Crucible Steel Co. of America (N. Y.).....	1131	Muren Coal & Ice Co. v. Howell (Ill.).....	469
McNeal v. Pierce (Ohio).....	938	Murphy, O'Brien v. (Mass.).....	700
McPeck, Alexander v. (Mass.).....	88	Murray, City of Elkhart v. (Ind. Sup.).....	593
Madison County Ferry Co., City of Venice v. (Ill.).....	105	Murray, City of Gibson v. (Ill.).....	319
Magnolia Metal Co. v. Gale (Mass.).....	219	Mutual Life Ins. Co., Myers v. (Ind. App.).....	31
Mahan v. Newton & B. St. R. Co. (Mass.).....	59	Myers v. Mutual Life Ins. Co. (Ind. App.).....	81
Mahon v. People (Ill.).....	768	National Coal Tar Co. v. Malden & Melrose Gaslight Co. (Mass.).....	625
Major v. Miller (Ind. Sup.).....	159	National Fire Ins. Co. v. Three States Lumber Co. (Ill.).....	450
Malden & Melrose Gaslight Co., National Coal Tar Co. v. (Mass.).....	625	National Wall Paper Co., Bristow v. (N. Y.).....	1127
Malkan v. Chicago (Ill.).....	548	Neal, Indiana & O. Coal Co. v. (Ind. App.).....	295
Manchester, Fox v. (N. Y.).....	1116	Neale v. Springfield St. R. Co. (Mass.).....	702
Manning v. Excelsior Laundry Co., two cases (Mass.).....	254	Neely, Board of Com'rs of Morgan County v. (Ind. App.).....	829
Mansfield v. Wallace (Ill.).....	682	Nelson v. Nelson (Ind. App.).....	679
Marion Trust Co. v. Indianapolis (Ind. App.).....	834	Newburyport Inst. for Savings v. Coffin (Mass.).....	81
Marion Trust Co. v. Indianapolis (Ind. App.).....	836	New England Structural Co. v. Everett Distilling Co. (Mass.).....	85
Markowitz, Goldberg v. (N. Y.).....	1129	New Hampshire Fire Ins. Co. v. Wall (Ind. App.).....	668
Marshall, Chicago & W. I. R. Co. v. (Ind. App.).....	973	Newton & B. St. R. Co., Mahan v. (Mass.).....	59
Marshall, Dayton & W. Traction Co. v. (Ind. App.).....	824	New York, Dinger v., two cases (N. Y.).....	1129
Marshall, Warner v. (Ind. Sup.).....	582	New York, Hale v. (N. Y.).....	1130
Martin v. Fokett (Mass.).....	709	New York, Pratt Institute v. (N. Y.).....	1119
Martin, Cleveland v. (Ill.).....	772	New York, Rodgers v. (N. Y.).....	1133
Mashek v. People (Ill.).....	108		
Masonic Fraternity Temple Ass'n v. Chicago (Ill.).....	439		

	Page		Page
New York, Wuest v. (N. Y.).....	1135	People v. Kankakee & E. W. R. Co. (Ill.).....	1063
New York Cent. & H. R. R. Co., Jones v. (N. Y.).....	1130	People v. Kelley (Ill.).....	1083
New York, N. H. & H. R. Co., O'Connor v. (Mass.).....	614	People v. Lannen (N. Y.).....	1132
New York, N. H. & H. R. Co., Riccio v. (Mass.).....	704	People v. Lyon (Ill.).....	1017
New York Steam Co., Koehler v. (N. Y.).....	538	People v. Matthews (Ill.).....	444
New York & H. R. Co., Muhler v. (N. Y.).....	1131	People v. Metropolitan Mut. Savings & Loan Ass'n (N. Y.).....	1132
New York & N. S. R. Co., Miller v. (N. Y.).....	1111	People v. O'Donnel (N. Y.).....	540
Nichols v. Dallas (Ind. Sup.).....	824	People v. Patrick (N. Y.).....	963
Nolte, Krause v. (Ill.).....	362	People v. Snedecker (N. Y.).....	1133
Norfolk County, Livermore v. (Mass.).....	724	People v. Steuben County (N. Y.).....	1108
Norfolk County Com'rs, Town of Wellesley v. (Mass.).....	725	People v. Sullivan (Ill.).....	1005
Northampton St. R. Co., Laroe v. (Mass.).....	255	People v. Wells (N. Y.).....	1132
Northwestern Mut. Life Ins. Co., City of Chicago v. (Ill.).....	808	People, Brown v. (Ill.).....	984
Northwestern Scraper Co., Durbin v. (Ind. Sup.).....	1	People, Chicago, E. I. & P. R. Co. v. (Ill.).....	363
Northwestern University, Parks v. (Ill.).....	991	People, Chicago & E. I. R. Co. v. (Ill.).....	1021
Norton & T. St. R. Co., J. G. Brill Co. v. (Mass.).....	1090	People, Christensen v. (Ill.).....	103
Nowlin v. People (Ill.).....	209	People, Eddy v. (Ill.).....	1071
Noyes v. Chicago (Ill.).....	807	People, Everett v. (Ill.).....	188
Noyes, City of Mattoon v. (Ill.).....	1065	People, Fisher v. (Ill.).....	103
Oakland Cemetery v. Yonkers (N. Y.).....	1132	People, Harris v. (Ill.).....	1012
O'Brien v. Knotts (Ind. Sup.).....	594	People, Jacobs v. (Ill.).....	1034
O'Brien v. Murphy (Mass.).....	700	People, Klawanski v. (Ill.).....	1028
O'Brien v. People, two cases (Ill.).....	108	People, Mahon v. (Ill.).....	763
O'Brien, Pierce v. (Mass.).....	61	People, Mashek v. (Ill.).....	108
O'Connor v. Morch (N. Y.).....	1132	People, Nowlin v. (Ill.).....	209
O'Connor v. New York, N. H. & H. R. Co. (Mass.).....	614	People, O'Brien v., two cases (Ill.).....	168
Odin Coal Co. v. Tadlock (Ill.).....	332	People, O'Shea v. (Ill.).....	981
O'Donnel, People v. (N. Y.).....	540	People, Parsons v. (Ill.).....	993
Ogg v. State (Ohio).....	943	People, Phillips v. (Ill.).....	1016
Ohio Farmers' Ins. Co. v. Vogel (Ind. App.).....	849	People, Queenan v. (Ill.).....	103
O'Keefe, Hillis v. (Mass.).....	147	People, R. & C. Grosse v. (Ill.).....	978
Old Colony R. Co. v. Boston (Mass.).....	134	People, Stack v. (Ill.).....	347
Old Colony St. R. Co., Bouthillier v. (Mass.).....	960	People, Stecher v. (Ill.).....	501
Oliver, Alton Light & Traction Co. v. (Ill.).....	419	People, Wagg v. (Ill.).....	977
Olrick, Bowman v. (Ind. Sup.).....	820	People, Wistrand v. (Ill.).....	891
Olson, Hasterlik v. (Ill.).....	1002	Perry, Pierce v. (Mass.).....	734
O'Neill v. Lowell Mach. Shop (Mass.).....	744	Peterson, State v. (Ind. App.).....	602
Osborne, McDaniel v. (Ind. Sup.).....	647	Phenix Nerve Beverage Co. v. Dennis & Lovejoy Wharf & Warehouse Co. (Mass.).....	258
O'Shea v. People (Ill.).....	981	Phillips v. People (Ill.).....	1016
Oulighan v. Butler, two cases (Mass.).....	726	Phinney v. Foster (Mass.).....	103
Over v. Dehne (Ind. App.).....	604	Pierce v. O'Brien (Mass.).....	61
Pacaud v. Waite (Ill.).....	779	Pierce v. Perry (Mass.).....	734
Packard Co., McCarthy v. (N. Y.).....	1130	Pierce, Leonard v. (N. Y.).....	313
Page v. Page (Mass.).....	92	Pierce, McNeal v. (Ohio).....	938
Parker v. Young (Mass.).....	98	Pinkerton, Grand Pacific Hotel Co. v. (Ill.).....	427
Parker, Minot v. (Mass.).....	149	Pinkstaff v. Steffy (Ill.).....	163
Parks v. Northwestern University (Ill.).....	991	Pittsburg, C. & St. L. R. Co. v. Bryant (Ind. App.).....	829
Parascuta v. State (Ind. Sup.).....	970	Pittsburgh, C., C. & St. L. R. Co. v. Reed (Ind. App.).....	50
Parsons v. People (Ill.).....	993	Pittsburgh, Ft. W. & O. R. Co. v. Sanitary Dist. of Chicago (Ill.).....	892
Patrick, People v. (N. Y.).....	963	Pittsburgh, Ft. W. & O. R. Co., Sanitary Dist. of Chicago v. (Ill.).....	248
Patterson, Cleveland, C. C. & St. L. R. Co. v. (Ind. App.).....	857	Pitzle v. Cohn (Ill.).....	392
Paul v. Wilbur (Mass.).....	63	Potter, Mills v. (Mass.).....	627
Peck v. Hartshorn (Mass.).....	133	Powell, Wilson v. (Ind. App.).....	611
Peerless Motor Car Co., Garfield v. (Mass.).....	695	Prather, Kemp v. (Ind. App.).....	673
Penn. Collieries Co. v. McKeever (N. Y.).....	935	Pratt Institute v. New York (N. Y.).....	1119
Pennington, Miller v. (Ill.).....	919	Price v. Huddleston (Ind. App.).....	972
Penn. Plate Glass Co. v. James H. Rice Co. (Ill.).....	246	Priddle, Dowie v. (Ill.).....	243
People v. Abeel (N. Y.).....	307	Provident Sav. Life Assur. Soc. v. King (Ill.).....	169
People v. Atchison, T. & S. F. R. Co. (Ill.).....	573	Pruyn v. McCreary (N. Y.).....	1133
People v. Board of Suprs of Columbia County, two cases (N. Y.).....	1133	Purtell, Donovan v. (Ill.).....	334
People v. Bridgeman (Ill.).....	1057	Putnam v. Misochi (Mass.).....	956
People v. Brown (Ill.).....	907	Queenan v. People (Ill.).....	108
People v. Brown (Ill.).....	989	Quick, Rodman v. (Ill.).....	465
People v. Chicago (Ill.).....	239	Radovsky v. Sperling (Mass.).....	949
People v. Colegrove (Ill.).....	991	Randall, Church v. (N. Y.).....	1123
People v. Degenfelder (N. Y.).....	1132	Ray v. Keith (Ill.).....	921
People v. Frisch (Ill.).....	904	Ray, Gay v. (Mass.).....	138
People v. Hooper (Ill.).....	896	Reed, Pittsburgh, C., C. & St. L. R. Co. v. (Ind. App.).....	50
People v. Huggard (Ill.).....	371	Reichert Mill Co. v. Freeburg (Ill.).....	544
		Reilly, Busiere v. (Mass.).....	958
		Remster v. Sullivan (Ind. App.).....	860
		R. G. Packard Co., McCarthy v. (N. Y.).....	1130

	Page		Page
Riceo v. New York, N. H. & H. R. Co. (Mass.)	704	Snell, Commonwealth v. (Mass.)	75
Rice, Baldwin v. (N. Y.)	1096	Snell, Leighton & Howard Steel Co. v. (Ill.)	462
Rice Co., Penn Plate Glass Co. v. (Ill.)	246	Social Democratic Party, In re (N. Y.)	415
Richardson v. Winnissimmet Nat. Bank (Mass.)	97	South Chicago City R. Co. v. Kinnare (Ill.)	179
Richardson, Vickery v. (Mass.)	196	Southern Indiana R. Co. v. Bedford (Ind. Sup.)	268
Richeson, State v. (Ind. App.)	846	Southern R. Co. v. State (Ind. Sup.)	272
R. I. Sherman Mfg. Co., Commonwealth v. (Mass.)	71	Southern Tier Masonic Relief Ass'n Evans v. (N. Y.)	317
Ritchey v. McKay (Ind. App.)	161	South Side Elevated R. Co., Thomas v. (Ill.)	1058
Ritchey v. McKay (Ind. App.)	1090	Sovereign Camp, Woodmen of the World, v. Cox (Ind. App.)	290
Riverside Park, In re (N. Y.)	156	Sperling, Radovsky v. (Mass.)	949
Roberts v. Cook (N. Y.)	1133	Springfield St. R. Co., Neale v. (Mass.)	702
Roberts v. Cronk (N. Y.)	1133	Stack v. People (Ill.)	347
Roberts v. Evanston (Ill.)	923	Stackpole v. Wray (N. Y.)	1134
Roberts, Douglas Park Bldg. Ass'n v. (Ill.)	1018	Stafford v. Conwell (Ind. App.)	600
Robinson, George v. (Ind. App.)	607	Stafford, Crane v. (Ill.)	424
Rochester R. Co., City of Rochester v. (N. Y.)	1128	Stametz v. Mitchener (Ind. Sup.)	579
Rochester Trust & Safe Deposit Co. v. Truesdale (N. Y.)	1133	Standley v. Cleveland, C. C. & St. L. R. Co. (Ind. App.)	674
Rockwell, Jones v. (N. Y.)	1130	Starr v. Willoughby (Ill.)	1029
Roderick Lean Mfg. Co., Kuelling v. (N. Y.)	1098	State v. Morrison (Ind. Sup.)	968
Rodgers v. New York (N. Y.)	1133	State v. Petersen (Ind. App.)	602
Rodman v. Quick (Ill.)	466	State v. Richeson (Ind. App.)	846
Rodman, Central Safety Deposit Co. v. (Ill.)	466	State v. Sutherland (Ind. Sup.)	642
Roe, Creighton v. (Ill.)	1073	State, Bartlett v. (Ohio)	936
Rohrhor v. Schmidt (Ill.)	1062	State, Botkins v. (Ind. App.)	298
Rosenthal, Chicago Union Traction Co. v. (Ill.)	578	State, Bradley v. (Ind. Sup.)	878
Rose, Strong v. (Ind. App.)	291	State, Evans v. (Ind. Sup.)	651
R. & C. Grosse v. People (Ill.)	978	State, Gipe v. (Ind. Sup.)	881
St. Joseph Mfg. Co. v. Hubbard (Ind. App.)	17	State, Goetz v. (N. Y.)	1129
St. Louis, I. M. & S. R. Co., Illinois State Trust Co. v. (Ill.)	562	State, Heigert v. (Ind. App.)	850
Sander v. State (N. Y.)	234	State, Hicks v. (Ind. Sup.)	641
Sanders v. Saxton (N. Y.)	529	State, Ireland v. (Ind. Sup.)	872
Sanitary Dist. of Chicago v. Pittsburgh, Ft. W. & C. R. Co. (Ill.)	248	State, McCaslin v. (Ind. App.)	844
Sanitary Dist. of Chicago, Pittsburgh, Ft. W. & C. R. Co. v. (Ill.)	892	State, Ogg v. (Ohio)	943
Sawusch, Chicago Union Traction Co. v. (Ill.)	797	State, Parascouta v. (Ind. Sup.)	970
Saxton, Sanders v. (N. Y.)	529	State, Sander v. (N. Y.)	234
Sayer v. Humphrey (Ill.)	170	State, Southern R. Co. v. (Ind. Sup.)	272
Sayles, Keeley v. (Ill.)	567	State, Terrell v. (Ind. Sup.)	884
Schaeffer v. Burnett (Ill.)	440	State, Williams v. (Ind. Sup.)	875
Schaeppi v. Bartholomae (Ill.)	447	Staunton Coal Co. v. Bub (Ill.)	770
Schmidt, Chicago City R. Co. v. (Ill.)	383	Stebbins, Armstrong v. (Ill.)	1061
Schmidt, Rohrhor v. (Ill.)	1062	Stecher v. People (Ill.)	501
Schmig v. Union R. Co. of New York City (N. Y.)	1134	Steffy, Pinkstaff v. (Ill.)	163
Schreyer v. Schreyer (N. Y.)	1134	Steinhardt v. Bingham (N. Y.)	408
Schoiten v. Barber (Ill.)	490	Steinhardt v. Howe (N. Y.)	1134
Schrier, Doell v. (Ind. App.)	600	Steinson, McIlvaine v. (N. Y.)	1131
Schulte v. Warren (Ill.)	783	Sterwerf v. Smith (Ohio)	944
Schuls, West Chicago St. R. Co. v. (Ill.)	495	Steuben County, People v. (N. Y.)	1108
Scott v. McCullough (Ohio)	52	Stevens v. Henry County (Ill.)	1024
Searles, Corbin Oil Co. v. (Ind. App.)	293	Stillwell, Browning v. (N. Y.)	1128
Senn v. Greundling (Ill.)	1020	Stockbridge, Bosworth v. (Mass.)	712
Seyferth v. Groves & S. R. R. Co. (Ill.)	522	Stone v. Chicago (Ill.)	980
Shaver v. Home Tel. Co. (Ind. App.)	288	Stone v. Forbes (Mass.)	141
Shaw, Webber Lumber Co. v. (Mass.)	640	Stone & Co. v. Mulvaine (Ill.)	421
Shedd, Glos v. (Ill.)	887	Storey, Bradford v. (Mass.)	256
Sheets v. Hays (Ind. App.)	20	Stout, Town of Winamac v. (Ind. Sup.)	158
Sherman Mfg. Co., Commonwealth v. (Mass.)	71	Stout, Town of Winamac v. (Ind. Sup.)	651
Shipherd, Goreth v. (N. Y.)	1130	Stowell, Blodgett v. (Mass.)	138
Shoup, Whirlidge v. (Ind. Sup.)	871	Streator Independent Tel. Co. v. Continental Tel. Const. Co. (Ill.)	546
Siegel, Cooper & Co. v. Trcka (Ill.)	1053	Streuter, Koch v. (Ill.)	1049
Siegel-Cooper Co., Mullins v. (N. Y.)	1112	Strina, Kellyville Coal Co. v. (Ill.)	375
Sisson, Commonwealth v. two cases (Mass.)	619	Strong v. Ross (Ind. App.)	291
Slocum v. Dallas (Ind. Sup.)	823	Sullender, La Porte Carriage Co. v. (Ind. Sup.)	277
Smiley, Barker v. (Ill.)	787	Sullivan, Lovett, Hart & Phipps Co. v. (Mass.)	738
Smith, Commissioners of Highways of Town of McKee v. (Ill.)	396	Sullivan, People v. (Ill.)	1005
Smith, Inland Steel Co. v. (Ind. App.)	852	Sullivan, Remster v. (Ind. App.)	860
Smith, Sterwerf v. (Ohio)	944	Sutherland, State v. (Ind. Sup.)	642
Smythe, Crane Co. v. (N. Y.)	1128	Swart, Jackson v. (N. Y.)	226
Snedeker, People v. (N. Y.)	1133	Sweetser, Whittredge v. (Mass.)	222
		Swick v. Coleman (Ill.)	807
		Swing v. Hill (Ind. Sup.)	658
		Syracuse Sav. Bank v. Merrick (N. Y.)	232
		Taber-Prang Art Co. v. Durant (Mass.)	221
		Taber-Prang Art Co., Gardner Sav. Bank v. (Mass.)	705

	Page		Page
Tadlock, Odin Coal Co. v. (Ill.).....	332	Wakefield v. Van Tassell (Ill.).....	1058
Terrell v. State (Ind. Sup.).....	884	Walker v. Lancashire Ins. Co. (Mass.)....	68
Thayer v. Utica Knitting Co. (N. Y.)....	577	Walker, Chicago & A. R. Co. v. (Ill.)....	520
Thayer, Dexter v. (Mass.).....	223	Wall, New Hampshire Fire Ins. Co. v. (Ind. App.).....	668
Thomas v. South Side Elevated R. Co. (Ill.).....	1058	Wallace, In re (N. Y.).....	1135
Thomas, Barnett v. (Ind. App.).....	868	Wallace, Mansfield v. (Ill.).....	682
Thomas, Leathe v. (Ill.).....	810	Walters, Chicago & A. R. Co. v. (Ill.)....	441
Thompson v. Erie R. Co. (N. Y.).....	1134	Wampanoag Mills, Chambers v. (Mass.)....	1093
Thompson v. Hemenway (Ill.).....	791	Wampanoag Mills, Fountaine v. (Mass.)....	738
Thompson v. Trustees of Schools for Rio Tp. (Ill.).....	1048	Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co. (Ind. App.)..	672
Three States Lumber Co., National Fire Ins. Co. v. (Ill.).....	450	Warner v. Marshall (Ind. Sup.).....	582
Tilt's Estate, In re (N. Y.).....	1134	Warren, Miller v. (N. Y.).....	1131
Tircinski, Commonwealth v. (Mass.).....	261	Warren, Schulte v. (Ill.).....	783
Tone, Fuchs v. (Ill.).....	1014	Webber, Cummins v. (Ill.).....	1041
Tongert v. Carlin (Ind. Sup.).....	887	Webber Lumber Co. v. Shaw (Mass.)....	640
Town of Knightstown v. Homer (Ind. App.).....	13	Weigel v. Green (Ill.).....	913
Town of Ulysses v. Ingersoll (N. Y.)....	225	Welch v. Trustees of Episcopal Theological School (Mass.).....	189
Town of Wellesley v. Norfolk County Com'rs (Mass.).....	723	Wellesley, Bennett v., thirty-nine other cases (Mass.).....	717
Town of Winamac v. Stout (Ind. Sup.)....	153	Wells v. Massachusetts Institute of Technology (Mass.).....	128
Town of Winamac v. Stout (Ind. Sup.)....	651	Wells, People v. (N. Y.).....	1132
Tracy v. Ginzberg (Mass.).....	637	Wells & French Co. v. Kapaczynski (Ill.)..	751
Trah, Village of Grant Park v. (Ill.).....	1040	Wermuth, Mawson v. (N. Y.).....	1131
Travelers' Ins. Co. v. Ayers (Ill.).....	506	West Chicago St. R. Co. v. Schulz (Ill.)....	495
Trcka, Siegel, Cooper & Co. v. (Ill.).....	1053	Wheeler v. Chicago Title & Trust Co. (Ill.).....	455
Trees, Greenfield Gas Co. v. (Ind. Sup.)...	2	Whinery v. Brown (Ind. App.).....	605
Tri-City R. Co. v. Gould (Ill.).....	493	Whirlidge v. Shoup (Ind. Sup.).....	871
Trotter's Will, In re (N. Y.).....	305	Whittredge v. Sweetser (Mass.).....	222
Truesdale, Rochester Trust & Safe Deposit Co. v. (N. Y.).....	1133	Wightman v. Evanston Yarnan Co. (Ill.)..	502
Trustees of Episcopal Theological School, Welch v. (Mass.).....	139	Wilbur, Paul v. (Mass.).....	63
Trustees of Schools for Rio Tp., Thompson v. (Ill.).....	1048	Wilder v. Aurora, De K. & R. Electric Traction Co. (Ill.).....	194
Tucker, City of New York v. (N. Y.).....	1123	Wilkerson, Capital Nat. Bank v. (Ind. App.).....	837
Tudor v. Ebner (N. Y.).....	1134	Wilkin, In re (N. Y.).....	1105
Turner v. Turner (Mass.).....	612	Willets v. Haines (N. Y.).....	1135
Turner, Bedford Quarries Co. v. (Ind. App.).....	25	Williams v. State (Ind. Sup.).....	875
Turners Falls Fire Dist. v. Millers Falls Water Supply Dist. (Mass.).....	630	Williams, Currier v. (Mass.).....	618
Tyler v. Davis (Ind. App.).....	3	Willinsky v. Gregory (N. Y.).....	1135
Ullsperger v. Meyer (Ill.).....	482	Willis v. Willis (Ind. Sup.).....	633
Union County Traction & Power Co., Eddleman v. (Ill.).....	510	Willis v. Willis (Ind. Sup.).....	655
Union Mut. Life Ins. Co. of Portland, Me., v. Adler (Ind. App.).....	1088	Willoughby, Starr v. (Ill.).....	1029
Union R. Co. of New York City, Schmieg v. (N. Y.).....	1134	Wilson v. Hinman (N. Y.).....	236
Union Square Bank, Engel v. (N. Y.).....	1129	Wilson v. Massachusetts Institute of Technology (Mass.).....	128
Urgalones, Lyons v. (Mass.).....	950	Wilson v. Powell (Ind. App.).....	611
Utica Knitting Co., Thayer v. (N. Y.).....	577	Wilson, Elgin, A. & S. Traction Co. v. (Ill.)	436
Vandalia Levee & Drainage Dist., Hutchins v. (Ill.).....	354	Winnissimmet Nat. Bank, Richardson v. (Mass.).....	97
Van Tassell, Wakefield v. (Ill.).....	1058	Wistrand v. People (Ill.).....	891
Verble v. Dillow (Ill.).....	1046	Wolf, Isphording v. (Ind. App.).....	598
Vickers, Kincaid v. (Ill.).....	527	Wood v. Harlow (Mass.).....	259
Vickery v. Richardson (Mass.).....	136	Worcester Consol. St. R. Co., Bartlett v. (Mass.).....	706
Village of Grant Park v. Trah (Ill.).....	1040	Worcester Consol. St. R. Co., Dolphin v. (Mass.).....	635
Vogel, Ohio Farmers' Ins. Co. v. (Ind. App.)	849	Worcester Trust Co., Elliott v. (Mass.)....	944
Von Schuckmann v. Heinrich (N. Y.).....	1135	Wray, Stackpole v. (N. Y.).....	1134
Wagar, Cohen v. (N. Y.).....	691	Wright v. Hart (N. Y.).....	404
Wagg v. People (Ill.).....	977	Wright, Fulks v. (Ohio).....	55
Waite, Pacaud v. (Ill.).....	779	Wuest v. New York (N. Y.).....	1135
		Yonkers, Oakland Cemetery v. (N. Y.)....	1132
		York Mfg. Co., Donovan v. (Mass.).....	733
		York Mfg. Co., Feeney v. (Mass.).....	733
		Young v. Barry (N. Y.).....	1135
		Young, Parker v. (Mass.).....	98

REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

- | | |
|---|--|
| <p>Adams v. Pittsburgh, C., C. & St. L. R. Co. (Ind. Sup.) 74 N. E. 991.</p> <p>American Quarries Co. v. Lay (Ind. App.) 73 N. E. 808.</p> <p>Baggerly v. Lee (Ind. App.) 73 N. E. 921.</p> <p>Baltimore & O. R. Co. v. Ray (Ind. App.) 73 N. E. 942.</p> <p>Bartholomee v. Lowell (Ind. Sup.) 72 N. E. 1030.</p> <p>Board of Com'rs of Perry County v. Lindemann (Ind. Sup.) 73 N. E. 912.</p> <p>Britton v. Young (Ind. App.) 74 N. E. 905.</p> <p>Chicago, I. & L. R. Co. v. Indianapolis & N. W. Traction Co. (Ind. Sup.) 74 N. E. 513.</p> <p>Chicago Terminal Transfer R. Co. v. Walton (Ind. Sup.) 74 N. E. 983.</p> <p>Cincinnati, R. & M. R. Co. v. Shera (Ind. App.) 73 N. E. 293.</p> <p>Clark v. American Cannel Coal Co. (Ind. Sup.) 73 N. E. 1083.</p> <p>Clear Creek Stone Co. v. Carmichael (Ind. App.) 73 N. E. 935.</p> <p>Cleveland, C., C. & St. L. R. Co. v. Miller (Ind. Sup.) 74 N. E. 509.</p> <p>Continental Casualty Co. v. Lloyd (Ind. Sup.) 73 N. E. 824.</p> <p>Cooper v. Murphy (Ind. App.) 72 N. E. 664.</p> <p>Corbin v. Henry (Ind. App.) 74 N. E. 1096.</p> <p>Dinius v. Lahr (Ind. App.) 74 N. E. 1033.</p> <p>Flickner v. Lambert (Ind. App.) 74 N. E. 263.</p> <p>Frank Bird Transfer Co. v. Morrow (Ind. App.) 72 N. E. 189.</p> <p>Gilmore v. Kitson (Ind. Sup.) 74 N. E. 1083.</p> <p>Hargis v. Board of Com'rs of Perry County (Ind. Sup.) 73 N. E. 915.</p> <p>Huffman v. Huffman (Ind. App.) 73 N. E. 1096.</p> <p>Huntington Light & Fuel Co. v. Beaver (Ind. App.) 73 N. E. 1002.</p> <p>Indiana Natural Gas & Oil Co. v. Beales (Ind. App.) 74 N. E. 551.</p> <p>Indianapolis, G. & F. R. Co. v. Hubbard (Ind. App.) 74 N. E. 535.</p> <p>Indianapolis St. R. Co. v. Marschke (Ind. App.) 70 N. E. 494.</p> <p>Indianapolis & M. Rapid Transit Co. v. Edwards (Ind. App.) 74 N. E. 533.</p> | <p>Indiana Springs Co. v. Brown (Ind. Sup.) 74 N. E. 615.</p> <p>Indiana Trust Co. v. International Bldg. & Loan Ass'n (Ind. App.) 74 N. E. 633.</p> <p>Jones v. Mount (Ind. App.) 74 N. E. 1032.</p> <p>Knickerbocker Ice Co. v. Gray (Ind. Sup.) 72 N. E. 869.</p> <p>Luther v. Nason (Ind. App.) 74 N. E. 1128.</p> <p>Lyons v. Board of Com'rs of Perry County (Ind. Sup.) 73 N. E. 916.</p> <p>McCarty v. Bosart (Ind. App.) 74 N. E. 1128.</p> <p>McClaskey v. McDaniel (Ind. App.) 74 N. E. 1023.</p> <p>Matlock v. Lock (Ind. App.) 73 N. E. 171.</p> <p>Monaghan v. Mount (Ind. App.) 74 N. E. 579.</p> <p>Nance v. Kemper (Ind. App.) 73 N. E. 937.</p> <p>New American Oil & Min. Co. v. Troyer (Ind. App.) 74 N. E. 37.</p> <p>New American Oil & Min. Co. v. Wolff (Ind. App.) 74 N. E. 41.</p> <p>Newman v. Gates (Ind. Sup.) 72 N. E. 638.</p> <p>Ohio Oil Co. v. Detamore (Ind. Sup.) 73 N. E. 906.</p> <p>O. M. Cockrum Co. v. Klein (Ind. Sup.) 74 N. E. 529.</p> <p>Pere Marquette R. Co. v. Aho (Ind. App.) 74 N. E. 1131.</p> <p>Pere Marquette R. Co. v. Baerts (Ind. App.) 74 N. E. 51.</p> <p>Pere Marquette R. Co. v. Baker (Ind. App.) 74 N. E. 1130.</p> <p>Pere Marquette R. Co. v. Bellasty (Ind. App.) 74 N. E. 1130.</p> <p>Pere Marquette R. Co. v. Black (Ind. App.) 74 N. E. 1130.</p> <p>Pere Marquette R. Co. v. Donelly (Ind. App.) 74 N. E. 1130.</p> <p>Pere Marquette R. Co. v. Folk (Ind. App.) 74 N. E. 1129.</p> <p>Pere Marquette R. Co. v. Grund (Ind. App.) 74 N. E. 1131.</p> <p>Pere Marquette R. Co. v. Jones (Ind. App.) 74 N. E. 1129.</p> <p>Pere Marquette R. Co. v. Jones (Ind. App.) 74 N. E. 1130.</p> <p>Pere Marquette R. Co. v. Koch (Ind. App.) 74 N. E. 1129.</p> |
|---|--|

- Pere Marquette R. Co. v. Kubech (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Lealie (Ind. App.) 74 N. E. 1130.
 Pere Marquette R. Co. v. Locush (Ind. App.) 74 N. E. 1130.
 Pere Marquette R. Co. v. McCaully (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. McGovern (Ind. App.) 74 N. E. 1128.
 Pere Marquette R. Co. v. ~~McMannis~~ (Ind. App.) 74 N. E. 1130.
 Pere Marquette R. Co. v. Martenson (Ind. App.) 74 N. E. 1131.
 Pere Marquette R. Co. v. Nimmo (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Palmer (Ind. App.) 74 N. E. 546.
 Pere Marquette R. Co. v. Palmer (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Phillips (Ind. App.) 74 N. E. 1131.
 Pere Marquette R. Co. v. Sharzinski (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Skurath (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Smith (Ind. App.) 74 N. E. 545.
 Pere Marquette R. Co. v. Strobel (Ind. App.) 74 N. E. 1129.
 Pere Marquette R. Co. v. Swanson (Ind. App.) 74 N. E. 1130.
 Pere Marquette R. Co. v. Wonries (Ind. App.) 74 N. E. 1131.
 P. H. & F. M. Roots Co. v. Meeker (Ind. Sup.) 73 N. E. 253.
 Renn v. United States Cement Co. (Ind. App.) 73 N. E. 269.
 Roberts v. Smith (Ind. Sup.) 74 N. E. 894.
 Schnull v. Ouddy (Ind. App.) 74 N. E. 1030.
 Todd v. Cage (Ind. App.) 73 N. E. 925.
 Townsend v. Meneley (Ind. App.) 74 N. E. 274.
 Wabash R. Co. v. Erb (Ind. App.) 73 N. E. 939.
 Western Union Tel. Co. v. Krueger (Ind. App.) 74 N. E. 25.
 Westfall v. Wait (Ind. Sup.) 73 N. E. 1089.
 Workman v. State (Ind. Sup.) 73 N. E. 917.

THE
NORTHEASTERN REPORTER.
VOLUME 75.

(185 Ind. 237)

DURBIN et al. v. NORTHWESTERN
SCRAPER CO. et al. (No. 20,659.)

(Supreme Court of Indiana. June 29, 1905.)

APPEAL AND ERROR—SUPREME COURT—JURIS-
DICTION—STATUTES—CONSTRUCTION—INTER-
MEDIATE APPEALS.

Burns' Ann. St. 1901, § 1337j, subd. 3, providing that in any case decided by either of the divisions of the Appellate Court any losing party may appeal to the Supreme Court if the amount in controversy, exclusive of costs and interest on the judgment of the trial court, exceeds \$6,000, authorizes an appeal only where the amount in controversy as established by the judgment of the trial court exceeds such sum, and hence does not authorize an appeal where the trial court overruled plaintiff's demurrer to appellant's answer, and rendered judgment in plaintiff's favor as against the others for \$18,100, which judgment, in so far as it overruled the demurrer, was reversed on appeal to the Appellate Court with directions to sustain the demurrer.

Appeal from Circuit Court, Delaware County; Jos. G. Leffler, Judge.

Action by Winfield T. Durbin and others against the Northwestern Scraper Company and others: From a judgment in favor of defendant Hester Neely, plaintiffs appealed to the Appellate Court, where the judgment as to defendant Neely was reversed, with directions to sustain plaintiffs' demurrer to the answer of such defendant (73 N. E. 297), from which she caused the case to be transferred to the Supreme Court under Burns' Ann. St. 1901, § 1337j, subd. 3. Dismissed.

Lovett & Slaymaker and Warner & Brady, for appellant. Bagot & Bagot, for appellee.

PER CURIAM. In this case Winfield T. Durbin et al. brought an action against four defendants, one of whom was Hester Neely, to recover on a note for \$15,000, executed by the defendants. Said Neely answered by general denial, and she also filed two special paragraphs of answer, which were predicated upon the theory that she was a surety on the note, but had been discharged. A demurrer to the latter paragraphs was overruled, and an exception reserved by the plaintiffs. Upon issues joined there was a finding and judgment for \$18,100 in favor of plaintiffs as against two of the defendants,

but as to said Neely and the remaining defendant the finding and judgment was adverse to plaintiffs. The latter prosecuted an appeal to the Appellate Court of this state, with the result that the cause was reversed, with a direction, among other things, to sustain plaintiffs' demurrer to said two special paragraphs of answer, and the said Neely, as the defeated party in the Appellate Court, has filed the record of said cause in this court, and has assigned error based on the mandate of the Appellate Court.

A motion to dismiss the appeal which has been attempted to be prosecuted to this court has been filed by plaintiffs on the ground that in the circumstances of this case an appeal will not lie under the provisions of subdivision 3 of section 1837j, Burns' Ann. St. 1901. That subdivision provides that: "In any case decided by either of said divisions of the Appellate Court any losing party shall have the right to appeal to the Supreme Court, only when the amount in controversy, exclusive of costs and interest on the judgment of the trial court exceeds six thousand dollars." It is argued by counsel for said Neely that, as the demand is not unliquidated, and as, under the issues, there would have to be a recovery against her for the full amount, if there should be a recovery against her at all, the amount in controversy in this case exceeds \$6,000, exclusive of interest and costs. If the question were only as to the amount of the controversy, said contention would undoubtedly be correct, but a holding that an appeal in this case would lie to this court would require an overruling of the cases of *Avery v. Nordyke & Marmon Co.* (Ind. Sup.) 78 N. E. 119, and *Crum v. Pump & Lumber Co.* (Ind. Sup.) 72 N. E. 587, in which it is held that said statute authorizes an appeal only where the amount in controversy, as established by the judgment of the trial court, exceeds \$6,000, exclusive of interest and costs. As we are not prepared to depart from the holding in the cases cited, it results that we must refuse to entertain jurisdiction in this cause. Such remedy, if any, as the parties defeated in the Appellate Court had, should have been asserted by petition to transfer.

The appeal is dismissed.

(165 Ind. 209)

GREENFIELD GAS CO. v. TREES. (No. 20,620.)

(Supreme Court of Indiana. June 28, 1905.)

1. PLEADING—CONCLUSIONS AND RECITALS.

The omission of the averment in the complaint in an action against a natural gas company for turning off the gas from plaintiff's residence that plaintiff complied with, or offered to comply with, the reasonable regulations of defendant before or when it shut the gas off, is not supplied by the allegation, by way of conclusion and recital, that, after being tendered its charges therefor by plaintiff, defendant wrongfully and unlawfully turned off the gas from plaintiff's residence.

2. RES JUDICATA—JUDGMENT IN MANDAMUS.

In an action for damages for the turning off by defendant natural gas company of gas from plaintiff's house, the judgment against defendant in a prior mandamus suit brought after the gas was so turned off, in the name of the state on the relation of plaintiff, to compel defendant to furnish plaintiff gas at his residence, is conclusive as to any question in issue and decided in the mandamus suit; plaintiff, and not the state, being the real party in interest therein.

3. SAME—PLEADING.

The averment of the complaint in an action for damages for the turning off by defendant of gas from plaintiff's residence that, after the gas was so turned off, mandamus was brought against defendant to compel it to furnish plaintiff gas at his said residence, and judgment was rendered therein that defendant furnish gas to plaintiff, does not show that the question whether the turning off of the gas was wrongful was in issue and determined in the mandamus suit, so as to make it res judicata in the action for damages.

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Action by James R. Trees against the Greenfield Gas Company. Judgment for plaintiff. Defendant appeals. Reversed.

Marsh & Cook and Downing & Hough, for appellant.

MONKS, C. J. Appellee brought this action against appellant to recover damages for the alleged turning off by appellant of natural gas from the pipes which supplied appellee's residence with said natural gas. A trial of said cause resulted in a verdict, and, over a motion for a new trial, a judgment, in favor of appellee. Appellant's demurrer to the complaint for want of facts was overruled, and this ruling of the court is assigned for error.

It appears from the complaint that appellant was and is a natural gas company occupying the streets of the city of Greenfield, Ind., with its gas mains, and that appellee owned a dwelling house abutting on a street so occupied by appellant, and had his house connected with appellant's gas main in said street for the purpose of using said natural gas for fuel and lights, and that on February 12, 1902, appellant turned off the gas from the pipes which supplied appellee's residence therewith; that, after the gas was so turned off, appellee brought an action against appellant, in the name of the state, on rela-

tion of appellee, to compel appellant to furnish him gas at his said residence; that appellant appeared to said action and filed an answer; and that final judgment was rendered in said action against appellant that it furnish gas to appellee.

It is settled in this state "that a natural gas company, occupying the streets of a city or town with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such streets, when such owners or occupants make the necessary arrangements to receive it and comply with the reasonable regulations of such company, such gas as they may require, and that, when it refuses or neglects to perform such duties, it may be compelled to do so by writ of mandamus." *Portland Natural Gas Co. v. Keen*, 135 Ind. 54, 34 N. E. 818, 21 L. R. A. 639, and authorities cited; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535, and authorities cited; *State ex rel. v. Portland Gas Co.*, 153 Ind. 483, 488, 53 N. E. 1089, 53 L. R. A. 413, 74 Am. St. Rep. 314, and cases cited.

There is no direct averment in the complaint that appellee had complied with, or offered to comply with, the reasonable regulations of appellant before or at the time he alleges appellant shut the gas off from his residence. It is true that it is alleged "that, after being tendered its charges therefor by this plaintiff, defendant wrongfully and unlawfully turned off the gas from the residence of this plaintiff," etc. It avails nothing, as against a demurrer, to aver conclusions or plead facts, as the tender of charges, by way of recital, as in this case. *Indianapolis, etc., Transit Co. v. Foreman*, 162 Ind. 85, 98, 99, 69 N. E. 669, 102 Am. St. Rep. 185, and authorities cited; *Malott, Receiver, v. Sample* (last term) 74 N. E. 245.

There is an attempt in said complaint to show that the question whether or not said turning off of the gas by appellant was wrongful was adjudicated in the mandamus case in favor of appellee. If a former adjudication of said question in favor of appellee is shown by the complaint, the same was sufficient to withstand appellant's demurrer for want of facts, notwithstanding the fact that it contains no allegation that appellee had complied or offered to comply with the reasonable regulations of appellant. This is true because, if it was adjudicated in the mandamus case that the alleged turning off of the gas by appellant was wrongful, appellant was bound thereby, and cannot again litigate that question in this case. *Merrill on Mandamus*, § 315. Appellant insists that said question was not res adjudicata, because the parties in the mandamus case and this case are not the same; citing *Glenn v. State ex rel. Clore*, 46 Ind. 368. This case cited by appellant was a bastardy proceeding, and it was held that the record of a judgment in an action for seduction by the relatrix against the defend-

ant was not admissible to prove sexual intercourse in the bastardy case, because the parties were not the same. This was correct, because in the bastardy case the state, and not the relatrix, was the real party in interest. The judgment rendered in such case, if against the defendant, does not belong to the relatrix, but must be expended for the support of the child. In the mandamus case brought by appellee against appellant, the relator, who was the appellee, and not the state, was the real party in interest; and the judgment recovered in that case against appellant was for the benefit of appellee, and not of the state. Any question, therefore, in issue determined in that case is binding upon the parties in this case, because the real parties are the same. The averments of the complaint in regard to the mandamus case, however, are not sufficient to show that the question of whether or not the turning off of the gas by appellant, involved in this case, was in issue and determined in the mandamus case. For this reason, the complaint does not show a former adjudication of the question involved in this action.

1 Works, Practice & Pleading, § 605; 2 Thompson's Indiana Forms, p. 97, notes 2, 3, 4. It follows that the court erred in overruling appellant's demurrer to the complaint.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

67 Ind. App. 557)

TYLER et al. v. DAVIS. (No. 5,092)*
(Appellate Court of Indiana, Division No. 2
June 30, 1905.)

**1. PROCESS—SERVICE—RETURN—CONCLUSIVE-
NESS.**

A sheriff's return regular on its face, showing service of summons by leaving a true and certified copy at defendant's last and legal place of residence, is, in the absence of fraud, conclusive against collateral attack.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 193.]

2. SAME—HARMLESS ERROR.

Where certain defendants who were duly served claimed that one of their number was the exclusive owner of the property in controversy, and that another defendant was not interested in the property, error in failing to quash the summons served on the latter defendant on her motion is harmless as to the former defendants.

3. PARTIES—SUBSTITUTION AFTER JUDGMENT.

Burns' Ann. St. 1894, § 6678, makes the state the proper party to sue for money lost at gambling after the loser thereof has failed for six months to sue therefor, and provides that, if the loser of money sued for by the state has a wife, she is the sole beneficiary of a judgment for such money. Sections 251, 252, require every action to be prosecuted in the name of the real party in interest, except that executors, trustees of an express trust, or parties expressly authorized by statute may sue without joining the party for whose benefit the action was prosecuted. Section 273 authorizes the court to bring in additional parties when a complete determination of the controversy cannot be had without their presence, and fur-

ther provides for the addition of parties by amendment on their application. *Held*, that where the state, as sole plaintiff, recovered money lost in gambling, it was not error for the court to substitute the wife of the loser as plaintiff over defendant's objection, and without the consent of the official representative of the state, in order to permit her to enforce the judgment by setting aside a fraudulent conveyance made by the winner in order to defeat such judgment.

4. SAME—WIFE—MONEY LOST IN GAMING.

Since under Burns' Ann. St. 1894, § 6678, making the state a proper party to sue for money lost at gambling, and providing that the wife of the loser is the beneficiary of any judgment recovered, the wife is not a proper party to the suit, the judgment in such suit should not state that the recovery is for the use and benefit of the wife.

5. TRIAL—INSUFFICIENT FINDINGS—REMEDY.

Where facts specially found are not sustained by sufficient evidence, or are contrary to law, or when additional facts should have been found which were not found, the proper remedy is by motion for a new trial, and not by motion to modify, strike out, or add to the findings.

6. APPEAL—REVIEW OF EVIDENCE.

The Appellate Court will not weigh the evidence under Acts 1903, p. 841, c. 193, § 8, requiring the Supreme and Appellate Courts to consider the evidence when required by the assignments of error, and to render judgment according to the justice of the case.

7. SAME—BRIEF.

Under Sup. Ct. Rule 22 (55 N. E. v), requiring appellant's brief to contain a concise statement of so much of the record as presents every error and exception of the transcript, assignments of error complaining of various items of evidence will not be considered where the brief fails to give the page of the record showing the alleged errors.

8. PARTIES—DISCLAIMER.

One who is without interest in a suit to set aside a fraudulent conveyance should file a disclaimer in order to protect himself against judgment, and should not appear and answer.

9. FRAUD—QUESTION FOR JURY.

Fraud is a question of fact to be proven by direct or circumstantial evidence, and the determination of which is within the province of the court or jury trying the case.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 69.]

Appeal from Circuit Court, Greene County; Orion B. Harris, Judge.

Suit by Annie V. Davis against Dallas Tyler and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. R. Gardiner, C. G. Gardiner, and T. D. Shimp, for appellants. C. K. Tharp and Ogdon & Inman, for appellee.

COMSTOCK, J. October 4, 1901, a suit was instituted in the name of the state of Indiana by the prosecuting attorney at the instance of Annie V. Davis, as the wife of Richard C. Davis, in the Daviess circuit court, against Matthew Kelly and Dallas Tyler, to recover against the defendants the sum of \$10,000, alleged to have been lost by said Richard C. Davis to the defendants in gambling, and for which said Davis had failed for six months to sue. The venue of the cause was changed to the Knox circuit

court, where it was tried February 27, 1902, and a judgment rendered against Kelly and Tyler for \$9,000 in favor of the state of Indiana. Afterwards an action was commenced in the Daviess circuit court in the name of the state of Indiana against appellants and one Philip Meeh to set aside a certain deed, made by Tyler to his sister, and subject that property to the payment of the \$9,000 judgment. Mr. Meeh filed a disclaimer, and on the application of the appellant Alwilda Tyler Graves the venue of the cause was changed to the Greene circuit court. The Greene circuit court sustained the demurrers to the complaint, whereupon on her petition the appellee was substituted as plaintiff, instead of the state of Indiana, and she filed her complaint in this action, from which Philip Meeh was dropped as defendant. The complaint was in one paragraph. After rectifying the substitution of the plaintiff instead of the state of Indiana, it proceeds: "That during the months of June and July, 1900, but prior to the 21st day of July, one Richard C. Davis lost to the defendants Dallas Tyler and one Matthew Kelly, at gambling by betting and wagering money on games of dice known as 'craps,' the sum of \$9,000, all of which said Tyler took and received from said Davis, and has ever since kept, appropriated, and converted to his own use, and refused and failed to refund, repay, or return any part thereof to said Davis or any other person whatsoever; that at the time said Davis so lost said money he was, and ever since has been, a married man, with a wife and three children, all of whom live with and constitute the family of said Davis, at the city of Washington, Daviess county, Indiana; that the name of the wife of said Davis was and is this plaintiff, Anna V. Davis; that after said Davis so lost said money to said Tyler he did not within six months thereafter, or at any other time, sue for the recovery of said money, or any part thereof, but failed to bring or prosecute any suit for the recovery of said money, and no part of same was recovered by said Richard C. Davis; that after the expiration of six months from the time of losing said money this plaintiff, as wife of said Richard C. Davis, duly filed with J. Alvin Padgett, prosecuting attorney within and for Daviess county, Indiana, an information setting forth all the facts touching said games and the loss of said money by said Richard C. Davis; said prosecuting attorney and counsel employed by this plaintiff caused a suit to be brought and filed in the Daviess circuit court against said Tyler and Kelly in the name of the state of Indiana to recover said money for the use and benefit of this plaintiff, Anna V. Davis; that thereafter, to wit, on the ——— day of January, 1902, on the application of said Tyler and Kelly, the venue of said cause was changed to Knox county, Indiana; that during the January term, 1902, of said Knox circuit court, said

cause was put at issue, and duly tried, and on the 27th day of February, 1902, a judgment of said Knox circuit court was rendered on the verdict of the jury in said cause for \$9,000 jointly against Dallas Tyler and Matthew Kelly and in favor of the plaintiff in said cause, the state of Indiana; that said judgment still remains in full force and effect and unappealed from and unpaid; that there was also judgment rendered against said defendants for \$100.95 cost in said cause. And said plaintiff further says that at the time said Tyler so won said money as aforesaid and long prior thereto he was the owner in fee simple of the following real estate in the city of Washington, Daviess county, Indiana [describing it]. Plaintiff further says that by a certain instrument purporting to be a deed of conveyance dated June 4, 1900, but not admitted to record in the deed records of said Daviess county until July 23, 1900, the said Dallas Tyler pretended to convey to the defendant Alwilda Tyler Graves, who was a sister of said Dallas, all of said real estate for the stated consideration of one dollar and love and affection. Plaintiff says that said pretended deed is fraudulent and void as to this plaintiff and the said judgment so rendered against said Dallas Tyler and Matthew Kelly in favor of the state of Indiana for her benefit for the following reasons, to wit: First. That there was no consideration whatever for the conveyance of said real estate to said Alwilda. Second. That said deed was pretended to be made on June 4, 1900, just prior to the time said Tyler won as aforesaid the said money from said Richard C. Davis for which said judgment was rendered, but was not delivered to said Alwilda and placed on record in said county until after said Tyler had won said money as aforesaid, and was prepared and signed by said Tyler solely in anticipation of winning said money from said Davis, and to prevent the said real estate from being subjected to the payment of any judgment which might thereafter be rendered against him for the recovery of said money or any part thereof. Third. That said pretended deed and conveyance by said Dallas to Alwilda was meant and intended by them to be and constitute a charge, trust, and limitation of the use in and to said real estate in favor of said Dallas Tyler made and created with intent to cheat and defraud the plaintiff Annie V. Davis, who is beneficiary of said judgment as rendered in the name of the state of Indiana against said Tyler and Kelly, and for whose use and benefit said suit was prosecuted and said judgment was rendered. Fourth. That said pretended deed was a deed of gift and conveyance from said Dallas Tyler to said Alwilda Tyler Graves, made by the said Dallas to the said Alwilda to be held in trust by her for the use and benefit of said Dallas, and received by her to be held in trust for the said Dallas Tyler. Fifth. That said pretended deed of conveyance from said

Dallas Tyler to said Alwilda Tyler Graves was made by him and received and suffered to be received by her with intent to hinder, defraud, and delay the plaintiff in the collection of said judgment so rendered against the said Tyler as aforesaid. Plaintiff further avers that at the time and subsequent to the time said Tyler so incurred the said liabilities for which said judgment was rendered as aforesaid against him and said Kelly, he, the said Tyler, was the owner of a large amount of personal property, to wit, \$12,000 in cash of the lawful money of the United States; that in order to further carry out, consummate, and complete his fraudulent purpose, scheme, and intention to shield, secrete, and protect said cash and his property from being subjected to the liabilities which he had incurred by reason of his illegal and unlawful acts as aforesaid, and to further cheat, hinder, and delay and defraud the plaintiff out of her just and lawful claims and demands against him on account of his illegal and unlawful acts as aforesaid, the said Tyler placed and secreted \$9,000 of said cash in a safety vault, of a banking house at Seymour, Indiana, and other places, all unknown to plaintiff, and loaned \$3,000 of said \$12,000 to good and solvent residents of Jackson county, Indiana, and took notes as evidence of said loans in three promissory notes, and for the fraudulent purpose of concealing same and to further cheat, hinder, and defraud the plaintiff made said promissory notes payable to said Alwilda Tyler Graves; that no part of said sums so loaned in the name of said Alwilda belonged to her, but said Dallas made said loans in her name, and she suffered and permitted him to use her name as payee in said notes and to receive and hold same all in order to aid and assist said Dallas to cover up and conceal the said money, and to cheat, hinder, and defraud the plaintiff out of her just and lawful claims and demands and the said judgment so rendered as aforesaid, and with the secret purpose and intent to secrete and hold same in trust for the said Dallas Tyler; that on the same day of the rendition of said judgment against said Tyler and Kelly, to wit, February 27, 1902, but before the jury returned the verdict in said cause, and before the court rendered its judgment in said cause against said Tyler and Kelly for said \$9,000, the said Tyler secretly, clandestinely, and without the knowledge of plaintiff took all the cash money he then had, to wit, said \$9,000, and fled from the state of Indiana with same, and has ever after kept the same beyond the jurisdiction of the courts of Indiana; that immediately after the rendition of said judgment, in order to keep plaintiff from seizing and subjecting said \$3,000 which he had loaned in the name of Alwilda Tyler Graves to the partial satisfaction of said judgment, and to further cheat, hinder, and defraud the plaintiff, said Dallas Tyler procured the parties to whom he had loaned the

same by a liberal discount to repay the same to said Alwilda long before the said notes were due, and the said Alwilda, for the purpose of aiding and assisting the said Dallas to hinder, delay, and defraud the plaintiff, received for said Dallas said \$3,000, and as plaintiff is now advised, and so avers, the said Alwilda and her husband, the defendant George Graves, are now holding in secret the said \$3,000 so paid on said notes in order to keep plaintiff from discovering and subjecting the same to the satisfaction of said judgment, and in trust for said Dallas, and have and are aiding said Dallas to collect said \$3,000, and to transfer same beyond the jurisdiction of the state of Indiana—all for the purpose of cheating, hindering, and delaying this plaintiff from collecting her just and lawful demands and the said judgment from said Dallas Tyler. Plaintiff says she is the sole and only beneficiary of said judgment, and sole and exclusive owner of same; that the action in which said judgment was rendered was brought and filed in the name of the state of Indiana for her sole and only benefit, and she is prosecuting this action in her name in lieu and instead of the state of Indiana for the enforcement of the said judgment so rendered in the name of the state of Indiana for her use and benefit; that besides the said real estate and said cash and the cash derived from the collection of said \$3,000 notes said Tyler is the owner of no other property subject to execution in the state of Indiana, and was not, and never has been, the owner of any other property subject to execution in the state of Indiana since the day of the rendition of said judgment, and has not been the owner of any property since the delivery and recording of said deed to said Alwilda Tyler Graves subject to execution within the state of Indiana except said real estate and said cash and notes, all of which, before the rendition of said judgment he disposed of as aforesaid, leaving nothing whatever subject to execution within the state of Indiana out of which said judgment or any part of it can be made; that said Matthew Kelly is hopelessly and notoriously insolvent. And plaintiff further says that immediately after the rendition of said judgment, to wit, on the 1st day of March, 1902, she caused execution to be issued by the clerk of the Knox circuit court on said judgment directed to the sheriff of Knox county, said county being the county where said judgment was rendered, and at the same time an execution to be issued by said clerk on said judgment directed to the sheriff of Jackson county in the state of Indiana, said county being the county where said Tyler at that time and ever since resided, and likewise an execution to be issued by said clerk on said judgment directed to the sheriff of Daviess county, where said Matthew Kelly then resided and ever since resided; that all of said executions have been returned by said sheriffs as to said Tyler indorsed wholly

unsatisfied, and said Tyler not found, and as to him no property found on which to levy same; that the execution directed to the sheriff of Davless county was by him levied upon certain personal property belonging to said Kelly, and after due notice the same was by said sheriff sold, out of which there was realized the sum of \$——, leaving a balance wholly due and unsatisfied on said judgment and execution of \$9,000. Plaintiff further avers that on the 1st day of March, 1902, she caused a duly certified copy and transcript of said judgment rendered in the Knox circuit court to be duly filed in the office of the clerk of the Davless circuit court, and to be duly recorded in the order books of said court, and the said judgment then and now still remains a valid and subsisting lien on and against all of said real estate; that said instrument purporting to be a deed from said Dallas Tyler to said Alwilda Tyler Graves is fraudulent and void as against the plaintiff and the said judgment, and prevents the plaintiff from enforcing the payment of said judgment and any part thereof; that said real estate hereinbefore described is of the full value of \$7,000; that it will require all of same and said \$3,000 so paid to and held by said Alwilda to fully pay and satisfy the said judgment and interest and cost; that said George Graves is husband of said Alwilda. Wherefore plaintiff prays judgment and decree against said Dallas Tyler, Alwilda Tyler Graves, and George Graves declaring said deed from Dallas Tyler to Alwilda Tyler Graves fraudulent and void as to the plaintiff and the said judgment, and that same be set aside and held for naught; that said judgment be declared a valid and subsisting lien on and against all of said real estate superior and paramount to the interest and title of said Alwilda Tyler Graves and George Graves and said Dallas Tyler; that said Alwilda and George Graves, and each of them, be required to answer under oath as to said \$3,000, and required to discover same and pay same over to the clerk of this court for the use and benefit of this plaintiff; and, finally, for all just and proper relief in the premises."

Appellant's first proposition is that the court erred in overruling the motion of Dallas Tyler made on his special appearance to quash the summons and the return issued against him. The evidence shows that Tyler was and had been a resident of Seymour for 17 years when the summons was served. The return of the sheriff of Jackson county shows service by leaving a true and certified copy at his, the last and legal place of residence. It is regular on its face, and in the absence of a charge of fraud is conclusive as against a collateral attack. *Cully v. Shirk*, Ex'r, 131 Ind. 77, 30 N. E. 882, 31 Am. St. Rep. 414. If there was error in failing to quash said summons it was harmless, so far as appellants are concerned.

Alwilda Tyler Graves and her husband

were duly served, and claimed that Alwilda Tyler Graves is the exclusive owner of the real estate in controversy; that Dallas Tyler is not interested in such estate. She has had her day in court.

It is claimed that the action having been instituted by the state of Indiana as sole plaintiff against the appellants and one Phillip Meeh in the Davless circuit court, and the venue having been changed to the Greene circuit court, that it was error to substitute the appellee for the original plaintiff over the objection of the appellants, and without the consent of the official representative of the estate. Annie V. Davis was not a proper or necessary party relatrix in the suit by the state of Indiana to recover the money lost at gambling. *Ervin v. State ex rel. Walley*, 150 Ind. 334, 48 N. E. 249. While she was not a necessary party in the suit to recover the money lost at gambling, yet when the state recovered such judgment, as the wife of the loser of such money she became the exclusive beneficiary and owner of the judgment, and entitled to all equitable and legal remedies to protect and enforce such judgment. "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section." *Burns' Ann. St. 1894*, § 251. The next section is as follows: "An executor, administrator, a trustee of an express trust, or a party expressly authorized by statute may sue without joining with him the party for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." *Burns' Ann. St. 1894*, § 252. Whoever is entitled to the benefits of a suit is the real party in interest, and should institute the suit. *Rawlings v. Fuller*, 81 Ind. 257; *Smock v. Brush*, 62 Ind. 157; *Board of Commissioners Bartholomew County v. Jameson*, 86 Ind. 154; *Pixley v. Van Nostern*, 100 Ind. 34. Section 6673, *Burns' Ann. St. 1894*, provides that the state of Indiana is the proper party to bring suit for money lost at gambling after the loser thereof falls for six months to sue for and recover such money. By the express provision of the statute, "if the loser of the money which the state sues for and recovers has a wife then she is made the sole beneficiary of such judgment; if such loser have no wife but have children then such children are made the beneficiaries; but if such loser have neither wife nor children then the common schools become the beneficiary." Under the statute, then, Annie V. Davis is the party designated as the sole beneficiary of such judgment, and the proper party to prosecute any proceedings. Section 273, *supra*, gives the court the right to determine any controversy between the parties before it when it can be done without prejudice to the rights of the others, or by saving their rights; but when a complete determination

of the controversy cannot be had without the presence of other parties the court must cause them to be joined as proper parties. And when in an action for the recovery of real or personal property a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be made a party by proper amendment. The right is recognized in the following decisions: *McCall v. Lee* (Ill.) 11 N. E. 522; *Brown v. Caddy*, 115 Ind. 484, 18 N. E. 9; *Pond v. Irwin*, 113 Ind. 243, 15 N. E. 272; *Homer v. Bar, etc., Co. (Mass.)* 61 N. E. 883; *Congress, etc., Co. v. Farsons, etc. (Ill.)* 65 N. E. 357; *State, etc., v. Ludwig (Wis.)* 82 N. W. 158; *Hook v. Coal Co. (Iowa)* 83 N. W. 963; *Garcia v. U. S.*, 37 Ct. Cl. 243; *Clough et al. v. Thomas et al.*, 53 Ind. 24. We think it may be held upon the weight of the authorities that have been and the many others that might be cited that upon the trial of a cause, when there is no change in the issues, nor in the relief demanded, and there can be no change in the results reached, and when the court has acquired jurisdiction of the parties and of the subject-matter, there is then a discretion vested in the court on the subject of amendments and the substitution of parties so as to fully settle the question of proper parties and the rights of the parties before them. The original complaint, which was filed in the name of the state of Indiana to set aside the Tyler deed, and the substituted complaint which was afterwards filed in the name of appellee Annie V. Davis, are in substance the same. The same defense, the same evidence, would have been available to appellants whether the suit was in the name of the state or in the name of Annie V. Davis. The conclusion would have been the same with either as plaintiff, and such conclusion would be a bar to another action for the same cause. There was therefore no available error in the substitution.

Appellants contend that there was a fatal variance between the certified copy of the proceedings in the Daviess and Knox circuit courts in the case of *State of Indiana v. Tyler and Kelly* and the complaint in the case at bar, in that the judgment in that case did not sustain the allegation that it was for the use and benefit of the appellee. It would have been improper for the judgment to have so stated. She was not a proper party in the suit to recover the money lost in gambling. *Ervin v. State*, supra. We have considered this question in discussing the substitution of appellee for the state in said cause.

In their seventh point appellants insist that the special findings from 1 to 37, inclusive, are of immaterial, evidentiary facts, and not of ultimate facts; that the consideration of said facts and those in each of said findings confused the judgment of the court, and prevented an impartial consideration of the facts material to the issues. The proposi-

tion is true as to some of the special findings, but we cannot concede that they confused the court, and prevented an impartial consideration of the facts material to the issue.

It is contended that special finding No. 35 is not sustained by evidence, and is contrary to law, and that the ultimate facts stated therein are in irreconcilable conflict with the evidentiary facts material to the issue stated in the other findings. That finding is as follows: That the said deed dated June 4, 1900, by the said Dallas Tyler to said Alwilda Tyler Graves, was and is a voluntary conveyance made by said Tyler to said Alwilda, and was made by him and received by her with the secret purpose and intent on the part of both that said Alwilda Tyler Graves should and would hold the said real estate therein described in trust for the use and benefit of said Dallas Tyler. Courts are permitted to draw reasonable inferences from facts proven. We cannot say that such fact is wholly unsupported by evidence, or is contrary to law, or is in irreconcilable conflict with evidentiary facts material to the issues stated in the other findings.

The appellants moved the court to add to and include in its special findings of facts special findings from 1 to 9, inclusive, and each of them, which appear in the record as numbered. The court refused. Appellants duly excepted. "It has been uniformly held by this court that motions to modify, strike out, or add to the special findings are not recognized by our Code of Procedure. Where any or all of the facts found are not sustained by sufficient evidence, or are contrary to law, or when facts should have been found, but were not, the proper remedy is a motion for a new trial." *Chicago, etc., R. Co. v. State ex rel.*, 159 Ind. 241, 64 N. E. 860.

Appellants excepted to conclusions of law No. 1, 2, 3, 4, and 5, and in rendering judgment thereon in favor of appellee. Conclusion 1 stated that there was due from the defendant Dallas Tyler to the plaintiff Annie V. Davis on the judgment set forth in the plaintiff's complaint the sum of \$8,716.84. (2) That said judgment was rendered for the use and benefit of the plaintiff Annie V. Davis, and that she is the sole and only owner of that judgment. (3) That the deed of conveyance dated June 4, 1900, from Dallas Tyler to Alwilda Tyler Graves, mentioned and set forth in the complaint, was and is a voluntary conveyance, without consideration, made by him and received by her in trust for Dallas Tyler; that under said conveyance the said Alwilda took and now holds the real estate described in said deed in trust for said Dallas Tyler, and said deed is void as against the judgment set out in the complaint and as to the plaintiff's claim thereunder. (4) That the judgment set forth in the plaintiff's complaint and plaintiff's claim thereunder is a lien on the real estate mentioned in the complaint, except that part of

said real estate described as being a part of lot 1 in Kinney Addition, superior and paramount to the title, claim, and interest of the defendants, and either of the defendants, in and to said real estate. (5) That said deed prevents plaintiff from collecting the judgment set forth in her complaint, and ought to be set aside, canceled and held for naught as against the judgment and the plaintiff's claim thereunder set out in the plaintiff's complaint, and said real estate, or so much thereof as may be necessary, subjected to sale for the satisfaction of the said judgment and plaintiff's claim thereunder; that said real estate herein set out is the only property subject to execution owned by said Dallas Tyler in the state of Indiana. We find no error in this conclusion of law.

It is next contended that the judgment is not fairly supported by, and that the same is clearly against, the weight of the evidence. Appellants therefore ask this court to weigh the same under section 8, c. 193, p. 341, Acts 1903. The Supreme Court and this court has recently held that appellate courts will not weigh the evidence under said act. *Hudelson et al. v. Linaeus Hudelson et al.* (present term Sup. Ct.) 74 N. E. 504; *U. S. B. & P. Co.* 7. *Moore* (present term this court) 74 N. E. 1094.

In point 14 it is claimed that neither of the items of evidence and testimony referred to in the fifth reason for a new trial and numbered from 1 to 20, inclusive, and those numbered 25, 36, 37, 38, and 39, tended to sustain any material issue in the case, and that the court erred in admitting them and each of them. Appellant's brief does not give the page of the record showing these alleged errors. The record is voluminous, containing over 700 pages. The same is true of point 15, which is to the effect that the items of evidence and testimony referred to in the fifth reason for a new trial and numbered 21 to 35, inclusive, except 25, that were offered in evidence by the appellants, were competent and material on their behalf, and behalf of each of them, in their defenses, and tended to rebut the presumptions raised by appellee and sustain the issues on their behalf. As to both of these points rule 22 of the Supreme Court (55 N. E. v) is disregarded, and it will be presumed that appellants did not expect them to be considered.

The sufficiency of the evidence to sustain

the findings and judgment of the court is questioned. It is claimed that the special findings of facts do not justify a judgment against George Graves. He appeared to the complaint, and answered by general denial and by affirmative answer. If he were without interest in the proceeding, he should have filed a disclaimer; but the evidence discloses that he was not wholly without pecuniary interest.

In the rulings on the pleadings we find no reversible error. Upon the merits of the case it can be fairly said appellant Tyler, in a manner contrary to law, obtained from the husband of appellee a large sum of money, and converted it to his own use. By the folly of Davis his wife is made to suffer in mind and bodily comfort. The sister of Tyler, in being made the grantee of her brother, is the beneficiary of her brother's wrongful acts. That both of these women interested in this case are innocent of wrongdoing we may well believe. Fraud is a question of fact. The number of its badges is almost without limit. It may be proven by circumstantial or direct evidence. Circumstances apparently trivial in themselves when considered singly, may, when taken in connection with others, fix the fraudulent character of a transaction. The parties between whom a transaction takes place often give point to conduct which otherwise would be free from suspicion. And so where fraud is charged it is a question peculiarly within the province of the trial court or jury. The trial court has specially found that no consideration passed to said Dallas Tyler for the conveyance of the property in question, that said conveyance was made by him and received by her with the purpose and intent on the part of both of them that said Alwilda should and would take and hold the said real estate therein described in trust for the use and benefit of said Dallas, and that the deed to his sister was wholly voluntary. To indicate the various facts and circumstances set out in the evidence from which a fraudulent purpose might be inferred, or that the transfer of the real estate was without consideration, and was to be held in trust for the use and benefit of Tyler by his sister, would be to greatly extend the length of this opinion without a corresponding advantage.

We find no error for which the judgment should be reversed.

(36 Ind. App. 56)

FLETCHER BROS. CO. v. HYDE. (No. 5,392.)(Appellate Court of Indiana, Division No. 1.
June 29, 1905.)**1. MASTER AND SERVANT—INJURY TO SERVANT—WARNING AND INSTRUCTING SERVANT.**

It is the duty of an employer, knowing that the employment is dangerous, and that the employé is inexperienced, to warn and instruct him how to avoid the danger, though the danger is open to observation, but not understood by the employé.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 314.]

2. SAME.

An employer is not relieved of the duty of warning and instructing an inexperienced employé merely because the appliances with which to do the work are in perfect order, when the danger is not obvious.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 310, 316½.]

3. SAME—ASSURANCES OF SAFETY.

An employer having knowledge of the danger and of the employé's ignorance thereof, who gives the employé assurances of safety so that he feels secure, is liable for an injury resulting in consequence thereof.

4. SAME—COMPLAINT—SUFFICIENCY.

A complaint in an action against an employer for injuries received by an employé while engaged in assisting the placing of trusses in a building, which set forth the manner of doing the work, and alleged that the work was dangerous; that the employé was placed in a dangerous position; that the danger was not apparent to him, who was inexperienced; that the employer did not warn him of the danger, but assured him that the place was safe; and which alleged the manner of the happening of the accident resulting in the injury sued for—was sufficient against a demurrer, when construed as setting forth a cause of action based on the theory that the employer, knowing the danger and the inexperience of the employé, directed him to work in a particular place, without instructing him as to the danger.

5. SAME—MOTION TO MAKE MORE DEFINITE.

The complaint, when so construed, was sufficient, as against a motion to make it more specific.

6. SAME—EVIDENCE.

To entitle the employé to recover under the complaint so construed, it was not necessary to show that the work required any special mechanical knowledge or other skill than that expected from a common laborer.

7. SAME—INEXPERIENCED SERVANT.

Where an employé placed in a dangerous position was inexperienced and ignorant of the danger, and the employer, knew the facts, and assured him of his safety, and induced him to occupy the position assigned, and he was injured, the employer was liable therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 314, 548, 676.]

8. SAME—INSTRUCTIONS.

The complaint in an action against an employer for injuries received by an employé was based on the employer assigning the employé to work in a dangerous position without instructing him, he being ignorant of the danger. The court charged that a verdict for plaintiff might be rendered on finding that the appliances were defective. *Held*, that the instruction erroneously authorized a verdict on matters not included in the complaint, necessitating a reversal, especially where the jury found that the appliances were defective.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by John E. Hyde against the Fletcher Bros. Company. From a judgment for plaintiff, defendant appeals. Reversed.

William A. Kittinger and William S. Diven, for appellant. Ellison & Ellis and Bagot & Bagot, for appellee.

BLACK, J. The appellee's complaint against the appellant consisted of three paragraphs, but the court instructed the jury that they need not give the first or second paragraph consideration. In the third paragraph it was alleged, after introductory matter, that in January, 1900, the appellant was building a large stone and brick building in the city of Anderson, known as the "New Christian Church"; that in the construction thereof it became necessary to move and place in the building from the street trusses more than 40 feet long and more than 8 feet wide, framed and consisting of iron beams, plates, and crossbars, and each of many tons weight; that January 23, 1900, the appellant employed the appellee to work for the appellant in the construction of this building, and on the next day the appellant ordered and put the appellee to work in assisting in bringing the trusses into the building from the street and putting them in position in the building; that a part of this work consisted in sliding one of the trusses through a large opening in the east wall of the building from the street to the inside of the building, standing it in an east and west direction on the floor of the building in an upright position, resting upon its edge, and then by means of ropes, blocks, pulleys, chains, crowbars, props, and windlass easing or letting down the truss toward the south from its upright position, so that it would lie upon its side on the floor; that in the work of so lowering or letting down the truss upon its side the appellant attached a rope to the truss near the center of the top thereof, carried the rope back to the north and east, allowing the rope to angle from the truss in a northeast direction, and passed the rope through a block or loop attached to an I-beam in the northeast corner of the building, and then attached the end of the rope to a windlass in the south part of the building, south of the truss; that the only support the appellant had for the truss in so letting it down consisted of this rope and windlass and a small wooden prop used for such purpose by the appellant; that by means of the windlass and the wooden prop under the top of the truss the appellant attempted to let the truss down upon its side as aforesaid, and before starting to do so the appellant placed one end of a crowbar under the east end of the truss on the opposite side from the windlass—the north side—and between the truss and a large brick column forming a part of the building,

which stood 3 or 4 feet north of the truss and near the east end thereof; that the brick column contained, on the south side thereof, a small niche, or recess, and the appellant then and there ordered and directed the appellee to stand against the brick column, and within the niche or recess, and to hold the upper end of the crowbar while the truss was so being let down; that the rope, pulley, I-beam, and windlass were so placed by the appellant that the rope left the truss at an acute angle toward the east end thereof, and the crowbar was so placed by the appellant under the truss and the prop was so placed and handled by the appellant that when the truss left the perpendicular in its descent the great weight of the truss upon the rope was likely, by reason of the angle of the rope with the truss, to cause the bottom of the east end of the truss to kick up and the truss to slip or slide toward the east and north, in the direction of the rope, and toward the appellee, and to wrench and throw down the prop, and to wrench the crowbar out of the appellee's hands, thus allowing the truss to fall and catch and crush and injure the appellee; that by reason of the facts aforesaid the place where the appellant so ordered and directed the appellee to work was a very dangerous and hazardous one, and the work to which the appellee was thus put by the appellant was very dangerous and hazardous to a person who was inexperienced in said work, and who was uninstructed in the proper method and manner of doing the same; that said danger was not apparent to appellee, and was of such a character that it would only be discovered or detected by a person of experience in that line of employment, or by instruction from some one having knowledge thereof; that to perform the work safely it was necessary that a person have sufficient experience and skill in the work to know and appreciate the weight of the truss, the capacity of the windlass and those operating it, "the character and extent of the bearings upon said rope and windlass, the effect upon said truss, and its action in being lowered, of the effect of the rope being attached at an angle as aforesaid, and also the resistance of said truss against said crowbar and the strength and leverage of said windlass"—all of which facts were known to the appellant and unknown to the appellee, as the appellant well knew; that a part of the work and the danger thereof in the manner in which it was done by the appellant was not ordinary and simple labor, but was intricate and complicated, in that it consisted in moving, raising, and lowering great weights by mechanical devices and machinery, the power and strength, capacity and tendencies of which, and the manner of operating and controlling which were not open, plain, or apparent, but could only be learned by experience in the use thereof, or by proper instructions as to the proper

manner of using the same, and in the power, capacity, and tendencies thereof; that the appellee was wholly unacquainted with the power, strength, and capacity of said machinery, and the tendencies thereof, and with the proper manner of safely operating the same, and with the manner in which to do the work properly and safely with said machinery and devices, and with the power and capacity and tendencies of said machinery and appliances, which facts were to the appellant well known; that to perform the work without great hazard and danger to the appellee required that a person in the place where he was so ordered and directed to work be experienced in the work and in the manner of doing it, or be fully instructed as to how to safely do the work, and also be apprised of said danger and fully instructed as to how to avoid it—all of which was well known to the appellant and wholly unknown to the appellee at that time; that at the same time he was wholly without experience in the work, he had never before performed the same or similar work, and was wholly unacquainted with and had no knowledge of the danger and hazard attending the work or the means or way of escaping the same, and had no notice or knowledge that his said position was one of great danger—of all which facts the appellant then and there had full notice and knowledge, and should have notified the appellee of all of them—and none of them were apparent to an inexperienced and uninstructed person; that, if appellee had been instructed as to the manner of applying the machinery and appliances and their effect on the truss and the dangers thereof, he would not have assumed said position; that, notwithstanding all said facts, and the appellant's notice and knowledge thereof, the appellant carelessly and negligently failed and neglected to give the appellee any notice or warning of said danger, or in any way to apprise him thereof, nor did the appellant at any time give the appellee any instructions concerning said danger and the means and way to avoid the same, but when the appellant so placed the appellee in said place and at said work it carelessly and negligently told him and assured him that it was a safe place, and that there was no danger in said place, and that the work and place were unattended with any danger whatever; that the appellee relied upon said statement of appellant that the place and work were free from danger, and believed said statements to be true, and assumed the place and the duties thereof relying upon said assurance of the appellant that it was safe; that the appellee was then and there placed and required by the appellant to remain in the niche, and remained therein at all times thereafter until he was injured as hereinafter stated; that when the truss, in its descent, had reached an angle of about 45 degrees from the perpendicular, by reason of the great weight

thereof and of the said pressure and draft toward the east and the north made by the angle in the rope, and by reason of the manner in which said machinery and appliances were arranged by the appellant as aforesaid, the truss suddenly slipped toward the east and the north, and the east end thereof suddenly kicked up, and without warning swung around to the east and north, catching the appellee beneath and throwing the crowbar out of his grasp, fell upon the appellee's left leg, and broke, crushed, and mangled the same, totally and permanently disabling the appellee; that appellee's said injury was brought about wholly and solely by reason of the carelessness and negligence of the appellant in failing to notify the appellee of the danger attending his position and the work required of him, and in carelessly and negligently telling him and assuring him that the place where the appellant had required him to work and the work itself were free from danger, and in failing and neglecting to give him any instructions and directions as to said danger and hazard and how to avoid and escape the same; that by reason of said injury the appellee has been put to great expense, etc. A demurrer for want of sufficient facts addressed to this paragraph was overruled.

It does not appear that the work was not work of the kind which the appellee was employed to do. The pleading does not ascribe negligence in providing insufficient or defective appliances, or in the manner of using the appliance, or in the doing of the work in the prosecution of which the appellee was injured; but it is shown that the doing of the work in the manner described was dangerous to the appellee, and the causes of the danger are stated. It does not distinctly appear that his injury was occasioned by his doing anything himself unskillfully, or in any manner other than that in which a skillful person would have acted in a like dangerous situation.

Seeking a consistent theory, and confining the pleader thereto, it would seem that the complaint proceeds upon the ground that the employer placed the employé in a particular position, and assigned him certain work there, in co-operation with other persons doing their portion of the work elsewhere; that to occupy the position and perform the work assigned to him was dangerous for the employé, as described; that he was ignorant and uninstructed as to the danger; that the employer, knowing the danger, and knowing that the employé was ignorant and uninstructed concerning it, not merely negligently failed to instruct or warn him of the danger, but negligently told him and assured him that the place where he was so placed and the work to be done by him there were safe, on which assurance the employé relied; and he was injured while so pursuing his employment, as might have been anticipated by the employer so acquainted with the dan-

ger and with the employé's ignorance and inexperience. It is a general rule that the employé assumes the risk of injury in doing work within his contract of employment which exposes him to danger known to him or obvious to a person of ordinary intelligence in like circumstances; but if the employer knows, or ought to know, that the employment is dangerous, and knows that the employé is inexperienced in the employment and ignorant of the danger, it is the imperative duty of the employer to warn the employé of the danger, and to instruct him how to avoid it; and if injury results to the employé through the failure of the employer to perform such duty, without contributory fault of the employé, the employer is liable therefor. This duty is incumbent upon the employer though the danger be open to observation, if the employer knows that the employé, because of his inexperience or other cause, is unable, without warning and instruction, to understand the risk and to avoid the danger. *Atlas Engine Works v. Randall*, 100 Ind. 293, 296, 50 Am. Rep. 798; *Hawkins v. Johnson*, 105 Ind. 29, 4 N. E. 172, 55 Am. Rep. 169; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; *Salem Stone & Lime Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *Republic Iron Co. v. Ohler*, 161 Ind. 393, 402, 68 N. E. 901. The master is not necessarily relieved of the duty to warn and instruct the servant by the mere fact that the appliance from which the danger arises is in perfect working order, if the danger be not open and obvious. *May v. Smith*, 92 Ga. 95, 18 S. E. 360, 44 Am. St. Rep. 84. It is manifest that danger might be obvious to an experienced and instructed employé which would not be appreciated by an employé who, because of inexperience and want of instruction, does not understand the effect which will be produced by the application of the means employed, though before the commencement of the work they be open before his eyes. If the master, having knowledge of the danger of which he knows the servant is ignorant, by his conduct and words gives the servant assurance of safety, so that he feels secure, and in consequence thereof he is injured, the master is answerable. *Hoffman v. Dickinson*, 31 W. Va. 142, 6 S. E. 53. The third paragraph of complaint was not insufficient. Before the filing of the demurrer to this paragraph the appellant moved to require the appellee to make it more specific in 16 particulars, separately stated in the motion. The court sustained this motion in part and in part overruled it, and the appellee accordingly inserted in the complaint certain amendments which appear in the complaint, which is, in substance, above set out. We have carefully examined the motion to make more specific, and we do not think there was available error in the action of the court upon the motion, or upon a motion

made by the appellant to require the appellee to comply more fully with the order to make the paragraph more specific. The complaint is sufficiently specific upon the theory above suggested to put the appellant to its answer.

With their general verdict against the appellant, the jury returned answers to interrogatories, and the court overruled the appellant's motion for judgment in its favor upon the interrogatories and the answers thereto by the jury, notwithstanding the general verdict. The court also overruled a motion of the appellant for a new trial. It was not necessary, in order to entitle the appellee to recover under the third paragraph of the complaint, as above construed, that it should be made to appear that the work in which he was engaged when injured was work requiring any special mechanical knowledge, or any skill other than that required or to be expected of a common laborer. It was the duty of the appellant to anticipate the probable tendency and effect of the application of the force provided by it for the moving of the iron truss; and if all the materials and appliances were in view of the appellee, and he could see the operation being performed, yet, under the conditions and circumstances of his case as stated in the third paragraph of complaint, we cannot say that he was bound, as between him and the appellant, to apprehend injury after the positive assurance of safety. If the jury found under the evidence that the work of the appellee in the situation in which he was placed by the appellant to do it was dangerous, as described in the complaint, and that the appellee was inexperienced, and, without any fault on his part, ignorant of the danger, and that these facts were known to the appellant, and that it assured the appellee of his safety, and thereby induced him to occupy the place and to do the assigned work there, whereby he was injured, the appellant would be responsible. It was the duty of the appellant not to assure the appellee of safety when it knew there was danger which the appellee could not appreciate, as alleged in the complaint.

The court, in its sixth instruction, told the jury that if they found that there was in the tools, machinery, and appliances with which

the appellee was required to perform the appellant's service dangerous defects and imperfections of which the appellee did not know, and which were not open to ordinary observation, and which the appellee could not learn by the use of ordinary care and the ordinary use of his senses, then the appellee would not be charged with notice of such defects, if any existed; while, on the other hand, if the appellant could have learned of such dangers, defects, or imperfections, if any existed, by reasonable and ordinary care, then it would be charged with full notice thereof to the same extent as if it had actual notice of the same. This instruction presented for the consideration of the jury matter not within the issue on trial under the third paragraph of the complaint, to which, by other instructions, the court limited the jury. If we could say with confidence that the jury based its general verdict solely upon the third paragraph, we might conclude that such instruction was not injurious; but our attention is called to certain special findings in answer to interrogatories which indicate that the evidence related to some extent to matters to which this instruction pointed. Thus it was specially found that the crab or windlass that was used in lowering the truss was not strong enough to do the work for which it was assigned; that the dog or ratchet slipped or failed to work properly; that the windlass or crab got away from and out of the control of Canter (an employé operating the windlass) when the truss was being lowered, when the truss slipped, when the prop was taken out; that the sudden jerk on the rope caused the windlass to get away from his control. Thus it appears that the court submitted interrogatories requiring special findings concerning matters not within the third paragraph of complaint; and instructed the jury concerning like matters, while it withdrew all other paragraphs of complaint from the issues on trial. The impression that the case was not tried and determined upon a consistent theory of a cause of action is so strong that justice seems to require another trial.

The judgment is reversed, and the cause is remanded, with instruction to grant a new trial, and to give leave, if asked, to amend the complaint.

(36 Ind. App. 129)

TOWN OF KNIGHTSTOWN v. HOMER.
(No. 5,391.)(Appellate Court of Indiana, Division No. 1.
June 30, 1905.)**1. COMPLAINT—SUFFICIENCY AFTER VERDICT.**

Where the sufficiency of a complaint is tested for the first time after verdict, it will be sufficient if it contains facts sufficient to bar another action for the same cause, when strengthened by every reasonable intendment and doubt, even to the extent of supplying omitted facts resulting as a natural consequence from the facts averred.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1451-1477.]

2. BOARDS OF HEALTH—CONTAGIOUS DISEASES—SERVICES RENDERED.

Under Burns' Ann. St. 1901, § 6718, declaring that the trustees of each town shall constitute ex officio a board of health, and requiring them to elect a secretary, who shall be health officer of the board, and that it shall be the duty of the board to protect the public health, and to take prompt action to arrest the spread of contagious and infectious diseases, a complaint alleging that one S. was found afflicted with smallpox in the livery stable of plaintiff's husband, and, after being brought to plaintiff's house without her consent, he and a certain physician and plaintiff were quarantined therein, and plaintiff was directed by the town secretary of the board of health to care for and nurse S. and such physician, it was sufficient after verdict to entitle plaintiff to recover from the town the reasonable value of her services performed in that behalf.

3. APPEAL—RECORD.

No available error can be predicated on a ruling on a demurrer not copied in the record.

4. BOARD OF HEALTH—CONTAGIOUS DISEASES—EMPLOYMENT OF NURSE.

Evidence held to constitute an emergency authorizing the secretary of a town board of health to direct plaintiff to nurse a smallpox patient and a physician quarantined in plaintiff's house, and to bind the town for such services, under Burns' Ann. St. 1901, § 6718, requiring the board of health of a town to take prompt action to arrest the spread of contagious and infectious diseases.

5. SAME—EXPENSES.

Where a smallpox patient was taken to plaintiff's house at the instance of plaintiff's husband, and not by any act or command of the town board of health or its secretary, and, after the death of the patient, plaintiff's household furniture, etc., was destroyed, by order of the board of health, to prevent the spread of the disease, the town was only liable for its value at the time it was destroyed.

6. SAME—LIABILITY OF TOWN.

Where it did not appear that plaintiff was in indigent circumstances, nor unable financially to provide any and all means for the care and attention of her child, who contracted varioloid from a smallpox patient with whom plaintiff and her son were quarantined in plaintiff's home, and for whom she was employed to care by the secretary of the town board of health, the town, in the absence of a statute, was not liable for services rendered by plaintiff to her son.

7. SAME.

Acts done to prevent the spread of disease being within the jurisdiction of the board of health, as provided by Burns' Ann. St. 1901, § 6718, and the town being only liable when the board or its secretary acts within the scope of its authority, an instruction authorizing a recovery against a town for the destruction of property "by its officers," when done "for the

purpose of preventing the spread of disease," was erroneous.

8. APPEAL—HARMLESS ERROR.

Plaintiff having been held not entitled to recover anything for property so destroyed, and being required, as a condition of affirmance, to remit damages awarded for such destruction, the error was harmless.

Appeal from Circuit Court, Henry County;
John M. Morris, Judge.

Action by Pearl Homer against the town of Knightstown. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition.

L. P. Newby and Forkner & Forkner, for appellant. Eugene Bundy and Wm. A. Brown, for appellee.

MYERS, P. J. This was an action by appellee against appellant to recover for services rendered Jesse Swain, Dr. Stanley, and her minor son, smallpox patients, and for damages to property belonging to appellee, destroyed to prevent smallpox contagion in the town of Knightstown. The facts as stated by the complaint, so far as material, are as follows: In the month of June, 1902, the appellee and her husband and one child were living in their home, in the town of Knightstown, Ind. That during said month one Jesse Swain, while at the livery barn of appellee's husband, Ed Homer, became afflicted with a virulent and contagious disease, known as smallpox. That appellant, by and through its health board, and through the orders and directions of the secretary of the said health board, and at the request of appellee's husband, directed that said Swain be taken to the home of appellee, which was done. That as soon as said Swain was taken into appellee's home the appellant, by and through its health officers, quarantined appellee and her son in her home with said Swain, and compelled appellee to nurse said Swain, and refused to permit her or her said son to leave said home. That one Dr. Stanley, while attending said Swain, took sick at the home of appellee, and said health officer ordered, directed, and demanded that said Stanley remain in said home of appellee, and ordered, directed, and commanded appellee to take charge of said Stanley, and nurse and wait upon him, during his said sickness. That, upon the order of said health officers, appellee did render and perform for said Swain services as a nurse, and nursed, cared for, and waited upon him for a period of 30 days, and performed the same services for said Stanley for a period of 30 days, and that the services so rendered by appellee during the said period of 60 days were reasonably worth \$5 per day. That said services so ordered and commanded by appellant, and so performed by appellee, were services necessary to prevent the spread of said disease in said community, and were necessary to the preservation of the general health of the citizens of the said ap-

pellant. That said Swain while at the home of appellee, from the effects of said disease, died. That said Stanley recovered. That immediately thereafter appellee's minor son became sick with said disease of smallpox, which he contracted from said Swain solely by reason of said Swain being confined and quarantined in appellee's home by appellant, and appellee was thereby compelled to nurse and care for said minor child, which services so rendered in nursing said child on account of said sickness were of the value of \$50. That, after the recovery of her said child, appellant, by order and command of Dr. O. H. Barrett, then secretary of appellant's local board of health, ordered its police to enter appellee's home and destroy by fire all the household goods, kitchen furniture, and wearing apparel of herself and said son, together with all the draperies, carpets, window curtains, beds and bedding owned by the plaintiff, which was done by said appellant, as so ordered, all of which—said goods so burned and destroyed—was done because of the necessity then and there existing to preserve the general health of the citizens of said appellant, and to suppress and prevent the spreading of said disease among the people of said town and vicinity, and which was done as ordered by said secretary of said board of health. That all of which goods so destroyed were of the value of \$300. A bill of particulars of all of said goods so destroyed is made a part of the complaint. It appears from the record that a demurrer was filed to this complaint and overruled. The demurrer is not in the record, and we are not advised on what grounds the demurrer was filed. Appellant answered in two paragraphs—the first, a general denial. Appellee replied to the second paragraph of answer by general denial. The issues thus formed were submitted to a jury for trial, resulting in a verdict and judgment in favor of appellee for \$200. Appellant's motion for a new trial was overruled. It appeals to this court, and assigns errors: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) the court erred in overruling the demurrer to the complaint; (3) the court erred in overruling appellant's motion for a new trial.

1. A complaint tested for the first time in this court will be held good if it contains facts sufficient to bar another action for the same cause, although its averments may be objectionable for uncertainty and inadequacy, or for stating conclusions instead of facts, upon the theory that such facts or conclusions, strengthened by the verdict, are to be given the benefit of every reasonable intendment and doubt, even to the extent of supplying omitted facts, resulting as a natural sequence from the facts averred. But this rule does not obtain when the defect is a failure to aver some fact or facts essential to constitute a cause of action, or, from the

facts averred, plaintiff's right to recover is clearly denied. *Efroymson v. Smith*, 29 Ind. App. 451, 63 N. E. 328; *Cleveland, etc., Ry. Co. v. Baker*, 24 Ind. App. 152, 54 N. E. 814; *Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831; *Evansville, etc., R. Co. v. Darling*, 6 Ind. App. 375, 33 N. E. 636; *Brandis v. Grissom*, 26 Ind. App. 661, 60 N. E. 455; *Stockwell v. State ex rel. Johnson, Auditor*, 101 Ind. 1; *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200.

By section 6718, Burns' Ann. St. 1901, the trustees of each town in this state shall constitute ex officio a board of health for such town, and it is made the duty of such board to "elect a secretary who shall be the health officer of the appointing board," and it is the duty of such board "to protect the public health by the removal of causes of disease when known, and in all cases to take prompt action to arrest the spread of contagious and infectious diseases." The complaint in the case at bar charges that, at a livery stable belonging to appellee's husband, one Swain became afflicted with the disease of smallpox. Smallpox is an infectious and contagious disease, and, under the statute supra, it is the duty of the town board to take immediate and active measures to prevent the spread of this disease among its people. The party so afflicted was found in what may be termed a public place. The patient was ordered into the home of appellee by the "health officer" of the health board of the town. While it appears that this order was at the request of the husband of appellee, yet it does not appear that appellee was consulted, or had any information as to the condition or character of the disease with which Swain was afflicted until after he had been installed in her home, and where her property was situated, and which was thereafter destroyed upon the order of the town health officer. The discovery of a contagious disease like smallpox in a thickly settled community like the town of Knightstown, Ind., whether one or more cases, as it seems to us, creates an immediate necessity for activity on the part of those charged with the duty of preventing its spread, and creates a liability on the part of the town to pay any necessary expense incurred by its health board, or, in the absence of an order of its health board, the expenses incurred by its "health officer," under such an emergency. Therefore, giving to the averments of fact stated in the complaint the benefit of every intendment and doubt, as authorized by the principles of law enunciated in the cases above referred to, in our opinion the complaint states facts sufficient to withstand an attack after verdict, and for the first time on appeal.

2. No available error can be predicated upon the ruling of the court on a demurrer not copied in the record. *Kahn v. Gavit*, 23 Ind.

App. 274, 55 N. E. 268; Samples v. Carnahan, 21 Ind. App. 55, 51 N. E. 425; Jones v. Mayne, 154 Ind. 400, 55 N. E. 956.

3. Appellant's motion for a new trial contains many reasons in support thereof. We will only consider those by it discussed.

(1) The verdict is not sustained by sufficient evidence. The bill of particulars filed with complaint totals \$450.15, of which \$350 is for nursing the parties mentioned in the complaint, and the balance for property destroyed. From the evidence it appears that on Thursday, May 29, 1902, and without objection on the part of appellee, and at the direction of appellee's husband, one Jesse Swain, a nephew of appellee's husband, was taken into the home occupied by appellee and her husband as husband and wife. A physician was called to attend Swain. The patient was supposed to have and was treated for measles until the following Sunday evening, when he was found to be suffering from a very severe attack of smallpox. Appellee and her son, a child eight years old, were immediately quarantined in the house with Swain. Swain was without any property or means whatever. On Sunday evening he became delirious, and continued in this condition most of the time during Sunday night and the next day, and in his delirium would have left the house and gone on the streets of said town, but for the efforts of appellee. On Sunday evening, when Swain's affliction was diagnosed to be smallpox, and after Dr. O. A. Barrett, the secretary of the board of health of said town, had been so notified, appellee applied to him, asking that he provide a nurse to care for Swain, and was told, ordered, and directed by said health officer to care for said patient, which she alone did until the evening of the following day, when one Morrison, a nurse, came and took charge of the patient. From that time until the patient died, on Monday evening, June 9th, appellee assisted Morrison in the care of Swain, by preparing tea, carrying water for him, and providing him with bed linen with which to change the patient's bed, and other errands, as requested by Morrison. It also appears from the evidence that one Dr. Stanley came to her home on Tuesday morning, June 3d, and there remained for the purpose of rendering medical aid to Swain. On Tuesday morning, June 10th, and while at appellee's home, Dr. Stanley was taken sick with what at first was supposed to be smallpox, but later this impression was found to be erroneous. Appellee on June 10th notified Dr. Barrett of Stanley's sickness, and, at the request of Barrett, appellee alone cared for and nursed Stanley until the following Saturday night, when Morrison returned and took charge. In our opinion, an emergency appeared to exist, sufficient to authorize the secretary of the board of health of appellant to act, when he directed appellee to nurse Swain and

Stanley, and to bind the city to pay for services rendered Swain and Dr. Stanley from the time they took sick until Morrison, the nurse, was employed and took charge. Monroe v. City of Bluffton, 31 Ind. App. 269, 67 N. E. 711. As we have heretofore said, by our statute (section 6718, supra) it was the duty of the board of health of the town of Knightstown to "protect the public health by the removal of causes of disease when known," and to take prompt action to prevent the spread of contagious and infectious diseases. From the evidence in the case at bar, the contagious and infectious disease was present and within the jurisdiction of the board. It was its duty to take prompt action to prevent its spread. It could not shift the responsibility, and, on the facts here presented by the evidence, the language used by this court in the case of Board v. Fertich, 18 Ind. App. 1, 46 N. E. 699, is clearly in point; that is to say: "The expenses assumed by the county should not be too narrowly confined. The county board of health should be regarded as having authority sufficient to protect the public health. The afflicted persons should not be required to defray expenses not incurred for their own benefit. Expenses authorized by the board of health for the public benefit should be defrayed by the benefited public. So far as the indebtedness is incurred not upon the credit or under the contract of the afflicted person, but by direction of the board or by its authority, which are occasioned by reason of the measures taken by the board to protect the public health by preventing the spread of the disease, to that extent payment should be made by the county. The particular items of expense for which allowance should be made will vary with changed circumstances, and only the general principle which should govern the board in making allowances can be here pointed out." It also appears from the undisputed evidence that under the direction of Dr. Barrett, and superintended by Dr. Stanley, certain property mentioned in the complaint, of which appellee was the owner, was on the night of the death of Swain taken from the house and burned, which property was shown to be of the value of \$75 at the time Swain was taken to the home of appellee, and worthless at the time destroyed. Under this evidence, in considering the value of the property destroyed, did the rule for fixing the amount of damages apply to the value of the property at the time it was discovered that Swain was afflicted with smallpox, or at the time the property was taken by the board of health and destroyed? Swain was in appellee's home not by any act or command of the board of health or its secretary, but he was there at the direction of appellee's husband, and with appellee's consent, and there remained until his death, without request from appellee to any one for his re-

moval. Under these facts, as it seems to us, the rule for assessing appellee's damages for the property so taken, if appellant was liable therefor, should be what the property was worth as there situate at the time it was destroyed. *Brown v. Murdock*, 140 Mass. 314, 3 N. E. 208; *Selkirk v. Cobb*, 13 Gray, 313. If the rule here announced for the assessment of damages be correct, and the property burned was worthless at the time it was so destroyed, as appellee testified, then there can be no recovery for the item of property, as no damages were proven. It further appears from the evidence that shortly after the death of Swain appellee's child was taken with varioloid, and that appellee nursed and cared for him until his recovery, for which she claims \$50. There is nothing in the evidence which shows that appellee was in indigent circumstances, or was not clearly able financially to provide any and all means necessary for the care and attention of her son. She and her son were quarantined in her own home, and, in the absence of a statute making the town liable for such services so rendered by appellee to her son, the town was not liable. *Board, etc., v. Fertich*, supra; *Dodge County v. Diers* (Neb.) 95 N. W. 602.

(2) The amount of recovery was too large. From what we have heretofore said, it is apparent that, in our opinion, appellee's right to recover in this action is limited to the value of her services performed in nursing and caring for Swain and Dr. Stanley, the reasonable value of which, as shown by the evidence, is \$35. Therefore all that part of the judgment in excess of \$35 is subject to the criticism claimed by appellant.

(3) Appellant insists that the court erred in giving and refusing certain instructions. After a careful consideration of the instructions given, we are of the opinion they correctly state the law, except as to instruction "a," which is somewhat lengthy; and, with-

out quoting it, we think that part of the instruction applicable to the right of appellee to recover for services rendered is sufficient, even though it does not contain the word "emergency," which we will admit it should contain, but in view of the evidence, which, in our judgment, clearly shows that at the time appellee was employed by the secretary of the board of health, an emergency for such action clearly existed. As to that part of the instruction which applies to the destruction of the property, we think it erroneous, for the reason that it makes the town liable for the destruction of property "by its officers" when done "for the purpose of preventing the spread of disease." Acts for the purpose of preventing the spread of disease are wholly within the jurisdiction of the board of health, and the town can only be made liable when the board acts within the scope of its authority, or for the acts of the secretary of the board when an emergency arises and he is acting within the scope of his authority. *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334, and cases cited. But as the objectionable part of this instruction, under our theory of this case, occasioned no injury to appellant, this cause will not be reversed on account of this instruction alone. Appellant tendered to the court a number of instructions which were refused, which, in view of our present opinion, it will answer no purpose to consider.

(4) That the court erred in the admission of certain evidence. We have carefully examined this evidence, and, in our opinion, the court committed no error in admitting it.

In view of the entire record here presented, we have concluded to affirm the judgment on condition that appellee within 30 days from this date file a remitter for \$165; and, on failure of appellee to file such remitter within the time herein allowed, the judgment is reversed, with instructions to grant a new trial.

(36 Ind. App. 34)

ST. JOSEPH MFG. CO. et al. v. HUBBARD et al. (No. 5,270.)

(Appellate Court of Indiana, Division No. 1.
June 29, 1905.)

1. REFERENCE TO MASTER COMMISSIONER.

A reference to one, by agreement, to examine into all the issues, take evidence thereon, and report his findings of fact and the evidence heard by him, and his rulings thereon, is a reference to a master commissioner, under Burns' Ann. St. 1901, § 1462 et seq., and not to a referee, under sections 565-567.

2. APPEAL—ASSIGNMENTS OF ERROR.

Questions whether a claim is fraudulent, and a judgment is contrary to the law and evidence, should be raised by motion for new trial, and not by assignments of error.

3. REFERENCE—MOTION TO REFER BACK.

A motion to refer a report back to a master, without any reason being assigned therefor, is properly denied.

4. SAME—EXCEPTIONS.

Exceptions to report and findings of a master not appearing to have been in writing will be presumed to have been oral.

5. SAME—SUFFICIENCY.

A general exception to the "report and findings" of a master is insufficient. It should specify the particular matters desired to be reviewed by the trial court.

6. APPEAL—RECORD—MASTER'S REPORT.

The report of a master, to whom reference is made to take evidence, and report the same and his findings thereon, to be part of the record, must be made so by bill of exceptions or order of the court.

7. SAME—ASSIGNMENTS OF ERROR.

The action of a master, to whom reference is made, to take and report evidence and his findings thereon, in admitting or refusing to strike out evidence, may not be assigned as error, but the assignment must be to the refusal of the trial court to correct any error of the master.

Appeal from Circuit Court, St. Joseph County; Walter A. Funk, Judge.

Suit by Willard W. Hubbard and another against the St. Joseph Manufacturing Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

James A. Peterson, George Bradshaw, and Milton Higgins, for appellants. Anderson, Du Shane & Crabill, for appellees.

ROBINSON, J. Each of the first 34 paragraphs of appellee's amended complaint is based upon a note executed by appellant company and owned by appellee Hubbard; the next paragraph is based upon an account against appellant company and in favor of appellee Niles; and the remaining paragraph avers that the appellant company is insolvent, and that appellees own all its indebtedness, and the character of the property comprising the assets of the company, and asks for a receiver to sell the property and pay the claims. Christian Hanson, Lawrence Nelson, Frank A. Helmer, and James A. Peterson, executors of the will of Andrew Peterson, deceased, and the State Bank of Chicago, trustees named in such will, were made parties defendant, and filed answer in denial. Appellant company filed an answer in gen-

eral denial. It was stipulated by the parties that appellants, under the general denial, might introduce any evidence they might have in denial of the averments of the complaint, and it was ordered by the court that under this stipulation the appellants might introduce such evidence as they had in denial of the material averments of the complaint; that they might have an accounting by Niles as to all receipts, expenditures, purchases, loans, credits, and debts of appellant corporation, and all matters relating to the management and business of the company while under his control and management; that appellants might introduce any evidence they had in relation to such account and transactions had by Niles while acting as secretary, treasurer, and general manager of the corporation, including any evidence of mismanagement by him in the discharge of his duties as such general manager, and any loss or damage, if any, to the company or its stockholders by reason of such mismanagement; that they might introduce any evidence they had against the notes or other claims of appellees, or against allowing interest on any such claim; that they might show the statute of limitations, if such, against any claim, the actual value of the property, and whether it be for the interests of the stockholders to meet and elect a full board of directors, who should be instructed to reorganize the company, and whether a receiver should be appointed; that appellees should have the right to rebut any testimony offered by appellants; that Niles should have the right to prove all payments made to him by the company, and all property and money received by him from or on account of the company, as the same appear on the books of the company, as if he had set forth all these items in his complaint, and might prove all the charges made against him that appear on the books of the company as fully as if, in his complaint, he had set forth a full, itemized statement thereof. By agreement Francis E. Lambert was appointed master commissioner to examine into all the issues, take evidence, and report to the court the indebtedness, if any, due appellees, and also state the character, kind, and value of the property of the company, and that he should make a full report of all the evidence heard by him, and also his rulings as to the admission and rejection of evidence, and all rulings and exceptions relating thereto.

The master commissioner, in his report filed, finds that the St. Joseph Manufacturing Company is a corporation organized and doing business under the laws of this state; that the company is indebted to Hubbard on notes, as set forth in his complaint, in the sum of \$32,216.36, for principal and interest, together with the sum of \$650, attorney's fees, making a total amount due Hubbard from the company of \$32,866.36; that the company is indebted to Niles on account for money advanced and disbursed, as set forth

in the complaint, in the sum of \$25,617.52; that the St. Joseph Manufacturing Company is insolvent; that the company is the owner of certain real estate, which is particularly described; that the total value of the real estate is \$15,000; that the total value of the personal property, exclusive of bills and accounts receivable, belonging to the company, is \$15,372.12; that the water power is worth \$4,500; that the value of the accounts and bills receivable is \$4,000; and that the real estate should be sold in certain parcels, as in the report set out. With this report the commissioner also reported the evidence heard by him, which was also filed in the circuit court. The report is dated June 24, 1903, and was filed June 29, 1903. Thereupon the appellants moved the court that the report be referred back to the master, with instructions to take further evidence of appellee Niles as to the sales, purchases, receipts, expenditures, and gross profits of the company for each year he acted as secretary and manager of the company, and report in regard to the doings of the company for each year during that period, which motion was overruled, and exception reserved, "and thereupon the defendants file their bill of exceptions to the report and the findings of the said master commissioner, which bill of exceptions contains the evidence heard by the said master commissioner, with the objections to the admission and exclusion of evidence, and the rulings of said commissioner thereon, and exceptions thereto, and is in these words." This is followed by a transcript of the evidence taken before the commissioner, signed by him as a bill of exceptions. The next entry is, "And the court overruled said exceptions," to which ruling appellees excepted, "and the court now approves and confirms the report of said master commissioner and his findings, to which action of the court the defendants jointly and severally except." This is followed by a judgment in favor of appellees. Afterwards appellants filed their several motion for a new trial, which was overruled, "and now the defendants file their bill of exceptions number two, which said bill of exceptions has heretofore, before the filing thereof, been duly signed by the Honorable Walter A. Funk, judge of the St. Joseph circuit court, and is duly filed in open court, and is in the words and figures as follows [after title of cause]: 'Defendants' bill of exceptions in the circuit court, being bill of exceptions number two.'" This bill recites that on June 29, 1903, all the parties appearing by counsel, the master commissioner filed his report and findings, and also the evidence taken in the cause by him, and his rulings thereon, and his rulings as to the admission and rejection of evidence; that appellants moved to refer the report back to the commissioner, with certain instructions, the overruling of this motion, and exceptions; that appellants excepted to the commissioner's report, which

exceptions were overruled; the exception of appellants to the court's confirmation of the commissioner's report, "and thereupon the defendants filed their bill of exceptions to the report and findings of the said master commissioner, which bill of exceptions contains all the evidence heard by said master commissioner, with the objections to the admission and exclusion of evidence, and rulings of said master commissioner thereon, and exceptions thereto, and was duly signed by said master commissioner and filed with him before the filing of his said report, and the court overruled said exceptions of said defendants, to which ruling of the court the said defendants jointly and severally excepted. The evidence heard by said master commissioner, with the objections to the admission and exclusion of evidence, and rulings of said master commissioner thereon, and exceptions thereto, as shown in the report of said commissioner, and which is contained in said bill of exceptions filed by said defendants, includes all the evidence heard by said master commissioner and said court in the trial of said cause. And this was all the evidence given in said cause." The bill further recites the appointment of the receiver, and exceptions: "And the said defendants, jointly and severally, now here tender this, their bill of exceptions, on the 22d day of September, 1903, and pray that the same may be signed, sealed, and made a part of the record of said cause, which is accordingly done on this 22d day of September, 1903." This is signed by the judge of the St. Joseph circuit court, and is the only bill of exceptions in the transcript that is so signed. The above bill of exceptions appears to have been copied into the transcript. The præcipe filed directs the clerk to insert in the transcript "the original bill of exceptions, containing the evidence and proceedings upon the trial of said cause, in lieu of a copy thereof."

The effect of the reference to the master was to require him to report his findings of certain facts, and also to report the evidence. In the original order of reference the master "is authorized, as such, to examine into all the issues arising in this cause, to take evidence thereon, and to examine all the various books and papers" of the company, and make report showing the indebtedness, if any, due appellees, and in his report to state the character, kind, and value of the corporate property, and how the same should be disposed of. Afterwards the order of reference was modified, requiring that the master "shall make a full report of all evidence heard by him, also all his rulings as to the admission and rejection of evidence, and all rulings and exceptions relating thereto." This cannot be held to be a reference to a referee, under sections 565-567, Burns' Ann. St. 1901, but it was a reference to a master commissioner under section 1462 et seq., Burns' Ann. St. 1901. See *McGillis v. Slat*

tery, 52 Ind. 44; McKinney v. Pierce, 5 Ind. 422; McNaught v. McAllister, 93 Ind. 114. In McGillis v. Slattery, supra, by agreement submitted to a master commissioner, "who is to report the evidence and his findings at the next term of this court," the court said: "We do not think that this was, or that it can be held to be, a reference to a referee, under section 349, 2 Gav. & H. Rev. St. p. 210 (sections 565-567, Burns' Ann. St. 1901). There was no issue or issues referred to a referee to be tried, nor was there any written consent of the parties filed. But we think it was a reference to a master commissioner, under the act of March 2, 1853 (1 Gav. & H. p. 433, c. 47, § 2; section 1463 et seq., Burns' Ann. St. 1901)." It is also held in that case that as the master was required to report the evidence, but did not, exceptions to the report should have been sustained. So far as shown by the record, the court made no finding of its own, but adopted the finding made by the master, and upon this finding rendered judgment. The master, also, in compliance with the order of reference, reported the evidence.

Appellant St. Joseph Manufacturing Company has assigned error as follows: (1) The claim of Niles is fraudulent and void, as against public policy, and the judgment thereon in his favor is error. (2) The claim of Hubbard is fraudulent and void, as against public policy, and the judgment thereon in his favor is error. (3) The evidence is insufficient to sustain the judgment in favor of Niles. (4) The evidence is insufficient to sustain the judgment in favor of Hubbard. (5) The said judgment in favor of Henry G. Niles against the St. Joseph Manufacturing Company is contrary to law. (6) The said judgment in favor of Henry G. Niles against the St. Joseph Manufacturing Company is contrary to the evidence. (7) The said judgment in favor of Henry G. Niles against the St. Joseph Manufacturing Company is contrary to the law and the evidence. (8) The judgment in favor of Henry G. Niles is not supported by competent evidence. (9) The said judgment in favor of William W. Hubbard against the St. Joseph Manufacturing Company is contrary to the law. (10) The said judgment in favor of William W. Hubbard against the St. Joseph Manufacturing Company is contrary to the evidence. (11) The said judgment in favor of William W. Hubbard against the St. Joseph Manufacturing Company is contrary to the law and the evidence. (12) The judgment in favor of William W. Hubbard is not supported by sufficient evidence. (13) The circuit court erred in refusing to order said report to be sent back to said master commissioner with instructions to take further evidence as to said company's sales, purchases, receipts, expenditures, and gross profits of such company for each year said Niles acted as secretary and manager, and to report in regard to the doings and acts of

the St. Joseph Manufacturing Company for each year during said period. (14) The circuit court erred in overruling the motion for a new trial.

The questions sought to be presented under the first twelve specifications in the assignment of errors might be presented in a motion for a new trial, but as assignments of error they present nothing for review.

The thirteenth specification seeks to question the refusal of the court to refer the report back to the master. Whether this motion was oral or in writing does not appear. However, even if the question is properly presented, there was no error in overruling the motion. Appellee Niles was examined as a witness before the master. The parties were present by counsel. The witness was examined and cross-examined at great length. No reason whatever is given for a re-examination of the witness. It is not claimed that ample opportunity was not given for all proper investigation of all matters presented by the issues in the case. The master was directed to hear evidence upon all the issues, and it does not appear that appellants were prevented from making the examination as thorough as they desired, or that they were denied the right to introduce any evidence which they seek to introduce under this motion. It is not shown that such an investigation would have thrown any light upon the questions at issue. The effect of the request to have the report referred back was to ask for a new trial before the master, without assigning any reason whatever therefor.

The first nine reasons for a new trial are that the master erred in admitting certain evidence, and in refusing to strike out certain evidence; the tenth, that the master erred in his findings as to the amount of recovery, the same being too large; the eleventh and twelfth, that the findings of the master are not sustained by sufficient evidence and are contrary to law; thirteenth, that the court erred in overruling appellants' objections to the master's report; fourteenth, refusal of the court to refer the report back to the master; fifteenth, that the court erred in confirming the report; sixteenth, that the assessment of the amount of recovery by the court is erroneous, being too large; seventeenth, "that the findings and judgment of the court are not sustained by sufficient evidence"; and, eighteenth, "that the findings and judgment of the court are contrary to law." When the report of the master was filed, a record entry, immediately following the report, recites that "thereupon the defendants jointly and severally except to said report and findings of said commissioner." Then follows what purports to be a bill of exceptions signed by the master, and immediately following this is the entry: "And the court overruled said exceptions, to which ruling of the court said defendants jointly and severally except; * * * and

the court now approves and confirms the report of said master commissioner and his findings, to which action of the court, the defendants jointly and severally except." This is followed by the judgment. The exceptions to the "report and findings" of the master do not appear to have been in writing, and therefore are presumed to have been oral. The court was not referred to any error claimed to have been committed by the master, but the exception was general, and was to the "report and findings." Such an exception, if it could be said to be effective for any purpose, challenged every ruling adverse to appellants made by the master in hearing the evidence and in the finding. If it was thought that the master had committed error in the admission of testimony, the particular error or errors should have been brought to the attention of the trial court. The exceptions should have specified the particular matters it was desired to have the trial court review, and, if the exceptions were overruled, such rulings should have been presented on appeal by a proper bill of exceptions. The report of the master was not made a part of the record by any order of court, nor was it incorporated in any bill of exceptions signed by the trial judge. In *Stanton v. State ex rel.*, 82 Ind. 463, where by agreement the reference was to a master commissioner, to hear and "report the evidence in said cause, and his findings of facts therein, to the court," and the report was not made a part of the record by bill of exceptions or by order of court, the court said: "Under the practice, therefore, the trial of the issues is not submitted to the master commissioner by referring to him the cause, to hear and report the evidence and the facts. The trial still remains before the court, and it is for the court to apply the law to the facts, make a finding thereon, and render judgment accordingly. The report of the commissioner is only advisory, and for the assistance of the court in coming to a conclusion, and when the evidence is reported, or required to be reported, it is not conclusive, and the court has the right to examine the facts and look into the evidence, in order to make a correct finding before rendering judgment thereon; and for that purpose exceptions to the report may be filed, pointing out any errors therein contained. It will be presumed correct until the contrary is shown. * * * This report must therefore be considered as 'relating to collateral matters,' and not as a paper directly 'pertaining to the cause and filed therein,' and cannot be made a part of the record except by bill of exceptions or order of court. We therefore cannot consider the report of the master commissioner, nor the exceptions or motions made in relation thereto." See, also, *Terre Haute, etc., R. Co. v. State ex rel.*, 159 Ind. 438 (481), 65 N. E. 401; *Lewis v. Godman*, 129 Ind. 359, 27 N. E. 563; *Bremmerman v. Jennings*, 101 Ind. 253; *McKinney v.*

Pierce, 5 Ind. 422; *Hauser v. Roth*, 37 Ind. 89; *McNaught v. McAllister*, 93 Ind. 114; *City of New Albany v. Iron, etc., Co.*, 141 Ind. 500, 40 N. E. 44; *Lee v. Templeton*, 88 Ind. 256; *King v. Marsh*, 87 Ind. 389.

The reasons, assigned for a new trial, that the master erred in admitting certain evidence and in refusing to strike out certain evidence, are not statutory causes for a new trial. In *Lewis v. Godman*, supra, the court said: "The evidence in the cause was reported to the court, and it was its duty to consider the same, and either adopt such conclusions as were reached by the master, or find conclusions of its own, as the evidence required. No question as to the action of the master in the admission of evidence can be presented to this court, without an opportunity afforded to the circuit court to correct the error, if any exists, in the admission of such evidence. Following the proper effort in the circuit court to correct such error, and a refusal of the court to grant the proper relief, the action of the court would be subject to review here; but the action of the master in admitting evidence on the hearing of the cause before him cannot be assigned as a reason for a new trial, because, as we have seen, when the order of reference requires him to report the evidence, the cause is ultimately tried by the court, and not by the master commissioner." The master having complied with the order of reference by reporting to the court the evidence heard by him, and his findings of facts thereon, it was the duty of appellants, if there was error in the report, to file with the court exceptions to the report, pointing out and bringing to the attention of the court the errors complained of, and present for review the rulings of the trial court thereon by a proper bill of exceptions. The record does not in any way disclose the nature of the exceptions taken in the trial court to the report filed by the master. It was not the duty of the court to search through the whole report for any supposed errors it might contain, as the report was presumed to be correct until it was shown to contain error. A general exception to the whole report was, properly overruled. As the record comes to us, no question is presented for review under the motion for a new trial.

Judgment affirmed.

(36 Ind. App. 106)

SHEETS et al. v. HAYS. (No. 5,352.)
(Appellate Court of Indiana, Division No. 2.
June 29, 1905.)

1. **INJUNCTIONS—BONDS—CONSTRUCTION.**
Injunction bonds should be liberally construed.

2. **SAME—BENEFICIARY.**

Under *Burns' Ann. St.* 1901, §§ 269-273, providing that all persons who have an adverse interest to plaintiff, or who are necessary parties to effect a complete settlement of matters in issue, are proper parties defendant, and section 1167, requiring persons seeking an injunc-

tion or restraining order to file a written undertaking in favor of the adverse party affected thereby for the payment of all damages and costs which may accrue by reason of the injunction or restraining order, a contractor, who is admitted as a defendant in a suit to enjoin county commissioners from paying him money or completing the contract, and who is the party actually interested adversely to plaintiffs in the injunction suit, is entitled to the benefit of an undertaking, filed by plaintiffs, conditioned to pay "defendant all damages and costs which may accrue to said defendant by reason of the restraining order or injunction in this action," although such undertaking was filed prior to the contractor's admission to defend the suit.

Appeal from Circuit Court, Vigo County; Geo. M. Crane, Special Judge.

Action by Fred L. Jessup against Martin A. Sheets and others. Plaintiff died pending suit, and William Hays, his administrator, was substituted in his place. From a judgment overruling a demurrer to the complaint, defendants appeal. Affirmed.

Homer A. Taylor and Samuel R. Hamill, for appellants. William Tichenor, for appellee.

WILEY, C. J. The decedent, Fred L. Jessup, commenced this action upon an injunction bond. During its pendency he died, and, his death having been suggested to the court, his administrator, William Hays, was substituted as plaintiff. The appellants demurred to the amended complaint, and the demurrer was overruled. They then filed an answer in general denial, but afterwards withdrew the same, and elected to stand upon the ruling upon the demurrer. Upon their refusal to plead further, judgment was rendered against them for costs. Overruling the demurrer to the amended complaint, is assigned as error.

The amended complaint is of considerable length, but the material facts therein stated, upon which its sufficiency must be determined, may be stated in few words. It is averred that on the 27th of November, 1899, the appellant Sheets and one Underwood, on their own behalf and on behalf of various other citizens and taxpayers of Sugar Creek township, Vigo county, Ind., filed their verified complaint in the Vigo circuit court against the board of commissioners of said county, averring that on the 14th day of April, 1898, said board entered into a contract with Fred L. Jessup, by the terms of which he was to build, construct, improve, gravel, etc., certain roads in said township, which were specifically described. It is then charged that in said complaint appellant Sheets and others fully set up, the terms of the contract with Jessup, and alleged that said road had not been constructed, etc., as required by the terms thereof, to the injury of the plaintiff, etc.; that 80 per cent. of the contract price of the "Darwin Road" had been paid to said Jessup; and that he had notified the board of commissioners that said road had been completed, and ready to be

received by them. It was further charged that an emergency existed for the immediate issuance of a restraining order, restraining the board of commissioners from paying the balance of the contract price for said improvement, and that the board be restrained and enjoined from receiving said road as completed, and from ordering any amount of money to be paid to said Jessup on his contract, or doing anything toward carrying out said contract, until the final hearing, and that thereupon the board be perpetually enjoined, etc. It is then charged that upon the filing of said complaint appellant Sheets and others appeared in open court and procured a restraining order to be issued, by which order the board of commissioners were restrained from accepting or receiving as completed said road, and from paying any sum or sums of money to said Jessup upon the contract, and from taking any steps toward the completion of said contract, and that said restraining order was duly served upon said board, etc.; that upon the issuing of said restraining order the appellants executed, for the benefit of said board of commissioners and said Jessup, who was a proper party and should have been made a defendant therein, their certain bond, which said bond was duly approved by the judge of the Vigo circuit court. It is further charged that the said board of commissioners had no interest whatever in said suit, except as the agents of the plaintiffs therein and other taxpayers of said township; that said board of commissioners manifested no interest in the success or failure of said injunction suit, but were wholly indifferent as to whether or not it should be enjoined from receiving said road and paying therefor. It is further charged that the decedent did furnish material and perform the labor of constructing and improving said road, and that as such contractor he had an interest adverse to the plaintiffs in said action, and that a complete and final determination could not have been had without his presence in court as a party defendant; but that it was unnecessary for plaintiffs therein to amend their said complaint for the purpose of alleging facts therein concerning him, for the reason that such facts were already fully alleged in the original complaint. It is further charged that the plaintiffs in said action refused and neglected to make decedent a party defendant thereto, and that it became necessary for him to petition the court to be made a party defendant, that his interests in said action might be protected. It is further charged that the plaintiffs in said suit for injunction made the board of commissioners of Vigo county sole defendants, and omitted to make the decedent a party defendant, for the reason that they would not be liable on their bond to said board of commissioners for attorney's fees as damages in said injunction, should the same be wrongful, and would be so liable to decedent;

if he had been made a party defendant, and that for their own protection in that regard they failed, refused, and neglected to make him a party therein; that on the 22d day of June, 1900, the decedent appeared in the Vigo circuit court, and asked leave to be made a party defendant in said action, which leave was granted, and he was thereupon made a party defendant therein. It is then charged that on the 9th day of November, 1901, the decedent moved the court to dissolve the temporary injunction granted therein, which said motion was sustained by the court, and it was ordered that said injunction be, and the same was, dissolved; that on the 13th of February, 1901, the decedent moved the court that said suit for injunction be stricken from the docket, which motion was sustained and judgment entered against the plaintiffs therein for costs. The complaint then sets out in detail the expenses incurred by the decedent in said cause, and demands judgment for said sums, to wit, \$250. A copy of the bond is made an exhibit to the complaint, and after entitling the cause in which the bond was executed it is as follows: "We undertake that the plaintiffs in the above-entitled cause shall pay the defendant all damages and costs which may accrue to said defendant by reason of the restraining order or injunction in this action."

The single question presented by the overruling of the demurrer to the amended complaint is this: The bond having been executed to cover all damages and costs which might accrue to the defendant in the injunction suit, and the defendant having originally been the board of commissioners, and during the pendency of the action Jessup having been made a party defendant therein, does such bond operate to cover all damages and costs sustained by him in the defense he interposed? He having been the contractor to build and construct the road, and being entitled to recover all sums from the county due him under the contract, it seems to us that he was a party in interest, and that he was properly admitted as a defendant in the injunction suit. At most, the board of commissioners was only a nominal party, representing the taxpayers. It is true such board was chargeable with making the contract and paying out the money thereunder, and such board was a proper party to the suit. If the plaintiffs in the injunction suit had been successful, the result would have been that Jessup could not have received the balance of the money due him upon the contract. The court having upon his petition admitted him as a party defendant in this proceeding, he should be treated as a party defendant, and, if so, the bond operated in his favor. Both under the statute and the decisions, all persons who have an adverse interest to the plaintiff, or who are necessary parties to effect a complete settlement of the matters in issue, are proper parties de-

fendant. Sections 269-273, Burns' Ann. St. 1901; *Blittinger v. Bell*, 85 Ind. 445; *Curtis v. Gooding*, 99 Ind. 45; *Meritt v. Wells*, 18 Ind. 171. In any event Jessup was admitted as a party defendant. His interests were adverse to the plaintiffs in the injunction proceedings, and, being a party defendant, he had a right to contest the questions which affected his interests.

Before any party is entitled to an injunction or restraining order, the statute requires that he shall file a written undertaking, with approved surety, in favor of the adverse party affected thereby, for the payment of all damages and costs which may accrue by reason of the injunction or restraining order. Section 1167, Burns' Ann. St. 1901. It has been held and is the law that injunction bonds should be liberally construed. *Connor v. Paxson*, 1 Blackf. 207; *Boden et al. v. Dill et al.*, 58 Ind. 273; *Alexander v. Gish* (Ky.) 9 S. W. 801; *Andrews, Receiver, v. Glenville Woolen Co.*, 50 N. Y. 282; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. Ed. 48. It has been held that a bond executed to one defendant will inure to the benefit of all the defendants. *Boden v. Dill*, supra. The case of *Alexander et al. v. Gish*, supra, is in principle much like the one under consideration, except that the bond in that case was made payable, not only to the defendants, but also to the persons belonging to a class named; and the plaintiffs in the action on the bond were persons belonging to that class. They were not originally made parties to the injunction suit, but became parties, and were admitted as such upon their own voluntary petition. The Court of Appeals of Kentucky, in deciding the case, said: "To exclude the appellants from the right to sue on the bond because they were not, as they ought properly to have been, parties defendant to the action when the order of injunction was made, or because they were not named therein, would not only be in disregard of an expressed stipulation in it, but enable a designing party, by making those having a nominal interest, to do irreparable injury to those really interested." In the case of *Oelrichs et al. v. Spain et al.*, supra, one Hill was the plaintiff, and the action was to recover damages upon two injunction bonds. Hill had not been named in either bond, nor joined as a party in the original injunction suit; nor had he become a party in any manner, except that he had an interest in the funds in controversy. The suit was to enjoin the disposition of that fund, and Hill was adversely affected by the restraining order therein issued; and it was held by the Supreme Court of the United States that, notwithstanding the fact that he was not a party, having an interest in the fund, he was entitled to recover. Substantially to the same effect is the case of *Andrews, Receiver, v. Glenville Woolen Mill Co.*, supra.

Appellee alleges in his complaint that the bond in suit was filed for the benefit of Jes-

sup, and that he had an interest adverse to the plaintiff in the subject-matter of the controversy arising under the injunction suit. Our conclusion is that under the facts pleaded the complaint was sufficient, and required an answer.

There was no error in overruling the demurrer, and the judgment is affirmed.

CLEVINGER v. MATTHEWS et al. (No. 5,070).*

(Appellate Court of Indiana, Division No. 2. June 27, 1905.)

SURETIES—CONTRIBUTION FROM HEIRS OF CO-SURETY—LIMITATIONS.

The complaint of a surety on a note against the heirs of a co-surety shows that it was practically impossible to file the claim against decedent's estate, so that the action, though commenced after the two years from settlement of the estate limited by Burns' Ann. St. 1901, § 2597, may be maintained, the complaint averring that plaintiff was at all times a nonresident; that decedent and the maker of the note were residents; that the note was payable three months after it was made; that the maker within a year became, and ever after remained, insolvent, and that plaintiff had no knowledge or notice of such insolvency and the nonpayment of the note, and supposed it had been paid, till three years after decedent's estate was settled, and this though by the note the sureties waived notice of nonpayment, that not being conclusive on questions of notice arising between sureties in a suit for contribution.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Peter C. Clevinger against Martha A. R. Matthews and others. Judgment for defendants. Plaintiff appeals. Reversed. See 73 N. E. 161.

John W. Kern, and A. E. Clevenger, for appellant. James M. Winters, Joshua Jump, and P. N. Bogart, for appellees.

ROBY, J. Action by appellant against appellees, the widow and daughters of Claude Matthews. The complaint was in one paragraph, to which demurrers were sustained. The plaintiff declined to plead over, and appeals from the judgment against him.

The substance of the complaint is that on August 8, 1892, the Pendleton Glass Tube & Pipe Works of Indiana executed its promissory note to J. O. Henderson, by which it promised to pay on or before three months from date \$2,400, with interest at 6 per cent. per annum until paid; that Alexander Shroyer, Claude Matthews, and appellant joined in the execution of said note as accommodation indorsers by writing their names across the back thereof; that appellant was, and has since remained, a resident of Ohio, but that the note was executed in the city of Indianapolis, where the principal office of the said corporation was at all times and is now maintained; that said corporation became insolvent during the year 1893, and has so remained, so that no part of the debt evidenced by said note could have been at any

time since the last-named date collected; that appellant had no knowledge of such insolvency and no notice of the nonpayment of said note, and supposed said note had been paid until the month of May or June, 1902, when the payee thereof notified him that it was unpaid, and that he would be required to pay it; that said Alexander R. Shroyer died in 1901 insolvent, leaving no estate out of which any part of said debt could be collected; that said Claude Matthews died intestate in the year 1898, in Vermillion county, Ind.; that an administrator was appointed, the estate fully settled, the administrator making his final report, which was approved by the circuit court of said county on October 5, 1899, and said administrator then discharged; that the appellees are the sole heirs of said Claude Matthews, Martha A. R. Matthews being his widow and the other appellees his only children; that in final settlement the surplus of said estate for distribution after the payment of debts and expenses of administration was \$8,393.88, which sum was equally distributed between appellees; that said Claude Matthews at his death was the owner in fee simple of 1,700 acres of land in said county of the value of \$65,000, the title to which land upon his death vested in appellees, who then and there became the owners thereof by inheritance, each taking title to one-third thereof, the daughters afterward executing a quitclaim deed for all their interest therein to said Martha A. R. Matthews, who has ever since been and is now the owner in fee simple of all of said land; that appellant, after said demand was made upon him for the payment of said note on the 2d day of August, 1902, to prevent suit being brought thereon, and to save the costs thereof, was compelled to and did pay to said Henderson \$3,500 in payment of principal and accrued interest thereon; that said Henderson surrendered and delivered up the same to appellant; that no part of said amount has been paid to him by any person, but that there is due from the defendants, as widow and heirs of said Claude Matthews, the sum of \$1,750, with interest from the date of payment, and that this action is brought against them for contribution to him of the amount of the said note and interest for which said Claude Matthews and his estate were legally liable. Wherefore he prays judgment for \$2,000, and that the same be declared a lien upon all property inherited by the defendants as aforesaid.

Those principles of natural justice upon which the doctrine of contribution is based require the application of that doctrine to the facts exhibited in this case, provided that such application can be made in conformance to law. The right to the relief prayed is complicated by the death of the nonpaying surety. Were his estate pending, the complicator would be immaterial, since the claim valid against decedent would be valid against his administrator. Had the estate been set-

tied, yet appellant, being a nonresident, might maintain his action against the heirs and distributees, provided that he instituted it within the two years after such final settlement. Section 2597, Burns' Ann. St. 1901. This action is, however, brought more than three years after the final settlement of such estate and the payment by appellant, because of which the right of contribution is claimed, is averred to have been made more than two years and ten months thereafter. So that no relief can be had under the statute; and, indeed, appellant seeks none under it. Where a claim does not arise until after the settlement of the estate, there must either be a failure of justice or a right of action against the heirs and distributees independent of and additional to the statutory one. It is accordingly held by the courts of this state that, where it was practically impossible to file the claim thus accruing against the decedent's estate, the maxim that "the law does not require that to be done which cannot be done, and no one shall lose his remedy for not doing what cannot be done," applies, it being presumed that the Legislature did not intend by the provisions relative to the settlement of decedents' estates to deprive any one of a well-founded right by forbidding a remedy therefor. *Blair v. Allen*, 55 Ind. 409; *Stevens v. Tucker*, 87 Ind. 109; *Harmon v. Dorman*, 8 Ind. App. 461, 35 N. E. 1025; *Voris v. State*, 47 Ind. 345. The disposition of this appeal depends, therefore, upon whether the facts pleaded show it to have been practically impossible for appellant to have filed this claim against the Matthews estate. The note indorsed contained a clause as follows: "The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note."

It is contended that it was the duty of appellant to know that his note was unpaid, and that it lay within his power, having such knowledge, to have made payment at any time, and thereupon to have presented his claim against such estate in the usual manner. It has also been held that a surety may, after maturity of the debt, pay the same—not being under compulsion to so do—and enforce contribution from his co-surety, without regard to the solvency or insolvency of the maker. *Reiter v. Cumbach*, 1 Ind. App. 41, 27 N. E. 443; *Judah v. Mieure*, 5 Blackf. 171.

The clause quoted, which, as between the payee and indorsers, bound the latter to take notice of nonpayment by the principal, is not conclusive upon questions of notice arising between the sureties in a suit for contribution. The conduct of appellee and his omissions are to be determined upon the facts in view of which such action or omission occurred. Had some artifice been used to induce the belief on his part that the note was paid, surely it would not be pretended that the clause quoted would debar the appellant from showing that his failure to act was based upon ignorance of the fact that such note had not been paid. Neither is the conclusion that he might have made payment himself before the Matthews estate was settled, and thereby matured his claim conclusive against his right to maintain this action. The question is whether, in view of the facts as they existed, it was practically possible for him to do so.

It is averred that the appellee believed the note to be paid. In the course of business it ought to have been paid by the corporation maker three months after its date. It is averred that the principal became insolvent in 1893, and that the first knowledge appellee had of the nonpayment was received in 1902. It may develop upon the trial that he was not warranted in relying upon the presumption of payment by the maker in due course of business, but in view of the peculiar circumstances existing, of the long delay by the payee, of the fact that such payee was the president of the corporation maker, that the appellant was an absent nonresident, that the decedent was a resident, and in view of his long-continued passivity, and in view of the failure of the payee to file his claim against the Matthews estate, it seems to us that the equities as stated are strong enough to require an answer, and that it was practically impossible for this man to have paid a debt of the existence of which he was ignorant.

Appellee filed a motion to dismiss the appeal, the argument in support thereof being based upon the hypothesis that the action is founded upon section 2597. The hypothesis is an unwarranted one, and the motion, therefore, not well taken.

Judgment is reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint and for further consistent proceedings.

BEDFORD QUARRIES CO. v. TURNER.
(No. 5,078.)¹

(Appellate Court of Indiana, Division No. 2.
June 28, 1905.)

1. TRIAL — SPECIAL FINDINGS — GENERAL VERDICT.

In an action for injuries sustained in moving stones with a derrick, where a paragraph of the complaint alleged that the machinery was out of repair, resulting in a heavy stone being moved striking another stone and separating, and another paragraph charged negligence in failing to properly inspect the stone before it was lifted to be swung, and the jury specially found that the stone did not strike another stone until it had broken and fallen, and the cause of its breaking was a dry seam in it, the special finding must be considered with reference to the second paragraph, and the verdict as based thereon.

2. INJURY TO SERVANT—INSPECTION—NEGLECT OF MASTER.

Where a stone, which broke because of a seam in it, was inspected before it was moved in the usual way, and the defect in it was not discovered because not visible, and the inspection was made by the person whose duty it was to make the inspection, the employer discharged his full duty, and was not liable for injuries caused by the breaking.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 287.]

3. SAME—PRESUMPTIONS.

Where a stone was inspected before it was moved, it must be presumed that the inspector was competent, in the absence of any charge or finding to the contrary.

4. SAME—ASSUMPTION OF RISK.

An employé engaged in the hazardous employment of moving a stone by means of a derrick assumed such risk as, from the business as ordinarily conducted, he must have known, and those risks which the exercise of his opportunities for inspection would have disclosed to him.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 538, 552, 553, 574-600, 610-624.]

5. SAME.

An employé assumes all ordinary risks incident to the service for which he is engaged, and the employer agrees not to subject him to greater risks than those which fairly and properly belong to the particular service for which he is engaged.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 538, 543.]

6. TRIAL—SPECIAL FINDINGS—GENERAL VERDICT—INCONSISTENCY.

In an action for injuries resulting from the breaking of a stone being moved with a derrick, the special findings showing that the stone broke because of a dry seam in it, that it had been inspected in the customary manner, that defendant was not negligent, and that the breaking was an incident of the employment, are in irreconcilable conflict with a general verdict for plaintiff, and a motion for judgment on the interrogatories was improperly overruled.

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by James F. Turner against the Bedford Quarries Company. From a judgment for plaintiff, defendant appeals. Reversed.

F. M. Frissal and Brooks & Brooks, for appellant. East & East and McHenry Owen, for appellee.

WILEY, C. J. Action by appellee to recover damages resulting to him through the alleged negligence of appellant. His complaint was in two paragraphs, to each of which a demurrer was overruled. Answer in denial, trial by jury, and general verdict for appellee, and with the general verdict the jury found specially by answering interrogatories submitted to it. Appellant's motion for judgment in its favor on the answers to interrogatories and for a new trial were each overruled. All of the above specified rulings are assigned as errors.

The sufficiency of the first paragraph of complaint is not questioned in the briefs, but, in view of the contention between opposing counsel as to which paragraph of complaint the judgment rests upon, it is important to state the facts relied upon in the first paragraph as to the acts of negligence charged. In the first paragraph of complaint it is charged that appellee was in the employment of appellant, and that under such employment it was his duty to run and control a derrick used in lifting stones from one place and carrying them to another; that the derrick was out of repair in this, to wit, that the boxings and bearings in which worked a heavy upright metal rod, on either end of which there were small cogwheels, were greatly worn, old, defective, and unfitted for use, and said boxings and bearings would not hold said rod in position, but allowed said rod to become loose, and the play was so great in the boxings that said cogwheels, which worked in other cogwheels on each end of said rod, would not catch, but would permit the cogs to slip out of their places, and thus said derrick would become unmanageable and dangerous to operate when lifting heavy stones, and that said cogwheels, by reason of being worn, would not catch on each other and hold, so that said derrick could be safely operated, unless the bearings and boxings were in good and proper condition; that said upright rod and cogwheels were attached to the base of the derrick and mast pole, and were used by operating a wheel connected therewith, called a "bull wheel," and which latter wheel controlled the rotary motion of the derrick; that by the turning of the bull wheel the derrick could be turned around to the right or left, or stopped in any desired position, when the derrick was lifting stone or when empty. It is then averred that appellee reported the defective and dangerous condition, etc., of the derrick to appellant's superintendent, and that he promised appellee that if he would continue to work with the derrick he would have it repaired and placed in a safe and proper condition; that on the following day appellee again began to work

¹ Superseded by opinion, 77 N. E. 53. Transfer to Supreme Court denied.

with the derrick, and found it defective, and again notified the foreman, and also notified him unless it was repaired and placed in proper and safe condition that he would not continue in defendant's employ; that he was thereafter informed by the appellant's assistant mechanic that said derrick had been repaired, and was safe for use, and he thereupon continued using the same. It is further averred that on the following day appellee was engaged in giving signals to one Yeskey, a servant of appellant, assigned to the duty of conveying signals to the person in charge of the power controlling the raising and lowering of the boom pole; that a large stone, weighing many tons, was attached to chains and ropes at the outward end of said boom pole, and was being raised by said derrick, and being swung around in a northwesterly direction; that appellee signaled Yeskey for the powerman to stop the power, which signal Yeskey carelessly and negligently failed to convey; that thereupon appellee signaled and ordered the person in charge of the bull wheel to stop the derrick from turning around; that the said last signal and order were obeyed, but that on account of the worn and defective condition of the cogwheels and the defective and dangerous condition of the bearings and boxings, and the fact that the upright rod or shaft would not hold its position, the cogwheels of the derrick slipped, and would not catch; that the derrick continued to swing rapidly toward appellee with a large stone attached, as aforesaid, and before he could make his escape he was injured "by the carelessness and negligence of said defendant, as above charged, by reason of said large swinging stone striking another stone, causing it to break and separate, and one large, heavy piece of said swinging stone fell, striking the opposite end of another stone upon which this plaintiff's right foot was for the instant resting in his flight away from said swinging stone and derrick, causing it to suddenly fly upward catching plaintiff's right foot between it and another stone, and thereby crushing said foot," etc. Another act of negligence charged in this connection was appellant's retaining in its service said Yeskey, who was too young and inexperienced to perform the duties of his position, and he was wholly incompetent and negligent in the performance of his duties; that he was of the age of 13 years, and incapable of realizing the importance of his position; and that appellant well knew of said facts, and that appellee was ignorant thereof.

In the second paragraph of complaint appellee sets out in full the duties he was called upon to perform by reason of his employment, and describes the manner in which heavy stones are lifted by dogs and chains attached to a derrick, and removed from one place to another. It is then averred that stones that were sound and free from dries

were reasonably safe to hitch to and lift, but if such stones being lifted had what were called "dry seams" in them then the lifting of said stones became more hazardous, for the reason that while being swung around the boom they were likely to separate, fall, and injure appellee and other employees; and that, if the stone had dry seams in it, the place around and beneath and near the stone was dangerous to work about and unsafe for the reason that the same was likely to separate and fall upon and injure appellant's servants. It is then charged that it was the duty of appellant to examine or cause to be examined the stones that were to be lifted to ascertain whether they were free from dries and reasonably safe to lift; that on the day appellee was injured he was in the line of his duty; had the "dogs" placed in a large stone, and attempted to lift the same for the purpose of moving it and placing it upon another lot of stone; that to properly place the stone that was being lifted it was appellee's duty to take his position at a point near which such stone would finally be placed, and there ease it down to a convenient resting place; and that while he was so situated, and without any knowledge on his part that the place where he was working was dangerous, and without any knowledge that the stone had a dry in it, or was likely to separate in being lifted, the stone, when near appellee, suddenly separated, and pieces of the same fell against appellee and on his foot, and thereby inflicted the injury of which he complains. It is then charged that appellee "received his injuries by reason of the carelessness and negligence of the defendant in this, to wit, that it failed to furnish him a reasonably safe place to work; that it had placed the stones which caused his injuries at a point where he hitched to the same 24 hours prior to the time he received his injuries; that at the time it was placed, and at all times afterward until it injured and caused the injuries to plaintiff, it contained what is known as a dry or fine seam, which separated the stone wholly or partly from the bottom toward the top; that such seam was a fine division of the solid stone in whole or in part, and of such character that in lifting the same in the ordinary and usual manner the stone, while swinging in the air, was likely to separate at such seam, fall, and injure or cause to injure those near by; that defendant well knew that such seam existed in such stone, or with a reasonably close inspection could have known it long enough before plaintiff's injuries to have prevented the same; that by a proper and reasonable inspection, although not visible to casual observation, the dry could have been discovered, and plaintiff's injuries prevented. Plaintiff further charged that defendant well knew that the lifting of said stones by means of dog and boom pole, heretofore described,

would be dangerous to defendant's employes, and especially to this plaintiff. The defendant further knew, or by reasonable diligence could have known, that said stone, while being lifted in the air, would probably separate, fall, and injure the plaintiff or other employes, and with all such knowledge it further negligently failed to notify the plaintiff of the defective condition of such stone, or that there was a dry seam in the same, or that it was likely to fall and injure him, or that the place he was working at the time was dangerous and unsafe for him to work; that said defendant well knew that said place was unsafe and dangerous; and plaintiff further charges that he was ignorant of all such facts, and received his injuries while he was in the line of his duty," etc.

As to the first paragraph of complaint, appellant has not pointed out any objection to it.

In the second paragraph of complaint appellee seeks to predicate actionable negligence upon appellant's attempt to move a large stone with a derrick, which stone had a dry in it; that it was negligently inspected; and that by reason of the dry it broke while being moved, and thus made appellee's working place dangerous. The objection which appellant urges to this paragraph is that there is no connection between the wrong complained of and the injury, and no showing that appellee did not assume the risk. In this connection it should be observed that no negligence is charged on account of defective machinery or in the operation thereof. Conceding, without deciding, that the second paragraph of complaint is sufficient to withstand the attack of a demurrer, we proceed to the consideration of the question arising under appellant's motion for judgment on the answers to interrogatories and for a new trial. From the view we have taken of the law as applied to the evidence and facts specially found, appellee is not entitled to recover; and if we should reach the conclusion that the second paragraph of complaint is bad, and order a reversal for that reason, the cause would have to be retried, and, as appellee could not recover upon the facts elicited by the evidence and those specially found, no useful purpose would be subserved by a new trial. It is the policy of the law to put an end to litigation at the earliest moment consistent with the ends of justice.

It is very earnestly contended by counsel for appellant that the answers to the interrogatories affirmatively show that appellant was not guilty of any negligence, that appellee had the same opportunities to observe and know the conditions as it did, and that he assumed the risk incident to the employment. The jury answered 100 interrogatories, but for the purposes of this opinion it is unnecessary to refer to many of the facts

specially found. We will only give an abstract of those which bear upon the question under consideration, and that is whether or not appellant was entitled to judgment on such answers, notwithstanding the general verdict. The facts pertinent to the matter under consideration, as determined by the answer to interrogatories, are as follows: The steam power had nothing to do with turning the derrick, but was simply used to raise and lower the stone swung from the boom. Appellee was the derrick runner, and in charge of it and the men operating it. It was his duty to direct what stones to lift and move, as to how they were hooked, how high they were to be raised, and how far moved and when to be let down. There were several interrogatories addressed to the jury, which they answered, that had special reference to the condition of the machinery, but, as these interrogatories and answers can only be considered in connection with the first paragraph of the complaint, we do not deem it necessary to refer to them or set them out, because, as will hereafter be shown, we think the answers to the interrogatories clearly establish the fact that the verdict and judgment rest upon the second paragraph of the complaint. Referring again to the answers to interrogatories, the jury found that the stone which was being moved, and which broke and injured appellee, did not strike any other stone or object until it had broken and fallen; that it broke because of the dry or defect in it; and that the breaking of the stone caused it to fall and inflict the injuries upon appellee. The entire operation of moving the stone, including the hooking of the dogs into it, was under the sole management and direction of the appellee. He was an experienced derrick runner, and familiar with the duties of operating and managing a derrick. He had had 21 years' experience in working in quarries. After the stone was hooked, it was raised, under appellee's direction, to the height it retained until it broke. The stone was raised to its entire height before the derrick and stone began to swing. Before appellee caused the stone to be lifted, he looked at it to see if it was all right. It was the duty of the appellee to look out for the safety of himself and the other members of the derrick crew. He gave the order or signal to lift the stone. When appellee was hooking the stone, before it was lifted, he was close enough to see the dry if he had looked. He had daily been working as a derrick runner, and had been lifting and moving with the derrick stones with "dries" in them. When the stone was lifted and moved no one was present, other than appellee, to give orders and directions in regard thereto. It was his duty, if he saw anything wrong with the stone, not to lift it until he had notified the ledge foreman. The dry in the stone was not visible to a person within

two or three feet of it, and it did not show through the stone on bottom, top, and sides. When the stone was dragged, appellee stood within a few feet of it, and gave the signals and directions when the power was to pull and when not to pull, and such directions were given of his own volition, and not by the orders of any one else. Before the stone was lifted, appellee put one hook in the hole in one end and went to the other end to see if his helper had properly and safely hooked the other end. He was on the stone when he put the hook in one end and walked on it to look at the other end. The stone had been dragged from the ledge about 75 feet to a place from which it was lifted on the day before by the derrick controlled by appellee. When he was hooking and preparing the stone for lifting, he could have seen the dry if he had looked, if such dry had been visible. The jury found that the reason why appellee could not and did not see the dry was because it was not visible. The inspector, whose duty it was to inspect the stone, did not discover the dry, nor did any one discover it before the accident. The inspector made the inspection in the usual and customary manner of making such inspections under like circumstances. The stone which was being lifted did not strike another stone just at or before it fell. The stone contained a dry seam, which made a division in the stone that was not discoverable by a casual observation. It would have required a close examination or inspection of the stone to have ascertained the nature and extent of the dry seam. These are all the facts which need to be exhibited in determining the question as to whether or not appellant was entitled to judgment on the answers to interrogatories.

As above stated, we are clearly of the opinion that the verdict and judgment rest upon the second paragraph of the complaint. This is made manifest by the facts charged in the first paragraph as to the acts of negligence of appellant resulting in appellee's injury. In the first paragraph it is charged that one Yeskey, a co-employé, was incompetent to perform the duties of giving signals to the person in charge of the power controlling the raising and lowering of the boom pole; that the machinery by which the derrick was moved and the boom pole turned was out of repair, in that the cogs were worn and would not catch; and that by reason of such machinery being out of repair the derrick, when it was being swung, moving a heavy stone from one place to another, could not be controlled, and that the stone which was being moved was caused to break and separate by striking another large stone. It will be observed, therefore, that to make out the cause of action under the first paragraph of complaint it must appear that the stone which injured appellee was caused to break by reason of its having come in con-

tact with another large stone, for the language of the complaint is that "by reason of said large swinging stone striking another stone, causing it to break and separate," etc. The jury specifically found that the stone which fell and hurt appellee did not strike any stone or object until it had broken and fallen, and that the cause, and sole cause, of its breaking, was the dry seam in it. We must therefore consider the facts thus specially found with reference to the charge of negligence in the second paragraph of complaint to determine the rights of the parties thereunder. In this paragraph no charge of defective machinery is made, and the negligence complained of was the failure to properly inspect the stone before it was lifted by the derrick to be swung around. It is charged in this paragraph that stones that were round and free from dries were reasonably safe to hitch to and lift, while the lifting of stones by the derrick with dries in them was more hazardous than lifting stones without such dries. The appellee thus shows by his complaint that the employment in which he was engaged was a hazardous undertaking. While it was not appellee's duty to inspect the stone, yet he had the same opportunity of seeing whether there was a dry in it as appellant or its foreman. It was an everyday occurrence, as the jury found, for appellee to move stones with dries in them. The stone, before it was lifted, was inspected in the usual and customary manner, and the reason that the dry was not discovered was because it was not visible. We cannot believe it to be the duty of a master engaged in such an undertaking, to the end that it may be determined with an absolute degree of certainty that a large stone about to be moved in the manner indicated has a dry in it, to break the stone to pieces to discover such dry. That would destroy the very business in which appellant was engaged. The jury in this case having found that the stone was inspected in the usual and customary way, and, further, that the dry was not discovered because it was not visible, it seems to us that appellant performed the full measure of its duty. The inspection was made by the person whose duty it was to make such inspection, and this, it would seem, was sufficient. *Louisville, etc., Ry. Co. v. Bates*, 146 Ind. 564, 45 N. E. 108. See, also, *Elliott on Railroads*, § 1278. No charge is made that in this case the inspector was incompetent, and no evidence introduced or fact found by the jury showing that he was incompetent. The presumption is that he was competent. *Louisville, etc., Ry. Co. v. Bates*, supra; *Evansville, etc., Ry. Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; *Evansville, etc., Ry. Co. v. Duel*, 134 Ind. 156, 33 N. E. 355. Appellee was upon and about the stone in adjusting the dogs preparatory to lifting it. He had the same opportunity to discover de-

fects in the stone that appellant had. An employé is not required to make a critical examination to discover defects or dangers, and he is only bound to observe defects that are visible and apparent. *Linton Coal Co. v. Persons*, 11 Ind. App. 204, 39 N. E. 214; *Gould Steel Co. v. Richards*, 30 Ind. App. 348, 66 N. E. 68. The authorities are many that an employé when he enters the service of an employer agrees to assume all ordinary risks incident to the service for which he is engaged, and the employer likewise agrees not to subject the employé to greater risks than those which fairly and properly belong to the particular service for which the employé is engaged. *Brower v. Locke*, 31 Ind. App. 354, 67 N. E. 1015; *Chicago, etc., Ry. Co. v. Martin*, 23 Ind. App. 468, 63 N. E. 247; *Guedelhofer v. Ernsting*, 23 Ind. App. 188, 55 N. E. 118; *Peirce, Rec'r, etc., v. Oliver*, 18 Ind. App. 87, 47 N. E. 485; *Stone v. Bedford, etc., Co.*, 156 Ind. 482, 60 N. E. 35; *Hollingsworth v. Chicago, etc., Ry. Co.*, 160 Ind. 259, 65 N. E. 750; *Baltimore, etc., Ry. Co. v. Roberts*, 161 Ind. 1, 67 N. E. 530; *Wabash Ry. Co. v. Ray*, 152 Ind. 392, 51 N. E. 920; *Wabash Paper Co. v. Webb*, 143 Ind. 303, 45 N. E. 474. Of the many authorities in this jurisdiction in support of the proposition above, we only deem it necessary to cite a few of them.

The handling of heavy stones in the manner indicated by the complaint and as shown by the evidence was one of the ordinary risks incident to the work in which appellee was engaged, and under his contract of employment he impliedly agreed to assume. The fact that he charges in his second paragraph of complaint that lifting and moving the stone with a dry in it was more hazardous than lifting and moving one without such dry, implies that such work was in itself hazardous. He possessed equal means or opportunities that appellant had of knowing of the dangers to which he was exposed. He had the same means and opportunities that appellant had to observe whether or not the stone he was about to lift and move had a dry in it. Such dry was not visible either to him or appellant's servant whose duty it was to make the inspection. In such case there can be no liability. *Wolf, Adm'r, v. Big Creek, etc., Co.*, 148 Ind. 317, 47 N. E. 664; *Wabash Ry. Co. v. Ray, Adm'r*, 152 Ind. 392, 51 N. E. 920; *Big Creek, etc., Co. v. Wolf, Adm'r*, 138 Ind. 496, 38 N. E. 52; *Diamond Plate Glass Co. v. De Hority, Adm'r*, 143 Ind. 381, 40 N. E. 681; *Salem-Bedford Stone Co. v. Hobbs, Adm'r*, 11 Ind. App. 27, 33 N. E. 533; *Romonia Co. v. Tate*, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529; *Chicago, etc., Ry. Co. v. Wagner, Adm'r*, 17 Ind. App. 22, 45 N. E. 76, 1121. The rule is firmly established that a servant assumes such risks as, from the business as ordinarily conducted, he must have known, and those risks which the exercise of his opportunities for inspection would have disclosed to him. *Linton Coal Co. v. Persons*, *supra*; *Evansville, etc., Ry. Co. v. Henderson*, 134 Ind. 639, 33 N. E. 1021; *Atlas Engine Wks. v. Randall*, 100 Ind. 293, 50 Am. Rep. 798; *Pittsburgh, etc., Ry. Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Louisville, etc., Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Bailey, Master's Liability to Servant*, p. 162. The stone that broke because of the dry in it had been inspected in the customary and usual manner. The jury found that no one had any actual knowledge of the dry before the accident, and that it was not visible. There is no charge in the complaint that the inspection was negligently made, and hence there is no finding in the general verdict that appellant was negligent in this regard. Such a finding would be outside of the issues in any event. The facts specially found show that appellant took the proper precautions as to the inspection, and that it performed the full measure of its duty. Also, from the facts specially found, it clearly appears that appellant was not guilty of any negligent act in connection with the moving of the stone which broke and resulted in appellee's injury. These facts absolve it from liability. The facts specially found also show that appellee assumed the risks incident to the service in which he was engaged, and that the breaking of the stone when being lifted, on account of a dry therein, was one of the incidents of his employment.

These facts having been established by the answers of the jury to interrogatories, they are in irreconcilable conflict with the general verdict, and therefore of controlling influence. This conclusion makes it unnecessary to consider questions presented by the motion for a new trial.

The judgment is reversed, and the trial court is directed to sustain appellant's motion for judgment on the answers to interrogatories.

(36 Ind. App. 681)

**FEATHERSTONE FOUNDRY & MACHINE
CO. v. CRISWELL. (No. 5,401).***(Appellate Court of Indiana, Division No. 2
June 29, 1905.)**1. CONTRACTS—COMPLETED CONTRACT—SIGNATURE OF PARTIES.**

Where an employé submitted to his employer a form of a contract containing stipulations as to compensation, and the employer read it, and stated that it was all right, and that it would be fixed up later, and directed the employé to begin work, there was a completed contract of employment, before the same was signed, entitling the employé to recover the compensation stated in the proposed contract, though it was never signed.

2. SAME—ACTION ON.

Where the complaint in an action on a contract does not allege that it was in writing, it will be regarded as oral.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1642.]

3. SAME—EVIDENCE.

A parol contract is shown by proof of a proposed written contract assented to but not signed by either of the parties.

4. APPEAL—EXCLUSION OF EVIDENCE—REVIEW.

Where the court excluded evidence on a distinct ground, and the question whether the evidence was not admissible on another ground was not presented, the party complaining cannot raise the question on appeal.

5. MASTER AND SERVANT—CONTRACT OF EMPLOYMENT.

On the issue as to the terms of a contract of employment, evidence of the terms of contracts with other employés is irrelevant.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1798.]

6. APPEAL—OBJECTIONS WAIVED.

The admission of evidence to which no objection was made or exception taken is not reviewable on appeal, though stated as a ground for a new trial.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Alexander P. Criswell against the Featherstone Foundry & Machine Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. C. Harris and F. C. Cutler, for appellant. R. O. Hawkins, H. E. Smith, and G. R. Hawkins, for appellee.

ROBY, J. Appellee sued appellant for \$2,500 alleged to be due under an oral contract for the payment of a commission upon sales made by appellant in its "refrigerating department" during the term of appellee's employment by it as a general agent, such commission being in addition to a salary of \$175 per month and other expenses paid to him by it. He recovered according to the theory of the complaint. The issue was made by general denial and an answer of payment, which was also denied. Error is assigned upon overruling the motion for a new trial. The reasons given for a new trial will be considered in the order in which they are presented.

The controversy between the parties is over the terms of appellee's employment. His contention is that he was to receive \$175 per month, expenses, and 2½ per cent. commission upon all sales made by the department. The appellant's contention is that it did not agree to pay any commission; that no commission was contemplated. The testimony was in direct conflict. Appellee, after some preliminary negotiations, in which "there was not much said about compensation," submitted to appellant's president a form of contract, which was not assented to. He thereupon prepared a second form, and submitted it to the same person. The principal difference in the two drafts related to the fixed salary, which was reduced in the later one from \$200 to \$175 per month, both containing a provision for the payment of 2½ per cent. commission on sales made by the department of appellant's business named. Appellee testified that appellant's president read the last draft; said it was all right; said he wanted to submit it to his lawyers; that he was going east; that appellee should go to work, and when he came back he would fix up the contract. He further testified that he was not able after that time to get the attention of the president to the matter. He continued in the employment 13 months. It is insisted that, although the terms of the contract were assented to, it was not completed until it was signed, the intent being manifest that it should be reduced to writing. The law is that where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until it is reduced to writing and signed. But where they assent to all of its terms, the mere reference to a future contract in writing will not negative the existence of a present and completed one. 7 A. & E. Enc. L. p. 140. Appellee entered upon the employment in pursuance to the arrangement made. The reduction to writing of the agreement was not made a condition precedent to its completion, and the point is not, therefore, well, taken.

The contract sued upon is not alleged to have been in writing, and the complaint is therefore regarded as founded upon an oral contract. Perkins v. Yeoman, 23 Ind. App. 484, 55 N. E. 782. A written contract is not legal evidence of an oral one. Perkins v. Yeoman, supra. It is insisted that signature by the parties is not essential to constitute a written contract; that, if the terms of an agreement are put into writing, and the writing is accepted by the parties as their agreement, although not signed, the agreement is a written one; and that a material averment of the complaint—i. e., the making of a parol contract—is unproven. The cases are numerous in which a contract signed by one party and acted upon by the other is held to be

* Rehearing denied. Transfer to Supreme Court denied.

binding upon both, but the principle governing in such cases is not applicable to the draft of a proposed contract not signed by either party.

The president of the appellant company, while testifying on re-examination, was asked the following question: "When Mr. Wright called your attention to the matter that Mr. Criswell was talking to him about commissions, what instructions, if any, did you give Mr. Wright, as your inferior officer, touching as to whether or not Mr. Criswell had any claim for commissions—whether or not you instructed Mr. Wright as representing the company to make any communication to Mr. Criswell?" An objection to the question was sustained. It is argued that a part of the conversation referred to was elicited by appellee on cross-examination, and appellant was entitled to make proof of the entire conversation relevant to the subject. This proposition, abstractly considered, is accurate. *Carey v. City of Richmond*, 92 Ind. 260. The appellant made an offer to prove without indicating therein that it was asking the question to complete a conversation previously given in part. The court sustained the objection upon other grounds, which were distinctly stated. The question not having been ruled upon by the trial court, and the ruling made having been invited upon the proposition considered, it is not available upon appeal. *Elliott, Appellate Procedure*, 630. The court refused to permit this witness to testify that the habit or course of business of the appellant company was not to pay commissions to its employes; "that nobody in the service of the company had at any time ever been paid any commission." The controversy was as to the terms of a particular contract. Evidence as to the terms of other contracts with other persons by one of the parties was not relevant. *Reynolds' Stephen's Ev.* art. 10, p. 20, III, A. B. To other evidence, the admission of which is stated as a ground for a new trial, no objection was made or exception taken.

Judgment affirmed.

(36 Ind. App. 323)

MYERS v. MUTUAL LIFE INS. CO. et al.
(**BARTHOLOMEW**, Intervener).
(No. 3,294)*

(Appellate Court of Indiana, Division No. 2.
June 28, 1905.)

1. RECEIVERS—EXPENSES OF RECEIVERSHIP—ATTORNEY'S FEES.

While expenses incurred in the administration of a receivership for an insolvent, including expenses of litigation by which the trust fund is created or preserved, are chargeable against such fund, yet services rendered in litigation intended and operating to diminish the trust fund cannot be made the basis of a claim for compensation out of such fund, although the result of such litigation was to establish a rule by which similar claims were expeditiously settled without litigation, and it

* Rehearing denied.

was thus incidentally advantageous to the trust fund.

2. SAME—DISCRETION OF COURT.

The allowance of costs, expenses, and attorney's fees incurred in litigation beneficial to a trust estate is largely discretionary with the lower court, and its action is treated on appeal as presumptively correct.

3. SAME—REVIEW.

The appellate court cannot reverse the action of the lower court in receivership proceedings in refusing an allowance of attorney's fees to an attorney who attacked the trust fund on the ground of a previous oral agreement between the judge of the lower court and the attorney to allow such fees.

4. SAME—SERVICES OF ATTORNEY.

Services rendered by an attorney who successfully attacked a receivership fund in afterwards aiding the receiver by explaining the effect of the court's decision to persons sent him by the receiver, and advising them to settle their claims in accordance with such decision, is not ground for an allowance of compensation to the attorney from the receivership fund.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Insolvency proceedings by William R. Myers against the Mutual Life Insurance Company and Union Trust Company, receiver. From a judgment sustaining a demurrer to an intervening petition filed by Pliny W. Bartholomew, intervener appeals. Affirmed.

P. W. Bartholomew and Jesse D. Hamrick, for appellant. Ovid B. Jameson, F. A. Joss, Linn D. Hay, and Henry J. Brandon, for appellee.

ROBY, J. The trial court sustained the receiver's demurrer for want of facts to an intervening petition for an allowance by Pliny W. Bartholomew, who declined to plead further, and appeals from the judgment thereupon rendered against him. The facts upon which the intervener founds a claim against the estate for services as an attorney at law are, in effect, as follows: One Huter intervened in the receivership case, and asked that a bond and mortgage given by him to the insolvent company be found paid and ordered canceled. The conclusions of law were against him. He appealed to the Supreme Court, and secured the reversal of a judgment following the conclusions. *Huter v. Union Ins. Co.*, 153 Ind. 204, 54 N. E. 755. The claim presented by the intervener arises out of services rendered by him as an attorney for Huter in such litigation. The following propositions are quite thoroughly established: Expenses incurred in the administration of the trust are payable out of the fund. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. Expenses of litigation by which the fund is created or preserved are also chargeable against it. *Central, etc., Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915. Where the object of the litigation is to diminish or destroy the fund, expenses incurred in its prosecution are not thus chargeable. *Trustees v. Greenough*, *supra*. The effect of the appeal

was to reduce the assets of the insolvent company, and the services rendered were rendered for one who by the litigation sought to diminish the trust fund, and was to some extent successful in so doing, and ought not, therefore, to be made the basis of a claim for compensation out of such fund.

Additional facts are set up in the petition and relied upon to make the case an exception. They are:

1. That the result of the appeal was to establish a rule by which many similar claims throughout the state were expeditiously settled without litigation, and its establishment, which could not have been had without the appeal, was to the advantage of the trust, and its cost, therefore, a proper charge against the fund. The advantage thus secured was an incidental one. The duties which were performed by the intervener were such as were due from him to his client, whose interest was adverse to the trust, and there is therefore no warrant for his payment out of the fund. *Ober, etc., Co. v. Macon, etc., Co.*, 100 Ga. 635, 28 S. E. 388.

2. That the appeal was taken at the suggestion of the judge of the court in which both the receivership and the action against Huter were pending, and in reliance upon a statement by him that he would, in view of the desirability of procuring an early and authoritative construction of the contract involved therein, make an order for the payment of expenses and fees thus incurred by the receiver. The allowance of costs, expenses, and attorney's fees incurred in litigation

beneficial to a trust estate is largely discretionary with the lower court, and is upon appeal treated as presumptively correct. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; *Trustees v. Greenough*, supra. It appears that during the pendency of the appeal an allowance of \$125 was made for the expenses thereof. Had the trial court made a further allowance to the intervener, the question of its power to so do would be directly involved, but, having refused to make such allowance, this court cannot reverse its action because of previous alleged oral agreements between its judge and the intervener.

3. That after the determination of the appealed cause the intervener aided and assisted the receiver by explaining the effect and force of the decision to various persons who were sent to him by said receiver, and "advised them to settle their claims in accordance therewith." The duty of an attorney is to his client, whose corresponding duty it is to reasonably compensate him. Such duty does not consist with the payment of his fees by the opposite party. There is in this case no suspicion of unprofessional conduct or misconduct, and the advice given to such persons was evidently correct, and to their interest; but it would be a dangerous precedent to recognize the right of an attorney to charge one party for advice given to the other in pursuance to any kind of an arrangement to which the person advised is not a party.

Judgment affirmed.

MONAGHAN v. CITY OF INDIANAPOLIS.
(No. 5,761.)¹

(Appellate Court of Indiana. Aug. 1, 1905.)

**MUNICIPAL CORPORATIONS—IMPROVEMENTS—
CONTRACTS—COMPETITION—PATENTED MA-
TERIALS.**

Under Acts 1905, p. 281, c. 129, § 95, requiring the board of public works of the city of Indianapolis to let contracts for street improvements to the "lowest and best bidder" after advertising for bids, the city has no power to specify that a street shall be paved with a patented pavement, though the owner of the patent agrees to furnish such material to any contractor equipped to lay the same, or who will equip himself to lay it, at a specified price per cubic yard, and furnish an expert to supervise the preparation of such material.

[Ed Note.—For cases in point, see vol. 86, Cent. Dig. Municipal Corporations, § 855.]

Wiley, C. J., and Myers, P. J., dissenting.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Suit by John Monaghan against the city of Indianapolis. From a decree dismissing the bill, complainant appeals. Reversed.

J. E. Bell, for appellant. Henry Warrum, for appellee.

OOMSTOCK, J. This was a suit for an injunction, appellant seeking to enjoin the appellees from letting a contract for a street improvement, and from further proceeding therewith, on the ground that a patent pavement was specified, and that this necessarily created a monopoly and made competition impossible.

The complaint alleges that the defendant, the city of Indianapolis, was a municipal corporation of the first class, and that the other appellees constituted the board of public works of said city; that the plaintiff was a taxpayer in said city, owning a certain lot (describing it) abutting on Northwestern avenue, a public street and highway in said city; that said real estate is subject to and will be assessed for the improvement of Northwestern avenue, unless defendants are enjoined from making said improvement; that on May 1, 1905, the board of public works adopted a resolution for the improvement of Northwestern avenue, from a point 1,216.1 feet north of the south property line of Twenty-First street to the south line of Thirty-Second street, by grading and paving with brick on a concrete foundation; that notice of such resolution was published, fixing May 17, 1905, as the day for hearing persons interested; that on said day a majority of the resident freeholders filed their written petition, asking that said resolution be modified, and that said street be paved and said improvement made with Warren's patent bitulithic pavement; that on May 22, 1905, said board modified said resolution, plans, and specifications, and provided therein for the said Warren's patent bitulithic pavement

for said improvement; that said resolution, as modified, was confirmed by said board on said day, and no remonstrance has been filed by any freeholder; and that said resolution and modification and plans and specifications, so far as they refer to the kind of pavement, were as follows. The complaint then sets out the improvement resolution. The modification referred to specifies for Warren's patent bitulithic pavement. Such specification calls the attention of bidders to the following: "The city engineer of the city of Indianapolis will furnish upon request to any bidder the copy of an agreement to the sale by Warren Bros. Company, stating at what price per square yard of pavement to be laid said company will furnish to any responsible contractor, who is properly equipped or who will properly equip himself, the right to construct the pavement herein specified under the patent owned and controlled by the said company, together with all the necessary bitumen combinations, and an expert who will give advice as to the use of said materials, the method of mixing same, and full directions for the building of the pavement." On the 22d day of May, 1905, the said engineer made and filed an estimate of the total cost of said improvement, showing that it was less than 50 per cent. of the aggregate value of the property subject to be assessed therefor as assessed for taxation, and the said board so found and decided, and found and decided that the benefits accruing to the property to be assessed, including that of this plaintiff, would exceed the estimated cost of the proposed improvement; that the said board duly advertised for bids, for such work and improvement, to be submitted on the 19th day of June, 1905, and threatened to, and will unless enjoined, let the contract therefor on the 19th day of June, 1905, and have said work done, to the irreparable injury of this plaintiff; that said proceedings are taken and had under the act of March 6, 1905 (Acts 1905, p. 219, c. 129), entitled "An act concerning municipal corporations," and all preliminary steps to the letting of a contract have been taken by said city and board of public works; that said pavement provided for in said resolution, and for which said contract will be let, and with which said improvement will be made, unless an injunction is granted, is a patented pavement covered by letters patent of the United States; that there is no authority for improving streets in said city with a patented pavement, and there can be no competition in said work, and an unlawful monopoly is created by making such improvement with a patent pavement; that it was not necessary for said board of public works to name in its specifications a patent pavement, or to name the said Warren's patent bitulithic pavement for the improvement of the said street, for the reason that there are many other first-class accepted pavements that are

as good and durable as said Warren's, which are not covered by patents, and are not controlled by any monopoly, with which said street could be improved.

To this complaint appellees filed answer, alleging that the board of public works adopted the resolution and modified and confirmed the same to provide for Warren's patent bitulithic pavement in accordance with the petition of the majority of the property holders; that Northwestern avenue is a public street in said city; that all necessary and proper proceedings were had and taken by the defendants for the improvement of said avenue, and that all proceedings were in all respects regular and duly taken; that they duly advertised for bids, and, unless restrained, will proceed to let the contract for said street to the lowest and best bidder on June 19, 1905; that the plaintiff is a resident taxpayer and owns the real estate described in the complaint, and that it is subject to be assessed for the benefits arising from said improvement; that the said Warren's patent bitulithic pavement is a certain kind of the accepted kinds of modern street pavements; that the same has been laid in many cities and towns of this and other states of the United States and Canada, and has the approval and indorsement of the cities and towns in which the same has been laid, and the general approval of the engineering profession of the country; * * * that the cost of said pavement is approximately the same as the cost of other bitumen or asphalt pavements, and practically no more; that said pavement is a desirable form of pavement for defendant city and other cities, and defendant knows of no other way to get this particular form of pavement, which is different in arrangement of materials, form, and method of construction from other pavements generally known to the engineering profession, and that it has a specific form of contract; and defendant further states that a majority of the resident freeholders of said street, on the day of hearing, filed a petition in writing with defendant board asking for Warren's patent pavement, and said petition was granted and proper specifications for said bitulithic pavement adopted and filed, the same being those named in plaintiff's petition; that in and as a part of said specifications is the following provision. The answer also sets out the notice to bidders already given in the statement of the complaint and the agreement of the Warren Bros. Company to furnish to any contractor, to whom a contract is awarded to pave street or streets in the city of Indianapolis with Warren's patent bitulithic pavement during the year 1905 at a certain price the material used in the composition of said pavement, and to allow the contractors to use their patent processes for laying said pavement, and to furnish an expert, who will advise in the laying of the pavement, with-

out extra charge; that by reason of said specifications and provisions competition and bidding on said improvement is provided; that the right to use said patented pavement can be obtained by contractors by the terms of said agreement with Warren Bros. Company, and that the defendants are informed and believe, and so aver, that competitive bids will be submitted for said proposed improvement; that they not only have the right to have streets of Indianapolis improved with patent pavement, even though there could be no competition, but also that competition is provided for in this instance; and said proceedings and proposed improvements are in all respects authorized, regular, and valid.

A demurrer for want of facts to this answer was overruled, and exception taken. Appellant declined to plead further, and judgment was rendered upon such demurrer in favor of appellees for the cost of the action. The error assigned is that the court erred in overruling the demurrer of appellant to appellees' answer.

Upon the part of the appellant it is contended that the board of public works is given power to let contracts only by competitive bidding. Acts 1905, pp. 281, 282, c. 129, § 95. That the contract for the improvement of Northwestern avenue should be let to the lowest and best bidder prohibits the board from letting the contract for such improvement, when the improvement proposed is covered by letters patent, for the reason that such an improvement is in violation of the requirements of competitive bidding. Upon the question here presented as to the power of the board the courts are not in harmony. The difference in the view taken upon the question by eminent and learned courts, to whose decisions we will hereafter refer, may be explained in a measure by the difference in the particular statutes upon which they are based. In some of them the argument of convenience seems to have influenced the construction given. Since the adoption of the Constitution in 1851 there have been 11 separate enactments by the General Assembly of this state touching the method of making street improvements:

(1) The act of June 18, 1852 (1 Rev. St. 1852, p. 203), provides: "When the owners of two-thirds of the whole line, * * * and measuring only the front line of such lots as belong to the owners resident in such city, shall petition, * * * the mayor and council shall cause the same to be done by contract given to the best bidder," etc. Section 62, p. 217.

(2) The act of March 9, 1857 (Acts 1857, p. 42 et seq., c. 33), contains in section 66, p. 63, substantially the same provisions, with slight changes in verbiage, but none in substance; but to those is added, in section 68, p. 64, the provision that the common council, with the concurrence of two-thirds of the members

thereof, may order or cause any or all of the improvements mentioned to be made in like manner, without such petition, etc.

(3) The act of March 11, 1861 (Acts 1861, p. 32, c. 13). By this act section 66 is amended (a) so as to permit the council to improve less than a square; (b) so as to require the property holder to keep the sidewalk in repair.

(4) The act of December 20, 1865 (Acts 1865, p. 3, c. 1). By section 65, p. 29, the provision in regard to improvements is as before, but with additions in other respects not material or germane to the proposition pending here.

(5) The act of March 14, 1867 (Acts 1867, p. 33, c. 15; 1 Rev. St. 1876, p. 267). By section 68, p. 65, of the Acts of 1867, and section 3162 of the Revised Statutes of 1881, the provision is substantially the same as before, with the provision in regard to improvements by the council without a petition in section 70, p. 67, of the Acts of 1867; page 304 of the Revision of 1876, and section 3164 of the Revision of 1881.

(6) The act of March 8, 1889 (Acts 1889, p. 237, c. 118; Elliott's Supp. p. 241, § 812). The proceeding in regard to the improvement on petition of property holders is substantially the same as before; the provision, however, in regard to improvements other than upon the petition of two-thirds of the property holders, being varied under section 2 of the act.

(7) The act of March 6, 1891 (Acts 1891, p. 137, c. 97), being the act commonly known as the "Charter of the City of Indianapolis." By section 73, p. 175, of this act, the authority of the board of public works to order an improvement in the first instance appears for the first time, and here the provision is that the resolution should be adopted by the board, and shall be "final and conclusive on all persons, unless, within 10 days thereafter two-thirds of the resident freeholders upon such street remonstrate against such improvement," in which event the improvement cannot be made unless ordered by an ordinance passed by a two-thirds vote of the council, and approved by the mayor, and by section 61, p. 170, it is provided: "And said board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder." This is the first time in the legislation of the state where, as applied to the bidder, the word "lowest" is used. Up to this time the language was always simply to "the best bidder," and in all the enactments on that subject from that time to this the word "lowest" is used as an integral part of the limitation on the power to contract.

(8) The act of March 3, 1893 (Acts 1893, p. 65, c. 59). Of this act, section 61 and section 73 are left as they were in the act of 1891, *supra*.

(9) The acts of March 4, 1899—(a) Acts 1899, p. 451, c. 203; (b) Acts 1899, p. 390, c.

174. (a) By Acts 1899, p. 457, c. 203, § 61, section 3832, Burns' Ann. St. 1901, was amended so as to require all bidders to file an affidavit of no collusion. (b) By Acts 1899, p. 400, c. 174, Act March 6, 1891, was amended so as to permit the filing of petitions in writing requesting a certain kind of pavement, in which event power was denied to the board to pave with any other kind, unless ordered by a two-thirds vote of the council, and, if several petitions were filed, the board should grant the petition containing the largest number of resident freeholders, unless a like ordinance was passed by the council, and no improvement should be ordered to cost more than 25 per cent. of the value of the property abutting on the street.

(10) The act of March 11, 1901 (Acts 1901, p. 490, c. 217). By this act, section 73 of the act of March 6, 1891 (Acts 1891, p. 175, c. 97), as amended March 4, 1899, *supra*, was amended considerably in verbiage, but, with respect to the particular matters here, not in substance, other than that under the amendment of 1899 one-half of the resident freeholders might remonstrate, while under the amendment of 1901 the language is "a majority of the resident freeholders," etc.

(11) The act of March 6, 1905. This act is a compilation and consolidation, as well as in the nature of an amendment, of all previous legislation. (a) Section 95, p. 281, being in verbiage substantially, and in the particular respect pending here in language exactly, the same as section 61, p. 99, of the act of March 6, 1891, as amended by the act of March 4, 1899. (b) Section 107, p. 287, being a substitute for section 73, p. 175, of the act of March 6, 1891, as amended in 1899 and 1901, *supra*; the material difference being: (1) That in the act of 1905 the contract shall not be in excess of 10 per cent. of the assessment, while under the act of 1901 it might not exceed the assessment. (2) In the act of 1905, the cost of the improvement is limited to 50 per cent. of the value as assessed for taxation, while in the act of 1901 it might not exceed 25 per cent. of the value as appraised in the manner required by the act. (3) In the act of 1905 the petition for a specific kind of improvement is required to be by a majority of the resident freeholders, while under the act of 1901 the petition was not required to contain a majority of the resident freeholders.

It thus appears that in the outset the improvement was to be ordered upon a petition of two-thirds of the property holders resident in the city, or a two-thirds vote of the council in the absence of such petition. As it now is it may be ordered by the board of public works in its discretion, but if a majority in number of those resident upon the street to be improved, without any reference whatever to the extent of their holdings, and without regard to the wishes or interests of those who own property abutting on the

street, whether they reside in the city or not, desire any particular kind of improvement, such majority in number of property owners resident on the street may compel the making of any "certain kind of the accepted kinds of modern city pavements," unless restrained by a two-thirds vote of the council; but through all this legislation it is provided that no contract shall be let, except (from 1852 to 1891) to the "best bidder," and (from 1891 to 1905) to the "lowest and best bidder," and this without any reflection by the Legislature upon the judgment and integrity of the parties to the contract, but in recognition of the fact that competition is in itself safe and in the interests of the property owner. While the right to determine whether, in the first instance, an improvement shall be made, is exercised by two-thirds of the property owners resident in the city, or a two-thirds vote of the common council to the board of public works, and the right to determine the "certain kind of the accepted kinds of modern city pavement" has been conferred upon the majority of those who reside upon the street to be improved, leaving the minority of those who reside upon the street and all those who own property and will be compelled to pay, but who do not reside upon the street, powerless in the premises, except as they may be supported by a two-thirds vote of the common council, there has never been a retrogression from the safeguard that, before any man's property can be affected by a charge of a street improvement against it, competitive bids must be invited and received, and the lowest and best bidder selected to do the work that shall make the charge against the property.

From the course of legislation in this state upon this subject we think it cannot be presumed that it was the purpose to do away with the safeguard of competitive bidding. *City of Bluffton v. Miller*, 33 Ind. App. 524, 70 N. E. 989, cites many cases in support of the proposition that it is the duty of the courts to resolve doubts against the validity of the exercise of authority in the discharge of municipal duty whenever there is any substantial deviation at all, and to sustain proceedings in cases where there is not an exact compliance with the statute only if it clearly and unmistakably appears that no possible injury has resulted to the landowner or could result to him. The Warren Bros. Company are the exclusive owners and have absolute control of the patented pavement named in the specifications. We are unable to see that there can be the free competition contemplated by the statute when the particular kind of pavement to be used is covered by letters patent. No one could use the patented article but the patentee or his licensee. From such conditions there could only arise a monopoly. Monopoly prevents competition and encourages favoritism and fraud.

We have referred to the conflict in the decisions. The case of *Hobart v. City of Detroit*, 17 Mich. 246, 97 Am. Dec. 185, was heard July 8, and decided July 13, 1868. The case of *Dean v. Charlton, Treasurer*, 23 Wis. 590, 99 Am. Dec. 205, was finally decided February term, 1869. It had been decided before that, and a petition for a rehearing was pending at the time of the decision of *Hobart v. City of Detroit*, supra, and that case was considered by the court in connection with the petition for a rehearing. The opinion in each case was by a divided court. The case arose over the same matter, namely, the making of streets by means of the Nicholson, a patented process. The proceedings to improve a street of Madison, Wis., were begun in 1866; those in Detroit, in 1867. In the opinion in the Michigan case, delivered by Chief Justice Cooley, this language is used: "I am aware of the contrary decision which by a divided court has been made in the case of *Dean v. Charlton*; but, with great respect for the reasons assigned by that court, I am still brought to the conclusion that the decree of the circuit court was correct, and it must be affirmed." The opinion does not discuss the Wisconsin case. After the decision of the Michigan case a petition for a rehearing was filed in the Wisconsin case, and was overruled at the February term, 1869; the opinion overruling the petition for a rehearing making no reference to the Michigan case. In the Wisconsin case, Paine, J., speaking of the claim that the use of the patent precluded all competition, required under the language that it should be let to the lowest bidder, uses the following language at page 602 of 23 Wis. (99 Am. Dec. 205): "This objection is based upon the provision of the charter requiring all work to be let by contract to the lowest bidder, and the fact that the right to lay Nicholson pavement is a patented right, and was owned for the state of Wisconsin by one firm in the city of Milwaukee. It is said that the charter authorized a contract only for such work as is open to competition, and that this work was not open to competition, because nobody had any legal right to do it, except the one firm that owned the patent. Upon these facts alone the objection seems to me unanswerable. And nothing seems to be necessary, beyond the simple statement of the requirements of the charter as to the mode of letting work and the fact that this right was a monopoly, to show that the charter is inapplicable to it, and that a contract for this work would be in violation of the necessary implication from its provisions"—referring to the case of *Harlem v. Mayor*, 33 N. Y. 309, and expressing the opinion that proof merely of willingness of the owners to sell the right at a fixed price does not preserve competition.

In *Fishburn v. City of Chicago*, 171 Ill. 339, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep.

236, an ordinance making the use of a certain article within the control of a single person or corporation indispensable in the construction of the improvement, to be let to the lowest responsible bidder, is void as creating a monopoly in favor of such person or corporation, and preventing competition by limiting the bidders to those persons able to make the most advantageous terms with the favored person or corporation. The statute, by authority of which the city council enacted the ordinance under consideration in said case, provides that "all contracts for the making of any public improvement to be paid for in whole or in part by special assessment and any work or other public improvement when the expense thereof shall exceed \$500 shall be let to the lowest responsible bidder in the manner to be prescribed by ordinance, such contract to be approved by the mayor or president of the board of trustees," etc. The court said: "The ordinance in question provided the contract to perform the work should be awarded to the lowest responsible bidder. If the requirement that the asphaltum to be used in the improvement should be obtained from Pitch Lake, in the island of Trinidad, tended to restrict competition among those who might desire to become bidders for the performance of the work of improving the street, or tend to create a monopoly in favor of any one having for sale the asphaltum necessary to be used in the work of paving the said street, it would fall under the ban of this general rule of the law, and should be declared inoperative and void. It does not appear from the face of the ordinance that the effect is necessarily to so prevent competition or create a monopoly; but the proffered proof, which the court excluded, unmistakably disclosed that the asphaltum required by the ordinance to be used in making the street was a product which could only be obtained by purchase from a single corporation. The direct effect of the requirement, therefore, was to create a monopoly in favor of that corporation and to restrict competition in bidding accordingly. The principle under which the rejected evidence under consideration must be, as it is held by us to be; competent, came before this court for discussion in the cases of *City of Chicago v. Rumpff* and *City of Chicago v. Turner*, which cases were consolidated and decided together, and are reported in 45 Ill. 90, 92 Am. Dec. 196. The conclusion of the court was that the ordinance then under consideration tended necessarily to create a monopoly, and was therefore void; and the doctrine of the case is approved in *People v. Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; and *Foss v. Cummings*, 149 Ill. 353, 36 N. E. 553.

In *Smith v. Syracuse, etc., Co.* [N. Y.] 55 N. E. 1077, the city advertised for bids for paving a street with vitrified paving brick manufactured by the New York Brick &

Paving Company, and in pursuance thereof the city received bids and awarded the contract; other companies manufacturing vitrified brick as good as that of the New York Company. The proceedings were void, in violation of the Syracuse charter, requiring contracts to be let to the lowest bidder, since restricting the material to be used to that manufactured by the New York Company prevented free competition in bidding for the furnishing of paving material. The court said: "The reasoning is this: that while competition was to a certain extent allowed in this case, namely, as to the work required in paving the street, it was not allowed to the extent required by the statute, which contemplates a full and free competition in all things. Inasmuch as competition in the price of paving brick was sought to be prevented. This proceeding contemplated that this should be accomplished by requiring that the street be paved with 'vitrified paving brick manufactured by the New York Brick & Paving Company, of Syracuse, N. Y.'; thus necessarily allowing that corporation to practically fix its own price for brick to be used in the work, and this, too, in the presence of a well-known fact that there were many corporations in the country engaged in the manufacture of vitrified paving brick as suitable for the work as was that of the New York Brick & Paving Company."

In the fourth edition of *Dillon on Municipal Corporations*, at section 467, it is said: "The Supreme Court of Michigan has affirmed, while the Supreme Court of Wisconsin and other states have denied, the proposition that where a city charter provides that no contract shall be made by the city, except with the lowest bidder after advertisement of proposals, it does not prohibit corporations from contracting to lay Nicholson pavements, though the right to pave with it is patented and owned by a single firm. The question is close, but there seems so far to be a tendency in the courts to adopt the Wisconsin view"—citing in a footnote a number of decisions in support of each side of the question. *State v. Elizabeth*, 85 N. J. Law, 351, also holds that a contract for public improvements, where the use of a patented process or material is contemplated, made without the consent of the owners of one-half of the property along the line of the intended improvement, is void; the court, at page 354, saying with reference to the requirement of the statute that the contract should be given to the lowest bidder: "This section of the statute contemplates the public advantage of an open, free competition in doing work and furnishing materials for all public improvements, which is inconsistent with the exclusive right to sell a patented article previously accepted and alone acceptable." The following cases, with others that might be cited, are in line with *Dean v. Charlton*, supra; *Fineran v. Central, etc., Co.* (Ky.) 76 S. W.

415; *Burgess v. Jefferson*, 21 La. Ann. 143; *Nicolson Paving Co v. Painter*, 35 Cal. 690; *Smith v. Syracuse Co.* (N. Y.) 55 N. E. 1077; *Fairbanks Co. v. City of North Bend* (Neb.) 94 N. W. 537. In addition to *Hobart v. City of Detroit*, supra, the following and many other cases support the proposition, either directly or inferentially, that the city authorities had the right to select a patented material or pavement, and this without violating the rule of law requiring competitive bidding: *Holmes v. Common Council* (Mich.) 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. Rep. 587; *Rhodes v. Board* (Colo. App.) 49 Pac. 430; *Mayor v. Bonnel* (N. J. Err. & App.) 31 Atl. 408; *State v. Mayor* (N. J. Sup.) 49 Atl. 587; *Swife v. St. Louis* (Mo. Sup.) 79 S. W. 172; *City of Baltimore v. Raymo* (Md.) 13 Atl. 383; *Silsby v. Allentown* (Pa.) 23 Atl. 646; *Field v. Barber* (C. C.) 117 Fed. 925; In re *Dugro*, 50 N. Y. 513; *Baird v. Mayor*, 96 N. Y. 567. But in our opinion the status of the question, so far as it appears from the decisions, is correctly stated in *Dillon*, supra.

It is argued by appellees that in the case at bar, as any contractor can get the patented article or material, the law is satisfied, even though it should be held that a pavement could not be used if there could be no possible competition. While under the conditions set out in the answer there could be competition as to part of the work, there could be no competition as to that part covered by letters patent, because as to that the price is fixed, unless the patentee becomes a bidder. In that event he might, by a secret arrangement, favor a particular bidder, in which case the competition would be only nominal and to the prejudice of the property owner. Whether a city in the discharge of its municipal duties may acquire property covered by letters patent is not presented in the case at bar. "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *U. S. v. Goldenberg*, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394. "It is the intent of the law that is to be ascertained, and the courts do not substitute their view of what is just or expedient." *Lewis' Sutherland, Statutory Construction* (2d Ed.) vol. 2, § 364. If the pavement in question is superior in quality and, as averred, is desired by a majority of the property holders, such facts might appeal to the Legislature, but cannot justify the courts in disregarding the statute.

The judgment is reversed, with instructions to sustain appellant's demurrer to appellees' answer.

ROBY, J. Appellant, the owner of real estate abutting on Northwestern avenue, instituted this proceeding to enjoin appellees from letting a contract for paving said street, pursuant to the resolution hereinafter summarized. It is averred in the complaint that on

May 1, 1905, the board of public works of the city of Indianapolis adopted a resolution for the improvement of said street by grading and paving the same with brick, notice thereof being published, and that on the day set for hearing, a majority of the resident freeholders on said street filed their written petition that said resolution be modified and said street paved with Warren's patent bituminous pavement; that said resolution was modified according to the prayer of said petition, and confirmed by said board, there being no remonstrance against it. The original resolution, the modification thereof, and detailed specifications for the construction of said pavement are set out. It is also averred that said board has advertised for bids for the construction of said pavement and will let the contract therefor, unless enjoined, all to the irreparable injury of the appellant. It is further averred that said proceeding was had under the act of March 6, 1905; that all preliminary steps have been duly taken; that said pavement is a patented pavement, covered by letters patent issued by the United States, and that there can be no competition in bidding for the construction of the same, and that an unlawful monopoly is created by the specification of such patented pavement; that there was no necessity for its selection, for the reason that there are many modern first-class pavements, which are not patented or monopolized; that the cost of the improvement will be enhanced by its use, and appellant's property assessed for more than it will be if competition is had. To this complaint the appellees answered, averring that the resolution was modified in accordance with the petition of a majority of the resident freeholders on said street; that the cost of the proposed pavement is substantially the same as that of other bituminous or asphalt pavements; that a statement that the city engineer will furnish to any bidder, upon request, a copy of an agreement executed by the patentees of said pavement, stating at what price per square yard they will furnish to any responsible contractor, who is properly equipped or who will properly equip himself to do the necessary bitumen compositions, together with an expert who will give proper advice as to the use of said materials, the method of mixing the same, and full directions for the building of the pavement, is contained in the specifications. The agreement referred to is made part of the answer, and will be again recurred to. Wherefore, it is asserted, the city not only has the right to improve its streets with a patented pavement, but has in this instance provided for competition. To this answer a demurrer was overruled, and the plaintiff refused to plead further, whereupon judgment was rendered against him, from which he appeals.

The cause has been advanced, and is now decided upon the representation that the

questions involved are of immediate public interest to various municipalities and persons in the state. The statute under which the improvement is proposed to be constructed provides that the contract therefor shall be let to the "lowest and best bidder." The provision was intended to be, and is, an essential one, as the penal character of accompanying restrictions, reinforcing it, sufficiently show. The section is in part as follows: "Such board shall require each bidder to file with such board an affidavit that such bidder has not directly or indirectly entered into any combination, collusion, undertaking or agreement with any other bidder, to maintain the price of any work or contract, or to prevent any other bidder from bidding, or to induce any bidder to refrain from bidding, on any contract or work, and that such bid is made without regard or reference to any other bid, and without any agreement, understanding or combination, either directly or indirectly, with any other person with reference to such bidding in any way or manner whatever. And if after any contract has been let by said board it shall be made to appear that the successful bidder has been guilty of any collusion, combination, understanding, or agreement, as defined in such affidavit, such bidder shall forfeit such contract and such work shall be re-let by such board. * * * Such board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder. The board may by order impose further conditions upon bidders with regard to bond and surety, guaranteeing the good faith and responsibility of such bidders, or insuring the faithful completion of such work, according to contract, or for keeping the same in repair for any length of time, or for any other purpose." Acts 1905, p. 281, c. 129, § 95. The effect of the proposed contract will be to fasten a lien upon private property, to satisfy which the property may be sold. In such cases "the mode constitutes the measure of the power." The municipality has power in such behalf only as the statute grants it, and in exercising such power must strictly comply with the statute, or its acts will be void. *City of Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989. The provision for competitive bidding is for the benefit of the lot owner, and the city has no power to waive or ignore it. *Fineran v. Bitulithic Co. (Ky.)* 76 S. W. 415. The object of the requirement can only be effectuated by actual competition, or at least by the possibility thereof. A device by which such bidding is prevented is therefore inimical to the law. It is said that the cost of the proposed pavement is substantially the same as that of other similar ones, and that the board has reserved the right to reject any or all bids; but the concession that no imposition will be practiced in a particular instance does not allow of an exception in applying the law. No amount of casuistry

can obscure the palpable fact that competitive bidding for an article which is controlled by one person is a farce. "No one can compete on equal terms with a man who controls the sale of the thing needed." *State v. City of Elizabeth*, 35 N. J. Law, 354. There are matters of common observation which are so patent that courts cannot add or detract from the force of their simplest statement. The self-evident proposition above stated has been applied to facts calling for such application, in the following cited cases: *Nicolson v. Painter*, 35 Cal. 699; *State v. City of Elizabeth*, supra; *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. Rep. 236; *Smith v. Syracuse Co.*, 161 N. Y. 484, 55 N. E. 1077; *Burgess v. City of Jefferson*, 21 La. Ann. 143; *Fineran v. Bitulithic Co.*, supra; *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205; *Barber Co. v. Wilcox (Sup.)* 86 N. Y. Supp. 69.

A number of cases are cited in which results similar to that for which appellees contend were announced. The facts considered vary, and the processes followed are instructive. The case entitled to most consideration among them is, no doubt, that of *Hobart v. City of Detroit*, 17 Mich. 245, 97 Am. Dec. 185, in which Judge Cooley gave the weight of his name to the prevailing opinion; a vigorous dissenting opinion being, however, handed down by Judge Campbell. An injunction was here sought against the collection of an assessment after the improvement had been constructed, and an element of estoppel may have, unconsciously influenced the result. The Michigan statute considered bore little analogy to section 95 of the act of March 6, 1905. It required that there should be competitive bidding for all supplies purchased by the city when they exceeded \$200 in value, and was general in terms. The distinction between the power of a city to purchase patented articles for its own use and its power to charge the real estate of abutting owners for the cost of street improvements was not considered. Had it been, it is fair to presume that the result would have been different, since the entire course of reasoning is applicable only to the former class of facts. The argument of inconvenience, as used in connection with the purchase of articles by a city for its own use, has no application when the sole question is whether a specific statute, under which street improvements are authorized, has been complied with. The further statement that the fact that an article is patented does not prevent others than the patentee from bidding upon it would, if given any effect, result in wholly obscuring the difference between a substantial and a formal compliance with the law. *Fineran v. Bitulithic Co.*, supra. The bidder who takes chances of defeating an action for infringement, or of buying the right to use a patented article from his unsuccessful competitors in bidding, must include in his bid

a sufficient amount to meet the excessive expense thereby caused, which is not a proper item of charge against any lot owner.

The difference between contracts made by a city for the purchase of patented articles for its own use and the use of such articles under a statute requiring competition as one step in charging an abutting landowner with the cost of a street improvement is well defined and frequently expressed in *Kilvington v. City of Superior*, 83 Wis. 222, 53 N. W. 487, 18 L. R. A. 45. *Dean v. Charlton*, supra, was distinguished upon this ground. The question then before the court involved the power of the city to construct a cremating furnace to consume garbage. Reference was made to the provision in the Wisconsin statute permitting the lot owner to construct the improvement in front of his own property; but whether he may construct, or can only pay for the construction, does not affect his right to demand a strict compliance with the statute. In *Baird v. Mayor*, 96 N. Y. 576, the question was as to the purchase by a city of articles for its own use (water meters). In *Silsby v. City of Allentown* (Pa.) 26 Atl. 646, it was as to the purchase of a fire engine. In *Burgess v. City of Jefferson*, supra, the distinction was noted. Those decisions, in which the facts are thus differentiated from those under examination, are not in point. The Michigan case proceeding upon the same theory is not in point, although the facts before the court justified the application of a different doctrine. In *Rhodes v. Board of Public Works* (Colo. App.) 49 Pac. 430, the contention was that the specifications for a street improvement called for the use of an article (Trinidad Lake asphaltum) which was monopolized, and for which there could therefore be no competitive bidding. The court states in the opinion that there is no evidence of such monopoly—nothing but counsel's word for it. In *Mayor v. Bonnell* (N. J. Err. & App.) 81 Atl. 408, it is also stated that use evidence does not show that the article specified was monopolized. *State v. Mayor* (N. J. Sup.) 49 Atl. 586, follows *Mayor v. Bonnell*, supra. In *Field v. Barber* (C. C.) 117 Fed. 925, 929, it is said that the evidence fails to show any monopoly. When it was determined in these cases that there was no monopoly, nothing further was presented. Lawsuits are decided upon the facts out of which they arise. The authority of a judicial decision does not extend beyond those facts and the principles of law which are applied to them. Discussion of the effect that the existence of a monopoly might have, if it were established, after an announcement that it was not established, are outside the case, and are not authoritative. There are frequent examples of such judicial garrulity found in the books, usually demonstrating the lack of preparation by the author to discuss the subject. In *Yarnold v. City*, 15 Kan. 126, the writer of the opinion

refers to a conflict between the courts of Michigan and Wisconsin, and adds that he is inclined to favor the Michigan, rather than the Wisconsin, view. This is followed by a decision expressly placed upon the fact that the Kansas statute did not contain any provision that the contract should be let to the lowest bidder. This was also the ground of the decision in *Baltimore v. Raymo* (Md.) 13 Atl. 383.

Section 95, supra, must be considered in connection with other provisions of the act. In section 107 it is provided: "That if at any time between the date of the adoption of the resolution and the day appointed for modifying, confirming, or rescinding said resolution, there shall have been filed in the office of said board of public works a petition or petitions in writing, of a majority in number of resident freeholders upon said street or alley sought to be improved, requesting that said street or alley be paved with any certain kind of the accepted kinds of modern city pavement, then the board of public works shall not have the power or authority to pave said street or alley or any part thereof with another kind of material unless the same is specifically ordered by an ordinance passed by a two-thirds vote of the council of said city. If such original resolution be confirmed or modified, it shall be final and conclusive, on all persons unless within 10 days thereafter, a majority of the resident freeholders upon such street or alley, or proposed improvement, remonstrate against such improvement. In case of such remonstrance the improvement shall not be made unless specifically ordered by an ordinance, within 60 days thereafter, passed by a two-thirds vote of the council and approved by the mayor." Acts 1905, p. 287, c. 129. The provision for competitive bidding inures to the benefit of all persons liable to assessment, whether resident upon the street to be improved or not. The appellant has not averred his nonresidence, but in construing the statute we take cognizance of the fact that all abutting owners do not reside upon the property so owned by them. If the act should be so construed as that the right of nonresident landowners to the benefit of the provision for competitive bidding may be waived or lost through the action of the residents upon the street to be improved, the validity of such provision would be a subject for examination, but the substitution authorized is only of the "accepted kinds of modern city pavement," a term which has reference to such pavements as may be fixed upon in the first instance. Having no power to select an article in the first instance for the furnishing of which there is no room for competition, the board does not acquire such power from the act of resident freeholders in petitioning for a modification.

It remains to consider the effect of the proposition made by the patentees relative to

the use of the patented article by any contractor who is equipped or shall equip himself with the necessary appliances for laying the patented pavement. In *Hastings v. Columbus*, 42 Ohio St. 585, suit was brought by the contractors to recover the amount of the assessment for laying a patent asphalt pavement. The court said, in answer to the objection that the improvement required a species of pavement that was patented and for the making of which there could therefore be no competition: "But in each case, before there was any letting, the city had acquired the right to secure at a reasonable cost the right of such patent with regard to this improvement for any successful bidder for the work, and the bidders were placed in this respect by the city on substantially even terms. We think the objection untenable." The character of the agreement made by the city is not clearly stated. We fully agree with the Ohio court that the objection would be untenable if the bidders were placed upon even terms, and given opportunity to purchase materials at actual value, and this, whether the city, independent of the improvement and contract, purchased the right to use the process or the same was relinquished voluntarily by the patentee. If the patentee had filed with the board of public works a license for the construction of the pavement upon Northwestern avenue by whoever might be awarded the contract for the construction thereof, the article would, for the purpose of such improvement, cease to be monopolized. The proposition made does not amount to such license or waiver. Warren Bros. Company propose to furnish to any contractor to whom a contract is awarded to pave a street or streets in the city of Indianapolis with Warren's bitulithic pavement during the year 1905, and who shall enter into such contract with such sureties as may be provided by law and by said city, who is equipped or shall equip himself with the necessary appliances purchasable in the open market for preparing and laying such pavement, all the necessary compounds to prepare and lay such pavement, according to standard specifications for such work, for the sum of 90 cents per square yard for such pavement, to have ——— inch foundation and a two-inch top, and said compounds to be as follows: "Warren's No. 1 (Puritan brand) semi-liquid cement; Warren's No. 24 (Puritan brand) bituminous cement for wearing surface; Warren's quick-drying bituminous flush coat composition. In addition to the above we hereby propose and agree to allow the contractor to use our patented processes for laying our pavement, and to furnish an expert who will advise in the laying of the pavement without extra charge."

Competitive bidding is a practical affair. Having power to discriminate among bidders, the patentee has power to determine the successful bidder in every letting. The

board in effect lets the contract by installments. One part, amounting to 90 cents a square yard, is let to the patentee, without any competition, advertisement, or other safeguard. The residue of the contract is to be let to the lowest and best bidder, he being compelled to buy at 90 cents a square yard that which the patentee may sell to another bidder at a less price, and to take from the patentee, not only material prepared by it, without choice of cheaper or better equivalent material, but a superintendent whose power to make any contract unprofitable may be fairly taken for granted, in addition to which the patentee has provided only for the transfer of such privilege as it has stipulated to those who are equipped or who will equip themselves with the necessary appliances for preparing and laying said pavement, leaving to the patentee the function of prescribing the outfit required. The proposition does not waive any right possessed by the patentee, whose grasp upon the entire contract and construction is carefully retained. The effect of such a stipulation and specification is to make all bidders parties to a contract made through a third person, by which the price of bitumen compositions used in the improvement is maintained at 90 cents per square yard, without competition. It would be interesting to follow the process by which one, respecting the integrity of an oath, could satisfy himself to make the affidavit required in section 95, *supra*, after having procured a contract by and through such a combination. Of course, the city is proposing to make itself a party to this evasion; but the city has no power to waive a statute, and as against the lot owner it has no power to waive or dispense with anything. The specifications call for a concrete foundation upon which a wearing surface of carefully selected crushed stone mixed with bitumen shall be laid; the crushed stone, after being heated to a temperature of 250 degrees, to be passed through screens, the size of the openings in which are graded from an inch to one-tenth of an inch in diameter, the several sizes of stone being separated after screening and placed in different compartments, from which they are to be drawn in such proportion as has been previously determined, to give "the most dense mixture of mineral aggregate, and one having inherent stability." This mixture of stone is then to be reheated and coated with Warren's bituminous cement, and hauled on the street to be paved, spread on the prepared foundation, and compressed with steam rollers to a thickness of two inches, after which a surface coating of cement is applied to fill any unevenness or honeycomb which may appear, making the density so nearly as possible that of solid stone. An additional coating of cement into which stone chips are rolled is then spread over the surface of the pavement.

It goes without saying that the municipalities of the state ought not to be deprived by the courts of the power to avail themselves of this very admirable system of street pavement, and that the manufacturers of Warren's bituminous cement ought not to be favored, to the exclusion of other manufacturers of bituminous cement. When the municipality advertises for bids to construct a crushed stone pavement of the general character indicated, leaving the contractor free to buy all the material, bituminous cement as well as stone, in the general market, it will be relieved from the suspicion of favoritism, and exercise ordinary business sagacity. In *Martindale v. Palmer*, 52 Ind. 411, the petition, title of ordinance, notice to contractors, and contract, were for "wooden block pavement." The body of the ordinance described it as "Nicholson or wooden block pavement." The work was done with wooden block pavement, "Ballard's process." The court said: "They could not authorize the construction of a stone pavement, and then put in a wooden pavement; but, when they authorized the construction of a wooden block pavement, the difference between Nicholson and Ballard patents are not material." In *Perine C. & P. C. Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533, the specifications required the paving to be done with bituminous rock, prepared for use by either steaming, hot air, or other processes; but "in no case must the material be reduced or melted by any process which would burn it." It was contended that all known processes for melting the rock were covered by patent, and that therefore there could have been competition among the bidders. The court held that the specifications did not confine bidders to one patented process, nor exclude processes not patented, and that the objection was not, therefore, well taken.

If there is no other bituminous cement or preparation capable of filling the requirements of the standard which may be fixed, then the patentees of the Warren brand will be commercially protected. If there is, or may hereafter be, a preparation, patented or otherwise, of equivalent value, those who possess it ought to be admitted to compete on equal terms, and those who pay for the improvements will not be damaged, and are likely to be greatly advantaged, both as to price and quality of work done, by the free competition thus induced. Under such circumstances the patentees of the Warren cement will have no monopoly, except such as has been legally conferred upon them by the government. Where their process is by the specifications and contract alone to be used, their monopoly is made complete, not by their letters patent, but by the act of the municipality. Section 95, *supra*, confers upon the board ample power to guard against defects and deficiencies not ascertainable at the time of the acceptance of the work.

These considerations require that the judgment of the trial court be reversed.

Judgment is reversed, and the cause remanded.

BLACK and ROBINSON, JJ. (concurring). Being of the opinion that, upon all the facts shown by the complaint and the answer, a perpetual injunction should be awarded, we concur in the reversal of the judgment.

MYERS, P. J., dissents.

WILEY, C. J. (dissenting). I am unable to assent to the doctrine that, because the process for paving streets adopted by the board of public works of the city of Indianapolis under the facts in this particular case is covered by a patent right controlled by a single firm or corporation, it must be held on account thereof that it stifles and forbids competition, and hence renders the contract for such improvement void. The facts relied upon, as they appear in the complaint and answer, are so fully stated in the majority opinion that it is unnecessary for me to restate them here. The single question presented by the record is: Do the facts pleaded preclude competition in bidding for the proposed improvement? If they do, then the trial court was in error in overruling the demurrer to the answer; and, if not, the ruling was correct. The question for decision is one of first impression in this jurisdiction, while in other jurisdictions the authorities are in conflict. The decision here should therefore rest upon principle and sound reason.

The board of public works of the city of Indianapolis is clothed with legislative authority to improve and pave streets, and it derives all of its power from that source. Beyond that authority it cannot lawfully go. Within that authority it is the sole arbiter. It is required to conform to the mode prescribed by statute conferring such power. This serves only as a limitation upon the exercise of the power. When the board of public works, which is the authorized agent of the city, proceeds in the way prescribed by statute, it may lawfully use the whole power conferred upon it. The limitation is not upon the power, but upon the exercise of it. So far as I know the universal rule for the improvement of streets is to provide for paying the cost thereof by assessments on the abutting lots. Without at this time quoting the statute in detail, it is made imperative that proposals for bids upon adopted specifications must be advertised for, and that the contract for the improvement shall be let to the lowest and best bidder. There is no mandatory provision of the statute which requires the board to let the contract to the lowest and best bidder. The board is to be the sole judge as to whether any bid or bids is or are reasonable, and, if in its judgment

the bids are unreasonable, all of them may be rejected, and they cannot be required to enter into a contract. If the rule for which appellant contends must prevail and become the law of the land, municipal and other public corporations must be deprived of the use of articles manufactured under patent rights, or patent rights themselves, where such articles and rights are owned and controlled by a single person or corporation, no difference how beneficial they may be to the public. Supposable instances of this character are many. The process of improving a street, as in this case, may be controlled by a patent. It might cost less and be superior to any other process, yet a municipal corporation could not adopt and use it, because it was patented. Its use would be greatly to the benefit of the abutting property owners, who are to pay for it, and to the public generally in using it; but it is barred because it is a patent. It is a matter of common knowledge that not many years ago an electric fire alarm was patented, which was practical, useful, and economical, and came into general use in cities. If the rule for which appellant contends had prevailed, this useful device could not have been adopted. Again, the same is true of a patent for adjusting harness to horses used for drawing fire engines. Again, if a public highway is to be improved by grading and graveling, and the only available gravel bed is owned and controlled by one person, and it is known that it can be had only at a fixed price per yard, yet the improvement cannot be made, however necessary, because there can be no competition in bidding. A municipal corporation finds it necessary to erect a public building, and decides, as it has the power to decide, that its walls should be constructed of a particular quality of stone or brick. Such particular stone could only be procured from one quarry, or such brick from one kiln, at known and fixed prices. Would it be within reason to hold that such public enterprise would have to be abandoned, because there could be no competition in bids for the stone or brick? If so, reason would have to yield to folly, and principle give way to unfounded technicality. In either event the public would suffer because of the intervention of technical theory over the application of just principle and good reason. The law is not founded upon uncertain and changeable technicalities, that are shifting with the varying moods of men, but upon principle and reason, which abide and are stable.

In the improvement of a public street there are elements of labor, skill, etc., which enter into it, other than the material with which it is finished and surfaced. It is conceded in this case that any bidder who may procure the contract for the improvement of the street in question can obtain from the patentee the right to use the patented process at a fixed price per square yard. This opens

the door to all bidders, and they stand upon an equality in that regard. The work of grading the street and preparing it for the patented process, as well as all incidental work, is open to all bidders. The work, labor, and skill required to place the patented process upon the prepared grade is also open to competition. Every step in the progress of the work, from its inception to its finish, is open to competitive bidders, except the patented process, controlled by the Warren Bros. Company, and the right to use that process and the material of which it is composed is also open alike to all. No presumption can be indulged, because the board of public works decided, upon petition of a majority in number of the abutting property owners, to improve the street with Warren's patent bitulithic pavement, and that that particular patent is owned and controlled by the Warren Bros. Company, which said company agreed to furnish to any and all bidders "the necessary compounds to prepare and lay such pavement" for 90 cents per square yard, that there can be no competitive bidding for such work. The right to use "the necessary compounds to prepare and lay such pavement" at a fixed price is not prohibitive of competitive bidding, except as to the cost of the "compounds." One bidder, being better equipped to lay the pavement than another, might well be able to perform the work cheaper than another competitor; or one bidder, who was no better equipped than another, might be willing to do the work cheaper, and still do it at a profit. The mere cost of the material cannot be the criterion by which to determine the question of competition. The standard cements used in the construction of sidewalks, asphalt pavements, etc., have a fixed commercial value, that can be procured alike by all purchasers. Yet, because of such fact, competition is not destroyed, where such products are used in public works and enterprises. The elements of labor, conditions, facilities, etc., must all be considered, for they all enter into the question under consideration. I am firmly convinced that where a street is to be improved, and the proper authority, as in this case, decides, upon the petition of the majority in number of the abutting property owners, the kind of improvement to be made, though the improvement provides for a pavement which can only be constructed under a patented process, and the purchase of "the necessary compounds to prepare and lay such pavement" is open alike to any and all bidders, that a valid contract may be entered into for the construction of such pavement, and that the essential element of competitive bids is not destroyed by reason of the patented process.

With these observations I will proceed to a brief review of the statute and authorities. By a resolution of the board of public works it was ordered that a specified portion of

Northwestern avenue should be improved by constructing a brick pavement laid upon a concrete foundation. The statutory notices were given, and before the time fixed for modifying, confirming, or rescinding the resolution a petition was filed with the board, signed by a majority in number of the resident freeholders upon such street, requesting that the street be paved with Warren's patent bitulithic pavement. The board granted the petition and modified the original resolution in that regard. There is warrant in the statute for such proceedings. A part of section 107 of the act approved March 6, 1905, reads as follows: "Provided, however, that if at any time between the date of the adoption of the resolution and the day appointed for modifying, confirming, or rescinding said resolution, there shall have been filed in the office of the said board of public works a petition or petitions in writing, of a majority in number of resident freeholders upon such street or alley sought to be improved, requesting that said street or alley be paved with any certain kind of the accepted kinds of modern city pavement, then the board of public works shall not have the power or authority to pave said street or alley, or any part thereof, with another kind of material, unless the same is specifically ordered by an ordinance passed by a two-thirds vote of the council of said city. If such original resolution be confirmed or modified, it shall be final and conclusive on all persons, unless, within 10 days thereafter, a majority of the resident freeholders upon such street or alley, or proposed improvement, remonstrate against such improvement." The expression "with any certain kind of the accepted kinds of modern city pavement," as it appears in the statute, does not in terms or by implication exclude patented pavements. We must presume that the Legislature used the expression advisedly, and, if it had been intended to exclude the use of a patented pavement, it would so have expressed such intention.

It is averred in the answer that the pavement ordered by the modification of the original resolution is an accepted kind of modern city pavement. This tenders an issuable fact, and the truth of that fact is admitted by the demurrer. The statute just quoted injects into this case an important element that is not found in any of the decided cases where the point in issue has been involved. Where a majority of the resident freeholders on the street file a petition asking that the improvement be made by putting down a specified particular kind of "modern city pavement," the board is deprived of all power or authority to make the improvement with any other kind of a pavement, except it is ordered to do so by an ordinance passed by a two-thirds vote of the city council. The council can override and strike down the will of the property owners, but the board is powerless to do so. In the absence of any show-

ing to the contrary, it must be presumed that no such ordinance has been passed.

Another element brought into this case by the statute, which was not present in any of the decided cases, is that, when the original resolution shall have been confirmed or modified, "it shall be final and conclusive on all persons, unless within 10 days thereafter a majority of the resident freeholders on such street * * * remonstrate against such improvement." The statute confers upon the majority of the resident lot owners the right to select the kind of a pavement to be used, and for which their property is to be assessed for payment. When they have exercised that right, as provided by statute, the board of public works is shorn of its power to order any other kind of an improvement. Having the right to select any particular kind of modern city pavement, I am unable to see what right courts have to read into the statute a provision which would take away the right given by the Legislature, simply because the pavement selected by them happened to be a patented pavement. The Legislature certainly had the right to let the resident freeholders have a patented pavement if they wanted it, if they should bring themselves within the provision of the statute. Certain it is that there is nothing in the statute which even remotely or impliedly excludes such pavement. All that is required by the statute is that, after the resident freeholders have made their selection, the board must, under proper notice, invite bids. If there is more than one bidder, then there is competition, except in the case of fraud or collusion, and the statute provides against that. If there is but one bidder, it may be presumed that he has been induced to bid with the fact in view that, if his bid is exorbitant or unreasonable, the board would reject it.

The statute safeguards the property owners and municipality in various ways. Thus it is provided that no contract shall be let which shall be more than 10 per cent. in excess of the estimate of the engineer, nor where the total cost of the improvement shall exceed 50 per cent. of the aggregate value of the property to be assessed; also that the board may, and in this case does, reserve the right to reject any and all bids. The statute also provides that each bidder shall file with his bid an affidavit of noncollusion. Again, it is provided that "such board shall, if a satisfactory bid be received, let such contract to the lowest and best bidder." See sections 95, 107, Acts 1905. It will be presumed that public officers will do their duty, and in a case of this character it will be presumed that the board would not let the contract, except to the lowest and best bidder, and in the event that the bid was satisfactory. With all these limitations and safeguards provided by statute, and the statute neither expressly nor impliedly excluding

patented pavements, I can find no warrant for the court, as matter of interpretation, to read into the statute an additional provision to the effect that a street shall not be improved by a patented pavement, even though a majority of the resident freeholders petition for it, and such pavement is recognized and considered to be a modern city pavement. The statute further provides that upon confirmation of the resolution, or upon its modification, "it shall be final and conclusive upon all persons, unless, within 10 days a majority of the resident freeholders * * * remonstrate against such pavement." In this case there was no remonstrance. The action of the board being final, the query suggests itself: Has not appellant slept on his rights, there being no fraud or collusion charged? I shall not pause to discuss this feature of the case, but merely say that it appeals to me with some force.

As above stated, the authorities upon the question for decision are not in accord. Of the cases supportive of appellee's contention, the best considered and reasoned one, in my judgment, is that of *Hobart v. Detroit*, 17 Mich. 248, 97 Am. Dec. 185. That case, like this, was a street paving case, and involved the right of the city to cause to be constructed a patent block pavement. Chief Justice Cooley wrote the opinion, and his reasoning is so clear and his statements so forceful that I desire to refer to it fully and quote largely from it. The charter of the city of Detroit prohibited the council from entering into any contract for any public work except to and with the lowest responsible bidder, and only after "advertised proposals and specifications therefor." A certain firm owned the patent and exclusive right to lay the Nicholson pavement. Such firm alone bid for the contract, and the contract was awarded to them. Appellant sued to enjoin the collection of the assessment against his property. In the opinion Cooley, C. J., said: "The doctrine of the complainant leads to this conclusion: That wherever, from the nature of the case, there can be no competition, the city can make no contract, however important or necessary for the interest of the city, since contracts, except by public letting, are forbidden by the express terms of the statute, and those by public letting are forbidden by an implication which is equally imperative. And if applied to this case, however much this mode of paving may exceed all others in utility, it cannot be adopted in the city of Detroit, or in any other city with the like provision in its charter, even although the proprietors of the patent might be willing to lay it on terms more advantageous to the city than those on which pavements of less value could be procured. To support this conclusion, we must import into the statute a condition which we must suppose to pervade its spirit, but which is not expressed by its words. The power

which the charter gives to the common council to cause the streets to be paved is conferred by another section in very ample terms; the sole condition imposed upon it being the public letting of the contract to the lowest bidder. The courts, I think, should be very cautious about importing new terms into a statute in order to make it express a meaning which its words do not convey, and they ought, at least, to first make sure that they are not changing the legislative intent, and giving the statute an operation that the Legislature never designed, and, perhaps, would never have assented to. * * *

But it is not, I apprehend, strictly correct to say that, because a patented invention which must be made use of is owned by one person exclusively, therefore no one else can be a bidder. Every one has a right to bid, and to take upon himself the risk of being able to procure the right to make use of the invention. Certainly the showing that Smith, Cook & Co. owned the right to put down the Nicholson pavement in the city of Detroit does not go far enough to show that they alone could bid on a contract for that purpose. If that firm held the privilege of putting down the pavement for sale at a regular price per square foot or yard, the opportunity to bid for a public contract would be as much open to public competition as for any other work requiring skilled labor. For aught we know, this was the case; and we may well take notice of the fact that it is frequently by thus selling the 'royalty' that the owners of new inventions expect to obtain their reward. The royalty acquires a sort of market value which becomes well understood; and all persons have the benefit of this market value, just as much as they would if the ownership and right to control were of such a character that monopoly would be impossible. True, the owner may at any time withdraw the royalty from sale in order to drive hard bargains; but, if he does, the public still retain a security in the power to refuse to contract with him. The theory of the complainant is that more than one bid in this case was impossible. But suppose, in point of fact, Smith, Cook & Co. had not bid at all, but several other persons, having first ascertained at what price they could obtain the royalty, had entered into a sharp competition for this contract, would it not have been demonstrated that not only was more than one bid possible, but that the very benefits the charter designed to secure by the public letting had been obtained? And, if this is so, how can it be said that the fact that a monopoly of the patent exists necessarily defeats all contracts to which the patent is essential?"

In a more recent case the Supreme Court of Michigan had before it the case of *Holmes v. Detroit*, 79 N. W. 200, 45 L. R. A. 121, 77 Am. St. Rep. 587, in which the same question in principle was involved. I quote from the

opinion as follows: "Complainant's proposition seems to be that, under the charter, no paving contract shall be let which involves the use of any material which, by reason of its exclusive production, is not subject to competition; or perhaps, more accurately, complainant's claim is that such contract cannot be made for the use of such material, except when it had been subject to competition with some other material. This would result in some serious consequences. If such is the rule, the city may be denied the right to have the pavement that it wants, because some one is willing to furnish something else, that may be thought equally good, for a less price. One or two blocks of a street may be paved with Nelsonville brick; but, when it is desired to extend the pavement, they cannot take bids and proceed with the same if some other brick can be obtained cheaper. It may be that the cheaper price is made by interested parties, at a loss, to injure a rival, or for some other ulterior purpose, or because of insolvency, or it may be untried brick, or it may happen that the competing brick is not likely to be obtainable thereafter for repairs. But this would make no difference. The city must be subjected to these dangers and inconveniences because it can obtain a lower bid. Thus, a pavement would be likely to be of a variegated pattern. This doctrine, carried out to its logical consequences, would prevent a city from doing any public work after an intelligent and well-digested plan, and the harmony and beauty of public improvements would be impaired. Whenever any article that should be the subject of a monopoly should be found to enter into a building or other improvement, the contract would be void, and payment could be enjoined by any taxpayer, if complainant's claim rests on solid ground. In this age of improvement and competition, we should not hold that municipalities are denied the most modern methods and improvements, unless it is clear that they have been prohibited. Many valuable innovations involve patents. Others are introduced through agencies, as in this case; and they are, therefore, practically controlled by one person or firm. * * * The gist of complainant's claim is that the city cannot specify the brick or other material made and controlled by one manufacturer, but must open the proposed improvements to competitors, and submit to the consequences of competition. * * * A more sensible view to take would seem to be that those charged with the making of an improvement should determine definitely what is wanted, and then advertise for bids, and let the contract to the lowest responsible bidder, leaving him to procure the material required as best he may. * * * Counsel seeks to draw the line at patented articles, but we see no distinction between brick made by the Nelsonville Company under patents, and brick made by the

same company but not under patents. * * * This rule applied to patented articles should extend to any desirable article, although, from the course of business, its manufacturers may have the exclusive sale of it. * * * We think the law is complied with, in the absence of actual fraud or corruption, when specifications are submitted to competitive bidding, although some article is specified which, by reason of a patent or circumstances, is in the hands or under the control of a single dealer."

In *Swift v. City of St. Louis* (Mo. Sup.) 79 S. W. 172, the right to contract for paving a street with Warren's Puritan brand of cement (being same here involved) was under consideration, and it was held that when, at the time a street was proposed to be paved with bituminous macadam, there was only one manufacturer who had succeeded in making a uniform coal tar cement, which was available and necessary to be used to bind the macadam, an ordinance specifying that the cement to be used should be that made by such manufacturer was not void on the ground that it thereby prevented competition and denied taxpayers the right to have the work done by the lowest bidder, as provided by the city charter. The opinion is well considered, instructive, and convincing. In *Asphalt Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. Rep. 530, it was held that the city of St. Louis was not prohibited from letting a contract to pave a street with material covered by letters patent. In that case it was further held that to rule otherwise would be to deprive the city of the right to enjoy the benefits of modern invention. The same question was again before the court in the case of *Verdin v. City of St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52, and the holding in the *Hunt* Case was reaffirmed, and the doctrine as to a patented material was even extended to a material whereof the owner had a monopoly by reason of his exclusive ownership of such material.

A case possibly most directly in point is that of *Hastings v. Columbus*, 42 Ohio St. 585. There the city let a contract to pave a street with a patented pavement. It was urged that the contractors owned the patent, and for that reason there could be no competition in bidding, and hence no valid assessment could be made against abutting lots. Before the contract was let, however, the city had acquired the right to secure at a reasonable cost the right of such patent, with respect to the improvement, for any successful bidder for the work. It was held that under such facts bidders were placed by the city in this respect substantially upon equal terms, and that the objections urged to the contract were not tenable. The only difference between that case and this is that there the city secured the right to all bidders to use the patent at a reasonable cost, while here

the patentees enter into an agreement with the city that they will furnish the patented product to any successful bidder at a fixed price who is equipped, or may become equipped, to use it, and to furnish an expert, free of charge, to instruct the successful bidder how to use it.

Field v. Barber Asphalt Co. (C. C.) 117 Fed. 925, is in point. There the city of Westport, Mo., let a contract to pave a street and the contract called for "Lake Trinidad asphalt." In the course of the opinion Mr. Justice McPherson said: "There is evidence tending to show that good asphalt, and quite as good as Trinidad, can be obtained from Bermuda, Mexico, and from places in the United States. On such facts it is contended that the city had no right to limit the contract to Trinidad, and that in doing so the commerce clause of the Constitution was violated, and that the federal anti-trust statutes were likewise violated; and this argument is emphasized by complainant's counsel, because, as he contends, the defendant has a monopoly of Trinidad asphalt. The evidence does not show this to be so. But, if it have not the monopoly, I do not believe the point is well taken. An individual certainly has the right, in the erection of an improvement, to get that which he believes the best, and that which he prefers, regardless of the reason; and he should not defeat a recovery by showing that in fact something else was as good or better, or that the vendor had a monopoly. And why should not the same holding be made as to a city? Can it be so that because the city concludes, although wrongly, that Trinidad is the best asphalt, that its contract must be canceled on a showing that the Trinidad is not the best, and that it is the subject of a monopoly? Why limit the evidence to other asphalts? Why not receive evidence as to brick or other paving? I think this matter was in the province of the city to determine, and that the courts have no right to review it."

In *Mayor, etc., v. Bonnell*, 57 N. J. Law, 424, 31 Atl. 408, it was held that where the proper municipal board advertises in good faith for proposals for paving streets, and specifies the employment of the material deemed to be for the best interests of the municipality, the city is not debarred by any rule of law from contracting for what it wants merely because the desired material is the subject of private ownership or the product of exclusive manufacture. To the same effect is the case of *State v. Mayor, etc.* (N. J. Sup.) 49 Atl. 587. The pavement there ordered was to be of the standard of Trinidad Lake asphalt. The court said: "If it appears that the action of the city authorities was taken in an honest belief that to award the contract as they did was for the best interests of the public, it will not be disturbed, even though the court, on a review of the same facts, may think that another con-

clusion would have been justified. The law places the obligation upon the municipal authorities, and not upon the court; and, where there are facts which show their action to be consistent with an honest judgment, the court should not interfere. *Van Reipen v. City of Jersey City*, 58 N. J. Law, 262, 288, 33 Atl. 740; *Findley v. City of Pittsburgh*, 82 Pa. 351; *Ferguson v. Board*, 60 N. J. Law, 404, 38 Atl. 676. In *Oakley v. Atlantic City* (N. J. Sup.) 44 Atl. 651, Mr. Justice Lippincott stated the rule in this wise: 'In the absence of fraud or palpable abuse of discretion on the part of the municipal authorities in the exercise of the power granted by the Legislature, the only question for judicial cognizance is whether there has been any violation of legal principles or neglect of prescribed formalities in entering into the engagement which is the subject of the controversy.' * * * There is nothing in the record to justify the finding that the action of the mayor and city council of Patterson in this case was not taken in good faith and upon the exercise of an honest judgment, with all necessary facts before them."

The Supreme Court of Tennessee, in the case of *Beazley v. Kennedy*, 52 S. W. 791, held that the board of public works and affairs of a municipality incorporated under the act of 1883, providing that they shall have exclusive control of the fire department and exclusive power to make all expenditures therefor, but that when a contract involves more than \$50 it shall be let to the lowest responsible bidder, is the judge of the quality of desired supplies, and hence, when a fire house was needed, such board may in good faith limit the bidding to two designated brands.

The later New York cases, it seems to me, are in substantial harmony with those I have cited. See *Baird v. Mayor, etc.*, 96 N. Y. 567, 582, 583; *In re Dugro*, 50 N. Y. 513; *Harlem Gas Co. v. Mayor, etc.*, 33 N. Y. 309; *People, etc., v. Van Nort*, 64 Barb. 206; *People, etc., v. Flagg*, 17 N. Y. 584. In *Dolan v. Mayor*, reported in the daily cases in 4 Abb. Prac. (N. S.) 397, it was held in the Special Term of the Supreme Court that a patented pavement could not be used. On appeal to the General Term, the decision being reported in the New York Daily Transcript of February 8, 1869, the decision of the Special Term was reversed; the court holding, upon the authority of the *Dugro Case*, supra, that a patented pavement could be used. The cause was appealed to the Court of Appeals, and was affirmed per curiam, without an opinion. *Dolan v. Mayor, etc.*, 67 N. Y. 609.

The cases cited by *Ketcham & Wilson* as amici curiæ, *Rose v. Low, Mayor* (Sup.) 83 N. Y. Supp. 598, and *Barker, etc., Co. v. Wilcox* (Sup.) 86 N. Y. Supp. 69, arose upon a special provision contained in the charter of the city of New York, which prohibited the

use of a patented article, unless under conditions that permitted competition. Additional cases cited—*Larned v. City of Syracuse* (Sup.) 44 N. Y. Supp. 857, and *Smith v. Syracuse, etc., Co.*, 161 N. Y. 484, 55 N. E. 1077—do not involve the right to cause improvements to be made from a patented article, or patented products, but only go to the point that an article which is a monopoly cannot be used where competition is required. A careful reading of these cases fails to convince me that they are in point upon the question involved in this case.

The case of *Dean v. Charlton*, 23 Wis. 590, 99 Am. Dec. 205, so strongly relied upon by appellant, is shorn of much of its force by the later decision of that court in the case of *Kilvington v. Superior* (Wis.) 53 N. W. 487, 18 L. R. A. 45. There the village of Superior contracted for the erection of a crematory to consume garbage, etc., and it was held that the fact that the mode of building the crematory was patented would not make the contract for its construction void, when the contract for performing the work and furnishing the materials is let to the lowest bidder, with the understanding that the patentee would allow the use of his patent and superintend its construction in consideration of a certain specified sum, to be paid to him by whoever secured the contract. That case is in principle exactly like this, and hence supportive of appellee's contention. I quote from the opinion in that case the following: "In view of the legislation which followed *Dean v. Charlton*, and the fact that it was decided by a divided court, and the general tenor of subsequent decisions, and the further fact that patented methods and processes now enter so largely into various classes and kinds of public work, we are not disposed to extend the rule of that case beyond the particular point there decided. In *Hobart v. Detroit*, 17 Mich. 246, 97 Am. Dec. 185, and *Motz v. Detroit*, 18 Mich. 515, decided at about the same time, a contrary conclusion was reached; and in *Nicolson Pav. Co. v. Painter*, 35 Cal. 699, and *Burgess v. Jefferson*, 21 La. Ann. 143, the rule of the majority of the court in *Dean v. Charlton* was sustained. Since then, in *Re Dugro*, 50 N. Y. 513, the question has been decided in conformity with *Hobart v. Detroit*, supra, and other like cases, and in *Yarnold v. Lawrence*, 15 Kan. 129, *Brewer, J.*, notices the diversity of judicial opinion on the question, and is inclined to favor the views of the courts of Michigan and New York. *Baird v. New York*, 96 N. Y. 567. In the present case there was a definite, well-settled price for the patent and specifications, at which it was held and offered to the city and all contractors, which would limit the recovery of the patentee, so that in fact there was free competition for the work and materials and all else except the patent. The city had the benefit of all the competition of which the nature of the

work admitted; and in such cases, where the entire work is done at the general expense of the city, the statute ought not to be so construed as to exclude the city from availing itself of desirable patented works or improvements, as to which there is but one price, and for which there can, in the nature of the case, be no competition, and when, for performing the work and furnishing materials, the advantage of competition is secured."

The California, Louisiana, and early Wisconsin cases, as they appear to me, are based upon a consideration or ground that does not exist here. And, further than this, the Supreme Court of California has, it seems to me, receded from its earlier holding in the more recent case of *Perine, etc., Co. v. Quackenbush*, 104 Cal. 684, 38 Pac. 533. I make the following quotation from that case, to show the force of the opinion, to the end that it may be apparent that the judicial tribunal of last resort of California is now in harmony with the views herein expressed: "*Appellant relies upon Pavement Co. v. Painter*, 35 Cal. 699. That case does not sustain appellant, though some expressions used in the opinion give color to his claim. By an act approved April 2, 1866 (St. 1865-66, p. 720, c. 539), it was provided that, whenever a majority of the owners in frontage should petition the board of supervisors of the city and county of San Francisco for the construction of the Nicholson pavement, they should order it to be done. In that case the owners did not so petition, but nevertheless the board ordered the Nicholson pavement to be used, and it was held that their proceedings were void. *Sanderson, J.*, said, in the course of the opinion, in substance, that where there was to be but one bidder, and where the owners are prohibited by heavy penalties from doing the work, to advertise for sealed proposals, and open, examine, and declare them, 'would be to play as broad a farce as was ever enacted behind the footlights.' But elsewhere in the same opinion the same learned justice said: 'It is true that the third section (St. 1862, p. 391, c. 298), which confers the power to pave, does not restrict the board to any kind of pavement, and if the question turned exclusively upon that section the board would have the power to contract at its election for any kind in use.' As no act, such as the Nicholson pavement act, restricts the powers of the board to order the bituminous rock pavement, we may adopt the language of *Sanderson, J.*, last above quoted, as applicable to this case, and as correctly declaring the law. Besides, in this case the specifications did not confine bidders to one patented process, nor exclude processes not patented, nor were the owners excluded from using the patented processes, but had the liberty to use them upon payment of a royalty of \$1 per ton of the rock treated. Appellant's contention would effect-

ually exclude all methods of paving which were patented, even though such method, because of its superiority, or even because of its cheapness, would be specially advantageous to the owners of lots liable for the expense of paving, as well as the municipality charged with its maintenance."

The Kentucky case (*Fineran v. Central, etc., Paving Co.*, 76 S. W. 415) relied upon by appellant, is not of controlling influence, because the facts upon which the decision is based are so vitally different from those at bar. There the ordinance required the council to accept the bid of the lowest and best bidder. Here the board of public works has the right to reject any and all bids. The facts in that case also show that no one but the appellee, who owned and controlled the patent, could obtain the right to lay the pavement or make a bona fide bid for the construction of the street with the material in question, and the council knew such to be the fact. Here it is admitted that any one who desired to bid for the work under the contemplation had a right to secure from the patentee the necessary materials, etc., with which to construct the pavement.

I do not deem it important to review the other authorities which have been cited. After a careful consideration of the question

involved, and the authorities pro and con, I have reached the conclusion that the great weight of authority and the best-considered opinions abundantly support the contention of appellees. A patent right or a commercial product manufactured under a patent right does not constitute an unlawful monopoly. Such right is given by the laws of the United States as reward for inventive genius, and for the benefit of the public. Personally, I do not know anything about the merits or demerits of the particular kind of pavement which the board of public works of the city of Indianapolis has ordered constructed in this case, but I do know that the public as well as the individual is entitled to the best that can be procured within reasonable restrictions, and, should it transpire that this particular kind of pavement is the best in the market and that it can be constructed for or within a reasonable range of other modern pavements, then the courts ought not to strain the law to prevent its use, especially when a majority of the resident freeholders have petitioned for it. These considerations lead me to the conclusion that appellee's answer was good as against a demurrer, and that the ruling of the trial court was correct.

The judgment should be affirmed.

(36 Ind. App. 67)

PITTSBURGH, C. & ST. L. RY. CO. v. REED. (No. 5,203.)

(Appellate Court of Indiana, Division No. 1
June 27, 1905.)**1. APPEAL—PRAECIPE.**

Acts 1903, p. 340, c. 193, § 7, provides that any person desiring a transcript for appeal "may file with the clerk a written praecipe therefor," and requires the clerk to certify that the transcript furnished by him contains true and correct copies of all papers in the cause "required by the above and foregoing praecipe." *Held*, that a record on appeal which contains a written praecipe inserted immediately before the clerk's certificate, which refers, in the language of the statute, to "the above and foregoing praecipe," substantially complies with the statute, although there is no record entry of the filing of the praecipe.

2. SAME—BOND—INSUFFICIENCY.

The insufficiency of an appeal bond to perfect an appeal in term, for which purpose it is filed, does not defeat an appeal in vacation.

3. SAME—NOTICE—WAIVER.

One who fails to move to dismiss an appeal until he files his brief on the merits, and embraces his motion to dismiss in such brief, waives notice of appeal.

4. PLEADING—JOINT DEMURRER.

A demurrer "to plaintiff's complaint and to each paragraph thereof," on the ground that "said complaint does not, nor does any paragraph thereof, state facts sufficient to constitute a cause of action," is a joint demurrer, addressed to the complaint as a whole, which admits the truth of all facts therein stated, and is bad if upon consideration of the whole complaint any paragraphs thereof are sufficient to state a cause of action.

5. APPEAL—ASSIGNMENTS OF ERROR — SUFFICIENCY.

Where a demurrer to a complaint containing several paragraphs was a joint one, addressed to the complaint as a whole, the action of the court in overruling the same could not be reviewed on assignments of error which did not invite a consideration of all the complaint, but each of which specified that the court erred in overruling the demurrer to a certain one of the paragraphs of the complaint.

6. SAME—RECORD—BILL OF EXCEPTIONS.

Under Acts 1903, p. 338, c. 193, making written instructions and exceptions thereto a part of the record, but providing that the act shall not be so construed as to preclude any matter from being made a part of the record by bill of exceptions, instructions which are not incorporated in the record in accordance with the statute may nevertheless be reviewed, when made a part of the record by bill of exceptions.

7. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

Under Burns' Ann. St. 1901, § 359a, providing that in actions for personal injuries it shall not be necessary for plaintiff to allege or prove want of contributory negligence, but contributory negligence shall be matter of defense, it is presumed, in an action for injuries caused by collision with a train at a railroad crossing, that the person injured exercised ordinary care, and, if it was necessary for him to do so, stopped, looked, and listened; and the burden of establishing that he did not exercise ordinary care is on the railroad, and so continues throughout the case.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1121, 1122.]

8. SAME—INSTRUCTIONS.

Where contributory negligence, constituting a defense, appears from the evidence, it is

immaterial whether it appears from the evidence of defendant or from that of plaintiff, and an instruction requiring contributory negligence to "be proved by a preponderance of the testimony on defendant's part" is erroneous.

Appeal from Circuit Court, Jasper County; C. W. Hanley, Judge.

Action by William J. Reed, administrator, etc., against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

G. E. Ross, for appellant. Jesse E. Wilson and John W. Talbot, for appellee.

BLACK, J. In the appellee's printed brief, for the filing of which the time was extended upon the written application of the appellee, there is what purports to be a motion to dismiss the appeal, which was not filed separately, or otherwise than as a portion of the brief on the merits. The suggestions of reasons for the dismissal relate to the praecipe for the transcript on appeal, and to the clerk's certificate, and to the appeal bond.

There was substantial compliance with the provisions of the statute of March 9, 1903 (Acts 1903, pp. 338, 340, c. 193), relating to the clerk's certificate and to the praecipe, unless the fact that there is no record entry of the filing of the praecipe, which the statute says the appellant "may file with the clerk," is a material defect. A written praecipe is inserted immediately before the clerk's certificate, which expressly refers, in the language of the statute, to "the above and foregoing praecipe." We think there is substantial compliance with the statute relating to the praecipe.

What is claimed to be a defect in the appeal bond, given for the purpose of an appeal in term, is suggested as a reason for dismissal. If the bond was not sufficient for the accomplishment of the purpose to take an appeal in term, an appeal in vacation would not thereby be defeated. Having embraced his suggestions for dismissal in his brief upon the merits, the appellee must be treated as having made full appearance, and as having waived notice of the appeal. If the bond was insufficient for the stay of execution, he could take such steps below as he deemed advisable for his protection under such conditions.

The complaint contained four paragraphs, and the court overruled a demurrer thereto which in the body thereof was as follows: "The defendant demurs to the plaintiff's complaint, and to each paragraph thereof, and for cause of demurrer says said complaint does not, nor does either paragraph thereof, state facts sufficient to constitute a cause of action." This was a joint demurrer. It was not a demurrer addressed only to the several paragraphs of the complaint separately considered, but was an attack upon the complaint as a whole, and admitted the

truth of all the facts therein stated, for the purpose of testing their sufficiency. The case relating to the forms of demurrers, and distinguishing between those which are joint and those which are several, are not in all respects uniform in their holdings. In the demurrer before us there is no specification of the several paragraphs of the complaint by their numbers, and the demurrer is plainly addressed to the whole complaint, with manifest purpose to attack it as an entirety, though there is also manifest a purpose to attack each paragraph conjointly with the whole pleading; the causes of demurrer stated (an essential part of a demurrer) being directed as such against the whole pleading, as well as against the several paragraphs. The court could not sustain the demurrer, for the causes assigned therein, if upon consideration of the whole complaint any paragraphs thereof were deemed sufficient; and the action of the court in overruling the demurrer cannot be reviewed under any assignment of error which does not invite a consideration of all the complaint, and could not be reversed if any paragraph were found sufficient. Without taking space to discuss the authorities, we suggest that a comparison of the following cases will afford support to our conclusion: *Barner v. Morehead*, 22 Ind. 354; *Rennick v. Chandler*, 59 Ind. 354, 361; *Newby v. Rogers*, 40 Ind. 9; *Stone v. State ex rel.*, etc., 75 Ind. 235; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 216, 4 N. E. 582, 55 Am. Rep. 192; *Hume v. Dessar*, 29 Ind. 112; *Silvers v. Junction R. Co.*, 43 Ind. 435; *Stanford v. Davis*, 54 Ind. 45; *Rownd v. State*, 152 Ind. 39, 51 N. E. 914, 52 N. E. 393; *Maynard v. Waidlich*, 156 Ind. 562, 60 N. E. 348; *Mitchell v. Stinson*, 80 Ind. 324; *Meyer v. Bohling*, 44 Ind. 238; *Washington Tp. v. Bonney*, 45 Ind. 77; *Baker v. Groves*, 1 Ind. App. 529, 27 N. E. 640; *Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921.

There is no assignment of error in overruling the demurrer to the complaint as a whole; nor is it assigned that the complaint does not state facts sufficient to constitute a cause of action. Each of the specifications of supposed error relating to the complaint and the action of the court upon the demurrer assigns error in overruling the demurrer to a certain one of the four paragraphs of complaint, thus treating the demurrer as several and not joint. Therefore no question is presented relating to the complaint or to the ruling upon the demurrer.

The court overruled the motion of the appellant for a new trial.

An objection urged by the appellee to the consideration of the instructions to the jury, on the ground that they and the exceptions thereto are not in the record as provided for by the statute of 1903 (Acts 1903, p. 338, c. 193), is sufficiently met by reference to the closing provision of that statute, that no provision of the act shall be so construed as

to preclude any matter from being made a part of the record by bill of exceptions under the rules of practice in force at the taking effect of the statute.

The action was one for the recovery of damages for the death of the appellee's intestate negligently caused by the appellant by running a car against him at a street crossing. Among the instructions given by the court of its own motion was the following: "(2) The court instructs the jury that the plaintiff need not affirmatively prove that his decedent stopped, looked, and listened. The presumption is that he did so, and the burden of proof that he did not stop, look, and listen is on the defendant railway company, and must be proved by a preponderance of the testimony on its part." In the absence of evidence to the contrary, the presumption is that a person injured or killed by collision with a train at a railroad crossing, through the negligence of the railroad company, exercised ordinary care; and where, to do so, he would stop, look, and listen, the presumption, where there is no evidence on the subject, in an action to recover for his injury or his death, is that he stopped, looked, and listened. The care to be exercised by a traveler on a highway approaching a railroad crossing is not diminished by reason of the enactment of 1899, relating to pleading and evidence in such cases (section 359a, Burns' Ann. St. 1901); but the presumption, in the absence of evidence on the subject, is that he did exercise such requisite care, his contributory negligence being by that statute made matter of defense. The burden of establishing such defense is upon defendant, and so continues throughout the case. It must be presumed in such case that the person killed or injured was free from contributory negligence in all respects until the defense of contributory negligence has been sufficiently proved. See *Nichols v. Baltimore*, etc., R. Co., 33 Ind. App. 229, 71 N. E. 170; *Chicago*, etc., R. Co. v. *Turner*, 33 Ind. App. 264, 69 N. E. 484; *Harris v. Pittsburgh*, etc., R. Co., 32 Ind. App. 600, 70 N. E. 407; *Chicago*, etc., R. Co. v. *La Porte*, 33 Ind. App. 691, 71 N. E. 166; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Texas*, etc., R. Co. v. *Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Southern Ind. R. Co. v. Peyton*, 157 Ind. 690, 61 N. E. 722. If the contributory negligence constituting a defense appears from the evidence, it is not material whether it appears from the evidence of the defendant or that of the plaintiff. *Cleveland*, etc., R. Co. v. *Coffman*, 30 Ind. App. 462, 469, 64 N. E. 233, 66 N. E. 179; *City of Evansville v. Christy*, 29 Ind. App. 44, 63 N. E. 867; *Howard v. Indianapolis St. R. Co.*, 29 Ind. App. 514, 518, 64 N. E. 890.

An instruction to the jury in an action of this class, in such form that the jury may imply therefrom that the defense of contribu-

tory negligence on the part of the plaintiff can be established only by testimony of the defendant's witnesses, is materially erroneous. *Indianapolis St. R. Co. v. Taylor*, 158 Ind. 274, 63 N. E. 456; *Cleveland, etc., R. Co. v. Miles*, 162 Ind. 648, 656, 70 N. E. 985; *Pittsburgh, etc., R. Co. v. Lighthouse* (Ind. Sup.) 71 N. E. 218; *Pittsburg, etc., R. Co. v. Collins* (Ind. Sup.) 71 N. E. 661. The instruction above quoted, instead of referring the jury to all the evidence on the subject, directed their attention to "the preponderance of the testimony" on the part of the appellant. This was adapted to mislead, and under the authorities above cited was erroneous. Our attention has not been directed to any instruction by which the error in this one is corrected, and upon examination of the instructions given we do not observe such a correction.

Judgment reversed, with direction to grant leave, if asked, to amend the complaint.

(73 Ohio St. 538)

SCOTT et al. v. McCULLOUGH et al.

(Supreme Court of Ohio. June 27, 1905.)

SPECIAL SCHOOL DISTRICT—FORMATION FROM CENTRALIZED TERRITORY.

No part of the territory of a special school district is subject to be taken to form another special school district.

(Syllabus by the Court.)

Error to Circuit Court, Coshocton County.

Proceedings by one McCullough and others against one Scott and others, excepting to an order of the probate court establishing a special school district. A demurrer to the remonstrance was sustained, and, on error, affirmed by the circuit court, and Scott and others bring error. Reversed.

On the 7th day of November, 1904, a special school district known as the "Adams Mills Special School District," comprising parts of townships in Muskingum county and part of Virginia township in Coshocton county, was legally established by the probate court of Muskingum county. On the 11th day of April, 1905, the special district known as the "Virginia Township Special School District," comprising the whole of Virginia township in Coshocton county, including the part that was in the Adams Mill special district, was ordered and adjudged to be created by the probate court of Coshocton county. In the proceedings in the Coshocton probate court, a remonstrance, signed by substantially all the male electors residing in that part of Virginia township included in the Adams Mills special school district, was filed. A demurrer to this remonstrance was filed and sustained. The remonstrators excepted to the order of the probate court sustaining the demurrer to their remonstrance, and to its order including that part of the Adams Mill special school district in the Virginia Township special school district.

On error, the court of common pleas and the circuit court affirmed the judgment of the probate court, and error is prosecuted to this court.

John J. Adams and O. B. Hunt, for plaintiffs in error. Thomas C. Roche, F. H. Southard, and Voorhees & Voorhees, for defendants in error.

SUMMERS, J. (after stating the facts). The question to be determined is whether territory already comprised in a special school district may be included in another special school district. The civil township is the basis of our school system. Land in each township was donated by the national government to the inhabitants of such township for the use of schools. For surveying the Northwest Territory, Congress adopted a new system of surveying. This system may be briefly described as the rectangular system. The territory was surveyed into townships 6 miles square. Each township was divided into 36 sections, 1 mile square, and, under the system of numbering, section 16 was as nearly as any other in the center of the township. By section 7 of the act of 1802, which authorized the people of the eastern division of the Northwest Territory to form a Constitution and a state government, Congress proposed that section 16 in every township "shall be granted to the inhabitants of such township for the use of schools." The proposition was accepted by a resolution passed November 29, 1802, by the constitutional convention, on condition that a like donation, amounting to about $\frac{1}{36}$ of the territory, be made in those parts of the state not surveyed; and this condition was complied with by an act of Congress in 1803. And in that year the Legislature provided for the leasing of the same, in order that the proceeds arising therefrom might be applied to the support of the schools. By an act passed in 1806, the commissioners, as soon as there were 20 electors in any original surveyed township, or part or fractional township, upon application of the electors, were required to fix the time and place for the election of trustees, who were empowered to lay off the township into proper divisions for the purpose of establishing schools therein. These districts were subdistricts. Subsequently joint subdistricts and city and village districts were provided for, and our system of common schools comprised township schools and city or village schools. The township was or might be divided into districts, and the city or village district might include territory outside of the corporate limits of the city or village.

Whether or not this donation by the national government originated or made necessary a system in which the civil township is the basis, it is not necessary to determine. The civil township and the original surveyed township are not always identical. The im-

portant thing is the fact that only territory forming part of the township school district was taken in creating other districts. Special districts were established by vote of the people under legislative authority or by special legislation, and were governed by the provisions of the act under which they were created. But prior to the act of 1878 (70 Ohio Laws, p. 195) special school districts were not recognized as a part of the common school system. By that act they were included as a part of that system, but it was not until the revision of the statutes in 1880 that provision was made for the establishment of such schools. Then section 3891 provided that: "Such districts may be established as provided in chapter five of this title." Chapter 5 provided for the establishment of joint subdistricts, and that a joint subdistrict composed of parts of two or more townships might be established by the mutual agreement of the boards of education of the townships interested; also that they might be so formed on petition of three or more qualified electors, residents of the territory sought to be included therein, and that, in the event such boards failed to do so within 60 days, three or more of such electors might file a petition therefor with the probate judge of the county, and it is made his duty to appoint three judicious, disinterested men of the county, not residents of either of the townships to be affected, to be commissioners, who were to meet at a time and place fixed by the probate judge, notice of which was to be given as therein provided, and there hear witnesses and consider and determine the question whether a joint subdistrict ought to be established; and, if they reported in favor of the establishment of a joint subdistrict, it was the duty of the judge to make an entry confirming the same.

It is apparent that it was the intention of the Legislature that only territory in township districts not already forming a part of a city or village or special school district should be taken to form a joint subdistrict. Territory included in a city or village or special school district was regarded as already pre-empted, and not subject to be taken. And so far as we are advised it never occurred to any one that any part of such territory was subject to be taken, and when the Legislature provided, in section 3946, that a petition might in like manner be filed, praying for the creation of a special school district, it contemplated its creation from like territory. And in section 3928 of the Revised Statutes, as enacted in the so-called Harrison School Code (97 Ohio Laws, pp. 334, 345), the same thing was contemplated. It is as follows: "A special school district may be formed of any contiguous territory, not included within the limits of an incorporated city or village, which has a total tax valuation of not less than one hundred thousand dollars. To establish a special school

district, a petition signed by not less than ten male citizens who are electors of the proposed special district shall be filed in the office of the probate judge of the county in which such special district is situated, or if said district is situated in two or more counties, then with the probate judge of the county having the greatest total tax valuation in said proposed district; said petition shall set forth the desires of the petitioners, shall contain a description of the territory to be included in the proposed special district, and shall be accompanied by a statement giving the total tax valuation of said territory certified to by the county auditor or auditors and also an accurate map of the territory to be included in said district, the same to be prepared to the satisfaction of the probate judge; said petition shall also be accompanied by an undertaking of one or more of the petitioners, with security to the satisfaction of the judge, in the sum of one hundred dollars, conditioned that the parties entering into the undertaking shall pay all the costs of the proceedings if a special school district is not created, and in such case the probate judge shall render judgment against the parties to the undertaking for all the costs of the proceedings. In case the petition is granted the costs shall be taxed against the special school district thereby authorized and shall be paid by the board of education of said special school district, thereafter elected, from any funds that may come into its possession. A remonstrance signed by one or more of the male citizens who are electors of the proposed district may be filed with the probate judge and shall be considered on the hearing of the petition." The section then provides that nothing therein contained shall be construed to abolish any special school district then in existence.

Section 3929 of the Revised Statutes, as enacted in said Code, is as follows: "Upon the filing of a petition in the probate court for the establishment of a special school district, the judge thereof shall fix a time for the hearing of the same, which shall be within sixty days of the filing thereof; he shall thereupon cause to be published for four consecutive weeks, in two newspapers of opposite politics, printed and of general circulation in the county where the petition is filed, notice of the filing of such petition and the time of the hearing thereon; such notices shall also be mailed to the clerk or clerks of the board or boards of education having territory in the proposed special school district. The probate judge is authorized to hear and determine the question of the establishment of such special school district, may subpoena and examine witnesses under oath, may change the boundaries of the proposed special school district, shall fix and determine the amount of money due and payable to said special district from the

surplus money in the treasury or in process of collection in the district or districts from which it was formed, or in case of the indebtedness of such district or districts, he shall determine the amount of money due and payable by the special school district to the district or districts from which it was formed, and in either case the amount so found due shall be [a] valid and binding obligation upon the board of education of such district or districts. The fees in cases involving the establishment of special school districts shall be the same as in civil cases, and the jurisdiction of the probate court in such cases shall be exclusive."

The contention of defendants in error is that section 3928 in express terms provides that a special school district may be formed of any contiguous territory which has a total tax valuation of not less than \$100,000, and is not included within the limits of an incorporated city or village, and that, as the act in terms exempts territory included within the limits of any incorporated city or village, any constructive exemption is precluded. But sections 3894, 3895, and 3935 are in pari materia with section 3928. Section 3894 provides that a part, or the whole, of any school district may be transferred to an adjoining school district by the mutual consent of the boards of education having control of such districts. Section 3895 provides that if the boards of education interested in the transfer of territory from one district to another fall or refuse to transfer territory by mutual consent, as provided for in section 3894, within 60 days after a petition therefor, signed by not less than one-half of the qualified male citizens who are electors residing in the territory sought to be transferred, is filed with the clerks of the boards, the petitioners may file a copy in the probate court of the county in which such territory is situated, or, if the territory be in two or more counties, in the probate court of the county containing the largest proportionate share of the territory to be transferred; and the probate judge is authorized to hear and determine the case, and give final judgment for or against such transfer. Section 3896 makes provision for a division of funds and indebtedness when territory is transferred or annexed, and section 3935 provides for abandonment or continuance of a special district. It specifies

when and how the question shall be submitted to an election by the board of education of the district, and provides: "If more votes are cast for abandonment than against it, or against continuance than for it, said boards shall certify the result to the board or boards of education of the township or townships having territory in said special district, and the territory of said special district shall thereby revert to the township school district or districts from which it was originally taken, except as hereinafter provided for in the case of indebtedness of the special district. Otherwise said district shall continue to be and remain and be recognized and regarded as a legal special school district as theretofore constituted." That is to say, unless more votes are cast for abandonment than against it, or against continuance than for it, the district shall remain a special school district as theretofore constituted.

These sections specify how a special school district may be discontinued, and how territory may be transferred from it to another district, and by implication cover all the changes within the contemplation of the Legislature. So that territory in a special school district is not open to be taken in whole or in part to form a new special school district. If part of one district may be embraced in another, then part of the latter may be taken for another, and so on, as long as other provisions of the statutes may be complied with, and with such consequences as make it unreasonable to assume that such a possibility was within the contemplation of the Legislature. The expediency of establishing the Adams Mills special school district and the alleged injustice of it to the remainder of Virginia township, are not questions for our consideration. The probate judge is authorized to hear and determine the question of the establishment of the district, and his jurisdiction is made exclusive. If the results are not in, but against, the interests of the school system, the remedy is with the Legislature.

The judgments of the circuit court, of the court of common pleas, and of the probate court are reversed.

Reversed.

DAVIS, C. J., and SHAUCK, PRICE, and SPEAR, JJ., concur.

(72 Ohio St. 547)

FULKS et al. v. WRIGHT et al.

(Supreme Court of Ohio. June 27, 1905.)

SPECIAL SCHOOL DISTRICT—FORMATION FROM CENTRALIZED TERRITORY.

When the schools of a township have been centralized, no part of the territory comprised in such centralization is subject to be taken to form a special school district.

(Syllabus by the Court.)

Error to Circuit Court, Coshocton County.

Petition of one Wright and others for establishment of a special school district. Fulks and others remonstrated. From a judgment of the circuit court, reversing a judgment of the common pleas, and affirming a judgment of the probate court providing for the establishment of the district, remonstrators bring error. Reversed.

The board of education of Washington township, Coshocton county, at a regular meeting of the board held January 23, 1905, decided by resolution to submit to the electors of said township, at an election to be held February 14, 1905, the question of centralizing the schools of said township under section 3927-2, Rev. St., passed and approved April 25, 1904. 97 Ohio Laws, p. 344. Notice was given as provided in section 3970-11 (97 Ohio Laws, p. 354), and such election was duly held on said February 14th, and at a meeting of the board, held on February 27, 1905, as provided in section 3970-10 (97 Ohio Laws, p. 354), the board canvassed the vote and entered upon its records the result, which was in favor of centralization by a vote of 76 for to 63 against. On the 13th day of February, 1905, the day preceding the day said election was held, the defendants in error, as petitioners, filed their petition in the probate court of Coshocton county for the establishment of a special school district comprising, with other territory, about one-fourth of Washington township within the boundaries of said district. The plaintiffs in error, male electors residing in Washington township, on March 15th, filed in said probate court a remonstrance against including part of Washington township in said special school district. A hearing was had in said court, and on March 22, 1905, the probate judge ordered that the district as petitioned for be established. The remonstrators prosecuted error in the court of common pleas, where the order of the probate judge was reversed, and on error in the circuit court the judgment of the common pleas court was reversed, and the order of the probate judge was affirmed; and error is prosecuted in this court by the remonstrators, plaintiffs in error herein, against the petitioners, defendants in error herein.

Glenn & Stockum and Voorhees & Voorhees, for plaintiffs in error. John J. Adams and Thomas C. Roche, for defendants in error.

SUMMERS, J. (after stating the facts). The contention here on the part of the defendants in error is substantially the same as the contention of the defendants in error in the preceding case. Scott et al. v. McCullough et al., 75 N. E. 52. That is, that section 3928 (97 Ohio Laws, p. 345) in express terms provides that a special school district may be formed of any contiguous territory which has a total tax valuation of not less than \$100,000 and is not included within the limits of an incorporated city or village, and that, as the act in terms exempts territory included within the limits of an incorporated city or village, any constructive exemption is precluded. But we are of opinion, for the reasons stated in the opinion in that case, that the words "contiguous territory" are to be limited to such territory as the Legislature manifestly had in contemplation when the section was enacted, and that is to territory that had not been pre-empted by being taken to form some other district, but such as remained a township district or a part thereof. Many illustrations of such construction might be given. Two presently occur:

Literally construed, the statutes providing for the organization of villages and hamlets would authorize their creation out of territory already forming a part of a village or hamlet. That would be absurd, and manifestly was not intended. Again, prior to the adoption of the new Municipal Code, the statutes provided that in cities of the second class the council should organize, at its first regular meeting after the second Monday in April in each year, by electing a president, a clerk, and other officers. The term of the clerk was for two years, so that, manifestly, it was not the intention that a clerk should be elected each year. Other illustrations, no doubt, might be readily found.

Take section 3927-2, Rev. St., passed and approved April 25, 1904. 97 Ohio Laws, p. 344. It provides: "A township board of education may submit the question of centralization and upon the petition of not less than one-fourth of the qualified electors of such township district, must submit such question to a vote of the qualified electors of such township district, and if more votes are cast in favor of centralization than against it, at such election, it shall then become the duty of the board of education, and such board of education is required to proceed at once to the centralization of (the) schools of the township." Interpreted literally, centralization would include all the schools in the township, city, village, and special district, as well as township schools, which manifestly was not the intention of the Legislature. This section further provides: "When the schools of a township have been centralized, such centralization shall not be discontinued within three years thereafter, and then only by petition and election as required herein, and if at such election more votes are

cast against centralization than for it, the division into subdistricts as they existed prior to centralization, shall be thereby re-established at the next regular election, and subdistrict directors shall be elected as provided in section 3921a of this act." This shows plainly that the Legislature contemplated only the centralization of subdistricts, and the provision that, when the schools of a township have been centralized, such centralization shall not be discontinued within three years thereafter, would seem to indicate clearly that the Legislature did not contemplate that decentralization might be effected by the taking of the whole or a part of the territory of the township for the establishment of a special school district. Such being the intent of the Legislature, and pro-

ceedings having been commenced for the centralization of the schools of the township prior to the filing of the petition in the probate court for the establishment of the special school district, the territory of Washington township, pending those proceedings, was not subject to be taken for a special school district; and the probate judge was without jurisdiction to include in the special school district any part of the territory of Washington township.

Judgment of the circuit court is reversed, and the judgment of the court of common pleas is affirmed.

Reversed.

DAVIS, C. J., and SHAUCK, PRICE, and SPEAR, JJ., concur.

(188 Mass. 537)

HASTINGS LUMBER CO. v. EDWARDS
et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 7, 1905.)**1. CORPORATIONS—CANCELING SUBSCRIPTIONS**
—POWER OF DIRECTORS.

The by-law of a corporation providing that the directors shall have general supervision and control of the business of the corporation and full power to take all such steps as shall be for its best interest, and may issue and dispose of such part of the treasury stock as they deem for its best interest, does not empower the directors, at request of a subscriber for stock, to convert shares for which he had subscribed, but which he did not wish to take and pay for, into such stock, and thus relieve him from his subscription.

2. SAME—STOCK SUBSCRIPTIONS—PAYMENT.

Under a contract of subscription for stock of a corporation, by which each subscriber agrees to take and pay for the number of shares set opposite his name, there is a promise by each signer, the performance of which is not dependent on payments of other subscribers, so that omission of the stock of one subscriber from assessments for payment of stock does not relieve the other subscribers from liability thereon.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Action by the Hastings Lumber Company against Edwards and, others, executors. Case reserved for determination of the full court. Judgment for plaintiff.

Gibbs & Pratt, for plaintiff. J. Willard, for defendants.

BRALEY, J. The plaintiff, a foreign corporation organized and chartered under the laws of the state of Maine, brings this action on a written agreement signed, among others, by the defendants' testator, who subscribed for 250 shares of its capital stock. After the contract took effect there was a full compliance with all precedent conditions upon which payment depended, while 187½ shares of his subscription have been taken and paid for by the testator, or since his death by his executors, for which certificates have been issued. Payment for these shares was made from time to time as called for by the directors, under the following provision: "The first payment on account of said subscription shall be 20 per cent. of the amount of all stock subscribed, respectively, and shall be payable when the title of said property has been approved, and a proper conveyance made, and the consummation of the agreement relative to the purchase thereof; and the balance of said subscription shall be payable when and as fast as may be necessary to comply with the terms of such purchase, and for the purpose of operating upon said property if such course is decided upon after the organization of said corporation." Among the subscribers the name of Garrett Schenck appears, who, after agreeing to take and pay for 250 shares, finally paid for 60, and then en-

deavored to transfer his obligation, or "the balance of my subscription for stock," to strangers to the agreement.

The by-laws of the corporation provide that: "The board of directors shall have general supervision and control of the business of the corporation, and shall have full power to take all such steps as in their judgment shall be for the best interests of the company. * * * They may issue and dispose of such part of the treasury stock as they deem for the best interests of the corporation." Acting under this authority, it appears from the records of the board that after the attempt to transfer had been undertaken, at a meeting held on April 19, 1900, and when making an assessment upon the subscribers, they voted to omit "the subscription of Garrett Schenck." It is to be inferred that no notice of this call was sent to him. While the vote to omit was limited in terms to the assessment then levied, and no vote of a similar exemption appears in making the remaining assessments required to complete the payment of the full capital, yet the actual omission of his stock, especially from the last two calls that are the subject of this suit, is the ground on which the defendants refuse to pay them; for they claim that such omission rendered each of these assessments void and uncollectible from the other subscribers. The wrongful conduct of which they really complain is that successfully to float the enterprise all the capital was to be paid in as called for, and because this was to be accomplished by payments made in installments it would be inequitable for the corporation to require the other stockholders to risk their money and to contribute, while his subscription was treated as exempt.

It is conceded by the parties that the suit is properly brought in the name of the corporation, and their respective rights are to be determined by the laws of its domicile. *Penobscot & Kennebec R. R. Co. v. Bartlett*, 12 Gray, 244, 71 Am. Dec. 753; *Callender, McAuslan & Troup Co. v. Flint*, 187 Mass. 104, 72 N. E. 345. In the consideration of the case the distinction is not to be forgotten that the action is not to recover an unpaid assessment levied upon the capital stock, but is brought upon the agreement "to take and pay for" the shares, treated as a contract at common law to recover the amount remaining due of the testator's subscription. *Worcester Turnpike Corp. v. Willard*, 5 Mass. 80, 86, 4 Am. Dec. 39; *Salom Milldam Corporation v. Ropes*, 6 Pick. 23, 24; *City Hotel v. Dickinson*, 6 Gray, 536; *Boston, Barre & Gardner Railroad Co. v. Wellington*, 113 Mass. 79, 87; *Anglo-American Land, Mortgage & Agency Co. v. Dyer*, 181 Mass. 593, 596, 64 N. E. 416; *Belfast & Moosehead Railroad Co. v. Moore*, 60 Me. 561; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294, 300.

No questions concerning the cumulative statutory remedy providing for the forfeiture of stock by sale for unpaid assessments, or the maintenance of an action at law to recover for a balance remaining after such sale, or the liability of a transferee for assessments after an assignment to him of shares by an original subscriber, are involved. See *Mechanics' Foundry & Machine Co. v. Hall*, 121 Mass. 272; *Lewey's Island Railroad Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236; *New Haven Horse Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 354, 7 N. E. 773; *Brigham v. Mead*, 10 Allen, 245.

The transaction shown by the assignment and the letter of the president of the company, set forth in the report, presumably was the reason for the vote of omission. But it is clear that these papers, with the action taken, cannot be treated as transferring the title of the stock to, nor its acceptance by, the plaintiff. As the entire capital was fully taken, and none of the shares appear to have been forfeited, there was no treasury stock the directors could issue. Furthermore, the by-law was insufficient to confer upon them any power, at the request of a subscriber, to convert shares for which he had subscribed, but did not wish to take and pay for, into such stock, and thus relieve him from his subscription. If there had been a formal agreement between him and the directors that the number of his shares should be reduced, and that he should take only those he had already paid for and surrender the balance to the corporation, while his original subscription should be canceled, such an arrangement, in the absence of a statute, charter, by-law, or vote of the corporation expressly permitting it, but not appearing in this case, would have been void. It neither would have relieved him, nor worked a discharge of the testator's liability. *Penobscot & Kennebec Railroad Co. v. Dunn*, 39 Me. 587; *White Mountains Railroad Co. v. Eastman*, 34 N. H. 124; *Meyer v. Blair*, 109 N. Y. 600, 17 N. E. 228, 4 Am. St. Rep. 500; *Addison's Case*, L. R. 5 Ch. 293; *In re Esparto Trading Co.*, 12 Ch. Div. 191, 194. And, while it may be inferred that it might have been the intention of the president, and possibly of part of the directors, to treat the remaining 190 shares as treasury stock, this purpose was not accomplished, and the corporation so far never has dealt with the proposition, or accepted a surrender of his stock, or relieved Schenck from his original promise.

The judgment of the board that the payments were necessary, and that the amount should be fixed as shown by these votes, was within the authority conferred upon them, and, where no fraudulent purpose is shown, their action is conclusive upon the subscribers without previous notice. *Glenn v. Marbury*, 145 U. S. 490, 12 Sup. Ct. 914, 36 L. Ed. 790. No evidence appears, nor is any claim advanced, that the directors, in

the exercise of their large discretionary powers in the supervision of the general affairs of the company, or in calling for the payment of subscriptions, have acted otherwise than in good faith and for its general welfare, or that they have shown any intentional partiality between the subscribers. Eventually no subscriber could be held under the agreement for more than the amount of his subscription. As the contract of Schenck was not canceled or discharged, the mere order of time, and nothing more, when payment should be enforced by appropriate corporate action taken against him, would be immaterial.

On recurrence to the contract, it is there stated that every subscriber agrees "to subscribe, take, and pay for, at par, the number of shares, * * * of the par value of one hundred dollars each, set opposite their respective names." This is an express individual promise, made by every signer of the subscription paper, the performance of which is not dependent upon payments by other subscribers. *Boston, Barre & Gardner Railroad Co. v. Wellington*, ubi supra; *Worcester Turnpike Corp. v. Willard*, ubi supra; *Salem Milldam Corporation v. Ropes*, ubi supra; *Belfast & Moosehead Lake Railroad Co. v. Moore*, ubi supra; *Northwood Union Shoe Co. v. Pray*, 67 N. H. 435, 32 Atl. 770. Upon reference to the decisions of the Supreme Judicial Court of Maine, where similar contracts have been under consideration, it fully appears that such construction uniformly has been given by that court in all cases where, as in the present case, it has been sought to hold a subscriber to perform his agreement. *Bangor Bridge Co. v. McMahon*, 10 Me. 478; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Kennebec & Portland Railroad Co. v. Kendall*, 31 Me. 470; *Kennebec & Portland Railroad Co. v. Jarvis*, 34 Me. 360, 363; *Buckfield Branch Railroad Co. v. Irish*, 39 Me. 44; *Penobscot Railroad Co. v. Dummer*, 40 Me. 172, 175, 63 Am. Dec. 654; *Belfast & Moosehead Lake Railroad Co. v. Inhab. of Brooks*, 60 Me. 568; *Belfast & Moosehead Lake Railroad Co. v. Cottrell*, 66 Me. 185, 190; *Skowhegan & Athens Railroad Co. v. Kinsman*, 77 Me. 370, 371, 372; *Rockland, Mt. Desert & Sullivan Steamboat Co. v. Sewall*, 78 Me. 167, 3 Atl. 181. See, also, *Penobscot & Kennebec R. R. Co. v. Bartlett*, supra. Thus, in the case of *Kennebec & Portland R. R. Co. v. Jarvis*, 34 Me. 360, 363, it was said by Chief Justice Shepley, when considering a like contract: "The promise is to pay 'all legal assessments.' It is to pay for the shares as he should be required by a vote of the company, without any reference to assessments or payments to be made by other shares." And this decision is followed in a full opinion by Chief Justice Appleton in *Bucksport & Bangor R. R. Co. v. Buck*, 65 Me. 536, 541.

Nor are the cases of *Somerset & Kennebec*

R. R. Co. v. Cushing, 45 Me. 524, and Pike v. Bangor & Calais Shore Line Railroad Co., 68 Me. 445, on which the defendants rely, in conflict with them. In these last cases the validity of the assessments under consideration arose under charters that, so far as expedient or necessary, permitted them to be levied and enforced from time to time only upon all the shares of the corporation. But in neither case did the cause of action declared on rest, or the decision go, upon the basis of an express contract to take and pay for stock.

In accordance with the terms of the report, judgment is to be entered in favor of the plaintiff for \$6,250, with interest at the legal rate on \$3,570 of this amount from July 25, 1902, and on the remainder of \$2,500 from October 3, 1902, to the date of entry.

So ordered.

(189 Mass. 1)

MAHAN v. NEWTON & B. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 7, 1905.)

1. ELECTRICITY—STREET RAILROADS—TROLLEY WIRES—ELECTRIC SHOCK—EVIDENCE.

Evidence in an action for the death of plaintiff's intestate and for his conscious suffering examined, and held to support a finding that the death and suffering complained of were caused by an electric current which came from the company's trolley wire, authorizing a recovery, if the company was negligent and the intestate free from contributory negligence.

2. SAME—NEGLIGENCE—SUFFICIENCY.

Evidence in an action against a street railway company for the death and conscious suffering of plaintiff's intestate, by reason of an electric shock while engaged in putting a cross-arm to a pole of a light company, examined, and held to support a finding of actionable negligence on the part of the street railway company for failing to prevent its trolley wire from coming in contact with a light wire and charging it with an electric current.

3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence in an action against a street railway company for the death and conscious suffering of plaintiff's intestate, by reason of an electric shock from the company's trolley wire coming in contact with a light wire near which he was working, examined, and held to show freedom from contributory negligence.

4. SAME—ELECTRIC LIGHT COMPANIES—RULES—VIOLATION BY LINEMEN.

A violation by a lineman of a rule of a light company employing him that linemen should treat every light wire as a live wire is not conclusive evidence of negligence, but only a circumstance to be considered with others.

5. SAME—APPLIANCES TO PREVENT INJURY—EVIDENCE.

In an action against a street railway company for the death of a lineman employed by a light company, by reason of receiving an electric shock coming from a trolley wire on coming in contact with a light wire, evidence of the existence of an appliance, known as a "guard wire," in common use for the purpose of preventing trolley wires from coming in contact with other wires, was admissible.

6. APPEAL—EXCEPTIONS—WAIVER.

Exceptions not argued are deemed waived.

Exceptions from Superior Court, Middlesex County; Wm. Schofield, Judge.

Action by one Mahan, as administrator of John P. Mahan, against the Newton & Boston Street Railway Company. There was a verdict for plaintiff, and defendant excepts. Overruled.

Geo. L. Mayberry and Vahey, Innes & Mansfield, for plaintiff. Walter I. Badger and Wm. H. Hitchcock, for defendant.

MORTON, J. This is an action of tort by the plaintiff, as administrator of the estate of John P. Mahan, to recover for personal injuries to, and for the death of, his intestate, which are alleged to have been caused by the defendant's negligence while the intestate was in the exercise of due care. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the court to rule, as requested by it, that the plaintiff was not entitled to recover, and to direct a verdict for the defendant and to the admission of evidence.

The accident occurred November 4, 1899. The plaintiff's intestate was at the time a lineman in the employ of the Newton & Waltham Gaslight Company, and was at work putting a cross-arm on to a pole belonging to that company in Beacon Square, Watertown. While so at work an electric current passed into and through his body, causing his death and the injuries complained of. The plaintiff contends that the current came from the contact of the trolley wire of the defendant company with an electric light wire belonging to the gaslight company, and that there were no guard wires above the trolley wire, as there should have been to prevent such an accident. We think that there was evidence supporting this contention.

There was testimony tending to show that, just below the place where the plaintiff's intestate was engaged in putting up the cross-arm, there were two other cross-arms carrying wires belonging to the gaslight company. The upper arm carried two wires belonging to the so-called commercial circuit, and the lower carried wires belonging to the incandescent circuit, which supplied the street lights of the town. There was testimony tending to show that, when the plaintiff's intestate mounted the pole, there was no current passing over any of these wires. Plugs had been pulled out of a cut-off box near by, which had the effect, it was testified, of rendering the commercial wires dead wires from there to the end of the circuit, which distance included the pole on which plaintiff's intestate was working. The incandescent circuit had been shut off at the works at 12:30 a. m., and an arc circuit, which was the only other one operated by the gaslight company, had been shut off at the works at between 5 and 5:30 a. m. The cut-off box was examined half an hour after the accident, and was found with the plugs

out and in good order. There was no dispute that the man was killed by the passage of an electric current through his body, and the testimony above referred to and other testimony tended to show that the current could not have come from the works of the gaslight company. The accident did not occur till a car of the defendant company approached the scene, and at the time of the accident there was testimony tending to show that the car was only a short distance away. There was also testimony tending to show that, as the car approached, the trolley pole lifted the trolley wire very near to the electric light wires, and "one witness testified that the trolley wire was shoved up against the electric light wires."

In view of this and other testimony, we do not see how it could be said or ruled that there was no evidence that the current which killed the plaintiff's intestate came from the trolley wire of the defendant. There was testimony to the effect that the cut-off box contained a fuse that would have burned out if at any time prior to the accident any heavy current had got into the wires connected with the box from an outside source, and that the fuse was in good condition after the accident. There was also testimony tending to show that a current of 500 volts, which was the current carried by the trolley wire, would not kill a man, or, at least, would not kill him unless he was well grounded, and that plaintiff's intestate was not well grounded. But these were matters for the jury to pass upon. It could not be ruled as matter of law that by reason of them the jury would not be warranted in finding that the current came from the trolley wire.

The fact, however, that the current came from the defendant's trolley wire, if it did so come, would not, of itself, without anything more, render the defendant liable. It must further appear, or there must be evidence tending to show, that the plaintiff's intestate was killed as the result of a breach of some duty which the defendant owed to him. The negligence relied on is the failure of the defendant to put up and maintain guard wires. There was evidence, which was objected to by the defendant, tending to show that it was customary to use such wires, and that they were in general use at the time of the accident, and that they were used to prevent other wires from coming in contact with the trolley wire, which was an uncovered wire, and thus becoming charged. The witness who testified to this admitted on cross-examination that some systems did not use such wires, and that they were not used in many important localities in this vicinity. The defendant was operating cars in the public streets by the use of a highly dangerous agency. It was bound to know that other wires were or might be strung along the streets for various purposes, and that persons would or might be employed

to work upon them, and it was its duty, in the exercise of reasonable care, to adopt such precautions as were proper to prevent its own wires from coming in contact with the wires upon which such persons were or might be employed and injuring them. It was for the jury to say, taking everything into account, including the expense and practicability of guard wires and the way in which the trolley wire was put up, as to which there was evidence from the defendant, whether the defendant had performed this duty, and whether the plaintiff's intestate was injured and killed in consequence of its failure to do so. It could not be ruled as matter of law that there was no evidence of negligence on its part, or that the negligence, if any, had not resulted in harm to the plaintiff's intestate. *McKay v. So. Bell Tel. Co.*, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; *City Electric Ry. Co. v. Conery*, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Atlanta Consol. St. Ry. Co. v. Owings*, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *Potts v. Shreveport Belt Ry. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; *Brooks v. Consol. Gas Co. (N. J. Err. & App.)* 57 Atl. 396; *N. Y. Tel. Co. v. Bennett*, '62 N. J. Law, 742, 42 Atl. 759; *United Elect. Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863; *Block v. Railway Co.*, 89 Wis. 371; 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849.

The defendant further contends that the plaintiff's intestate was not in the exercise of due care. He was not a regular lineman. He had been working for the gaslight company two weeks when killed, and a year and a half before had worked for it about six weeks. So far as appears, this had been the extent of his experience in the electric light business. The superintendent of the gaslight company testified that the linemen were to look out for their own safety, and that a notice to that effect was posted at the works, and the men were also instructed by the foreman. He also testified that there was a rule that the linemen should treat every wire as a live wire, and that the company provided rubber gloves for men to use in handling dangerous wires. But there was evidence tending to show that the deceased had no reason to believe, when he mounted the pole, that any of the gaslight company's wires which it carried were then dangerous; and, if they were not, there was no occasion for him to use rubber gloves, even if such gloves had been provided by the company and were there for use, of which latter fact there was slight, if any, evidence. The rule that linemen should treat every wire as a live wire was made in their interest and for their safety, as well as in the interest of the company, and was intended as a general standard of conduct for the men in working about the wires of the company. It would be going too far to say

that in no case and under no circumstances would a lineman be justified in treating a wire as a dead wire because of the rule. That would be making the rule itself a conclusive standard of negligence, whereas it was, at most, only one circumstance to be considered with others. The relative position of the trolley wire and the electric light wires was open to view. But there was nothing to show that the intestate's attention was called to it, or that, if it had been, he would have appreciated the danger from a contact of the two wires; and he could hardly be deemed at fault for not observing the relative position of the two wires, when the superintendent of the electric light company, whose business it was to notice such matters, testified that he might have driven through the square without seeing it. The question whether the intestate was, in the exercise of due care was eminently one for the jury.

There remain two questions of evidence—one, already referred to, of the customary use of guard wires; and the other, that in this part of the country, according to the usual construction, a trolley wire would be lifted between three and four inches by the passage of a car along the track. We construe the evidence relating to the former as meaning simply that there was an appliance, known as a "guard wire," in common use for the purpose of preventing contact between trolley wires and other wires. So construed, the evidence was clearly admissible. *Dolan v. Booth Cotton Mills*, 185 Mass. 576, 579, 70 N. E. 1025, and cases cited. In regard to the other matter we think that the evidence was admissible, as tending to support the plaintiff's contention that the accident was caused by a contact between the trolley wire and the electric light wires.

Exceptions were taken to the admission of other evidence; but they have not been argued, and we treat them as waived.

Exceptions overruled.

(139 Mass. 58)

PIERCE v. O'BRIEN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1905.)

1. FRAUDULENT CONVEYANCES — INTENT OF SELLER—KNOWLEDGE OF BUYER.

A sale with intent on the part of the seller to defraud his creditors is not invalid as to the purchaser, if he paid value and had no actual knowledge of the fraudulent intent.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 518, 520.]

2. SALES—CONSIDERATION.

Where the purchaser of personalty gave notes for the value of the goods, and also undertook the payment of accounts due by the sellers, there was consideration for the sale.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, § 214.]

3. TRIAL—INSTRUCTIONS.

The court is not required to pick out the uncontroverted facts and rule upon them, un-

less the disputed facts are immaterial to the issue.

4. CONVERSION—MEASURE OF DAMAGES—INSTRUCTIONS—HARMLESS ERROR.

Where, in conversion to recover the value of certain goods, the auditor found that the wholesale value of the goods was \$9,000 and the retail value \$12,000, and found for plaintiff in the sum of \$9,000 with interest, and on trial the judge instructed that as plaintiffs were content to take \$9,000 and interest they could not have a verdict for more, and the jury returned a verdict for a sum which was apparently \$9,000 and interest, the defendant was not harmed by the refusal of instructions that the wholesale value, and not the retail value, of the goods should be taken as the measure of damages.

Exceptions from Superior Court, Suffolk County; Jabez Fox, Judge.

Action by one Pierce against one O'Brien. There was verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

Chas. W. Bartlett, Elbridge R. Anderson, and Arthur T. Smith, for plaintiff. Elder & Whitman, F. L. Hungerford, and H. Ware Barnum, for defendant.

LATHROP, J. This is an action of tort against the former sheriff of Suffolk county for a conversion of the goods of the plaintiff by reason of an attachment by one of the defendant's deputies of a stock of office furniture on October 18, 1893, on a writ in favor of the Corbin Cabinet Lock Company, a Connecticut corporation, against the Indianapolis Cabinet Company. The defendant died during the action, and the action was defended by the executrix of his will. The case was sent to an auditor, who found for the plaintiff. It was afterwards tried by a justice of the superior court with a jury, and a verdict was returned for the plaintiff; and the case is before us on the defendant's exceptions to the refusal of the judge to give 34 requests for rulings, and to the instructions given, so far as they were in conflict with the requests. Many of the requests were not insisted upon at the argument, and we treat them as waived. Other requests were given in substance though not in form. We proceed to consider the case so far as argued.

The facts in the case may be briefly outlined as follows: The Indianapolis Cabinet Company was a corporation doing business at Indianapolis, Ind., in the manufacture and sale of office and other furniture. Its capital stock was \$150,000. It had six branches or subcompanies in different parts of the country. One of these companies, called the Indiana Cabinet Company, was situated in Boston. It was a corporation with a capital stock of \$10,000, of which \$75 had been paid in. All its stockholders and officers were either officers or employees of the Indianapolis Cabinet Company. It seems to have been treated at the trial as merely a branch of the Indianapolis

Cabinet Company, and we shall so consider it.

The principal issue in the case was whether a sale of the stock of goods in the Boston store by the Indianapolis Cabinet Company to the plaintiff on August 1, 1893, was fraudulent and void as to the creditors of the sellers, the Corbin Cabinet Lock Company being one of such creditors.

The first request which was refused was that upon all the evidence the plaintiff was not entitled to recover. There was much evidence in the case to show that the sale was fraudulent and void; and that it was made to hinder, delay, and defraud the creditors of the seller; and that the plaintiff participated in the scheme of fraud. But there was also evidence that the plaintiff was innocent of the fraud. The question was for the jury, and the plaintiff had put in the auditor's report, which was *prima facie* evidence in his favor.

The defendant's counsel, without referring to specific requests for instructions, contends in his brief as follows: "The defendant in several requests for rulings maintained that in this case the plaintiff could not recover if he knew, or as a reasonable man ought to have known, that the Indianapolis Cabinet Company intended to defraud its creditors." The judge ruled that actual knowledge by the plaintiff must be shown. The defendant then goes on to admit that there are Massachusetts cases in which it is said that, where an owner transfers property with the intention of defrauding his creditors, the grantee nevertheless is protected if he gave a valuable consideration therefor, and did not actually know or participate in the fraud. The requests must be overruled. Whatever may be the rule in other states, it is well settled in this commonwealth that there is a distinction between belief and reasonable cause to believe, and knowledge and reasonable cause to have such knowledge. To hold a purchaser liable for the fraud of the seller it must be shown that at the time of the purchase he had knowledge of the fraud, if he was a purchaser for a valuable consideration. *Kittredge v. Sumner*, 11 Pick. 50; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *Marden v. Babcock*, 2 Metc. 99; *Johnson v. Johnson*, 3 Metc. 63; *Green v. Tanner*, 8 Metc. 411, 419; *Banfield v. Whipple*, 14 Allen, 13; *Snow v. Paine*, 114 Mass. 520; *Carroll v. Hayward*, 124 Mass. 120; *Bristol Savings Bank v. Keavy*, 128 Mass. 298; *Morse v. Aldrich*, 130 Mass. 578; *Mansfield v. Dyer*, 131 Mass. 200; *Hill v. Ahern*, 135 Mass. 158; *Carr v. Briggs*, 156 Mass. 78, 30 N. E. 470.

Next it is contended that there was no valuable consideration paid by the plaintiff. It appears from the auditor's report that the plaintiff signed and gave 34 promissory notes, which aggregated the value of the goods.

He also undertook the payment of \$3,370.15 of accounts due by the grantors, under the bill of sale, and became liable for that amount. There can be no doubt that these acts on the part of the plaintiff were a legal detriment to the plaintiff, and that there was evidence for the jury on this question. *Green v. Tanner*, 8 Metc. 411. See, also, *Bridge v. Eggleston*, 14 Mass. 245, 7 Am. Dec. 209.

There is a further answer to this claim of the defendant. He states in his brief that this question is raised under the second and third requests for instructions. The second request is as follows: "Upon the uncontroverted facts in the case, the attempted transfer of title to the plaintiff was fraudulent and void, and he cannot recover in this action." The third request is based also upon "the uncontroverted facts," and upon the assumption "that he knew or had reason to know" the insolvent condition of the grantor. The court was not required to pick out the uncontroverted facts, and rule upon them, unless the disputed facts were immaterial to the issue. The case was to be tried upon all the material evidence. *Kellogg v. Thompson*, 142 Mass. 76, 80, 6 N. E. 860; *Packer v. Thompson-Houston Electric Co.*, 175 Mass. 496, 500, 56 N. E. 704.

The 32d and 33d requests were given in substance by the judge in his charge to the jury.

The remaining requests relate to the measure of damages, the defendant contending that the wholesale value of the goods should be taken, and not the retail value. The auditor found that the fair market value of the goods taken on October 18, 1893, was on that day \$9,000; that he arrived at this result by taking the value of the stock as a whole—that is to say, the wholesale prices of the several articles constituting such stock. He then stated alternatively that the value at retail would be \$12,000. He concluded his report by stating that he found for the plaintiff in the sum of \$9,000, with interest thereon from October 18, 1893. The judge instructed the jury that, as the plaintiffs were content to take \$9,000 and interest, they could not return a verdict for a larger sum; that in considering the damages they were to consider the evidence put in by the defendant, namely, the appraisal, and the amount the goods brought when sold by auction. The jury returned a verdict for \$14,500, which was apparently \$9,000 and interest.

We do not see that the defendant was in any way harmed by the refusal to give the instructions requested, or to the instructions given. We may add that the charge of the judge treated the case in a fair and impartial manner, and we find no ground of exception to any part of it.

Exceptions overruled.

(189 Mass. 48)

PAUL v. WILBUR.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1905.)**1. REFERENCE—FACTS FOUND BY AUDITOR—SUFFICIENCY.**

Whether a plaintiff makes out a case on the facts found by the auditor, apart from the additional facts put in evidence at the trial, is immaterial, and a ruling that plaintiff is not entitled to recover on the facts and evidence stated by the auditor is properly refused.

2. CONTRACTS—SERVICES RENDERED—IMPLIED LIABILITY.

A third person, who had purchased property, employed an attorney to draw up certain papers with reference to the purchase, and told the attorney that he had sold the property to defendant, and asked the attorney to furnish the papers to him. The attorney was not informed of the fact that the third person had agreed to furnish the papers to defendant, but turned them over to him in the expectation of receiving compensation from the person using them. Defendant used them. Subsequently the attorney sent his bill for services to the third person, with the request that it be sent to defendant. *Held*, that the attorney was entitled to recover from defendant on an implied contract for his services in drawing the papers.

3. STATUTE OF FRAUDS—IMPLIED CONTRACTS—SERVICES PERFORMED AT REQUEST OF ANOTHER.

A promise by one receiving papers drawn by an attorney at the request of another to pay the attorney therefor is not a promise to answer for the debt of another, within Rev. Laws, c. 74, § 1, cl. 2.

Exceptions from Supreme Judicial Court, Suffolk County; Braley, Judge.

Action by Frank Paul against George B. Wilbur. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Frank T. Benner, for plaintiff. H. E. Warner, for defendant.

LORING, J. This is an action to recover the reasonable value of certain legal services which resulted in the drawing of papers necessary for the organization of a railroad corporation under the laws of Ohio, the issue of its capital stock, and of its bonds secured by a mortgage on its property.

The case went to an auditor, who, in a report and supplemental report, found in favor of the plaintiff in the sum of \$2,000. At the trial before a single justice of this court the plaintiff offered in evidence the report and supplemental report of the auditor, including an agreement there referred to, and rested. The defendant then called the plaintiff for cross-examination. The plaintiff in rebuttal read the testimony of the defendant before the auditor. The defendant asked for a ruling that on the evidence the plaintiff was not entitled to recover, and that upon the facts and evidence stated by the auditor the plaintiff was not entitled to recover. These were refused. The case was left to a jury under instructions not objected to, and a verdict was re-

turned for the plaintiff. The case is here on exceptions to the refusal to give these two rulings.

The facts disclosed in the auditor's report and at the trial were in substance as follows: One Dickinson, in December, 1901, bought a railroad property in Ohio at a receiver's sale, paying down a part only of the purchase price. The balance of the purchase money finally became due on Monday, July 21, 1902, and on a failure to make this final payment Dickinson's interest in the railroad and in the payment already made was to be forfeited and lost. During the intervening seven months the plaintiff, a member of the bar, had prepared the papers, at Dickinson's request, for which he now seeks to recover from the defendant. On the Saturday next preceding the Monday when the final payment had to be made Dickinson had not succeeded in raising the money necessary to complete the purchase. On that Saturday he succeeded in interesting the defendant in the matter. It was agreed between Dickinson and the defendant that the defendant should advance the money necessary to complete the purchase and take title in his own name, it being agreed that if Dickinson should afterwards repay to the defendant all advances made to complete the purchase, and in addition \$5,000 previously lent by the defendant to Dickinson, plus any loss which the defendant should suffer by reason of certain bonds which he had bought of or through Dickinson, he, Dickinson, should have the railroad property, or the profits, if it had been sold at a profit over and above all these sums. In this connection Dickinson agreed to furnish the defendant with the papers which had been drawn by the plaintiff as his attorney. It was also arranged that the defendant's counsel, Mr. Cushing, should go to Ohio that afternoon to complete the purchase on the following Monday. Later on this same Saturday, Cushing, Dickinson, and the plaintiff had a conference at the plaintiff's office. At this time the plaintiff gave Cushing the papers and explained to him the condition of the enterprise and the steps to be taken in Ohio. The plaintiff at this time also drew an assignment to the defendant of the Dickinson interest in the purchase, to be signed by a third person to whom Dickinson had assigned it. The auditor found as a fact that the plaintiff never was told of the fact that the defendant was taking over the property for the ultimate benefit of Dickinson, nor of the fact that Dickinson had agreed to furnish these papers to the defendant. The auditor further found "that nothing was said at the time the papers were turned over as to whether Mr. Paul was to receive compensation or whether he was turning them over without expectation of compensation; but I find, if the same is material and admissible, that the

plaintiff turned over those papers to Mr. Cushing as the defendant's attorney in the expectation of receiving a reasonable compensation from the parties who should use them, but that Mr. Cushing, the defendant's attorney, received the papers without any notice (except such, if any, as was necessarily to be implied from the circumstances) that his principal would be called upon to pay for them." Cushing took the papers with him to Ohio, and made use of them in organizing the new corporation and in drawing the mortgage deed. The auditor concluded his report with this finding: "The fair value of the papers prepared by the plaintiff, considered as completed instrumentalities designed and adapted for certain uses, to which uses they were put by the defendant, was \$2,000."

In addition to the facts stated in the auditor's reports, the defendant relies in defense of the claim on certain facts drawn out by him on the cross-examination of the plaintiff. In September, 1902, two months after the papers in question were delivered to the defendant, the plaintiff made out a bill for his services to the Columbus & Southern Railway Company (the name of the corporation organized by the defendant), which included all the services he rendered in the railroad matter; some of which did not result in drawing the papers in question. This bill was sent to Dickinson, stating that Mr. Wilbur was the party to whom the bill should be sent, and asking Dickinson to forward it to him. The defendant further drew out from the plaintiff a letter written to Cushing on July 30, 1902, asking him to let the plaintiff complete his duplicate set of papers so as to make them conform to the papers in their final state. In this letter he wrote that he deemed this essential for divers reasons. On the stand his explanation was that he had an expectation of being called upon to act in the matter later, although he knew of Mr. Cushing's employment.

We are of the opinion that the exceptions must be overruled. It was of no consequence whether the plaintiff made out a case on the facts found by the auditor apart from the additional facts put in evidence at the trial. That exception must be overruled for that reason.

There is no question of the law on which the plaintiff's right of recovery depends. The rule is stated with great accuracy by Morton, J., in *Pew v. Gloucester National Bank*, 130 Mass. 391. Morton, J., there says, at page 395: "To render such party liable as a debtor under an implied promise. It must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or, at least, that the circum-

stances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them." See, also, *Sawyer v. Powner's Bank*, 6 Allen, 207; *Newmarket Mfg. Co. v. Coon*, 150 Mass. 586, 23 N. E. 380; *Bartlett v. Mystic River Co.*, 151 Mass. 433, 24 N. E. 780. And see, in this connection, *Higgins v. Shepard*, 182 Mass. 364, 367, 65 N. E. 805.

We do not agree with the defendant's contention that under this rule the plaintiff as matter of law has not made out a case. The question of what ought to have been understood is to be determined on what was known to the person who was parting with his property. Facts known to the defendant, who took the property, not known to the plaintiff, who parted with his property, and not communicated by the defendant to the plaintiff, cannot be taken into consideration. In the case at bar we assume that the plaintiff had done the work which produced the papers in question at the request of Dickinson, and that Dickinson then owed him for them. But when the plaintiff was told that Dickinson had sold the railroad enterprise to the defendant, and when he was asked to furnish this purchaser with the papers which he had prepared to carry it into effect, it would be assumed by the plaintiff, who had not been paid, that his bill for these papers would be paid by the person who had taken over the enterprise, and was to make use of his papers, at least in the absence of information that there was a special arrangement. We find nothing inconsistent with this position in the fact that by accident other charges (since withdrawn) were included in the bill sent to Dickinson to be forwarded to the defendant, nor in the letter accompanying that bill.

There is nothing in the defendant's contention that the promise sued on is a special promise to answer for the debt of another, within Rev. Laws, c. 74, § 1, cl. 2, unless Dickinson was discharged. That section does not apply where the promisor receives something from the promisee for his own benefit. The point is settled by a number of authorities, beginning with *Alger v. Scoville*, 1 Gray, 391, and ending with *Stratton v. Hill*, 134 Mass. 27; and is recognized in the two cases cited by the defendant (in which it did not apply), *Furbish v. Goodnow*, 98 Mass. 286, at pages 297, 298; *Curtis v. Brown*, 5 Cush. 488, 491; and in the recent case of *Griffin v. Cunningham*, 183 Mass. 505, 507, 87 N. E. 680. In the case at bar the defendant got from the plaintiff the papers which he wanted to use and did use in carrying out the enterprise in question, in which he had an interest, although under some circumstances not the whole and only interest.

Exceptions overruled.

(189 Mass. 70)

LOWELL v. ARCHAMBAULT.(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 8, 1905.)**1. HEALTH—USING BUILDING FOR STABLE—
LICENSE BY BOARD OF HEALTH.**

A license granted by a board of health, under Rev. Laws, c. 102, §§ 69, 72, relating to licensing stables in cities, to permit one to use a building for a stable is not a contract between him and the municipality, and does not confer on him any vested right of property, and its revocation, if lawful, does not deprive him of any constitutional privilege.

**2. SAME—CONTENTS OF LICENSE—STATUTORY
PROVISION.**

Though Rev. Laws, c. 102, § 69, authorizing the issuance by the board of health of a city of a license to use a building for a stable, contains no provision for a recall of a license once granted, it is the purpose of the statute that the license shall specify the extent of the right conferred by setting forth the conditions under which the building may be built and used.

3. SAME—RIGHT OF LICENSEE.

The right under a license granted by a board of health, under Rev. Laws, c. 102, §§ 69, 72, to continue a stable in existence, or to erect one and then use it, is subject to the reasonable regulations adopted by the board of health.

4. SAME—RIGHT TO REVOKE.

A license granted by a board of health to permit one to erect a building and use it for a stable, which contained no limit of time for its exercise, and was not subject to any existing regulation prescribed by the board, cannot be revoked by the board, on citizens in the vicinity objecting to the building, though it may have been imprudently issued.

Appeal from Superior Court, Middlesex County.

Bill in equity by City of Lowell against one Archambault. From a decree for plaintiff, defendant appeals. Reversed.

James Gilbert Hill, City Sol., for complainant. F. W. & S. E. Qua, for defendant.

BRALEY, J. This is a bill in equity, brought under Rev. Laws, c. 102, § 71, to enjoin the defendant from occupying and using a stable, in violation of the provisions of section 69 of the same chapter. In the superior court the case was submitted on agreed facts, and after a decree had been entered in favor of the plaintiff, it comes before us on the defendant's appeal.

It appears that the defendant, who is engaged in the business of an undertaker, desiring to erect on his land a stable to be used in connection therewith, applied to the board of health for a license to permit him to occupy and use the building when completed for the stabling of eight horses. This petition was granted, and a license duly issued to him, permitting the exercise of this privilege. Upon receiving it, he at once had plans prepared, and began the erection of a stable on a site from which he had at a pecuniary loss removed another building. After the work had been begun, but before its completion, the board of health, acting on the petition of residents

in the immediate vicinity, rescinded their former vote and canceled the license. Since the completion of the building the defendant has used it for the keeping of two horses, claiming this right under the license, which he contends never has been legally annulled. If the revocation was invalid, such use was not in violation of the statutory provision on which the plaintiff relies, and the bill cannot be maintained. The license granted under the police power of the commonwealth, as administered through the agency of the board of health, did not constitute a contract between him and the city, or confer upon him any vested right of property. Neither did its abrogation, if lawful, deprive him of any immunity or privilege conferred upon him by our Constitution. *Calder v. Kurby*, 5 Gray, 597; *Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385; *Young v. Blaisdell*, 138 Mass. 344. The Statutes of 1895 (page 219, c. 213), now Rev. Laws, c. 102, §§ 69, 71, under the authority of which the board acted and the license was issued, contained no provisions for its recall when once granted. It evidently was the purpose of section 1 of the original act that the license itself should specify the extent of the right conferred, by setting out the conditions under which the building could be built and used; for by section 2 the board may make regulations respecting the occupation and use of stables in existence at the date of its passage, while the last section provided a penalty for the violation of the act itself, or of any order or regulation made pursuant to its requirements. Whether a stable was in existence and its use was to be continued, or permission was to be given to erect a stable and then use it, the right in each instance was subject to such reasonable regulations as might be made by the board of health. It undoubtedly was presumed that the board would make proper inquiries before judicially determining whether a license should or should not be refused, and, if granted, to prescribe by its terms how far the privilege might be exercised. In any instance, if the granting of a license would be detrimental to the public health, or contrary to regulations already established, then it would not be issued. If the statute had given to the boards of health of cities a general authority similar to that conferred by Pub. St. 1882, c. 80, § 10, it might be that they lawfully could make the violation of their regulations a sufficient ground for revoking the privilege, and could issue it upon such a condition. *Young v. Blaisdell*, *ubi supra*; *Grand Rapids v. Brandy*, 105 Mich. 670, 677, 678, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472. At least it could be said that the licensee then would take it subject to this reservation, and, having agreed to its terms, no injustice would be done by a subsequent cancellation. Generally, under stat-

utes regulating the conduct of certain kinds of employment or of business which require the protection of a license before they can be lawfully prosecuted, the penalty of forfeiture is dealt with either by conferring express authority to revoke for violations upon the licensing board or some other tribunal, or else a general power is delegated, under which such a clause may be inserted in the license itself. Rev. Laws, c. 100, §§ 15, 47, 89; chapter 102, §§ 9, 28, 29, 33, 58, 72; *Grand Rapids v. Braudy*, *ubi supra*. Upon application for permission to erect a stable, which, in the absence of a restricting statute, would be a legitimate improvement in the enjoyment of his property, the applicant is entitled to know the full measure of immunity that can be granted to him before making the expenditure of money required to carry out his purpose. A resort to the general laws relating to the subject, or to ordinances or regulations made pursuant to them, should furnish him with the required information. When this has been obtained, he has a right to infer that he can safely act, with the assurance that, so long as he complies with the requirements under which it is proposed to grant the privilege, he has a constitutional claim to protection, until the Legislature further restricts or entirely abolishes the right bestowed. *Commonwealth v. Brennan*, 103 Mass. 70; *Commonwealth v. Kinsley*, 133 Mass. 578, 579; *Hirn v. State*, 1 Ohio St. 20, 21; *Schwuchow v. Chicago*, 68 Ill. 444; *Lantz v. Highstown*, 46 N. J. Law, 102, 107; *Grand Rapids v. Braudy*, *ubi supra*. Independently of this statute, while the board of health, under Pub. St. 1882, c. 80, §§ 8, 12, after a hearing and on proper evidence, might have adjudged the defendant's building, when erected and occupied as a stable, detrimental to the public health, and therefore a nuisance, it had no jurisdiction to issue a license to him permitting and regulating such use except as authorized. *Commonwealth v. Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Cambridge v. Munroe*, 126 Mass. 496, 502; *Commonwealth v. Plaisted*, 148 Mass. 375, 383, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566. It is the Legislature alone that primarily can impose, or give authority to impose, conditions and exact forfeitures (*Lantz v. Highstown*, *ubi supra*; *Dillon, Mun. Corp.* [3d Ed.] § 345, note 4, and cases cited); and the authority of the board as a governmental agent is commensurate with the provisions of the statute clothing it with this power (*Abbott v. Frost*, 185 Mass. 398, 400, 70 N. E. 478).

A licensee should not be subjected to the uncertainties that constantly would arise if unauthorized limitations, of which he can have no knowledge, are subsequently and without notice to be read into his license at the pleasure of the licensing board. Besides, all reasonable police regulations, enacted for the preservation of the public health or mor-

ality, where a penalty is provided for their violation, while they may limit or prevent the use or enjoyment of property except under certain restrictions, and are constitutional, create statutory misdemeanors, which are not to be extended by implication. *Commonwealth v. Beck*, 187 Mass. 15, 72 N. E. 357.

The license issued to the defendant contained no limit of time for its exercise, nor was it made subject to an existing regulation which so provided. It stated that permission was given to keep eight horses, and purported to and did set out in full the statute under which it was granted, but contained no further recitals. Thus neither by its terms nor by the statute itself was it made revocable, nor does it appear that any regulations had been adopted or promulgated the violation of which would cause a forfeiture. Originally it may have been improvidently issued, but upon being informed that citizens in the vicinity of the defendant's premises objected to the erection of the building for its proposed use, it was not within the power of the board of health, even after a hearing, in the absence of authority conferred upon them by legislative sanction, to deprive him of the privilege they had unreservedly granted. *Commonwealth v. Moylan*, 119 Mass. 109, 111; *Commonwealth v. Kinsley*, *ubi supra*; *Mayor v. Third Avenue Railroad*, 33 N. Y. 42; *Shuman v. Fort Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; *Hirn v. State*, *ubi supra*; *Grand Rapids v. Braudy*, *ubi supra*; *Lantz v. Highstown*, *ubi supra*.

In the opinion of a majority of the court, the decree must be reversed, and a decree entered dismissing the bill, with costs. So ordered.

(188 Mass. 560)

WALKER v. LANCASHIRE INS. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Sept. 6, 1905.)

1. FIRE INSURANCE—IMMEDIATE NOTICE OF LOSS—WAIVER.

Where a fire policy provided that in case of loss immediate notice in writing should be given the company, and the local agents who issued the policy received notice of the loss within 48 hours thereafter, upon which the company sent an adjuster, who interviewed insured about the fire, and some time later sent her a notice to forward the written statement required by the policy, and also attend a fire inquest where insured was present, a finding that the company had waived strict compliance with the requirement as to notice of loss was justified.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1374-1409.]

2. SAME—AGENCY—LIMITATION OF AUTHORITY—NOTICE.

Where agents of a fire insurance company had apparent authority to receive proofs of loss, any limitation thereof not known to an insurer who had sustained the loss did not affect him.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1374.]

3. SAME—PROOF OF LOSS—DELIVERY.

Where a fire policy required the insured to give immediate written notice of loss, pursuant to which insured delivered proofs of loss to agents who had apparent authority to receive proofs of loss, and thereafter immediately borrowed the papers for the purpose of making a copy of them, a finding that there had been a good delivery of the proofs of loss was justified.

4. SAME—ACTION ON POLICY—INTEREST.

Where, in an action on an insurance policy, it appeared that defendant company had been summoned as trustee of the plaintiff in a suit in which an award had been made against plaintiff before the action against the insurance company was brought, plaintiff was not entitled to interest on her recovery under the policy.

Exceptions from Superior Court, Bristol County; Loranus E. Hitchcock, Judge.

Action by Mary A. Walker against the Lancashire Insurance Company. There was a finding for the plaintiff, and defendant brings exceptions. Exceptions conditionally overruled.

Fuller & Davison, for plaintiff. Fredk. W. Brown, for defendant.

MORTON, J. This is an action of contract on a policy of fire insurance to recover for a total loss by fire of the property covered by the policy, which was household goods and furniture contained in "the frame building formerly occupied as a private barn owned by Francis Bump, situate on the west side of Broadway, in the village of North Raynham, Mass." The case was sent to an auditor, and was heard by the court without a jury, upon his report; it being agreed that certain facts found by him should be taken to be true so far as competent and material. Certain other facts were also agreed to. The court found for the plaintiff, and the case is here on exceptions by the defendant to the finding and to the refusal of the court to give certain rulings that were requested.

The policy provides, amongst other things, that: "In case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and the manner in which the fire originated, so far as known to the insured." The fire occurred November 26, 1899, and the statement was rendered according to the plaintiff's contention December 19th, and according to the defendant's contention not till March 15th. The defendant further contends that even if the statement is regarded as having been rendered December 19th, that was not "forthwith," within the meaning of the policy, and that there was no waiver by it of the requirement that it should be so rendered. This is the principal question in the case.

There is also a question of interest; the defendant having been trusted and contending that it is not chargeable with interest, but the court having allowed interest from the date of the writ.

The policy was issued through the agency of Hammond, Morse & Co. at Taunton, who had authority to receive applications, take risks, countersign, and issue policies, and receive the premiums therefor. It bore the lithographed signature of the "Manager of the Eastern Department," and was countersigned "at Taunton" by "Hammond, Morse & Co., Agents." The latter received the application, accepted the risk, took the premium, and, as already stated, issued the policy to the plaintiff. It is agreed that Hammond, Morse & Co. had no authority to adjust losses, but had authority to receive proofs of loss for the purpose of forwarding them to the company. The company received notice of the fire within 48 hours through its local agents, and immediately sent out its adjuster with authority to adjust the loss. He called on the plaintiff and interviewed her about the fire, and subsequently, on December 7th, wrote her as follows: "I have to advise you that if you consider that you have a valid claim against the Lancashire Insurance Company, by reason of recent fire destroying certain furniture belonging to you in North Raynham, you will kindly forward the written statement called for by the statutes and the policy." This was duly received by her, and certainly affords ground for the contention that it operated as a waiver of any delay that might have already occurred. Whether it constituted a waiver as matter of law it is not necessary to consider. Between the 7th and 19th of December a fire inquest was held by the marshal, which was attended both by the plaintiff and the adjuster. What communications, if any, there were between the plaintiff and the adjuster during this interval does not appear; but it would be extraordinary if the subject of the loss was not referred to, and it is possible that facts brought out at the inquest may have seemed to the adjuster to render a proof of loss of minor consequence. On December 19th the plaintiff signed and made oath to a written statement of her loss in the form and with the particulars required by the policy, and on the same day it was delivered by her counsel to Hammond, Morse & Co., and with their consent immediately taken away by him in order that he might make a copy of it. He returned it February 23d, no request appearing to have been made for it in the meantime, and it was thereafter sent to the defendant; the latter receiving it March 15th and retaining it without objection. Neither was any objection made by the adjuster, who acknowledged the receipt of it in a letter written more than a month afterwards. This and the conduct of the company are only material

as tending to throw light upon and explain previous conduct. It is to be noted that the property insured consisted of household goods and furniture. The auditor found, if not concluded by the referee's award, that the plaintiff's loss was \$2,000, showing that there was a large quantity of furniture. And it might well be that, in view of the inquest and the nature of the property, the time that elapsed from December 7th, when the adjuster wrote to the plaintiff calling her attention to the matter of the proof of loss, to December 19th, when it was given to Hammond, Morse & Co., was not unreasonable.

Taking all of the circumstances into account, we do not see how it can be said that the presiding justice was not warranted in finding that the defendant had waived strict compliance with the condition, and that, assuming that what took place constituted a valid delivery, the giving of the proof of loss to Hammond, Morse & Co. on December 19th was a performance of the condition. *Eastern R. R. Co. v. Relief Ins. Co.*, 105 Mass. 570; *Searle v. Dwelling House Ins. Co.*, 152 Mass. 263, 25 N. E. 290; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291. It is plain, however, that if the proof of loss was not delivered till March 15th, when it was received by the defendant company, the condition was not performed. And the defendant contends that what took place on December 19th did not amount to a delivery of the proof of loss to Hammond, Morse & Co. It bases this contention on the fact, which is agreed, that Hammond, Morse & Co. had apparent authority to receive proofs of loss for the purpose of forwarding them to the company, and had no authority to adjust losses. We construe this to mean that they had no authority to adjust losses, but did apparently have authority to receive proofs of loss. Whether their authority was strictly limited as between themselves and the company to the mere function of receiving and forwarding proofs of loss is, it seems to us, immaterial. There is nothing to show that any such limitation on their apparent authority was known to the plaintiff, and she cannot therefore be affected thereby. *Markey v. Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; *Parker & Young Mfg. Co. v. Fire Ins. Co.*, 166 Mass. 484, 44 N. E. 614. If the proof of loss had been delivered to the defendant company, and then immediately taken away, with the defendant's consent, by the plaintiff or her counsel, for the purpose of making a copy of it, there can be no question, we think, that there would have been a good and sufficient delivery of the proof of

loss; and we think that it was within the apparent scope of the authority of Hammond, Morse & Co. to allow the same thing to be done. There is no finding that the proof of loss was not delivered and borrowed in good faith, or that there was any intention in what was done to evade the conditions of the policy. The finding of the court in favor of the plaintiff must be taken to negative anything of the kind. The fact that the proof of loss was retained so long a time cannot, in the absence of any finding of a want of good faith, invalidate the transaction. We think that what took place could be found to constitute a good delivery of the proof of loss.

The remaining question relates to the matter of interest. The defendant was summoned as trustee of the plaintiff in a suit against her by O. E. Osgood & Co. That action was brought before this, and is still pending. Referees were appointed under the policy, and made an award in favor of the plaintiff before this action was brought. The defendant contended that, if liable at all, it was only liable for the amount of the award, and also asked the court to rule that if entitled to recover the plaintiff was not entitled to interest. The court found for the plaintiff for the amount of the award, with interest from the date of the writ. We think that the allowance of interest was erroneous. "It is well settled that, when one summoned as trustee is indebted to the principal defendant upon a demand where interest would be recoverable by the principal defendant only as damages for breach of contract, interest will not be deemed to accrue during the pendency of the trustee process." *Smith v. Flanders*, 129 Mass. 322; *Huntress v. Burbank*, 111 Mass. 213; *Bickford v. Rich*, 105 Mass. 340; *Oriental Bank v. Tremont Ins. Co.*, 4 Metc. 1. The exceptions are sustained on this point only; but as the amount of interest thus allowed is easily computed, if the plaintiff will remit that amount when ascertained the exceptions may be overruled, otherwise they will be sustained.

Ordered accordingly.

(188 Mass. 595)

DICKINSON v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 7, 1905.)

1. DEFECTIVE HIGHWAYS—RECOVERY FOR INJURIES.

Rev. Laws, c. 51, § 18, authorizing a recovery for injuries resulting from defects in highways, is inapplicable, where the person injured was at the time of the injury on his own premises.

2. DAMAGES—DEATH OF PERSON INJURED—CONSCIOUS SUFFERING—EVIDENCE.

In an action for the conscious suffering of plaintiff's intestate from the time of the accident, causing the injuries complained of, to her death, evidence proving that during this

period she was suffering and finally died from an intercurrent disease was admissible.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 482.]

3. SAME.

Evidence that members of the family of plaintiff's intestate had died from pulmonary tuberculosis was properly excluded, as too remote to show that the intestate had suffered and died from this disease.

4. APPEAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

The exclusion of this evidence, if erroneous, was rendered harmless by the admission of evidence of the presence of this disease in the family of the intestate, and under such circumstances that, if infectious, she might have contracted it.

5. DECLARATIONS OF A DECEASED PERSON—EVIDENCE—ADMISSIBILITY.

An action for injuries caused by a defective highway is not commenced, within Rev. Laws, c. 175, § 66, which provides that declarations of a deceased person shall not be inadmissible as hearsay, if made before the commencement of the action, by the service of the notice of the injury on the municipality required by chapter 51, § 20.

6. SAME—FINDING OF GOOD FAITH.

A finding that the declarations of a deceased person were made in good faith is inferred by the admission of evidence thereof, under Rev. Laws, c. 175, § 66, providing that a declaration of a deceased person shall not be inadmissible, if the court finds that it was made in good faith.

7. MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS—EXERCISE OF CORPORATE POWERS FOR PECUNIARY BENEFIT.

A city, engaging in the business of lighting its streets, pursuant to the authority conferred on it by St. 1825, p. 313, c. 3, for the purpose of lessening its liability for damages for defects in streets on account of their being dark, is engaged in an enterprise for its private benefit, and is liable for negligence in the management thereof.

Exceptions from Superior Court, Suffolk County; Lemuel Le B. Holmes, Judge.

Action by Evelyn Dickinson, prosecuted after death by Edward J. McIntyre, her administrator, against the city of Boston. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Chas. W. Bartlett, Elbridge R. Anderson, and Arthur T. Smith, for plaintiff. Sam'l M. Ohld, for defendant.

BRALEY, J. This is an action of tort to recover damages for injuries suffered by the plaintiff's intestate, which was caused by the fall of a defective lamp post owned by the defendant. Originally the deceased sought to sustain the suit under Rev. Laws, c. 51, § 18, for injuries received as a traveler upon the highway. But, if the lamp post which fell stood in a public way, at the time of the accident she was on her own premises, and this statutory provision is inapplicable. Upon her death the plaintiff, as administratrix, being admitted to prosecute the suit, by an amendment duly allowed, declared in tort at common law for the alleged negligence of the defendant in not keeping and maintaining the lamp post in

repair and allowing it to become defective and unsafe. At the trial in the superior court the plaintiff having obtained a verdict, the defendant brings the case here on exceptions to the exclusion and admission of certain evidence, and to a refusal to rule that upon all the evidence the action could not be maintained.

No argument has been advanced at the bar, nor is found in the defendant's brief that, if the action could be maintained, there was no evidence for the jury of its negligence, or that the deceased was not in the exercise of due care. This leaves for our consideration such matters only as were argued, or appear in the brief. Before taking up the principal question of liability the correctness of the rulings relating to evidence may be first considered. The cause of action was for the conscious suffering of the plaintiff's intestate from the time of the accident to her death, and evidence which had a tendency to prove that during this period she was suffering and finally died from an intercurrent disease was admissible. But the attempt of the defendant for this purpose to elicit on cross-examination from the mother of the deceased, who was a witness for the plaintiff, that other members of her family had died from pulmonary tuberculosis, and hence there was a presumption that her daughter also had died from this disease, well may have been deemed in the discretion of the presiding judge as too remote to be of any probative value, and its exclusion affords no just ground of exception. *Jennings v. Rooney*, 183 Mass. 577, 67 N. E. 685; *Perkins v. Rice* (Mass.) 72 N. E. 323. Furthermore, whatever benefit might have been derived from an answer to the question later was obtained by the defendant, when from one of its medical witnesses uncontroverted evidence of the presence of this disease in the family, and under such circumstances that, if infectious, she might have contracted it, was admitted. *Morrison v. Lawrence*, 186 Mass. 456, 72 N. E. 91.

Under an objection, but without an exception being taken at the time, though subsequently allowed as an exception of the defendant, a witness for the plaintiff, who had acted as counsel for her intestate, was permitted to give evidence of declarations she had made to him before the commencement of the action, whereby she fully narrated the circumstances under which the accident occurred. It is now urged that, as this conversation was held after a notice under Rev. Laws, c. 51, § 20, had been served upon the city, it is not brought within the provisions of St. 1898, c. 533, now Rev. Laws, c. 175, § 66, because serving such a notice is the bringing of an action within the meaning of the statute, after which such declarations are declared inadmissible. The presumption, however, is plain that it was the

legislative purpose that this language should have its ordinary meaning as used in our laws, and the words "commencement of the action" refer to the date when proceedings are instituted by a writ or other legal process issuing from the clerk's office. *Ford v. Phillips*, 1 Pick. 202; *Gardner v. Webber*, 17 Pick. 407, 411; *Com. v. Casey*, 12 Allen, 214, 217. While a preliminary finding of the good faith of the declarant by the court is required before such declarations can be received, this judicial action is to be inferred by the admission of the evidence itself, where the exceptions fail to state that the inquiry was not made. *Dixon v. New England Railroad*, 179 Mass. 242, 246, 60 N. E. 581. These declarations, therefore, were within the statute, and properly admitted in evidence. *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802.

By an ordinance duly enacted the city had established a lamp department, that included the lamps and other property used in its system of street lighting, the management of which was intrusted to an officer, therein designated as a "superintendent of lamps." The defendant now insists that he was a public officer, for whose negligence it was not responsible. It relies, in support of this position, upon St. 1825, p. 313, c. 3, permitting the city to set up and maintain lamps in its streets, so far as might be convenient and necessary for the purpose of lighting them, "and to make all necessary contracts, rules, orders, and regulations respecting said lamps." Under Prov. St. 1773-74, p. 301, c. 12, confirmed by St. 1796, c. 69, enacted when Boston was a town, and St. 1825, p. 313, c. 3, passed after it became a city, the defendant was authorized, but not required, to maintain lamps to light the streets, and to enact proper ordinances providing for the punishment of those "breaking or otherwise damaging the same." No general statutory duty is imposed upon cities and towns requiring them to light their streets for any purpose. See Pub. St. 1882, c. 203, § 76. But, when they are lighted at the expense of the municipality, authority to tax for such an expenditure must be given by statute. *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52; *Coolidge v. Brookline*, 114 Mass. 592, 594. And it has been said that the probable reason for the passage of these special laws was the limitation on the taxing power of the defendant, as without them neither the town, nor the city, could have established and maintained lawfully a system of artificial lighting of its streets to be paid for out of the public revenue. *Spaulding v. Peabody*, 153 Mass. 129, 131, 132, 26 N. E. 421, 10 L. R. A. 397.

In suits for damages caused by defects in streets which at night may become dangerous to travelers because they are dark and unlighted, it uniformly has been held that, as a city or town is under no statutory require-

ment to light them, an omission to do so does not constitute negligence. *Sparhawk v. Salem*, 1 Allen, 30, 32, 79 Am. Dec. 700; *Randall v. Eastern Railroad Co.*, 106 Mass. 276, 8 Am. Rep. 327; *Lyon v. Cambridge*, 136 Mass. 419; *Spillane v. Fitchburg*, 177 Mass. 87, 88, 58 N. E. 176, 83 Am. St. Rep. 262. But if, under no obligation imposed by statute, the defendant undertook this service for the general convenience of its citizens, and travelers within its borders, it also by so doing derived an incidental benefit by the protection thus afforded of decreasing the probability of suits against it for defective public ways, under Rev. Laws, c. 51, §§ 1, 18. An unlighted public way, indeed, may be dangerous when used at night, though not thereby rendered defective. If, however, it is out of repair, and this condition has been undiscovered, or, if discovered, not remedied, the probability that travelers using it would be less likely to be injured when lighted than if unlighted is apparent and appreciable. It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken the enterprise for its private benefit, and not acting in the performance of any public duty, it is liable for negligence in the management of its corporate property, when used for such purpose. *Perry v. Worcester*, 6 Gray, 544, 66 Am. Dec. 431; *Bigelow v. Randolph*, 14 Gray, 541, 543; *Hawks v. Charlemont*, 107 Mass. 414; *Sullivan v. Holyoke*, 135 Mass. 273; *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Doherty v. Braintree*, 148 Mass. 495, 20 N. E. 106; *Coan v. Marlborough*, 164 Mass. 206, 208, 41 N. E. 238; *Collins v. Greenfield*, 172 Mass. 78, 51 N. E. 454; *Butman v. Newton*, 179 Mass. 1, 60 N. E. 401.

By the ordinance the superintendent of lamps, among other duties, was required, at the expense of the city, to keep and maintain "all lamp posts" in good repair. It was through his negligence that the lamp post that fell was allowed to fall into decay. That the city could act as well by ordinance in the creation and appointment of agents charged with duties to be performed in its behalf as by a direct vote of the city council is settled. *Jensen v. Waltham*, 166 Mass. 344, 346, 44 N. E. 339; *Butman v. Newton*, *supra*. But, as we have said, the defendant was under no municipal duty to establish and maintain street lights, which were classified by its ordinance as a lamp department. It follows that the superintendent of this department, whether elected by the city council or appointed by the mayor, does not belong to that class of public officers, of which highway surveyors afford a familiar illustration, for whose official acts cities and towns are not held liable. For he is not charged with

the performance of duties prescribed by any statute, where he would act independently, but he acts, if at all, under the ordinance as a municipal agent of the defendant. *Walcott v. Swampscott*, 1 Allen, 101; *Hawks v. Charlemon*, ubi supra; *Sullivan v. Holyoke*, ubi supra; *Deane v. Randolph*, 132 Mass. 475; *Waldron v. Haverhill*, supra; *Butman v. Newton*, ubi supra. Being thus under the immediate direction and control of the city, it had full authority to direct the manner in which his department should be conducted. If the defendant lighted its street as a matter of convenience and safety for those having occasion to use them at night, without being required by law to undertake the performance of such a duty, the superintendent of lamps for this purpose became its servant, for whose negligent conduct in their maintenance it was responsible.

A majority of the court is of the opinion that the order must be:

Exceptions overruled.

(139 Mass. 76)

COMMONWEALTH v. R. I. SHERMAN MFG. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1905.)

1. TRADE-MARKS—USE OF ARMS OR SEAL OF COMMONWEALTH.

St. 1903, p. 155, c. 195, § 1, declaring that no person or private corporation shall use the arms or the great seal of the commonwealth for advertising or commercial purposes, is constitutional.

2. SAME—CRIMINAL LIABILITY—DEFENSES.

In a prosecution for violation of St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or great seal of the commonwealth for advertising or commercial purposes, an offer of proof, to the effect that at the time of the passage of the act and at the time it went into effect the defendant had on hand a large quantity of labels, did not go far enough, where there was no offer to show that the labels on hand when the act took effect were not printed within the year, or that the labels on hand when the act was passed were not disposed of when it took effect.

3. SAME—EXISTING CONTRACTS.

In a prosecution for violation of St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or great seal of the commonwealth for advertising or commercial purposes, the fact that when the act went into effect the defendant had contracts for the manufacture, sale, and delivery of goods bearing the prohibited device as a trade-mark was no defense.

4. SAME—STATUTE—CONSTITUTIONALITY.

St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or the great seal of the commonwealth for advertising or commercial purposes, is not in conflict with the provision of the federal Constitution investing Congress with the power to regulate commerce among the states.

5. SAME—INDICTMENT—SUFFICIENCY.

Under St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or the great seal of the commonwealth for advertising or commercial purposes, an indictment for violation of the statute, which is framed in the words thereof, is sufficient.

6. SAME—PUNISHMENT.

Under Rev. Laws, c. 220, § 4, declaring that, if no punishment for a crime is provided by statute, the court shall impose such sentence as conforms to the common usage and practice, a violation of St. 1903, p. 155, c. 195, § 1, forbidding the use of the arms or the great seal of the commonwealth for advertising or commercial purposes, is an offense, though the statute does not provide any punishment.

Exceptions from Superior Court, Suffolk County; Lemuel Le B. Holmes, Judge.

The R. I. Sherman Manufacturing Company was convicted of violating St. 1903, p. 155, c. 195, § 1, and brings exceptions. Exceptions overruled.

Frederic H. Chase, for the Commonwealth.
Edwd. C. Stone, for defendant.

LATHROP, J. The principal question in this case is whether St. 1903, p. 155, c. 195, is constitutional. Section 1 of this act reads as follows: "No person or private corporation shall use the arms or the great seal of the commonwealth, nor any representation thereof, for any advertising or commercial purpose whatever." The act was approved on April 6, 1903, and by its terms was to take effect "at the expiration of one year after its passage." An account of the adoption of the arms and seal of Massachusetts in 1780 may be found in Quincy, 468; and they are there stated to have remained unchanged until this day. The description of the seal and arms were not included in the statutes of the commonwealth until the year 1885. St. 1885, c. 288, §§ 1, 2. This is now Rev. Laws, c. 2, § 3. The great seal of the commonwealth bears upon its face the arms, though the color of the arms is not an essential part of the seal. A representation of the arms as established in 1780 has been printed upon the Acts and Resolves of the Commonwealth since 1808, with some slight changes, until the present day. In fact the design used in the labels by the defendant, as set forth in the first count of the indictment, was the design in use by the commonwealth from 1866 to 1885. It is an extraordinary proposition that the law has interfered with the defendant's trade-mark, when such trade-mark was taken from the design which the commonwealth had appropriated to itself as a symbol of its sovereignty. The defendant appropriated it later only because it was the official sign of the commonwealth.

In the leading case of *Gilman v. Hunnewell*, 122 Mass. 139, 147, it is said by Chief Justice Gray: "A trade-mark may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use." This right may be pro-

ted by injunction. Can it for a moment be said that the commonwealth cannot use its own device, or that the defendant can obtain an injunction against the commonwealth for so doing?

As against the commonwealth, the defendant cannot have any claim to a trademark. Could any one suppose that this court would allow its seal to be used as a trademark? And if a court's seal cannot be used, cannot the great and general court forbid the use of the great seal and the arms of the commonwealth "for any advertising or commercial purpose"? It seems to us too clear for argument.

The principal cases relied upon by the defendant are *Ruhrstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30, and *People v. Van De Carr*, 178 N. Y. 425, 70 N. E. 965, 66 L. R. A. 189, 102 Am. St. Rep. 516. Both of these cases related to statutes forbidding the use of the flag for commercial purposes. In the first case one of the main grounds of decision was that the national government had passed no legislation restricting the use of the flag. The latter case proceeds upon the theory that the statute applied "as well to articles manufactured and in existence when it was lawful to manufacture them and have them in possession as to those thereafter manufactured or acquired." The statute under which the defendant was convicted differs essentially from those in the cases above referred to. It does not apply to articles manufactured before the passage of the act, nor does it apply to the flag of the nation. It seeks merely to protect the seal and coat of arms of the commonwealth, and by the provision that it shall not go into effect for a year from its passage, gives ample time to all who have been using its seal or coat of arms to get rid of their goods.

As to the offer of proof that at the time of the passage of the act and at the time it went into effect the defendant had on hand a large quantity of labels, the offer does not go far enough. There was no offer to show that the labels on hand when the act took effect were not printed within the year, nor was there any offer to show that labels on hand when the act was passed were not disposed of when it took effect. As to the

last offer of proof, that when the act went into effect the defendant had contracts with various persons for the manufacturing, sale, and delivery of goods like those described in the indictment—that is, of goods having thereon the said trade-marks—it is perhaps enough to say that it does not appear that these acts could not be complied with without the use of the representation of the arms. It is a better answer to say that where a valid act is passed by the Legislature, it is no defense that prior to its taking effect contracts have been entered into with which the law interferes. *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *Salem v. Maynes*, 123 Mass. 372. The act in question, if otherwise within the power of the Legislature, is not in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several states. *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223; *Com. v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

The remaining points in the case require but brief consideration. The indictment set forth the offense substantially in the words of the statute, and is sufficient. *Commonwealth v. Dyer*, 128 Mass. 70; *Commonwealth v. Milliken*, 174 Mass. 79, 54 N. E. 357. The evidence was sufficient to show a "use," within the meaning of the statute, and that the representation of the arms of the commonwealth was there for an advertising and commercial purpose.

Lastly, it is contended that a violation of the statute does not constitute a crime. But a crime or misdemeanor is defined as "an act committed or omitted in violation of the public law, either forbidding or commanding it." 4 Bl. Com. 5. By Rev. Laws, c. 220, § 4, it is provided that "if no punishment for a crime is provided by statute the court shall impose such sentence according to the nature of the crime, as conforms to the common usage and practice in this commonwealth." This statute was early enacted, and has been in force ever since. St. 1782, c. 9, § 1; Rev. St. 1836, c. 139, § 1; Gen. St. 1860, c. 174, § 1; Pub. St. 1882, c. 215, § 1. See *O'Neill v. Commonwealth*, 165 Mass. 446, 43 N. E. 183.

Exceptions overruled.

(189 Mass. 156)

AZIZ v. ATLANTIC COTTON MILLS.

(Supreme Judicial Court of Massachusetts.
Essex. Sept. 11, 1905.)MASTER AND SERVANT—INJURIES TO SERVANT
—SCOPE OF EMPLOYMENT—ASSUMED RISK.

Where plaintiff, an inexperienced servant, was directed to put laps of cotton on at the feed end of a machine in a cotton mill, and, after the cotton had passed through the machine, to take the laps off at the other end, which was not dangerous, but without direction he attempted to clear the machine, when it was clogged, without shifting the belt, and in so doing was injured by the sudden starting of the machine, he assumed the risk, and was not entitled to recover for his injuries.

Exceptions from Superior Court, Essex County; Francis A. Gaskill, Judge.

Action by one Aziz against the Atlantic Cotton Mills. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Knox & Coulson and Mahoney, Crowell & Sullivan, for plaintiff. Sweeney, Dow & Cox, for defendant.

LATHROP, J. This is an action at common law for personal injuries sustained by the plaintiff while in the employ of the defendant. At the trial in the superior court, at the close of the plaintiff's evidence, the judge directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

The plaintiff is a Syrian, and came to this country five or six months before the accident complained of. He went to work for the defendant on the second or third day after his arrival. At the time of the accident, June 12, 1902, he was about 19 years old, and could not speak English. The only evidence as to the accident came from the plaintiff, and was given through an interpreter. He was first employed as a roving boy, and his duties consisted in carrying roving from one set of machines in one part of the mill to another set of machines in another part. For about two months preceding the accident, in addition to his duties as roving boy, he swept the floor and cleaned around certain machines, but not around the machine on which he was injured. He never had worked on any machine in the mills of the defendant before the day of the accident, nor on any machine anywhere, and before he came to this country he had worked on a farm in Syria. On the day of the accident he was directed by the second hand to go to work on four machines, which are known as "Kitson Two Beater Breaker Lappers," and he was instructed to put the laps of cotton on at the feed end, and, after the cotton had passed through the machine, to take the laps off at the other end, and this was all the instruction or direction that he received. He worked on these machines during the morning, and returned to work in the afternoon at 1 o'clock, and he had not

started or stopped the machine during the morning or when he returned to work in the afternoon. About half past 1 o'clock on this same day, the first the plaintiff ever had worked on these machines, one of the machines was stopped by the clogging of cotton in a beater box, and while the driving belt was running from the machine to the main shafting. When the machine stopped, the plaintiff lifted the cover of the second beater box about three or four inches, and saw that there was a considerable amount of cotton there, and he put his right hand in to take hold of the cotton, when the machine started, and his hand and arm was struck by the beaters, and torn and lacerated so that it was necessary to amputate the arm above the elbow. The plaintiff further testified on cross-examination that he himself knew that the picker picked the cotton and made it into a lap; that he never had seen the cover of the beater raised by anybody; that he raised the cover four or five inches by taking hold of the handle on the side, and that he never saw anybody take hold of the handle before; that he saw the belts on the machine and knew that they ran to pulleys or wheels, and that the wheels turned around very fast; that he knew that a belt ran over a revolving pulley at one end and over a small pulley that was fastened to a shaft running through the beater box, and that the shaft was turning around; that he would not have put his hand into the box, if he had thought that the machine had been running; that he never had been told to raise the cover; that he knew that there was a noise in the machine when it was in motion, and that, just at the point where the cotton went into the box, there were two rollers through which the cotton passed; that he saw the ends of the rollers on the outside of the box, and from that fact knew that the rollers went through the box; that the bottom of the cover came down very close to the cotton, and that he knew his hand would not get under unless he raised the cover; that, when the cover was raised and the machine was still, the knives could be seen; that the knives were something like a comb, and that there were two of them. A witness who was called as an expert by the plaintiff testified that it would not be safe to remove clogged cotton with the belt on the shaft which turned the beater; that it would be dangerous. Upon cross-examination the witness testified that the cover of the beater box was made of sheet iron and was quite heavy; that it was quite a weight to push up, and required strength to do it; that when the knives in the beater are revolving, and the pulley and the shafting to which the knives are fastened are turning, they can be seen by anybody who stands beside the beater; that, if one found the cotton closed up in the beater, he could know whether the knives were going around by seeing whether the pulley was turning; that the turning

of the pulley would indicate that the knives were revolving in the beater, and that when they were revolving they make quite a noise; that when they are revolving rapidly the knives are not visible, and that when any person raises the cover and cannot see the knives that indicates that there is danger; that it would be impossible for anybody to get his hand into the beater unless he raised the cover and put it in; that, if any one raised the cover four or five inches, there would be no difficulty in seeing the knives if they were still.

We are of opinion, on the evidence in this case, that the ruling was right. The plaintiff was set to work "to put the laps of cotton on at the feed end, and, after the cotton had passed through the machine, to take the laps off at the other end." There was no danger in this. He chose to go beyond this, and to attempt to clear the picker machine when it was clogged. This was no part of his duty, and he exceeded his instructions. The case falls within *De Souza v. Stafford Mills*, 155 Mass. 476, 30 N. E. 81. See, also, *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Robinska v. Lyman Mills*, 174 Mass. 432, 54 N. E. 873, 75 Am. St. Rep. 364; *Ohmiel v. Thorndike Co.*, 182 Mass. 112, 65 N. E. 47.

Exceptions overruled.

(189 Mass. 100)

BURNHAM v. CHINA MUT. INS. CO. et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1905.)

1. MARINE INSURANCE — COLLISION — CONSTRUCTION OF POLICIES.

Policies insuring a vessel against "the risk of collision sustained" and against "loss sustained by collision with another vessel" insure against collision with another vessel.

2. SAME—WHAT CONSTITUTES COLLISION.

A vessel which struck a wrecked vessel, sunk several hours before and never raised, though practicable to do so at a cost exceeding her value when raised, did not come into collision with another vessel, within the meaning of a policy insuring her against collision with another vessel.

Appeal from Supreme Judicial Court, Suffolk County.

Action by one Burnham against the China Mutual Insurance Company and others. Cause tried on agreed statement of facts filed in the superior court. Judgment pro forma was ordered for defendants, and plaintiff appeals. Judgment for defendants.

Arthur H. Russell, for plaintiff. Bryant, Griswold & Howard, for defendants.

LATHROP, J. Some of the policies in these cases cover "the risk of collision sustained," and others are against "loss sustained by collision with another vessel." We are of opinion that the two forms mean the same thing, namely, collision with another vessel. We agree with the plaintiff that if a ves-

sel is temporarily aground, or at anchor, or at her dock, and is run into by another vessel, this is a collision with another vessel, within the meaning of the policies. *London Assurance v. Companhia De Moagens De Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113, and cases cited. So, it may be true, as was decided in *Chandler v. Blogg* [1898] 1 Q. B. 32, that, where a vessel strikes another vessel which is at the time under water and resting on the bottom, this is a collision within the meaning of the policy, if the vessel is raised within a few hours. Mr. Justice Bigham in this case adopted the view that "collision," when used alone, without other words, meant two navigable things coming into contact, and that the sunken vessel, though she could not be navigated at the time, was still navigable, as she was raised within a few hours. In the case at bar the plaintiff's vessel struck a wreck, sunk several hours before, and which was never raised. While it was practicable to raise her, the cost would have exceeded her value when raised. Under such circumstances we are of opinion that the plaintiff's vessel did not come into collision with another vessel, within the meaning of this word in the policies.

The case of *Richardson v. Burrows*, though not reported, is cited in *Lowndes on Mar. Ins.* 199, in *Spencer on Col.* 14, and in *Cline v. Western Assur. Co.*, 101 Va. 496, 44 S. E. 700. The counsel for the plaintiff state in their brief that they have had an opportunity to examine a stenographic report of the case, and that it was an action to recover for a partial loss of wheat shipped on a small schooner which sailed from Lynn to England for Caen in France. During the night the vessel struck something which caused damage to the cargo. What the object was did not appear, but it was probably some old sunken wreck, or possibly floating wreck. After the evidence was in Lord Coleridge inquired whether there were any cases of collision. None were referred to. Lord Coleridge ruled that he should hold that the word "collision" meant collision with another ship, and did not mean either a rock, or a sand bank, or floating wreck. The jury were then discharged by consent, and judgment given for defendant. The case was decided December 16, 1880. While this is a *nisi prius* decision, it is of some weight. See, also, *Hough v. Head*, 54 L. J. Q. B. 294; *Reischer v. Borwick*, [1894] 2 Q. B. 548; *Cline v. Western Assur. Co.*, *ubi supra*; *The Bristol*, 10 Blatchf. 537, Fed. Cas. No. 1892.

We do not regard the case of *Fisher v. Chapman*, 20 Times Law Rep. 319, as applicable to this case. It involved no discussion as to what is collision, nor any adjudication thereon. The case of *Barr v. Gibson*, 3 M. & W. 390, relates to a bill of sale of a vessel on the shore. It has no bearing on this case.

Judgment in each case for the defendant.

(189 Mass. 67)

DUNN v. BOSTON & N. ST. RY.(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 8, 1905.)**1. MASTER AND SERVANT—INSPECTION OF APPLIANCES—CARS BELONGING TO THIRD PERSON.**

Where defendant maintained a coal shed into which a railroad company ran cars on a spur track to be unloaded by defendant's employes, defendant owed its employes no duty to inspect the cars.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 235, 236.]

2. SAME—WAYS, WORKS, AND MACHINERY.

The cars were not a part of the ways, works, and machinery of the defendant, so as to make it liable for a defect therein, under Rev. Laws, c. 106, § 71, cl. 1.

Report from Superior Court, Middlesex County.

Action by one Dunn against the Boston & Northern Street Railway. There was verdict for defendant, and the case was reported to the full court. Judgment on the verdict.

Daniel J. Donahue and Albert S. Howard, for plaintiff. Reginald Foster, William D. Turner, and George Hogg, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, while in the employ of the defendant, on February 20, 1904. The declaration contains four counts. The first is under Rev. Laws, c. 106, § 71, cl. 2, alleging the negligence of a superintendent. The second is under clause 1 of the same statute, for a defect in the defendant's ways, works, and machinery. The third and fourth are at common law. At the close of the evidence the judge directed a verdict for the defendant. If the verdict was properly ordered, judgment is to be entered for the defendant; otherwise, by agreement of counsel, judgment is to be entered for the plaintiff, and the damages assessed by a jury.

The plaintiff was about 30 years of age, and had been in the employ of the defendant at its power house in Lowell for some 16 to 18 months before the accident, engaged in putting asbestos coverings on steam pipes, unloading coal cars, and doing other odd jobs, when ordered by Nelson Young, the engineer of the defendant in general charge of the power house and the men employed there. Adjoining the boiler room was a coal shed belonging to the defendant, into which cars loaded with coal to be unloaded by the defendant were pushed over a single spur track from the road of the Boston & Maine Railroad, running up an incline to an elevated structure, which at the place of the accident was some 20 to 25 feet above the floor of the power house, and was level for a space sufficient to accommodate four long coal cars. The track rested on large sleepers supported by beams from the ground.

A gangway about two feet wide, for men occupied in unloading cars to stand on, was laid on sleepers outside the rails on both sides. There was a space some three feet wide between the sleepers and the wall of the shed on the side where the plaintiff fell. These conditions had existed during the time the plaintiff had worked at the power house, and he testified that he did not need any one to give him directions how to unload a coal car. On the day of the accident the plaintiff, with three others, was ordered by Young "to go and unload them coal cars." There was evidence that while unloading the cars he was injured by a defect in one of the cars. The cars did not belong to the defendant, and it was not its custom to inspect them.

To sustain the counts at common law, the plaintiff relies upon the case of *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 84 N. E. 1134. But that case differs widely from the one before us. There a granite company was using a car to carry its granite from its premises to the place of destination. Here the defendant was merely a consignee of coal delivered on its premises by a car of a railroad company. We are not aware of any case where under such circumstances the consignee has been held liable to its servants for a defect in the car; nor are we aware of any case which imposes upon the consignee the duty of inspecting the car. The case of *Foster v. New York, New Haven & Hartford Railroad*, 187 Mass. 21, 72 N. E. 331, has no application to the case at bar. In that case the defendant was using in its freight house an empty car belonging to another railroad, as a passageway from one of its own cars to the platform of the freight house. There was a hole in the bottom of the car through which a servant of the defendant fell.

It is further contended that this car was a part of the defendant's ways, works, and machinery; but we are of opinion that under the circumstances of this case the car was not a part of the ways, works, and machinery. The car in question was not under the control of the defendant. It was not its duty to inspect it, nor to repair it. *Hyde v. Booth* (Mass.) 74 N. E. 337, and cases cited.

According to the terms of the report, the order must be: Judgment for the defendant.

(189 Mass. 12)

COMMONWEALTH v. SNELL(Supreme Judicial Court of Massachusetts.
Bristol. Sept. 7, 1905.)**1. INDICTMENT—COUNTS—SUFFICIENCY ON MOTION TO QUASH.**

Where any count in an indictment is good, a motion to quash, addressed to the indictment as a whole, is properly overruled.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 487.]

2. HOMICIDE—INDICTMENT—TIME AND PLACE OF OFFENSE—ALLEGATIONS—SUFFICIENCY.

Under Rev. Laws, c. 218, § 17, which provides that an indictment shall contain a caption consisting of the name of the commonwealth, county, and court in which it is presented, and the time of the sitting of the court, and section 20, which declares that the time and place of the commission of the crime need not be alleged, that the allegation of time in the caption shall be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime, and within the period of limitations, that the name of the county and court in the caption shall be considered as an allegation that the act was committed within the jurisdiction of the court, and that all the allegations shall be considered to refer to the same time and place, and section 52, which authorizes the finding of an indictment for murder at any time after the death of the person murdered, an indictment for murder which alleges in its caption the name of the commonwealth, county, and court in which it was presented, and the time of the sitting of the court, alleges that the murder was committed before the finding of the indictment, and within the jurisdiction of the court.

3. SAME—ALLEGATIONS OF MEANS USED AND WOUND INFLICTED—SUFFICIENCY.

An indictment for murder, which alleges that defendant with a blunt instrument, the name and particular description of which are unknown, assaulted decedent on the head and struck him with the instrument, inflicting on the head a mortal wound, sufficiently shows the means used and the location of the wound.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 217, 218.]

4. SAME—ALLEGATION OF TIME OF DEATH OF PERSON MURDERED—SUFFICIENCY.

An indictment for murder, which alleges, after describing the means used in committing the assault on decedent and the wound inflicted on him, that he "then and there instantly died," sufficiently alleges that the death occurred within a year and a day after the assault.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 230.]

5. SAME—STATUTORY FORM OF INDICTMENT—SUFFICIENCY.

An indictment for murder, which in its caption sets forth the name of the commonwealth and county and court, and the time of the sitting of the court, and which alleges that defendant assaulted decedent with a blunt instrument and inflicted on his head a fatal wound, of which he then and there instantly died, is sufficient, within Rev. Laws, c. 218, § 67, prescribing a form of indictment for murder, though it does not follow the form.

6. SAME—STATUTORY FORM OF INDICTMENT—CONSTITUTIONAL LAW.

Const., Declaration of Rights, art. 12, which declares that no one shall be held to answer for any crime until the same is fully, plainly, substantially, and formally described to him, only requires such particularity of allegation in an indictment as may be of service to him in enabling him to understand the charge and to prepare for his defense; and hence Rev. Laws, c. 218, § 67, prescribing a form of indictment for murder, is not invalid, especially in view of section 39, requiring a bill of particulars in all cases where the indictment alone is not sufficiently full to give defendant knowledge of the nature of the crime charged.

7. SAME—EVIDENCE—ADMISSIBILITY.

Where, on a trial for murder, the evidence showed that defendant had formed a purpose to murder a third person with a view of obtaining possession of his property, and that he found that decedent stood in the way of the accomplishment of the purpose, evidence that, prior to the homicide, defendant had stated that

he intended to murder the third person at a place designated and in a manner described, which corresponded to the place at and the manner in which decedent was murdered, was admissible, as tending directly to establish defendant's guilt, and as contradicting the claim of the defense that decedent committed suicide.

8. SAME.

Where, on a trial for homicide, there was evidence showing that defendant had been living with a woman not his wife for several years, evidence that shortly before the homicide defendant impressed on her the peril of her position, if she made disclosures against him, was admissible, as tending to show that decedent's death was premeditated by defendant; the conversation between defendant and his mistress indicating that he had in mind the possibility of her making statements that would be used against him in reference to the death of decedent.

9. CRIMINAL LAW—EVIDENCE.

On a trial for homicide, the evidence of a physician that he was so confident in his opinion as to the cause of decedent's death that he believed that, if an autopsy could have been had earlier, it would have confirmed his opinion, was competent.

10. SAME.

The testimony of a witness as to what it appeared a person at a distance was doing was competent as a description of the movements of such person.

Exceptions from Supreme Judicial Court, Bristol County.

Angles Snell was convicted of murder in the first degree, and he brings exceptions. Overruled.

The indictment is as follows:

"Commonwealth of Massachusetts, Bristol—ss.:

"At the superior court begun and holden at Fall River, within and for said county of Bristol, on the first Monday of November, in the year of our Lord one thousand nine hundred and three, the jurors for the said commonwealth on their oath present that Angles Snell did assault and beat Tillinghast Kirby with intent to murder him, and by such assault and beating did kill and murder Tillinghast Kirby.

"And the jurors aforesaid, for the said commonwealth, on their oath aforesaid, further present that said Angles Snell in and upon one Tillinghast Kirby did make an assault, and that the said Angles Snell, with a certain blunt instrument, the name and more particular description of which is to the jurors aforesaid unknown, the said Tillinghast Kirby, in and upon the head of the said Tillinghast Kirby, then and there feloniously, willfully and of his malice aforethought did strike and bruise, giving to the said Tillinghast Kirby then and there, with the blunt instrument aforesaid, so unknown as aforesaid, in and upon the head of the said Tillinghast Kirby one mortal wound, of which said mortal wound he, the said Tillinghast Kirby, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Angles Snell the said Tillinghast Kirby then and there, in manner and form aforesaid, feloniously,

willfully, and of his malice aforethought did kill and murder.

"And the jurors aforesaid, for the said commonwealth, on their oath aforesaid, do further present that Angles Snell in and upon one Tillinghast Kirby did make an assault, and that the said Angles Snell, with a certain instrument, the name and a more particular description of which is to the jurors aforesaid unknown, the said Tillinghast Kirby, in and upon the head of the said Tillinghast Kirby, then and there feloniously, willfully, and of his malice aforethought did strike, wound, cut, and bruise, giving to the said Tillinghast Kirby then and there, with the instrument aforesaid, so unknown as aforesaid, in and upon the head of the said Tillinghast Kirby, one mortal wound, of which said mortal wound he, the said Tillinghast Kirby, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Angles Snell the said Tillinghast Kirby then and there, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought did kill and murder."

Herbt. Parker, Atty. Gen., Jas. M. Swift, Dist. Atty., and Fred T. Field, for the Commonwealth. Hugo A. Dubuque and Jas. P. Doran, for defendant.

KNOWLTON, C.J. The first question in this case arises upon the defendant's motion to quash the indictment. The indictment is in three counts, and the motion is general, applying to the indictment as a whole, and not asking for a ruling in regard to any particular count. If, therefore, any count is good, the motion was rightly overruled. *Com. v. Hawkins*, 8 Gray, 463; *Com. v. Pratt*, 137 Mass. 98.

The defendant's first objection, which applies to all the counts alike, is that the indictment contains no statement of the time and place of the commission of the crime. The answer to this is found in the statute, which was intended to simplify the forms and rules of criminal pleading. *Rev. Laws c. 218, §§ 17-21*. These sections, which were first enacted in St. 1899, c. 409, are as follows:

"Sec. 17. An indictment shall contain, first, the caption, which shall consist of the name of the commonwealth, county and court in which the indictment is presented, and the time of the sitting of the court. One caption will be sufficient, although the indictment contains more than one count. Second, a plain and concise description of the act which constitutes the crime, or the appropriate legal term descriptive of such act, without a detailed description thereof. The words used in a statute to define a crime, or other words conveying the same meaning, may be used.

"Sec. 18. The circumstances of the act may be stated, according to their legal ef-

fect, without a full description thereof.

* * *

"Sec. 20. The time and place of the commission of the crime need not be alleged, unless it is an essential element of the crime. The allegation of time in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed before the finding of the indictment, after it became a crime and within the period of limitations. The name of the county and court in the caption shall, unless otherwise stated, be considered as an allegation that the act was committed within the territorial jurisdiction of the court. All allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place.

"Sec. 21. The means by which a crime is committed need not be alleged in the indictment, unless they are an essential element of the crime."

Additional provisions of a similar character in regard to particular subjects are found in the sections immediately following.

In this indictment the caption conforms to the statute, giving the name of the commonwealth, county, and court in which the indictment was presented, and the time of the sitting of the court. This, when read in connection with the statute, is an allegation that the act was committed before the finding of the indictment and after it became a crime. In reference to the crime of murder, there is no period of limitations. *Rev. Laws, c. 218, § 52*. It is also an allegation that the act was committed within the territorial jurisdiction of the court. See *Com. v. Rogers*, 181 Mass. 184-191, 63 N. E. 421. These facts in regard to the time and place are all that need be proved at common law when the averments are made particularly. Except so far as necessary to show jurisdiction, such averments never need be proved. *Com. v. Tolliver*, 8 Gray, 386, 69 Am. Dec. 252; *Com. v. Lavery*, 101 Mass. 207; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; *Ledbetter v. United States*, 170 U. S. 606-613, 18 Sup. Ct. 774, 42 L. Ed. 1162. In all other particulars the second and third counts are good at common law. The allegations as to the means used and the location of the wound are sufficient. *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383; *Com. v. Robertson*, *ubi supra*; *Com. v. Coy*, 157 Mass. 200, 32 N. E. 4; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Westmoreland v. United States*, 155 U. S. 545, 15 Sup. Ct. 243, 39 L. Ed. 255. The statement that the deceased "then and there instantly died" is a sufficient allegation that the death occurred within a year and a day after the assault. *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25. With the aid of the statutory provision in regard to time and place, these two counts are unquestionably good. *Com. v. Rogers*, 181 Mass. 184-191, 63 N. E. 421. They are also good as statutory counts, even though

they do not follow the prescribed statutory form. Rev. Laws, c. 218, § 67.

The first count was intended to be strictly statutory. It follows exactly the form prescribed in Rev. Laws, c. 218, § 67, except that it does not contain the suggested statement of the manner in which the assault was committed. As the other two counts are good, it is unnecessary to determine whether this is sufficient. It contains no statement in terms that the death occurred within a year and a day after the fatal stroke. To this objection the commonwealth answers that under the statute this is included in the meaning of the word "murder." It may also be contended that Rev. Laws, c. 218, § 20, covers this in the provision that "all allegations of the indictment shall, unless otherwise stated, be considered to refer to the same time and place." In this particular the count is like one in *Com. v. Storti*, 177 Mass. 339, 58 N. E. 1021, in reference to which the court, finding it unnecessary to decide the constitutional question involved in a similar attack upon its validity, declined to give countenance to the suggestion that it was unconstitutional.

In reference to the defendant's contention that in other particulars the crime is not "fully and plainly, substantially and formally, described to him," as required by the twelfth article of the Declaration of Rights in the Constitution of Massachusetts, we may quote from *Com. v. Robertson*, 162 Mass. 90, 96, 38 N. E. 25, 26, the statement that "these provisions for the protection of an accused person only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare for his defense." We also notice, as an important part of the present statute, the provision for a bill of particulars in all cases where the indictment alone is not sufficiently full to give the defendant his constitutional rights. Rev. Laws, c. 218, § 39. In such cases, under the language of the statute, the defendant is entitled to this as an absolute right. *Com. v. Kelly*, 184 Mass. 320, 323, 324, 68 N. E. 346. With the aid of this, when needed, an accused person can always answer to a charge with a full understanding of everything involved in it. See, also, *Com. v. Dill*, 160 Mass. 536, 36 N. E. 472, and cases cited. Without attempting to pass upon the validity of this count in every particular, we do not hesitate to say that the general objections to the constitutionality of the statute are not well founded. See, also, *Cathcart v. Com.*, 37 Pa. 108; *Goersen v. Com.*, 99 Pa. 388; *State v. Sloan*, 65 Wis. 647, 27 N. W. 616; *Jordan v. People*, 19 Colo. 417, 36 Pac. 218; *Caldwell v. State*, 28 Tex. App. 566, 14 S. W. 122; *Com. v. Coleman*, 184 Mass. 198-203, 68 N. E. 220. The motion to quash was rightly overruled.

The other exceptions are to the admission and exclusion of evidence. *Tillinghast Kir-*

by, a man about 87 years of age, who was then boarding near the shore of the sea in Westport, went out fishing in a small boat on the afternoon of September 9, 1903, and his dead body was found on Horse Neck Beach on September 18th, one or two days after an unusually heavy storm. There was a fracture of his skull, as if caused by a blow from a heavy instrument, which, according to the testimony of medical experts, must have caused his death, and there was a rope around his neck. There was testimony that, as Kirby was about to go fishing, the defendant said to him: "Go with me. I am going out"—and that Kirby replied: "You go in your boat, and I will go in mine." It appeared that the defendant and Kirby started at about the same time, each in his own boat, and there was testimony that the defendant was accustomed to carry in his boat a rope, with a strap and weight attached to it like the strap which was attached to the rope found around Kirby's neck when the body was discovered, and that the defendant was observed in his boat near Kirby the last time that Kirby was seen alive. One Pierce testified that he lived in Fall River, that he was brought up with the defendant, and went to school with him when a boy, and that their relations had been intimate ever since. Subject to the defendant's exception, he was permitted to testify that he had a conversation with the defendant at the corner of Pleasant and Ninth streets, in Fall River, about the 1st of May, 1903, in which the defendant said: "I am going to take you as a friend. You have always been one. I want you to go down to Horse Neck and board a week with Burden Head. You need money, so do I, and Burden Head has from \$1,600 to \$2,000. And we will take him out in a boat fishing, and I will knock him on the head, tie a rope around his neck, and a stone to the other end, and throw him overboard, and he will never come up; and I will be proprietor down there, and then you can come down and stay any time you like after that." In regard to this testimony the jury were instructed as follows: "The jury are not permitted to use it as a basis for an argument that, because the defendant was wicked enough to plan the murder of Burden Head, therefore he is probably guilty of the murder of Tillinghast Kirby. That conversation was introduced for the consideration of the jury, for the purpose of showing a plan or purpose formed by the defendant to obtain the control or management of the house kept by Burden Head at Horse Neck Beach, and, in connection with the other evidence in the case, a purpose, influenced by the same motive on the part of the defendant, to remove or destroy any other person who stood in his path in carrying out that plan. Furthermore, it is a question in controversy in this case whether Tillinghast Kirby came to his death by accident or suicide, or by murder. The jury are permitted to consid-

er the testimony of the witness Pierce as bearing upon the probability whether he was murdered by the defendant, in connection with all the testimony in the case tending to show that means were used to destroy his life and dispose of his body similar to the means and methods suggested by the defendant to be used to murder and dispose of the body of Burden Head." The jury were cautioned against finding in the instruction an implication that an inference should be drawn upon the question, and were told that they could not consider the testimony, except for one or the other, or both, of the purposes above stated. No exception was taken to the instructions, and the only question argued before us in this part of the case is whether the testimony was competent for any purpose.

As a statement of the rule applicable to this question, we may quote this language of the court in *Com. v. Robinson*, 146 Mass. 571, 577, 16 N. E. 452, 454: "While it is well settled in this commonwealth that on the trial of an indictment the government cannot be allowed to prove other independent crimes for the purpose of showing that the defendant is wicked enough to commit the crime on trial, this rule does not extend so far as to exclude evidence of acts or crimes which are shown to have been committed as part of the same common purpose, or in pursuance of it. In such cases there is a distinct and significant probative effect, resulting from the continuance of the same plan or scheme, and from the doing of other acts in pursuance thereof. * * * It is sometimes said that such evidence may be introduced where the several crimes form part of one entire transaction; but it is perhaps better to say, where they have some connection with each other as a part of the same plan or induced by the same motive." The rules and principles applicable in such cases have often been discussed. Always the real question is whether the matter relied on has such a connection with the crime charged as to be admissible on any ground. If so, the fact that it constitutes another distinct crime does not render it inadmissible. See *Jordan v. Osgood*, 109 Mass. 457, 12 Am. Rep. 731; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; *People v. Harris*, 136 N. Y. 443, 33 N. E. 65; *People v. Seaman*, 107 Mich. 348, 65 N. W. 203, 61 Am. St. Rep. 326; *Goersen v. Com.*, 99 Pa. 388; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778; *People v. Craig*, 111 Cal. 460, 44 Pac. 186; *People v. Walters*, 98 Cal. 133, 32 Pac. 864; *People v. Painter*, 147 Ill. 444, 35 N. E. 64; *State v. Dooley*, 89 Iowa, 584, 57 N. W. 414.

Did this conversation, in connection with other evidence in the case, tend to show a general purpose on the part of the defendant, which operated, or would be likely to

operate, in inducing the murder of Kirby? The conduct of the defendant and the circumstances attending his residence at the house of Head were peculiar. In March, 1903, he induced one Sarah C. Sherman, who had lived with him in illicit relations as his housekeeper for 15 years, to go to Head's house as Head's housekeeper. He himself followed a few days later, and remained there until after the death of Kirby. He tried persistently to enter into business relations with Head, which should give him control, or at least independent standing, at the house. According to his own testimony he made a contract with Head "to run the place on halves." This was denied by Head, who testified that he made no arrangement with him about their running the house together. The defendant was engaged in the business of selling intoxicating liquor at Head's house. On Labor Day, September 7, 1903, he had a fight with Head, in which he was badly bruised, and which caused him to bleed profusely. Kirby had been accustomed to board with Head in this house summers for many years, and sometimes at other seasons of the year. In 1903 he went there in March, and stayed as a boarder until some time in May, when he went away, but returned about the 1st of August. A witness testified that he said he might remain there through the following winter. There was testimony that the defendant had said of Kirby: "If that man was out of the way, I could do anything I wanted around here, as Burden's housekeeper has been my housekeeper for 15 years." Another witness testified that he said "he could handle Mr. Head, if he (Kirby) was not there; that he could sell rum, and do what he was a mind to; that Head was not all there, and was half crazy"; also, speaking of Kirby, that "the damned old bugger ought to be out of the way." A third witness testified that on August 16, 1903, the defendant said: "I can't do any business while Kirby is there. If he wasn't there, I could do some business." Without referring further to the testimony, we think the jury well might find that the defendant formed a purpose to obtain control at the house owned by Head, and to remain there with his housekeeper and sell liquor, and that at one time, to carry out this purpose, he planned to kill Head and use money, which he knew Head had, as a help in establishing himself in the place, and that, in pursuance of the same purpose, finding Kirby in his way, he determined to get rid of him, and that the common plan and motive under which he was acting was an unintelligent, consuming desire to fortify himself in his position as an occupant of this house at whatever cost, even the killing of one or both of these men if need be. If the evidence, properly considered, would lead to this view of his conduct, the testimony of Pierce was competent as tending directly to establish his guilt. We are of opinion that

the evidence was rightly admitted on this ground.

In this connection, Head's testimony that he had \$1,600 and that the defendant knew it was competent, as showing a fact tending, with the other facts, to establish a probability of the existence of this purpose to strengthen his position there, in the execution of which the use of the money after Head's death might be helpful. Evidence of other criminal acts is admissible to prove the commission of the crime charged, when it tends to prove the absence of mistake or accident, if such a matter is involved in the issue, and when it tends to identify the person who committed the other crimes as the same person who committed the crime charged in the indictment. The principle applicable to evidence of other crimes is applicable to attempts to commit such crimes, and statements of an intention to commit them. See *Links v. State*, 13 Lea (Tenn.) 701-711; *Defrees v. State*, 3 Helsk. (Tenn.) 53, 8 Am. Rep. 1.

In the present case the defendant introduced the testimony of medical experts that the fracture of the skull might have been caused by the force of the waves after the death of Kirby, and that it was impossible to know that the death was not caused by drowning. The existence of the rope around the neck of the body was not inconsistent with an attempt of the deceased in that way to avoid the appearance of having committed suicide. Upon the question whether the death was by murder or suicide, we are of opinion that the previous declaration by the defendant of an intention to commit a murder and conceal it at this very place, in a manner which, from the proposal to go fishing to the final disposition of the body, was identical with the method that seems to have been adopted in dealing with Kirby, was competent evidence for the consideration of the jury. The combination of elements which entered into the plan disclosed to the witness Pierce was unusual, beginning with the innocent victim as a sojourner in safety upon the land, and leaving his lifeless body buried in the ocean, and held there by a force which was expected to conceal it forever. When the evidence tended to show that the same person who told of this plan invited Kirby to go fishing, and was seen near him in his own boat the last time that Kirby was seen alive, at a place where, if a body was thrown overboard, it would be likely to be washed ashore on the beach where this body was found, the fact that the defendant had previously formed such a plan for killing a man and concealing his body might well be considered by the jury in determining whether Kirby took his own life. Whether, if there had been no such question in the case, it would have been competent, as tending to identify the de-

fendant as the murderer, we need not decide. The exception to the admission of this evidence is overruled.

The letters written by the defendant to the witness Sherman were rightly excluded. There is nothing to show that they had any relation to any issue on trial. This witness was allowed to testify, subject to the defendant's exception, that after Labor Day, which was September 7th, the defendant said "that if I should go to do anything that the officers would shut me up—give me three years or five—for living with him, knowing that he was a married man." In another answer she said: "Why, he told me, if I went to do anything, he would kill me anyway." While the other answers indicate that the subject of which they were speaking was their misconduct in living together, there is much to indicate that the defendant might have had in mind the possibility of her making statements that would be used against him in reference to the death of Kirby. These statements or threats were after Labor Day, which was only two days before Kirby was killed. The evidence tends to show that Kirby's death had been premeditated by the defendant for a considerable time. If he then expected to kill Kirby, it was very natural that he should endeavor to impress this woman with the peril of her position, if she made disclosures of any kind against him. She was an important witness at the trial. It was competent to prove that, only a day before the murder, he tried to show her that it was for her interest to say nothing against him. We are of opinion that this testimony was competent.

The testimony of Dr. Buck, which was excepted to, was simply a proper statement of his opinion as an expert, and then a reaffirmation of it in stronger terms. It was, in substance, that he was so confident in his opinion as to believe that, if an autopsy could have been had earlier, it would still more positively have confirmed his finding. This was clearly competent.

The witness Grinnell, who on September 9, 1903, saw a man at a distance in a boat, was asked this question: "As you saw him, what did he appear to be doing?" and answered: "It appeared to me he was setting or pulling lobster pots." This was simply a description of the man in reference to his movements and occupation as they were seen by the witness. The evidence was competent, in accordance with familiar principles.

Besse was qualified as an expert as to the effect of winds and currents upon objects floating in the water in the places inquired of, and the testimony objected to was competent.

We are of opinion that there was no error in the admission or exclusion of evidence.

Exceptions overruled.

(189 Mass. 74)

**NEWBURYPORT INSTITUTION FOR
SAVINGS v. COFFIN.**

(Supreme Judicial Court of Massachusetts.
Essex. Sept. 9, 1905.)

**1. APPEAL — REPORT TO SUPREME COURT —
STATUTES—CONSTRUCTION—DISCRETION.**

Rev. Laws, c. 173, § 105, provides that a justice of the Supreme Judicial Court or of the superior court, after verdict or finding of facts, etc., may report the case for determination by the full court, etc. *Held*, that the power so conferred was discretionary, and that no duty was imposed on a judge to make such a report.

2. SAME.

A judge, not having heard the parties, has no statutory authority to report the case to the Supreme Judicial Court for review.

3. SAME—TRIAL JUDGE—DEATH—NEW TRIAL.

Where a case was fully heard and determined, and no question of law was saved by the claimant of the fund in controversy, a motion for a new trial, after the judge who tried the case had died before reporting the same to the Supreme Judicial Court, as he had intended, made before another judge, was properly denied.

**4. SAME—DEATH OF JUDGE—JUDGMENT—EN-
TRY.**

Where, in an action by trustee process, a claimant of the fund intervened, and a finding was made for plaintiff as against the claimant, and the trustee was charged on his answer, a judgment in favor of plaintiff was properly rendered on such finding by another judge, after the death of the judge who heard the case and made the finding.

Exceptions from Superior Court, Essex County; Chas. N. Bell, Judge.

Action by trustee process by the Newburyport Institution for Savings, in which one Winthrop O. Coffin claimed the funds admitted by the trustee. A judgment was rendered in favor of plaintiff, and the claimant excepted to the refusal of a judge of the superior court, other than the one by whom the case was tried, who had died in the meantime, to report the case, and to rule that the court had no power to enter judgment on the finding without the claimant's consent, and to the judge's refusal to grant a new trial. Exceptions overruled.

Nathl. N. Jones and Ernest Foss, for plaintiff. Horace I. Bartlett, for defendant.

LATHROP, J. This is an action by trustee process upon a promissory note, dated February 6, 1885, secured by a mortgage of real estate and personal property. Interest was paid to April 18, 1899. The defendant admitted the cause of action set forth by the plaintiff. The trustee admitted funds, but suggested that they were claimed by Winthrop O. Coffin. The claimant then appeared, and the case was tried before a justice of the superior court without a jury. A finding was made for the plaintiff as against the claimant, and the trustee was charged upon his answer. This was at the May sitting, 1901. It appears that the judge intended to report the case to this court, and in October, 1901, drafts of a report were prepared by each counsel, which were submitted to the judge, together with a tran-

script of the evidence. The judge died before settling the report. Afterwards application was made to another judge of the superior court to report the case. He has certified that he has carefully examined the stenographic reports of the evidence given at the trial, "and they do not seem to raise any question which should be reported." He therefore refused to report the case, and ordered the trustee to be charged. The case comes before us on exceptions to the refusal of the judge to report the case; to the refusal of the judge to rule that, if the case failed to be reported through the death of the judge who tried the case, the court had no power or authority to enter judgment on the finding without the consent of the claimant; and to the refusal of the judge to order a new trial.

Before St. 1878, p. 170, c. 231, the judges of the superior court had no power to report questions of law in civil cases tried without a jury. *Terry v. Brightman*, 129 Mass. 535. The law as it stands to-day is found in Rev. Laws, c. 173, § 105. The power to report is a discretionary power, and no statute imposes a duty upon a judge to make a report; nor is there any statute which allows a judge to make a report of a case to this court when he has not heard the parties. In the present case it is not contended that there were any exceptions taken at the trial of the case. If there had been, any question of law could have been brought to this court by duly filing a bill of exceptions signed by another judge, under Rev. Laws, c. 173, § 108; but there is no such provision as to a report.

The motion for a new trial was rightly overruled. The case was heard and determined; and, as no question of law was saved by the claimant, he had no right to have the case tried anew. The ruling requested was rightly refused. The judge who tried the case had done everything that was necessary to enable another judge to order judgment.

Exceptions overruled.

(189 Mass. 64)

JOYCE v. DYER et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 8, 1905.)

**1. APPEAL—FINAL JUDGMENT—REVIEW—EX-
CEPTIONS.**

Where, in a partition suit, an interlocutory judgment has been ordered, exceptions thereto are reviewable without a final judgment.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 357, 410.]

2. PARTITION—FINDING—CONSTRUCTION.

Where, in partition, various rulings were refused on the ground that "there had been no actual disseisin," and therefore the rulings were immaterial, a finding that there was no actual disseisin should be construed to mean that the relation of disseisor and disseisee never existed between one of the tenants in common and his predecessors in title and the holders of the record title, and not that, even if such relation

had existed, it had not continued long enough to vest a complete title by adverse possession in the disseisor.

3. TENANTS IN COMMON — OUSTER — ADVERSE POSSESSION.

While the seisin in possession of one tenant in common is the seisin in possession of his co-tenant, there may be an actual ouster of one tenant in common by the other, after which the possession becomes adverse, and, if continued for a sufficient length of time, bars the right of the co-tenant not in possession.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 42-52.]

4. SAME.

A long, exclusive, and uninterrupted possession of one tenant in common, without any possession or claim for profits by the tenant in common not in possession, is evidence from which a jury may and ought to infer an actual ouster.

5. SAME—DEEDS—PRESUMPTIONS.

Where a grantee of certain tenants in common entered and held uninterrupted possession under a deed purporting to convey the fee in the whole tract, it would be presumed that the grantee claimed under his deed, and that his possession was adverse from the entry as against every person, including a co-tenant who did not join in the deed.

6. SAME—KNOWLEDGE—PRESUMPTION.

Where a tenant in common of certain land knew that D. entered possession thereof through some sort of a deed from her tenants in common, in which she had not joined, but for more than half a century, during which the property was occupied by D. and his heirs as a homestead under her personal observation, she made no question as to his right to exclusive occupation, and asserted no claim to the property, and did not object to his changing its character, she would be presumed to know that D.'s possession was adverse.

7. DEEDS—DISSEISIN—OPERATION.

Where the grantor in a deed conveying all right and title which she then held in the property was disseised at the time the deed was made, which was prior to St. 1891, p. 919, c. 354, providing that, notwithstanding disseisin or adverse possession, any conveyance of real estate otherwise valid shall be effectual to transfer title as if the owner was seised, and it did not appear that the deed was delivered on the premises, it was ineffectual to pass the grantor's interest, if any.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Deeds, § 14.]

8. PARTITION — RELATIONSHIP OF PARTIES — PROOF.

Where, in partition, petitioner claimed by virtue of her relationship to D., the burden was on her to prove the number of children D. had, in order to establish the share to which petitioner was entitled as her descendant.

Exceptions from Superior Court, Norfolk County; Edgar J. Sherman, Judge.

Suit for partition by Mary L. Joyce against Lewis Dyer and others. An interlocutory judgment was ordered for petitioner, and respondent Lewis Dyer brings exceptions. Exceptions sustained.

Albt. P. Worthen and Clarence G. Swain, for petitioner. Wm. W. Jenness and Geo. W. Abele, for respondent McSweeney. C. C. Mellen, for respondent Dyer.

HAMMOND, J. This is a petition for partition. After a trial in the superior court without a jury, an interlocutory judgment

was ordered for the petitioner, and the case is before us on exceptions taken by the respondent Lewis Dyer. The appeal taken by him is not pressed. The petitioner contends that, since no final judgment has been entered, the exceptions should not now be heard; but it has been settled that in a proceeding like this the exceptions may be heard, although there has been no final judgment. *Lowd v. Brigham*, 154 Mass. 107, 28 N. E. 1004.

The record title to the fractional part claimed by the petitioner is in her, and she must therefore prevail, unless some reason to the contrary be shown. The respondent makes two objections: First, that the petitioner's mother was not the legitimate child of Nehemiah T. Dyer; and, second, that the record title is lost by long continued disseisin. The court found that the petitioner's mother was the legitimate child of Nehemiah T. Dyer, and that there was no actual disseisin.

In the brief of the respondent no argument is made in support of the exceptions so far as they respect the question of the legitimacy of the petitioner's mother, and the point may be dismissed with the simple statement that, in view of the kind of evidence required to bastardize a child born in wedlock, it is manifest that the finding of the judge is amply warranted. *Rev. Laws*, c. 152, § 22; *Hemmenway v. Towner*, 1 Allen, 209, and cases cited; *Phillips v. Allen*, 2 Allen, 453.

The more difficult question is whether the finding that there was no actual disseisin is warranted by the evidence. Some doubt might at first arise as to the nature of the finding—whether it means that the relation of disseisor and disseisee never existed between the respondent Lewis Dyer and those under whom he claims on the one hand and the holders of the record title on the other, or whether it means that, even if such a relation ever existed, it never continued long enough to vest a complete title by adverse possession in the disseisor; but, inasmuch as various rulings requested by Dyer as to the effect of coverture or other disability upon the rights of a disseisee were refused upon the ground that "there had been no actual disseisin," and therefore the rulings were immaterial, the obvious conclusion is that the finding means that the relation of disseisor and disseisee never existed between the respondent Dyer and his predecessors in title and the holders of the record title. Did the evidence justify such a finding?

There is no material conflict in the evidence upon that point, and we do not understand either party to contend that the uncontradicted evidence is not to be taken as true. The facts shown were substantially as follows: In 1818 Nehemiah Thayer, being seised of the real estate in question, died intestate, leaving a widow and three children, Sally, wife of Isaac Dyer, Clarissa

Sanborn, and Mary, wife of Joseph Dyer. The petitioner claims under this Mary, her great-grandmother. This real estate was set off to the widow of Nehemiah as a part of her dower, and the daughter Mary was the owner of one undivided third, subject to this right of dower. In 1826 Peter Dyer and Isaac Dyer, the husband of Sally, bought the interest of the widow and that of Clarissa, and received deeds of the same. The widow died in 1830. On June 17, 1829, Peter and Isaac Dyer conveyed the whole of the property by warranty deed containing the usual covenants of warranty, seisin, freedom from incumbrances, and right to convey. Sally, the wife of Isaac, joined in the testimonium clause in token of her consent to the bargain, sale, and relinquishment of her right, claim, etc., and the deed was acknowledged by all three. It was not recorded until August 22, 1902. Samuel Dyer entered under it, occupied the building on the land as a store about 1835, and about that year changed the store into a dwelling house, into which he moved; and "he continued to use and cultivate and live upon the property openly, peaceably, continuously, and exclusively" from 1835 down to the time of his death, which occurred in 1865. Samuel Dyer died intestate, leaving several children. To the two sons, Andrew and Lewis (the respondent), the other children in 1867 released their interest in the property, and in the same year Andrew quitclaimed his interest to Lewis. The deeds describe the property as "the real estate formerly owned by our father, Samuel Dyer," and were duly recorded in the same year. Lewis is now 67 years old, has always lived on the premises, and has been from 1867 to 1904 continuously in open, peaceable, and exclusive occupation of them. It further appears that for more than 60 years before her decease Mary Dyer aforesaid lived near the property in question and was a frequent visitor at the house; that Lewis frequently visited her house, and that this intimacy continued until her decease in February, 1889; that she and her husband Joseph lived together until his death, which occurred about 6 years before hers; that Joseph was an appraiser in the settlement of Samuel's property, and appraised the property as a part of Samuel's estate in 1865; that Lewis never heard that any one made any claim to any part of the property until after the death of Nehemiah T. Dyer in 1892, and no legal proceedings were taken to assert any title thereto until this petition was brought. Here, then, upon the undisputed facts, is an open, peaceable, continuous, and exclusive occupation of real estate under a claim of right, and there can be no doubt that in the ordinary case the relation of disseisin as between the occupiers and the owners of the record title would be conclusively shown by such facts.

It is contended, however, by the petitioner, that while the deed to Samuel Dyer pur-

ported to convey the entire property, yet, even if it be assumed that it operated to convey Sally's interest, as well as that formerly owned by Clarissa, two of the daughters of Nehemiah Thayer, still in legal effect it did not convey the interest to Mary, the other daughter, and consequently Samuel became a tenant in common with Mary, and that under the general rule of law that the possession of one tenant in common, though exclusive, being consistent with the right of the co-tenant, does not amount to a disseisin of the co-tenant, in the absence of some act which the law deems equivalent to an ouster, there was no disseisin in this case, or, in other words, that it is not shown that the possession, though exclusive, was adverse to Mary. The law upon this subject seems to be well settled. As stated by Shaw, C. J., in *Rickard v. Rickard*, 13 Pick. 251, 253: "It is, in general, true that the seisin and possession of one tenant in common is to be taken as the seisin and possession of his co-tenant, and the occupation of one will be deemed to be in conformity to his right and title as tenant in common, and not adverse, and consequently that lapse of time will not bar the co-tenant. But this rule is subject to some qualifications, and it has long been held that there may be an actual ouster of one tenant in common by another, that upon such actual ouster the possession becomes adverse, and, if continued for a sufficient length of time, the right of the co-tenant out of possession may be barred. It is also now well settled that a long, exclusive, and uninterrupted possession by one, without any possession or claim for profits by the other, is evidence from which a jury may and ought to infer an actual ouster." The same doctrine is stated by Bigelow, C. J., in *Lefavour v. Homan*, 3 Allen, 354, 355. The following part of his statement with reference to the effect of exclusive possession seems particularly pertinent here: "It may, however, be safely said that a sole and uninterrupted possession and pendency of the profits by one tenant in common, with the knowledge of the other, continued for a long series of years without any possession or claim of right, and without any perception of profits or demand for them by the co-tenant, if unexplained or controlled by any evidence tending to show a reason for such neglect or omission to assert a right, will furnish evidence from which a jury may and ought to infer an actual ouster and adverse possession"—citing *Doe v. Prosser*, Cowp. 217, *Culley v. Taylerson*, 11 Ad. & El. 1008, *Rickard v. Rickard*, 13 Pick. 251, 253, and *Parker v. Proprietors of Locks and Canals*, 3 Metc. 91, 37 Am. Dec. 121. In *Bellis v. Bellis*, 122 Mass. 414, 415, Morton, J., says: "* * * If, with the knowledge of his co-tenant, he [a tenant in common] enters upon the land under a claim of exclusive right, and maintains his possession to the exclusion of his co-tenant, this will amount to a disseisin,

which, if continued for 20 years, will give the disselsor a title by adverse possession."

In considering this question we must bear in mind the familiar principle that when one enters upon land he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his title. The deed to Samuel Dyer purported to convey the fee in the whole. Under that deed he entered, and, in the absence of anything shown to the contrary, he is presumed to have entered under a claim of right to the fee in the whole. It is not a case where a tenant in common, being or entering into possession as such, afterwards attempts to claim that his occupation was adverse to his co-tenant. Dyer did not enter as a tenant in common. From the very first he is presumed to have claimed under his deed, and there is nothing to show that he or his successors ever acknowledged or ever supposed that the title was anything other than as it appeared upon the face of the deed. The evidence conclusively shows that the possession was not only exclusive, but was adverse as to the interest of every other person, including Mary.

The next question is whether Mary must not be presumed to know that the possession was adverse. If the deed had been recorded, she would be presumed to have known of it. *Parker v. Proprietors of Locks and Canals*, ubi supra. She knew that at the death of her father her co-tenants were her two sisters, and no one else. When Samuel Dyer came into possession, she knew that he was either a disselsor as to her and her co-tenants, or that he had some sort of deed from them. There was a store upon the land. He changed it from a store to a dwelling house. As tenant in common she may well have challenged his right to make such a radical change in the property. For more than half a century under her own personal observation the house was occupied by him and his heirs as a homestead. She is not shown ever to have made a question as to his right to exclusive occupation, or to have asserted any claim to the property in any way whatever, and there is no explanation of her silence. Applying the principles stated in the cases hereinbefore cited to the undisputed facts, it is clear that as matter of law the possession of Samuel Dyer and those claiming under him was adverse, and that the finding that there was no actual disselsin is not warranted by the evidence. It does not appear, from the registry of deeds or otherwise, that Mary undertook to make any conveyance of her interest until June 2, 1886, on which day she, being then 86 years of age and a widow, conveyed by quitclaim deed to her son, Nehemiah, the grandfather of the petitioner, "all right and title which I hold in said property." The deed was made before St. 1891, p. 919, c. 354, and is not shown to have been delivered upon the

premises. As the grantor was then disselsed, the deed was inoperative to pass her interest, whatever it might have been. So far, therefore, as the petitioner's claim rests upon this deed, she cannot recover. *Sohler v. Coffin*, 101 Mass. 179. So far as her claim rests, apart from this deed, upon her relationship to Mary Dyer, it does not appear how many children Mary Dyer had, and hence it is not shown what the share of the petitioner as her descendant would be.

Inasmuch as the finding that there was no actual disselsin was not warranted by the evidence, we think that in refusing upon that ground to pass upon the rulings requested by the respondent Dyer as to the effect of the statute of limitations, as well as in refusing to give the 6th request, there was error.

Exceptions sustained.

(150 Mass. 150)

CARROLL v. METROPOLITAN COAL CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a servant, ordered to join certain men in the hold of a vessel, access to which was reached by a defective ladder, by which he was injured, knew that they had passed over the ladder only a few minutes before, he was not guilty of contributory negligence as a matter of law in using the ladder without making any particular examination thereof, even though one of the rungs was bent, so as to preclude him from recovering for his injuries; he being entitled to assume that defendant had used due care to see that the ladder was in a safe condition.

2. SAME—NEGLIGENCE—EVIDENCE.

In an action for injuries to a servant, caused by a defective ladder maintained by defendant leading into the hold of a vessel, evidence held to require submission of the question to the jury whether the defect was of such a nature and had continued so long that defendant was negligent.

3. APPEAL—EXCEPTIONS—BRIEFS—FAILURE TO ARGUE—WAIVER.

Where an exception, taken by defendant to certain evidence admitted on cross-examination of a witness, is not noticed in its brief, it will be deemed waived.

Exceptions from Superior Court, Suffolk County; Chas. W. Bell, Judge.

Action for personal injuries by one Carroll against the Metropolitan Coal Company. Verdict was rendered in favor of plaintiff, and defendant brings exceptions. Exceptions overruled.

F. C. Gilpatric and W. C. Cogswell, for plaintiff. John Lowell and Geo. McClure Sargent, for defendant.

HAMMOND, J. It was the duty of the defendant to use due care to see that the ladder was in a safe condition; and, while the plaintiff was not thereby relieved from taking proper care himself, still, in passing upon the degree of care required of him, it must be

borne in mind that he had the right to assume that the duty had been performed. The ladder was there for use as a way of getting into the hold, and he saw in the hold men who, as he knew, had passed over it only a few minutes before. He was ordered to join them. Under these circumstances, and without stopping to make any particular examination, he began to descend. Even if the rung was bent, we cannot say that he was not in the exercise of due care. It was a question for the jury.

The question whether there was evidence of negligence of the defendant is more difficult. It is plain that, at the time the plaintiff stepped upon the ladder, it was in a defective and dangerous condition. It was in a perpendicular position, and was from 16 to 18 feet in length. The rungs were fitted into holes in the uprights "about three-quarters of an inch" deep, but do not seem to have been fastened to the uprights in any other way. There might, therefore, have been an opportunity for a rung, especially if it were a little short, to work sideways, so that it could be pulled out. Should it come out while a person was using it for support, serious injury might happen to such person. The ladder was under the exclusive control of the defendant, and was unfit for the use for which it was intended. It does not appear that the defendant took any care of it whatever, except to see that it was there. The defect was not latent. The jury may well have found that, while it was not visible to the eye, yet it could easily have been detected by touch, and that that was the only proper way to examine a ladder for such a defect. There was some evidence that the rung was bent, although one witness, called by the defendant, testified that he did not notice any bend in it, and the evidence as to the extent of the bend was very vague. The evidence as to whether the rung was handed to the defendant's superintendent was conflicting, but it warranted a finding that it was handed to him, and the jury might properly have inferred that the defendant could have produced it at the trial, and would have done so if its appearance would have helped the defense.

Considering the construction of the ladder, its defective condition, the ease with which the defect could have been detected by a proper examination, the entire lack of any inspection on the part of the defendant, the serious injury likely to happen to a servant through the instability of a rung, and the fact that the ladder was under the exclusive control of the defendant, and considering, further, the evidence as to whether the displacement of the rung was due to its original length or to a shortening by reason of its being bent by contact with a tub or otherwise, taken in connection with the failure of the defendant, in whose possession the jury might have found the rung to be, to produce it at the trial, we are of opinion that the question whether the defect was of such a nature and

had continued so long that the defendant was negligent in the discharge of its duty to the plaintiff was for the jury.

The exception taken by the defendant to certain evidence admitted during the cross-examination of the witness Driscoll is not noticed in the brief of the defendant, and in view of its nature we consider it waived.

Exceptions overruled.

(189 Mass. 146)

NEW ENGLAND STRUCTURAL CO. v. EVERETT DISTILLING CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 11, 1905.)

1. TRIAL — RULINGS — CONSTRUCTION — REPORT—RECITALS.

A recital in the report of a case to the Supreme Court that "the court ruled and found as a matter of law" that on the facts stated in the report the respondent had no right of way over any portion of petitioner's land, formerly called F. street, would be construed to be a ruling on the question as one of law, and not a finding of fact.

2. EASEMENTS — CONVEYANCE—DESCRIPTION—RIGHTS IN STREETS.

Where land was described with reference to a plat as bounded by a street, there was created in its favor a right of way over the street as shown on the plat, not only as to that part against which the lot abutted, but also over the rest of the street, so far as the grantor had power to create such right, even though such grantor had no power to create the right over the whole of the street.

3. SAME—OTHER WAYS.

A right of way over a street, passing as an incident to a conveyance of a lot described with reference to a plat "as bounded on the street," is not a way of necessity, but is an easement created by estoppel, which exists, though there are other ways, public or private, leading to the land.

4. SAME — DEEDS — DESCRIPTION — CONVEYANCE OF EASEMENT.

Where a deed to certain land described it as running southwesterly on the land to a certain stone company "to the middle line of F. street," thence "on said middle line of F. street," etc., a certain distance, etc., being lot A of a certain plat referred to, the fact that the land was not described as bounded "on" F. street, but as running "to the middle line" thereof, etc., did not render such description insufficient to create an easement in such street in favor of the land conveyed.

5. SAME—GRANTS—EASEMENTS — EXTINGUISHMENT—NONUSER.

An easement acquired by grant cannot be lost by mere nonuser.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 78.]

6. SAME—ABANDONMENT.

The erection of a building in a street west of respondent's premises and the building of a fence closing the street, the effect of which was to inclose the northwesterly half of the street abutting on a small part of a certain lot, leaving unobstructed the way from that part which was west of respondent's land to L. street, did not as a matter of law conclusively show an intention on respondent's part to abandon the way over the westerly part of the street, the use of which was continued by the corporation erecting the building and its successors in title.

7. SAME.

The erection of a building by respondent's predecessors in title over that part of the street

in which they owned the fee was not as a matter of law an abandonment of their easement of the remaining portion of the street.

8. SAME — ENCROACHMENTS — QUESTION OF FACT.

As a rule mere encroachment on a common right of way did not of itself necessarily show an intention to abandon the way; the question of abandonment being in most cases a question of fact, and not of law.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 94.]

Report from Supreme Judicial Court, Middlesex County; C. T. Davis, Judge.

Petition by the New England Structural Company against the Everett Distilling Company for the determination of a right of way over certain land belonging to petitioner, formerly called Front street. A decree was ordered for petitioner, to which respondent excepted, and the case was reported to the Supreme Judicial Court. Decree revoked.

Arthur A. Folsom and A. K. Cohen, for petitioner. Louis D. Brandeis and Wm. H. Dunbar, for respondent.

HAMMOND, J. The court "ruled and found as matter of law" that upon the facts stated in the report the respondent had no right of way over any portion of the petitioner's land, formerly called Front street. We understand this to be a ruling on the question as one of law, and not a finding of fact. At the argument before us the respondent waived any claim to any easement in Front street west of the westerly line of its premises, but contended that it has a right of way over that part of Front street which extends from said westerly line easterly to Locust street. The only question, therefore, is whether as to this part of the strip of land called Front street (which for the sake of brevity will be called the "easterly part") the ruling was correct. The report contains a detailed statement of the conveyances affecting the lands in question, made during the last three-quarters of a century, and at first sight the facts seem quite complicated, but the case of the respondent has been so clearly and logically set forth in its brief that the task of decision has been greatly lightened.

In 1857 the Atlantic Wharf Company conveyed to one Upham lot 4 on the plan known in this case as "Exhibit E." The deed described the land by reference to this plan as "lot 4, between Second and Front streets and bounded on said streets." Upon the plan Front street is shown as extending from Locust street westerly to a point some distance west of the present westerly line of the respondent's land. Lot 4, of which the respondent's land is a part, is upon the north side of Front street. Since the lot was bounded on this street, there was created in favor of it a right of way over the street as shown on the plan, not only as to that part against which the lot abutted, but also

over the rest of the street, so far as the grantor had power to create such a right; and that is so, even if the grantor had not the power to create the right over the whole of the street. The deed is operative by estoppel to create the easement, so far as the grantor's title will support it. Such a way is not a way by necessity, and the right exists, even if there be other ways, either public or private, leading to the land. *Van O'Linda v. Lothrop*, 21 Pick. 292, 32 Am. Dec. 261; *Rodgers v. Parker*, 9 Gray, 445; *Stetson v. Dow*, 16 Gray, 372; *Oswell v. Beverly*, 134 Mass. 98; *Howe v. Alger*, 4 Allen, 206, and cases therein cited.

It becomes necessary, therefore, to look into the nature and extent of the interest which at the time of this deed the grantor, the Atlantic Wharf Company, had in Front street. It acquired by the deed from *Sears, Coe & Upham* the fee in the south half of the street from Locust street to the east line of the respondent's land, and in the whole width of the street, so far as it abutted upon this land. To this extent, therefore, the deed gave, as against the grantor and its assigns, a right of way appurtenant to the respondent's land over Front street to Locust street. As to the northerly half of the street, extending from the easterly line of the respondent's land to Locust street, the respondent contends that it has a right of way by reason of other conveyances mentioned in the report; but the facts bearing upon this contention are somewhat meagerly set forth in the report, and as the case must go back to the trial court, and this question may become immaterial at the second hearing, by reason of the finding of the court upon the question of abandonment or otherwise, it is not necessary now to pass upon it. The court which finally passes upon it should have a copy of the detailed description in the releases which were given by Mrs. Norris of the boarding house lots and the lot immediately adjoining it upon the west, so that it may be seen whether or not the releases extend to the center of Front street, and should have also a more detailed statement of the transaction concerning the indenture between *Sears* and the owners of the *Rayner* lots. Whatever may be the case as to this part of Front street, it is clear, as stated above, that in any event the Atlantic Wharf Company had power to grant the easement in the southerly half and part of the northerly half of Front street, and its deed to Upham had that effect. Front street, as shown upon the plan, is 40 feet wide. The right of way, therefore, extended over a strip of land at least 20 feet wide leading to Locust street.

The mesne conveyances by which Upham's title in the premises of the respondent was acquired by the latter were all apt and sufficient to carry any easement that Upham had acquired in Front street. In 1871 his heirs conveyed the whole of lot 4 to Mun-

roe, who conveyed it in 1872 to the Union Stone Company. In 1885 this latter company carved out of lot 4, and conveyed to Charles W. Howland, the land now owned by the respondent. The parcel is irregular in shape. The boundaries in the deed, so far as material, are as follows: "Thence running southwesterly on said land of said Union Stone Company 162.60 feet to the middle line of Front street; thence running southeasterly on said middle line of Front street 107.50 feet; thence running northeasterly * * * to said Second street. * * * Being lot A on plan of land," etc. Upon the plan no sign of Front street is shown. The passageway named in the deed is upon the other side of the parcel, and leads to Second street. This passageway is shown upon the plan, and is marked "passageway." It is contended by the petitioner that, since the land conveyed is not described as bounding "on" Front Street, but as running to the "middle line," and thence along this line, the rules relating to the creation of easements in streets are not applicable; but there is nothing in this contention. The language of the deed was sufficient to create an easement, and therefore to transfer one, and by it the grantee, Howland, acquired the right of way made appurtenant to this parcel as a part of lot 4 by the deed from the Atlantic Wharf Company to Upham. In 1896 Howland conveyed to Joyce and others, whose title was conveyed to Murphy, who conveyed to the respondent. Each of these last three deeds contained language apt to transfer the easement, if it existed. The respondent's record title to the easement in Front street, to the extent above described, is thus made clear.

The only question remaining is whether the easement has been extinguished by any acts in pais; no extinguishment by any written instrument of record being alleged. The easement, having been acquired by grant, could not be lost by mere nonuser. *Butterfield v. Reed*, 160 Mass. 361, and cases therein cited. The contention of the petitioner is that it has been lost by abandonment. Even if it be assumed that prior to the time the Union Stone Company received the deed of lot 4 there had been an abandonment of the easement over the part of Front street west of the respondent's land, it by no means follows that the right over the rest of the street was abandoned. It appears that the Union Stone Company prior to 1885 erected in Front street, west of the respondent's present premises, a building and a fence closing the street. The effect was to inclose the northerly half of the street abutting on a small part of lot 4, leaving unobstructed the way from that point, which was westerly of the respondent's land, to Locust street. It cannot be said as matter of law that these acts conclusively show an intention to abandon the way over the easterly part of Front street, especially when it appears, as the

report discloses, that this corporation and its successors in title continued to use this part of the street. We are of opinion, further, that the erection of the building by Joyce, Curran, and Walsh, the respondent's predecessors in title, over that part of Front street in which they owned the fee, was not as matter of law an abandonment of their easement over the rest of the easterly part of Front street. Abandonment is a question of intent. In some cases, where acts of the owner of the dominant estate have seemed to be entirely inconsistent with an intention to make any further use of the easement, especially where a change in circumstances has rendered the easement no longer of any benefit, such acts have been regarded as showing conclusively as matter of law an intention to abandon, and the consequent extinguishment of the easement. *Corning v. Gould*, 16 Wend. 531; *Canny v. Andrews*, 123 Mass. 155; *Dillman v. Hoffman*, 38 Wis. 559. Since abandonment, however, is a question of intent, any act relied upon either must be accompanied by evidence of intention, or be in its nature such as necessarily to show an intention, to abandon. As a rule, mere encroachments upon a common right of way do not of themselves necessarily show an intention to abandon the way, and in most such cases the question of abandonment is one of fact, and not of law. In *King v. Murphy*, 140 Mass. 254, 4 N. E. 566, the general rule is thus stated by Morton, C. J.: "Mere nonuser, even for 20 years, will not conclusively show an abandonment of a right of way; but when the owner of the dominant estate, to which a right of way over a servient estate is appurtenant, does some acts inconsistent with the continued existence of the way, with the intention to abandon and extinguish his easement, it operates as a present abandonment; and it is a question for the jury to determine whether such intention existed." We are of opinion that the encroachments made on Front street west of the petitioner's land, or in front of this land, do not show as matter of law an intention to abandon the right of way over the rest of the street. These acts, taken in connection with other facts, such, for instance, as the creation by the deed from the Union Stone Company to Howland of a right of way over a strip of land adjoining the respondent's premises on the northeast to Second street, and with any other competent evidence, are to be considered as bearing upon the question whether in fact there was an intention to abandon.

In view of the finding of the trial court that the petitioner's building across Front street was erected under such circumstances as that no estoppel was created against the owners of the respondent's land, we cannot say that the respondent is thereby estopped from asserting its right of way. The ruling of the trial court that upon the facts stated in the report as matter of law the respondent

has no right of way over any portion of Front street was erroneous, and the order directing a decree for the petitioner should be revoked.

The case is to stand for further hearing only upon the questions whether the respondent has a right of way over any portion of Front street between the westerly line of its land and Locust street, and, if so, over what portion; and it is so ordered.

(189 Mass. 34)

ALEXANDER v. McPECK et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1905.)

1. PARTNERSHIP — CHANGE OF PARTNERS — AGREEMENT TO DISCHARGE THE LIABILITIES OF RETIRING PARTNER—CONSTRUCTION.

A partnership was dissolved on one of the partners retiring, and a new firm was created, consisting of the remaining partner and a third person. The new firm took over the assets and business of the old one, and at the same time the partners of the new firm executed an instrument reciting that they released, remised, and discharged the retiring partner from the payment of all liabilities of the old firm. *Held*, that the new firm assumed all the liabilities of the old firm, and the retiring partner's right against the partners of the new firm was complete, at the latest, when a judgment was rendered against the partners of the old firm in favor of another based on a claim against the old firm.

2. SAME — MONEY ADVANCED FOR MARGIN ON STOCKS—STATUTORY PROVISIONS.

Since Rev. Laws, c. 99, § 4, expressly gives a right to recover money advanced to a stockbroker to be used in the purchase of stocks on margin, the instrument executed by the partners of the new firm included a liability for money advanced by one to the old firm to be used in buying stocks on margin.

3. SAME—SUIT AGAINST OLD FIRM — NOTICE TO MEMBERS OF NEW FIRM.

A firm was dissolved on one of the partners retiring, and a new firm, composed of the remaining partner and a third person, was created. The new firm agreed to release the retiring partner from all liabilities of the old firm. At the time of the agreement a suit was pending against the old firm. The third person was informed of it, and was also informed of it after the suit had been appealed to the superior court and before the withdrawal of the appearance of the attorney employed by the old firm. There was no evidence of collusion in suffering a judgment against the old firm. *Held*, that the third person was liable on his agreement to the amount of the judgment.

4. PLEADINGS—CLAIMS IN ORIGINAL ANSWER —OMISSION IN SUBSTITUTED ANSWER.

A claim made in the original answer, which is not renewed in the substituted answer, will be treated as waived.

5. WILLS — CONSTRUCTION—VESTED INTEREST IN BENEFICIARY — RIGHT OF CREDITOR TO REACH INTEREST.

Testator, after providing for trust estates out of his residuary estate, provided that after his death the remainder of the residue should be converted into money and divided into three parts, one of which should be paid to his son, if he survived testator, or, if not, to his issue living at the time of testator's death, and in default of issue then living to his legal representatives. The son survived the testator and assigned his interest as security for a specified sum. *Held*, that the son's interest vested in

him absolutely on testator's death, entitling a creditor of the son to a decree with reference to his interest in the fund subject to the assignment.

6. SAME — TRUST ESTATES — CONSTRUCTION — RIGHTS OF BENEFICIARY.

Testator devised the residue of his estate to trustees, and directed that, if his wife survived him, they should set apart a third thereof and pay the income to her for life, and at her death the fund should be divided into three parts, one of which should be paid to his son, if surviving testator's wife, otherwise to his issue living at the time of her death, and in default of issue to his legal representatives. He directed the trustees, if the son survived him, to set apart and invest a specified sum and pay the income thereof to the son for life, and at his death to pay the principal to his issue, and in default of issue to his legal representatives. *Held*, that the words "legal representatives" meant executors and administrators, so that the son took one-third of the trust fund created for the use of the widow if he survived her, and the right to have it administered as a part of his estate by his own executors or administrators, if he died before the widow without issue, and the trust fund created for his own use was also to be turned over to his executors or administrators, if he died without issue.

7. CREDITORS' SUIT—PROPERTY SUBJECT.

The interest of the son was vested in each of those contingent rights, and could be reached by his creditor by virtue of Rev. Laws, c. 139, § 3, cl. 7, providing that a creditor can reach in equity any property or interest legal or equitable, though the same cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal, or by any means within the ordinary procedure of the court.

Case Reserved from Supreme Judicial Court, Suffolk County; Wm. Caleb Loring, Judge.

Suit by Harry O. Alexander against Neal E. McPeck and others, as trustees under, and Susie E. Braman and others, as executors of, the will of Grenville W. Braman, deceased. The cause was heard on the demurrer and answers of defendants, and on plaintiff's demurrer thereto. The questions raised on the demurrers were left in abeyance until after a hearing on plaintiff's claim against defendant Hammond Braman. There was a decree for plaintiff against defendant Hammond Braman, and he appeals; and the court reserves the case for the full court on the appeal and on questions of law raised by the demurrers. Decree for plaintiff affirmed, and decree for him ordered on the demurrers.

This is a suit to reach the interest of Hammond Braman under the will of his deceased father, to satisfy a judgment for which it is claimed he is liable. The provisions of the will for the benefit of Hammond Braman are as follows: "Second. I give, devise and bequeath all the residue of my property and estate, whether real, personal or mixed, to Elmer P. Howe, of Boston, in the county of Suffolk and commonwealth of Massachusetts aforesaid, to my son Grenville D. Braman and to my son Hammond Braman and their heirs, as joint tenants, but in trust nevertheless, upon the trusts following: (a)

If my said wife shall survive me, to set apart and invest in trust as a fund property to be selected and valued by my said trustees, which shall amount to one-third of the estate and property given to said trustees, or money to that amount, and to pay the net income thereof as often as once in six months to my said wife during her life, and at the death of my said wife to convert the principal of the said third of such estate and property into money and to divide the same in three equal parts * * * [and after directing the payment of two such portions to his son Grenville and his daughter Caroline or their appointees or legal representatives] to pay over the remaining part thereof to my son Hammond Braman, if he shall survive my said wife, or if he shall die before her, to his issue living at the time of her death by right of representation, and in default of his issue then living, to his legal representatives. * * * (d) If my said son Hammond shall survive me, to set apart and invest as another trust fund, the sum of fifty thousand dollars, in money or in property selected and valued at that amount by my said trustees, and to pay over as often as once in six months the net income of this trust fund to my said son Hammond during his life, upon his sole receipt and not in compliance with any assignment or anticipation, and at his death to pay over, transfer and convey the principal of this trust fund to his issue living at the time of his death, by right of representation, and, in default of his issue then living, to his legal representatives. (e) As soon as practicable after my decease, to convert into money all the residue of my estate and property not hereinbefore disposed of, and to divide the same into three equal parts * * * [and after directing the payment of two such parts to his son Grenville and his daughter Caroline, or their issue or legal representatives] to pay over the remaining part to my said son Hammond if he shall survive me, or if he shall die before me, to his issue living at the time of my death by right of representation, and in default of his issue then living, to his legal representatives."

Prior to February 5, 1902, plaintiff and defendant Neal E. McPeck were partners. On that day the firm was dissolved, and a new firm was created between McPeck and defendant Hammond Braman. The new firm took over the assets of the old firm and its business, and at the same time the following instrument was executed by the partners of the new firm: "Know all men by these presents, that we, Neal E. McPeck and Hammond Braman, copartners doing business under the firm name and style of McPeck & Company, stock and bond brokers at 60 State street, Boston, Mass., for a valuable consideration, do hereby release, remise, and forever discharge Harry O. Alexander, of Boston, from the payment of all debts, agreements, and liabilities of every name, nature,

and description contracted by the firm of McPeck & Company, of which the said Alexander was a partner, previous to the date of these presents. Witness our hands and seals, this 5th day of February, 1902. Neal E. McPeck. [Seal.] Hammond Braman. [Seal.]" The firm composed of plaintiff and McPeck were engaged in the business of stockbrokers, and at divers times Mary Humphrey advanced money to the firm on the understanding that the same should be applied in the purchase of stocks and bonds on margin. The sums advanced were lost, and prior to the creation of the new firm Mary Humphrey began suit against plaintiff and McPeck to recover the same. On January 5, 1903, judgment was entered in her favor for \$1,122.23 damages and costs. This is the judgment sought to be satisfied out of the property devised to Hammond Braman.

J. Noble, Jr., for complainant. Whipple, Sears & Ogden, for defendant Hammond Braman. Carret, Chase & Hay, for defendants executors and trustees under will of G. T. W. Braman.

HAMMOND, J. At the hearing on the merits the defense set up by Hammond Braman that the rights claimed by the plaintiff had been adjudicated against him in the receivership proceedings was abandoned; and there was no evidence that the instrument of February 5, 1902, was procured by fraud or misrepresentation. The case has two main branches; the first relating to the obligation assumed by Hammond Braman by the agreement of February 5, 1902, and the second relating to the question whether his interest in the trust funds under his father's will can be reached and applied so far as necessary to the payment of the judgment.

1. As to the agreement: Braman contends that under it he did not assume the liabilities of the old firm and agree to pay the old debts and obligations, or that, in any event, his liability is limited to reimbursing the plaintiff for such sums as he actually has paid out. While the words "release, remise, and forever discharge" were not the most appropriate to be used under the circumstances then existing, still they are to be given a meaning which will effectuate the plain intention of the parties, and so they must be construed to be an agreement to assume and discharge all the debts, agreements, and liabilities of the old firm. In no other way could Braman release and discharge Alexander from the obligations contracted by the old firm. *Dorsey v. Dashiell*, 1 Md. 198, 203, 206; *Griffith v. Buck*, 13 Md. 102, 114. So construed, the instrument is something more than a mere contract of indemnity. A contract to assume and pay a liability is a contract to pay it forthwith, if it is due when the contract to assume is made, or, if not then due, when it shall become due; and it gives to the party in whose favor it is made

a right of action as soon as the debt has matured, whether or not he has paid it himself. *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199. Under the doctrine of these cases, the plaintiff's right against Braman in respect of the Humphrey demand and the judgment rendered on it was complete, at the latest, when the judgment was entered, notwithstanding the fact that the plaintiff made no payment upon it. *Nichols v. Prince*, 8 Allen, 404, cited by the defendant, does not decide that the suit could not have been maintained before payment, and the question whether the agreement to "discharge" the retiring partner "from all liabilities" should be construed as an agreement to assume and pay them was not before the court.

It is further contended in defense that the instrument does not extend to such a claim as was presented in the Humphrey suit. Assuming that at common law there could have been no recovery upon such a claim, still the right to recover in such a case is given by statute. St. 1890, p. 479, c. 437; St. 1901, p. 391, c. 459; Rev. Laws, c. 99, § 4. The right so given imposed a corresponding obligation upon the defendants in the Humphrey suit to pay, and that obligation was a debt or liability contracted by the old firm before the date of the instrument in question. The assumption of the liability by Braman was not in contravention, but in furtherance, of the purposes of the statute. Public policy does not require the refusal to enforce an agreement to assume and pay such a liability. It can be released (*Wall v. Metropolitan Stock Exchange*, 168 Mass. 282, 46 N. E. 1062), and it can be assumed.

It is still further contended by the defense that this action cannot be maintained because Braman was not vouched in to defend the Humphrey suit, and final judgment therein was entered upon default. Braman, however, agreed to assume and pay that liability. At the time he signed the agreement he was informed of the pendency of the suit, and he was again informed of it after the appeal to the superior court and before the withdrawal of the appearance of the attorney who had been employed by the old firm for the defense. If he desired to have the suit defended, it was his duty to take the proper measures to that end. There is no evidence of collusion in suffering judgment to be entered. He cannot now complain that Alexander, whom he had agreed to discharge from this liability, did not continue to defend the suit. See *Tracy v. Maloney*, 105 Mass. 90; *Cutter v. Evans*, 115 Mass. 27; *Tapley v. Goodsell*, 122 Mass. 176; *Curtiss v. Curtiss*, 182 Mass. 104, 66 N. E. 635.

The contentions made in the original answer of Braman that the instrument of February 15, 1902, was void as being part of an inducement held out to him to enter upon an illegal business, and that the liability of the

old firm to Humphrey had been released by an instrument of December 26, 1901, are not renewed in the substituted answer, and we treat them as waived. Upon this branch of the case the result is that the decree that Hammond Braman shall pay to the plaintiff the amount of the Humphrey judgment, with interest, together with the costs of this suit, should be affirmed.

2. As to whether the interest of Hammond Braman in the trust funds held under the will of Grenville T. W. Braman can be reached to enforce this payment: For convenience in this branch of the case we shall call Hammond Braman only by his first name, to distinguish him from the other members of the family to which he belonged. The executors of the will allege that they have transferred to the trustees all the funds in which Hammond had any interest. We do not understand that the plaintiff desires to controvert this. The bill, therefore, should be dismissed against Susie A. Braman, who is summoned simply as executrix, and as against Elmer P. Howe and Grenville D. Braman, who are summoned as executors and trustees, so far as they are executors.

The will is of considerable length, and is drawn with some care. After giving certain personal property to his wife, Susie A. Braman, the testator gives all the residue in trust. Of the trusts in which Hammond is interested the first is contained in the second article in clause "a," and is as follows: "If my said wife shall survive me, to set apart and invest in trust as a fund property to be selected and valued by my said trustees, which shall amount to one-third of the estate and property given to said trustees, or money to that amount, and to pay the net income thereof as often as once in six months to my said wife during her life, and at the death of my said wife to convert the principal of the said third of such estate and property into money and to divide the same in three equal parts * * * [and after directing the payment of two such portions to his son Grenville and his daughter Caroline or their appointees or legal representatives] * * * to pay over the remaining part thereof to my son Hammond Braman, if he shall survive my said wife, or if he shall die before her, to his issue living at the time of her death by right of representation, and in default of his issue then living, to his legal representatives." With reference to this clause it appears that the widow is still living. The second trust is in clause "d" of the same article, and is as follows: "If my said son Hammond shall survive me, to set apart and invest as another trust fund, the sum of fifty thousand dollars, in money or in property selected and valued at that amount by my said trustees, and to pay over as often as once in six months the net income of this trust fund to my said son Hammond during his life, upon his sole receipt and not in compliance with any assignment or anticipation,

and at his death to pay over, transfer and convey the principal of this trust fund to his issue living at the time of his death, by right of representation, and in default of his issue then living, to his legal representatives." The third is in clause "e" of the same article, and is as follows: "As soon as practicable after my decease, to convert into money all the residue of my estate and property not hereinbefore disposed of, and to divide the same into three equal parts * * * [and after directing the payment of two such parts to his son Grenville and his daughter Caroline, or their issue or legal representatives] * * * to pay over the remaining part to my said son Hammond if he shall survive me, or if he shall die before me, to his issue living at the time of my death by right of representation, and in default of his issue then living, to his legal representatives."

Rev. Laws, c. 159, § 3, cl. 7, provides that a creditor can reach in equity "any property, right, title or interest, legal or equitable, of a debtor, * * * which cannot be reached to be attached or taken on execution in an action at law, although * * * the property sought to be reached and applied * * * cannot be reached and applied until a future time or is of uncertain value, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court." The plaintiff now concedes that under the doctrine of *Broadway National Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504, he cannot reach the income of the trust fund payable to Hammond under clause "d." He contends, however, that he can reach the interest of Hammond in the principal of each of these funds. As Hammond survived his father, his interest in the residuary fund named in clause "e" vested in him immediately as his absolute property, and was liable to be taken by his creditors. This the trustees now concede, but they allege that by a deed dated November 12, 1902, he, as security for money to the amount of \$30,000 advanced by them to him, assigned to them all his said interest, subject to two prior assignments which he had made to secure other creditors. In consequence of the demurrer of the plaintiff, this allegation is to be taken as true; but, as the amount of the fund is not alleged, it cannot be now assumed that the whole of Hammond's interest will be required to satisfy the terms of these various assignments. The plaintiff is therefore entitled to a decree in his favor with reference to Hammond's interest in that fund. The terms of the decree cannot be settled upon the information now before the court, and must be settled in further proceedings before a single justice.

The plaintiff concedes that he has no present right to demand a termination of the trust held under clause "a," or of that held under clause "d," or to have any portion of the principal of either of these two funds

now applied to the payment of his claim. The remaining question, therefore, is whether the interest of Hammond in the principal of either of those two funds is such that the plaintiff is entitled to have it applied, so far as may be necessary, in a just and equitable manner to the extinguishment of his claim. Clause "a" provides that at the death of the testator's widow one-third of the fund shall be paid to Hammond if then living, or if he is not then living to his issue then living, "and in default of his issue then living to his legal representatives." Clause "d" provides that at the death of Hammond the fund held under the clause shall be paid over to his issue then living, "and in default of his issue then living to his legal representatives." Contingent gifts to "legal representatives" of another son and daughter of the testator are also provided for in clauses "b" and "c" of the same article, which direct the trustees to set apart two funds of \$50,000 each, and to pay the income of one fund to the other son, and of one fund to the daughter, in each instance upon the sole receipt of the life tenant, and not in compliance with any assignment or in anticipation.

One question involved is the meaning to be given to the words "to his legal representatives" in that portion of clause "a" which deals with the Hammond Braman third of the trust for the widow, and in clause "d." The phrase is used in the will nine times, and is the only one used by the testator to designate the final beneficiaries of the five separate trust funds which he orders his trustees to set apart. We find nothing to indicate that it is not used in the same sense in each of the nine instances. The ordinary meaning of the words "legal representatives" is "executors and administrators," and they are to be given that meaning unless there is something in the will properly construed to show that they should have some other meaning. *Cox v. Curwen*, 118 Mass. 198. There is nothing in the terms of the will or the circumstances of the testator or his family, so far as appears, to indicate that he used the words in any other than their ordinary sense. On the contrary, in the third article he says that his omission to provide for the issue of his son Grenville is intentional. In each of the three bequests for the benefit of Grenville, however, the final direction is to pay "to his legal representatives." If those words are to be given another than their ordinary meaning of "executors and administrators," and are to be construed to mean either heirs at law or distributees under the statute of distribution, if Grenville should die leaving issue, such issue would be included among his heirs at law and distributees, and so would be provided for by the testator without any action on the part of Grenville, if he should die without making an appointment by will. We therefore construe the last provision of clause "a" as a gift to Hammond of one-third of

the widow's fund if Hammond survive her; if he dies before her, leaving issue, to his issue then living; and in default of his issue then living, to his executors or administrators.

The last provision of clause "d" is to have a similar construction, and, in the event of his dying leaving no issue then surviving, the fund provided for in clause "d" is to go to his executors or administrators. He has two interests in one-third of the widow's fund: First, a right to take it as his own if he survives her; and, second, the right to have it administered as a part of his estate by his own executors or administrators if he dies before his mother and if he has no issue then living. Besides his right (which it is properly conceded cannot be reached in this suit) to the income of the \$50,000 fund for life under clause "d," he has also the right to have that fund turned over to his own executors or administrators as part of his own estate, if when he dies he leaves no issue then living. Each of these rights is contingent—the first upon his surviving the widow, the second upon his dying before her and leaving no issue surviving her, and the third upon his having no issue living at the time of his death. His interest in each right is now vested, in the sense that he owns the right. If in their nature they are property, they are his property. There can be no doubt that, although each is a vested right in an equitable contingent remainder, it is capable of being alienated by him and of passing by assignment in insolvency or bankruptcy. *Putnam v. Story*, 132 Mass. 205, and cases cited; *Daniels v. Eldredge*, 125 Mass. 356. Such a right is property. It is within the meaning of the word as used in *Rev. Laws*, c. 168, § 22, which provides that, if it appears upon the examination of a judgment debtor that he has property which cannot be taken on execution, he "shall be required to execute and deliver to the judgment creditor * * * a transfer, assignment or conveyance thereof," in such form as the magistrate orders. Since it "cannot be reached to be attached or taken on execution in an action at law," the fact that neither the debtor, nor the creditor if the right is transferred to him, nor the purchaser if it is sold, can get any portion of the corpus of the trust fund until some future time, is not under the statute fatal to the plaintiff.

But it is strongly contended in behalf of the defense that such a right is of "uncertain value" within the meaning of the statute, and therefore cannot be reached by proceedings under it. In a sense it is true that it is of uncertain value; but this phrase is to be read in the light of its context and the history of the statute. Prior to 1884 it had been held that under *Gen. St. 1860*, c. 113, § 2, cl. 11, which provided that a creditor might reach in equity "any property, right, title or interest, legal or equitable, of a debtor within this state, which cannot be come at to be

attached or taken on execution in a suit at law," this court would not take jurisdiction under the statute unless the claim of the creditor was equal to \$100 (*Chapman v. Banker's & Tradesman's Publishing Co.*, 128 Mass. 478); that the statute did not apply where the property sought to be reached was wholly in the possession of the debtor (*Phoenix Ins. Co. v. Abbott*, 127 Mass. 558), or, where it was an interest in an equitable remainder (*Bartholomew v. Weld*, 127 Mass. 210; *Russell v. Milton*, 133 Mass. 180), or where it was a patent right (*Carver v. Peck*, 131 Mass. 291). After these various decisions, *St. 1884*, c. 285, now *Rev. Laws*, c. 159, § 3, cl. 7, was passed. Upon reading this statute it plainly appears that the Legislature intended to change the law as declared by these and other like decisions with reference to the rights of property which a creditor might reach by proceedings in equity and to give the broadest scope to such proceedings. Within the meaning of the statute the property right is not of uncertain value "if the value can be ascertained by sale, appraisal, or by any means within the ordinary procedure of the court." In view of the history of the statute, the fact that the rights of Hammond are now vested in him as his property and are capable of being conveyed by him and of passing to his assignee in insolvency or bankruptcy solely for the benefit of his creditors, that he as a judgment debtor could be compelled under poor debtor proceedings to make an assignment or conveyance of them, and of the express language of the statute, we are of opinion that the statute should be broadly construed, and that, if the value of either of these rights can be ascertained either by sale or appraisal, it is within the statute, and that for the purposes of the statute the value of each of them can be ascertained by sale or by some other means within the ordinary procedure of the court.

Upon this part, as upon the other, therefore, there must be a decree for the plaintiff; and it is so ordered.

(189 Mass. 85)

PAGE v. PAGE.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 9, 1905.)

1. DIVORCE — ALIMONY — DECREE — CONSTRUCTION.

Where a foreign divorce decree directed that \$6 per week should be paid by the libelee to an attorney for the libelant for the support of a minor child, to be in lieu of alimony, the decree should be construed to require such payment to be used by the libelant to support herself and the child, and that the libelant, and not her attorney, was entitled to enforce the same.

2. SAME—FOREIGN DECREE — ENFORCEMENT — JURISDICTION.

Rev. Laws, c. 152, §§ 25, 27–33, providing for the allowance of alimony and the care of minor children in divorce proceedings, apply only to cases where the question of divorce or separation is heard in the courts of Massa-

chusetts; and, the court's power to grant alimony being wholly statutory, it has no authority to inquire as to the proper amount to be allowed as alimony in a proceeding to enforce a foreign decree therefor, nor to enforce such decree in any of the ways specified by the statutes for the enforcement of domestic alimony decrees.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 841, 842.]

3. SAME—PETITION—DEMURRER—PRESUMPTIONS.

Where a petition to enforce a foreign alimony decree did not allege that the decree was final, it would be presumed on demurrer to the petition that the decree was subject to revision and modification by the court passing it.

4. SAME—CONSTITUTIONAL LAW.

Where a foreign alimony decree was not alleged to be final in a petition to enforce it, it was not a decree enforceable in Massachusetts, within Const. U. S. art. 4, § 1, requiring that full faith and credit shall be given in each state to the judicial proceedings of every other state.

Report from Supreme Judicial Court, Suffolk County; Henry N. Sheldon, Judge.

Petition by Helen Kelso Page against one Page, her former husband, to recover arrears of alimony under a foreign decree. A demurrer to the petition was overruled, and the case was reported to the Supreme Judicial Court. Demurrer sustained, and case remanded for amendment and further proceedings.

Olcott O. Partridge and Edgar C. Bancroft, for petitioner. Frank L. Young, for respondent.

HAMMOND. J. This is a petition in equity filed in the superior court to recover arrears of alimony claimed to be due under a decree of the Supreme Judicial Court of the state of Maine, by which the court decreed a divorce a vinculo in favor of the petitioner, Helen Kelso Page, against the respondent, her husband, awarded to her the custody of their minor child, and directed the respondent to pay \$6 per week as alimony "said payment to be made each four weeks." The petition sets out the decree and alleges that the court had jurisdiction over the case and full authority to pass the decree; that the child is still a minor, and since the date of the decree always has been in the care and custody of the said Helen; that since the decree the respondent has paid only \$25; and that at the time of filing this petition there was due from the respondent, by the terms of the decree, the sum of \$479, which he, although frequently requested, has refused and neglected to pay. The prayers are, first, that the court may ascertain and decree what sum is justly and equitably due from the respondent; second, that the court may issue execution therefor, or order the respondent to pay such sum within a certain time to be fixed by the court; third, that there may be included in such execution or order such sums as may be found justly due for the support of the child during the time subsequent to this petition and

while it is pending; fourth, that the respondent be ordered to furnish sufficient security for the payment of such sums as may from time to time become justly due under said decree; and fifth, for such other relief as to the court may seem meet and proper. To this petition the respondent demurred. The justice of the superior court overruled the demurrer, and, being of opinion that before further proceeding the matter ought to be determined by this court, reported for our determination the questions of law arising upon the petition and demurrer.

The language of the decree is somewhat peculiar. It directs that the sum of \$6 per week shall "be paid by the libelee to the attorney for the libelant for the support of said minor child; said payment to be made each four weeks, and to be in lieu of alimony." We construe this decree to be in substance an order to the libelee to pay the libelant the sum named, to be used by her in the support of herself and the child, and that the libelant could enforce against the libelee whatever duty was placed upon him by the decree. The provision that it should be paid to the attorney of the libelant, rather than to her in person, was doubtless inserted for the convenience of the parties. At any rate, it does not affect the substance of the liability imposed upon the respondent. We shall therefore treat this case as an application to enforce the payment of arrears of alimony ordered by a competent court of a sister state.

It is to be noted that, as an application to pass upon a question of alimony as such, this petition cannot be maintained. Alimony is incidental to a suit for divorce or judicial separation, and neither at common law nor by the weight of authority in a court of equity, no suit for judicial separation then pending, could it be granted. Originally it was solely a question for the ecclesiastical courts. *Shannon v. Shannon*, 2 Gray, 285; *Pomeroy, Eq. Jur.* § 1120, and cases there cited; *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641, and cases there cited. In *Shannon v. Shannon* it was held that in this commonwealth the authority to grant alimony is now derived wholly from the statutes. With the exception named in Rev. Laws, c. 152, § 26, which is not here material, the statutes apply only to cases where the question of divorce or separation is heard in our own courts. Rev. Laws, c. 152, §§ 25, 27-33, both inclusive. Upon this petition, therefore, we cannot make any inquiry as to the proper amount to be allowed as alimony; nor can the order of the Maine court as to alimony be enforced in any of the ways set forth in our statutes. The questions as to whether any alimony should be allowed, and, if so, how much, are not for our consideration, but they are exclusively for the Maine court; and we can have no part in the matter until the question of amount has been there settled, and even then we cannot make

use of the statute proceedings, because they are not applicable. Whatever relief we can give must be founded upon general principles.

It is unnecessary at this late day to cite authorities in support of the general proposition that when a court of one state, having jurisdiction over the cause and parties, finally adjudicates that a certain sum of money shall be paid by one party to another, such an adjudication, whether it be in the form of a judgment in an action at law, or of a decree in equity, or a proceeding for divorce or alimony, is entitled, under the first section of the fourth article of the federal Constitution, to full faith and credit in every other state. Such an adjudication is made a debt of record not examinable on its merits, not only in the state where rendered, but in every other state. When an action is brought in a sister state upon such a judgment or decree, the court in which the action is brought has no occasion to inquire into the merits of the case upon which the decree was rendered. The court which rendered the decree has settled that question. Whether the original decree was founded upon a common debt or a claim for alimony is entirely immaterial. In the sister state it is known as a decree for the payment of money, and is seen in no other light. But, in order that a decree shall have this force under the Constitution, it is necessary that it shall be final; and the authorities have differed as to whether a decree for the future payment of alimony by installments is a final decree. In many cases a decree for the future payment of alimony by installments has been regarded as within the constitutional provision. In some of these cases the particular decree, although providing for future payment, was in such form as to be regarded not to be subject to further revision by the court which passed it, and therefore final (*Brisbane v. Dobson*, 50 Mo. App. 170); in some the point that such a decree was not final has not been taken by the defense (*Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227); and in some it has been directly decided that such a decree was final, and within the terms of the constitutional provision (*Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. Rep. 791, a majority decision).

But the question whether a decree for the future payment of alimony, which is subject to the revision of the court, is a final decree, and comes within the protection of the constitutional provision, seems to have been recently settled by the Supreme Court of the United States. *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. This case, in its various stages, is very instructive upon this whole question of the extent to and the manner in which a decree for alimony will be enforced in another state, and its importance justifies an extended notice of it. In August, 1893, on libel by the

wife, a divorce was decreed between the parties by the Court of Chancery of New Jersey. The decree was silent as to alimony. In February, 1896, the libellant, alleging that this decree was incomplete through the neglect of her counsel, filed a petition in that court, praying for an opening and amendment of the decree by allowing reasonable alimony. *Lynde v. Lynde*, 54 N. J. Eq. 473, 35 Atl. 641; *Id.*, 55 N. J. Eq. 591, 39 Atl. 1114. Thereupon such proceedings were taken that in December, 1897, a final decree supplementary to the decree of divorce was passed, awarding the wife \$7,840 back alimony, and a counsel fee of \$1,000, and future alimony at the rate of \$80 a week, authorizing the execution therefor, declaring the sums awarded as alimony to be liens upon the defendant's real estate, requiring him to give security for the payment of such sums, and providing for sequestration and a receivership in case of the defendant's failure to make the prescribed payments or to furnish the prescribed security. See *Lynde v. Lynde*, 41 App. Div. 280, 281, 58 N. Y. Supp. 567; *Id.*, 162 N. Y. 405, 406, 56 N. E. 979, 981, 48 L. R. A. 679, 76 Am. St. Rep. 332. Upon this decree the wife brought a suit in the Supreme Court of New York, which rendered judgment in her favor. It was held that she was "entitled to judgment against the defendant for the amount of alimony, counsel fee, and costs due or incurred under the New Jersey decree, for the amount of alimony accrued since the decree, that he pay to her the sum of \$80 a week from the date of the decision as and for permanent alimony, that he give a bond in the sum of \$100,000 to secure the payment of the several sums of money specified, and that, upon his failure to comply with the provisions of the decision, a receiver might be appointed, ancillary to the receiver appointed by the Court of Chancery of New Jersey." See 162 N. Y. 409, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. From this judgment the defendant appealed to the Appellate Division of the Supreme Court. Upon this appeal two important questions were raised: First, whether the New Jersey court had jurisdiction to render the judgment for alimony against the defendant; second, if so, had the Supreme Court of New York any authority to enforce the New York judgment based upon the New Jersey decree for alimony, except by execution as a simple money judgment? The court, having decided the first question in the affirmative, proceeded to the consideration of the second question, and in an able opinion, in which some of the leading authorities are critically examined, comes to the conclusion that, while the New Jersey judgment established the plaintiff's right to recover the amount of alimony thereby adjudged to be due at the time of the rendition of the judgment, it did not confer upon her any right to enforce the payment of it in the state of New York by means of the

equitable remedies of sequestration, injunction, etc., for which the New Jersey judgment provided. These were no part of the judgment, but were only measures in the nature of an execution to enforce it. The judgment below was modified so as merely to adjudge that the plaintiff recover of the defendant the amount of alimony due at the time of the New Jersey decree, being \$7,840, with a counsel fee of \$1,000 and costs. See 41 App. Div. 288, 289, 58 N. Y. Supp. 567. From this decree both parties appealed. Upon this appeal the judgment was affirmed. 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. In giving the opinion of the court, Gray, J., says: "The action was to recover upon a final decree of the court of another state, which, being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. * * * As a debt of record against the defendant the courts of this state should give it full credit and effect; but as to its other provisions for future alimony and for equitable remedies to enforce compliance I do not think we should say that it falls within the rule of the federal Constitution. I do not think that the courts of this state should give effect to the decree by enforcing any of the collateral remedies which the prevailing party may be entitled to in New Jersey, and which the subsequent order gave to her. So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor, and lacked conclusiveness of character. * * * The provision of the federal Constitution which requires that full faith and credit shall be given to the judicial proceedings of another state, in my opinion, should be deemed to relate to judgments or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature. If they once for all establish a debt or obligation against a party, the record is available in other jurisdictions as a foundation for a judgment there"—and the judgment of the Appellate Division, which gave to the plaintiff only the amount due at the time the New Jersey decree was passed, with counsel fee and costs, was affirmed. From this judgment each party sued out a writ of error to the Supreme Court of the United States. The writ of error of the husband was there dismissed upon the ground that since the New York court had ruled that the decree of the New Jersey court was binding upon him, and had thereby decided in favor of the full faith and credit of the decree under the Constitution and laws of the United States, its judgment on that question could not be reviewed by the federal court on writ of error. As to the writ of error brought by the wife, the court, by Gray, J., said: "The decree for the payment of \$8,840 was for a fixed sum, and the judgment of the court

below was properly restricted to that. The provision for payment in the future was subject to the discretion of the Court of Chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum. The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution, and not of judgment, could have no extraterritorial operation; but the action of the courts of New York in these respects depended upon the local statutes and practice of the state, and involved no federal question." On the writ of error of the wife the judgment was affirmed. *Lynde v. Lynde*, 181 U. S. 183, 21 Sup. Ct. 555, 45 L. Ed. 810. The result of the suit brought in New York, therefore, was that, so far as respected the alimony, the wife got judgment for the amount found due by the New Jersey court at the time of its decree, but for nothing after that date.

This decision of the federal court is an authoritative declaration of the interpretation of the provision of the federal Constitution under consideration, and is binding upon this court. In order to bring herself under the protection of this provision, the plaintiff, therefore, must show that the decree was final. The decree had reference simply to future payments, and generally such a decree in the form of this one is subject to modification by the court which passed it. There is no allegation in the bill upon that subject. It is true that there is an allegation that the decree "still stands unreversed and in full force," but that is not an allegation that it is final. It is not an allegation as to the nature of the decree, but simply that its nature has not been changed. As the question comes to us upon demurrer, we have no information before us as to the law of Maine; but in view of the general character of such decrees, and the general rule that they are subject to the revision of the respective courts which pass them, we cannot, upon demurrer to this bill, assume that the decree is final. If the plaintiff contends that it is, there should be in the bill some such allegation as there was in *Brisbane v. Dobson*, ubi supra, namely, that there is no authority in the court to reverse or modify the decree. So far, therefore, as the plaintiff relies upon this constitutional provision, she has not stated a case. So far as, independently of that provision, she asks the assistance of this court as in a case of foreign judgment, she is met by the same difficulty. It does not appear that she has any positive or final decree for the payment of a sum certain, or which can be made certain. The fair construction of the bill, taken in connection with the nature of the decree, is that she has no such final decree. For aught that appears, the Maine court upon application might revise the decree and decline to issue any process for the collection of any sum whatever. The demurrer, therefore, must be sustained. It is unnecessary

to consider whether, if the decree be regarded as final, a bill in equity can be sustained. It would then be simply a decree for money, and, notwithstanding some dicta in our own cases and some decisions elsewhere, an action at law would seem at least to be a plain, adequate, and complete remedy. *Howard v. Howard*, 15 Mass. 196. See, also, cases hereinbefore cited.

Under the terms of the report, the case is remanded to the superior court for the allowance of such amendments to the bill as it may see fit to grant, and for further proceedings not inconsistent with this opinion; and it is so ordered.

(189 Mass. 7)

CAMPBELL v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 7, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—INJURY TO PEDESTRIAN.

A pedestrian on a sidewalk in general use is not required to examine it, but may rely on the presumption that, if not reasonably safe, the city will make the necessary repairs or warn pedestrians of the dangers.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1678.]

2. SAME — CONTRIBUTORY NEGLIGENCE — KNOWLEDGE OF DEFECTS.

A pedestrian, using a sidewalk with knowledge of its defective condition, is not guilty of contributory negligence as a matter of law, precluding a recovery for injuries received by reason of the defects, but the question of his negligence is for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1677, 1755.]

3. SAME—NEGLIGENCE OF ABUTTING OWNER—EFFECT ON CITY'S LIABILITY.

The negligence of an owner of land abutting on a sidewalk in failing to provide a substantial wall for the support of the sidewalk does not relieve the city of its duty to keep its sidewalks in repair, and furnishes no bar to an action against it for injuries to a pedestrian, caused by a sudden subsidence of the sidewalk by reason of the giving way of the owner's wall.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1591, 1592.]

4. SAME — NEGLIGENCE — EVIDENCE — SUFFICIENCY.

Evidence in an action against a city for injuries received by a pedestrian by reason of a defective sidewalk held to warrant a finding that the city negligently permitted the sidewalk to remain out of repair.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1739.]

Exceptions from Superior Court, Suffolk County; Wm. Schofield, Judge.

Action by Franklin Campbell against the city of Boston for injuries received by plaintiff by reason of a defective sidewalk. There was a verdict for defendant, and plaintiff excepts. Exceptions sustained.

Elisha Greenwood and F. J. Horgan, for plaintiff. Saml. M. Child, for defendant.

BRALEY, J. The proximate cause of the accident to the plaintiff was not the uneven depression in the sidewalk over which he was passing as a traveler, but arose rather from the sudden settling of the foundation underneath the surface. If this had remained firm, he would not have been injured. Under the provisions of Rev. Laws, c. 51, § 18, a city or town is required to keep its public ways in suitable repair for the convenient use of travelers. It is made liable for injuries received from defects, whether visible upon the surface or concealed within the roadbed, if it has had notice, or in the exercise of reasonable diligence should have known of their existence, and has failed to remedy them. While the plaintiff knew of the gradual sinking of the sidewalk and enlargement of the depressed area for at least a year, it had not further given way under constant use by himself and other travelers. If, from observation, he might have inferred that there was a probability of its being insufficiently supported, it also could be said that an inference might have been drawn that the bricks of which it was built had settled from constant travel. The street was in general use, which afforded to him some measure of belief that it was not dangerous. Besides, he was not required to make an examination to see what lay beneath, but might rely upon the presumption that, if not reasonably safe, the defendant would have made the necessary repairs, or in some proper manner have warned travelers that it was dangerous.

Knowledge by the plaintiff of the existence of defective conditions in the public way he was using had an important bearing upon the question of his negligence. "But a man does not take the risk of any danger which may arise from certain causes merely because, in a general way, he is aware of the existence of those causes." *Powers v. Boston*, 154 Mass. 60, 63, 27 N. E. 995, 996. What inferences, whether of care or of negligence, should be drawn from his knowledge and conduct, were matters of fact for the jury. *Weare v. Fitchburg*, 110 Mass. 334; *George v. Haverhill*, 110 Mass. 506; *Kelly v. Blackstone*, 147 Mass. 448, 18 N. E. 217, 9 Am. St. Rep. 730; *Norwood v. Somerville*, 159 Mass. 105, 33 N. E. 1108; *Torphy v. Fall River (Mass.)* 74 N. E. 465. There was some evidence that the cellar wall of the building on which the sidewalk abutted was thin, and suddenly gave way, causing the subsidence. But, if this was negligence of the owner in not providing a more substantial wall, which is not shown, his neglect would not relieve the defendant from its primary duty, or furnish a bar to the maintenance of the suit. *Bacon v. Boston*, 3 Cush. 174; *Burt v. Boston*, 122 Mass. 223.

The defendant's principal defense, however, is that because of the hidden character of the defect, and until disclosed by the accident itself, the city in the performance

of its statutory duty could not, by using reasonable care, have discovered or guarded against it. Ordinarily what constitutes reasonable diligence in the performance of the duty imposed upon the defendant is a question of fact, to be determined from all the circumstances. *Olson v. Worcester*, 142 Mass. 536, 8 N. E. 441; *Comerford v. Boston*, 187 Mass. 564, 78 N. E. 661. But there are cases where this may be a question of law. Thus it has been decided that in the absence of proof of actual notice, or of faulty construction, or repairs, and where no surface indications existed showing a want of unfitness of a public way, or, if present, they had existed for so short a time as not to furnish any ground for holding that the city or town should be held to have impliedly known of the defect, no liability attaches. *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249; *Rochefort v. Attleborough*, 154 Mass. 140, 27 N. E. 1013, 26 Am. St. Rep. 221; *Stoddard v. Winchester*, 154 Mass. 149, 27 N. E. 1014, 26 Am. St. Rep. 223; *Brummett v. Boston*, 179 Mass. 26, 27, 60 N. E. 388; *Miller v. North Adams*, 182 Mass. 569, 68 N. E. 197. See, also, *Burke v. Haverhill*, 187 Mass. 65, 72 N. E. 256.

Upon recurring to the evidence, much testimony is found that for at least a year this part of the sidewalk, while enlarging in area, had been slowly sinking and wearing deeper, until its condition had become distinctly noticeable. The bricks had been pressed down around the outer edge, and it could have been found that this created such an unevenness that they were becoming unserviceable from ordinary travel and might cause travelers to stumble and fall. It is not contended by the defendant, that it cannot be charged with implied notice of this condition. Indeed, the testimony of the deputy superintendent of streets would seem to be conclusive that in the proper performance of his duties he could have ascertained that the sidewalk had settled. If from this cause the accident to the plaintiff had happened, the question of the defendant's liability would have been for the jury. *McGaffigan v. Boston* (Mass.) 1 N. E. 371; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605; *Upham v. Boston*, 187 Mass. 220, 72 N. E. 946. In *Stoddard v. Winchester*, *ubi supra*, it is said: "It is not necessary that roads should be built according to the highest standards of engineering; and the practical rule, that must be adopted in order to impose liability in such cases, is that the condition of the road must be such that danger may reasonably be apprehended at any time, and therefore ought to be guarded against."

In the present case, as we have said, there had been a continuous and appreciable settling of this part of the street below the original level, with a corresponding degree of permanency. Before the accident water had been observed to accumulate in the hollow. An examination, made after this space

fell in, showed that the water had percolated under the surface, and ran into the cellar, and in this way the foundation of the sidewalk may have been, and probably was, undermined. Upon removal of the bricks, this state of things would have been discovered, and, if followed by proper repairs, the danger would have been removed. If the defendant's deputy superintendent of streets had been informed of this surface condition by the foremen of the district in which the street was located, who acted under him, and whose duty it was to inspect and report defects, and upon viewing the depression had decided that no interior repairs were required, his judgment would have been open to review at the trial, where it might have been sustained as being reasonable and sound; or it could be found that, as the bricks had become depressed because their support was falling away, he was called upon to make a further examination. This duty of proper supervision, and making suitable repairs, if they were called for, remains unchanged, where the notice, as in this case, may be implied from all the circumstances. When it is omitted, or imperfectly performed, so that the street remains defective, the city or town is not exonerated. *Post v. Boston*, 141 Mass. 189, 193, 4 N. E. 815. During the period shown, how far the superficial appearance of the sidewalk should have indicated to the public authorities charged with keeping it in repair that its sinking might be caused by an insufficient foundation, that called for a thorough investigation, was not a question of law, but an issue of fact for the jury to decide under proper instructions. *Fleming v. Springfield*, 154 Mass. 520, 523, 28 N. E. 910, 26 Am. St. Rep. 268.

Exceptions sustained.

(189 Mass. 25)

RICHARDSON v. WINNISSIMMET NAT. BANK.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 8, 1905.)

1. NOTES — CONSTRUCTION — POWER TO SELL COLLATERAL.

Where a note gave the holder or holders a right to enforce payment, and in another portion of the instrument provided that the holder or holders might exercise the power to sell the collateral and apply the proceeds to the payment of the note, and of any other note held by him against the maker, the power to sell the collateral and apply the surplus to any other note passed with the note.

2. BANKRUPTCY — CONVEYANCES TO HINDER OR DEFRAUD CREDITORS.

Where the maker of a note, while solvent, assigned a portion of his assets as security, which the holder or holders of the note were authorized to sell to pay the note, and any other notes of the maker in the hands of the same holder, the sale of the collateral by the holder of the note within four months before the bankruptcy of the maker was not a conveyance by him to hinder, delay, or defraud creditors, within the provision of Bankr. Act July 1, 1898, c. 541, §§ 60a, 60b, 67e, 30 Stat. 562, 564 [U. S. Comp. Stat. 1901, pp. 3445, 3449].

Case Reserved from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Bill by one Richardson as trustee against the Winnissimmet National Bank. Case reserved for the Supreme Judicial Court. Bill dismissed.

A. W. Putnam, for plaintiff. Hollis R. Bailey and Fredk. M. Ives, for respondent.

HAMMOND, J. Whether the note given to the County Savings Bank is negotiable we have not found it necessary to decide. See *Mahoney v. Fitzpatrick*, 133 Mass. 151, 43 Am. Rep. 503; *Richards v. Barlow*, 140 Mass. 218, 6 N. E. 68; *Rev. Laws*, c. 78, §§ 19, 21. Upon its face it is made payable to the bank "or order," and, as said by Holmes, J., in construing a note in *Richards v. Barlow*, 140 Mass. 221, 6 N. E. 70: "The form of the instrument plainly imports that it was drawn on the assumption that it would be negotiable, and, even if this assumption was erroneous, it must be taken into account none the less, if necessary, in interpreting the meaning of the power." This note plainly shows the intention of the parties that the right to enforce the payment of it should pass to the order of the payee, and that the party thus designated would be the holder. If it was the intention of the parties that the only holder should be the payee, then there was no occasion for using the phrase "holder or holders." The phrase "said holder or holders" is broad enough to include any person holding the note under the order of the payee. There certainly would seem to be no reason why the power to sell the securities for the payment of this note should not pass with the note. We do not understand the plaintiff to contend to the contrary as to so much of the power. We see no sound reason for holding that "holder or holders" means one thing in one part of the note and another thing in another part. It seems clear that the holder who can exercise the power to sell the collateral and apply the proceeds to the payment of this note is the same holder who has the right to apply the surplus to any note held by him against the maker of the note. If it be said that this is a curious and unusual way of doing business, and such intention on the part of the maker is not to be found, except where clearly expressed, the answer is that in this case it is clearly expressed. The words are broad enough to show such intent, and any other interpretation falls to give due force to their meaning. Moreover, to hold otherwise is to give one meaning to the words "holder or holders" in one place, and another meaning in another. The case differs in material respects from *Gillet v. Bank of North America* (Sup.) 47 N. Y. Supp. 558, and *Id.*, 160 N. Y. 549, 55 N. E. 292, cited by the plaintiff.

Nor is the transaction as thus interpreted in violation of the bankrupt act. In *Thompson v. Fairbanks*, 196 U. S. 516, 526, 25 Sup.

Ot. 306, 310, 49 L. Ed. 577, it is laid down that "under the present act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act." The case is not one of fraud. While solvent, Brown, the maker of the note, assigned a portion of his assets to the County Savings Bank as security for all debts due to such of his creditors as came within a certain description, namely, any one who held the note in which the assignment is contained. This he had the right at common law to do, and the trustee takes the bankrupt's estate subject to this transfer, unless this transfer is forbidden by some positive provision of the bankrupt act. The only provisions of that act which it can be claimed renders this transaction void are those found, respectively, in sections 60a and 60b, as to preferences, and 67e, as to conveyances to hinder, delay, and defraud. Act July 1, 1898, c. 541, 30 Stat. 562, 564 [U. S. Comp. St. 1901, pp. 3445, 3449]. After *Humphrey v. Tatman*, 198 U. S. 91, 25 Sup. Ct. 567, 49 L. Ed. 956, this transaction cannot be held to be a legal proceeding under section 67f. There is no allegation in the bill that the assignment of the securities contained in the note to the County Savings Bank was in fact made with intent to hinder, delay, or defraud. Hence it is not shown to be within section 67e. The transaction, so far as respected the securities, was a conveyance in trust, and not the mere creation of an agency. What took place was an assignment, made more than four months before the filing of the petition, by Brown, then solvent, of a part of his assets for the benefit of whatever creditor should hold the note containing the assignment. Nothing was done by Brown within the four months. All that was done within the four months was done by a creditor for whose benefit the prior valid assignment had been made, acting, not as a mere agent of Brown, but under a valid conveyance in trust. This was not an act by Brown within the four months, and hence not within either section 60a or section 60b.

Bill dismissed, with costs.

(188 Mass. 600)

PARKER v. YOUNG.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 7, 1905.)

1. REPLEVIN—NECESSITY OF BOND.

Under *Rev. Laws*, c. 190, § 9, chattels seized under a writ of replevin and claimed by a third person as lienor cannot be delivered to the plaintiff in replevin before receiving from him the customary bond.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Replevin, § 139.]

2. SAME—APPROVAL OF SURETIES—FAILURE TO GIVE NOTICE.

Under Rev. Laws, c. 190, §§ 15, 16, providing that in replevin the officer serving the writ may approve the sureties on the plaintiff's replevin bond, or that they may be approved by a magistrate, in which case the defendant shall be given notice in writing, stating the time and place of hearing and the names and places of residence of the proposed sureties, failure to give the notice required renders the approval of the sureties by a magistrate a nullity.

3. SAME—PURPOSE OF BOND.

The purpose served by a replevin bond is to provide security to the defendant, if he prevails, for a return of the property, and to indemnify him for such damages and costs as he may be entitled to recover.

4. SHERIFFS AND CONSTABLES—TAKING INSUFFICIENT BOND—LIABILITY.

Under Rev. Laws, c. 190, §§ 15, 16, allowing an officer executing a writ of replevin either to approve the bond himself or to have it approved by a magistrate, in which latter case he is not liable for the insufficiency of the sureties, an officer who accepts insufficient sureties, when in the exercise of a reasonable discretion he should have known of their insufficiency, is liable, whether his approval is in writing or whether, without a formal approval, he merely executes the process.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 219.]

5. REPLEVIN—BREACH OF BOND—FAILURE TO PROSECUTE.

Where a replevin bond is properly returned to the court from which it issues, but the action is not entered, this failure to prosecute the suit is a breach of the bond, which gives the obligee a cause of action for at least nominal damages.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Replevin, § 470½.]

6. SAME—RETURN—EFFECT.

Though an officer's return in a replevin suit showing that a bond was taken may give rise to the presumption that a proper statutory bond is meant, nevertheless this is not conclusive.

7. SHERIFFS AND CONSTABLES—TAKING INSUFFICIENT BOND—REMEDY.

Where the officer executing a writ of replevin wrongfully fails to take a bond with sufficient sureties, the appropriate remedy against the officer is by a suit for damages for his negligence, and an action of tort in the nature of trover cannot be maintained.

8. REPLEVIN—FAILURE TO APPROVE BOND—VALIDITY OF OBLIGATION.

A replevin bond, regular in form and duly executed, is valid and binding upon the obligor and sureties, though the bond is not approved by a magistrate or by the officer executing the writ.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Replevin, § 148.]

9. SHERIFFS AND CONSTABLES—TAKING INSUFFICIENT BOND—ACCRUAL OF RIGHT OF ACTION.

Where, in replevin, a bond in proper form is taken, the sureties on which are worthless, a right of action against the officer executing the writ does not accrue until there is a breach of the conditions of the bond.

10. SAME—WRONGFUL DELIVERY OF PROPERTY—RELATION BACK TO TAKING.

Under Rev. Laws, c. 190, § 9, providing that an officer executing a writ of replevin shall not deliver the property to plaintiff until a bond has been given with sufficient sureties, the delivery of the property to the plaintiff without requiring a sufficient bond renders the original taking by the officer unlawful, and he is liable in trespass or trover.

11. SAME—ACTION—CONVERSION.

Where an officer executing a writ of replevin delivers the property to the plaintiff in the writ without obtaining a sufficient bond as required by statute, such delivery is an exercise of authority, furnishing evidence of conversion sufficient to support an action of that nature against the officer without proof of a previous demand.

Exceptions from Superior Court, Middlesex County; Wm. C. Wait, Judge.

Action by one Parker against one Young. There was verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

M. E. S. Clemons, for plaintiff. Harrison Dunham and Geo. F. James, for defendant.

BRALEY, J. In serving the writ of replevin, although the defendant properly could seize and remove the chattels in which the plaintiff as lienor claimed a special property, they lawfully could not be delivered to the plaintiff in replevin before receiving from him the customary bond, with sufficient sureties. *Wolcott v. Mead*, 12 Metc. 516; *Hamberger v. Seavey*, 165 Mass. 506, 43 N. E. 297; Rev. Laws, c. 190, § 9.

It is left optional with the replevying officer to approve the sureties and thus become responsible, if subsequently they are found financially insufficient, or to refer this question to a magistrate authorized to act for his decision and so avoid this liability. Rev. Laws, c. 190, §§ 15, 16; *Stone v. Jenks*, 142 Mass. 519, 520, 8 N. E. 403; *Bowditch v. Harmon*, 183 Mass. 290, 67 N. E. 333. If the latter course is adopted, the defendant, under section 16, is entitled to notice in writing from the officer, stating the time and place of hearing, with the names and places of residence of the sureties proposed. In the present case this statutory requirement being ignored, the approval by the master in chancery was a nullity, and so far the bond must be treated as if no approval of the sureties had been given.

The purpose served by a proper bond is to provide security to the defendant, if he prevails, for a return of the property, and to indemnify him for such damages and costs as he may be entitled to recover. *Smith v. Whiting*, 97 Mass. 310; *Stevens v. Tufts*, 104 Mass. 328, 333, 334, 6 Am. Rep. 238. If the sureties, when they are approved by the officer, are found to have been irresponsible at the time of acceptance, and in the exercise of a reasonable discretion he should have known of their insufficiency, a suit against him can be maintained, whether his approval is in writing, which is evidence only of his official action, or without doing so he executes the process. *O'Grady v. Keyes*, 1 Allen, 284; *Stone v. Jenks*, ubi supra; *Carter v. Duggan*, 144 Mass. 32, 35, 10 N. E. 486. While the writ, with the bond, was properly returned by the defendant to the court from which it issued, the action was

not entered. This failure to prosecute the suit constituted a breach of the conditions of the bond, which gave to the present plaintiff, as obligee, a cause of action to recover at least nominal damages. *Smith v. Whiting*, 100 Mass. 122; *Easter v. Foster*, 173 Mass. 39, 53 N. E. 132, 73 Am. St. Rep. 257.

Without recognizing the validity of the bond, the sureties on which, for the purpose of these exceptions, must be considered as having been insufficient, he now contends that, as no security within the meaning of the statute was taken, the defendant became a trespasser. If so, it would follow that, the delivery of the property being unauthorized, an action in some form to recover damages could be maintained without awaiting the termination of the replevin suit. *Purple v. Purple*, 5 Pick. 226; *Dearborn v. Kelley*, 8 Allen, 426. Upon an examination of the return on the replevin writ, in connection with the bond, it appears that before delivery, while an instrument in suitable form was taken in twice the value of the replevied property, it is not stated that any investigation of the sureties was made by him, or that in his judgment they were peculiarly satisfactory.

It has been held that when an officer's return in a replevin suit shows that a bond was taken, without further description, the presumption follows that the proper statutory bond is meant. *Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 180. See *Richardson v. Smith*, 1 Allen, 541. But, if the return is treated as evidence in his favor, it is not conclusive. *Whitehead v. Keyes*, 3 Allen, 495, 81 Am. Dec. 672. There was further evidence from which it could have been found that the actual wrong suffered by the plaintiff arose from delivering the chattels without this preliminary question being determined, owing to the defendant's misfeasance, when, if his official duty had been regularly performed, the sureties proposed would have been rejected, and competent sureties taken in their place. For this misconduct it is true that an action of tort in the nature of trover cannot be maintained, as the appropriate remedy would be a suit for damages caused by his negligence. *Livermore v. Bagley*, 3 Mass. 487, 512; *Lafin v. Willard*, 16 Pick. 64, 26 Am. Dec. 629; *Stern v. Knowlton*, 184 Mass. 29, 67 N. E. 869.

The bond, however, being regular in form and duly executed when delivered to the replevying officer, was valid and binding upon obligor and sureties alike, without his approval or that of a magistrate. As the approval of either formed no part of the obligation, this omission did not affect its validity, or render it unenforceable. *Morse v. Hodsdon*, 5 Mass. 314; *Simonds v. Parker*, 1 Metc. 508, 513; *Wolcott v. Mead*, 12 Metc. 516, 518; *Stone v. Jenks*, *ubi supra*. But the

right to indemnity under it, and, if the sureties were found to have been financially worthless, then to recover damages from the defendant, or from the sheriff, whose deputy he was, did not accrue unless there was a breach of its conditions. Until then this form of procedure was not available, for the bond must be considered as representing the property. *Stevens v. Tuite*, *ubi supra*; *Stone v. Jenks*, *ubi supra*; *Carter v. Duggan*, *ubi supra*; *Miner v. Coburn*, 4 Allen, 136; *Parker v. Simonds*, 8 Metc. 205; *Easter v. Foster*, *ubi supra*; *Stern v. Knowlton*, *ubi supra*.

The plaintiff might have pursued this course, but he was not obliged to await the termination in any form of the proceedings in replevin, as he could bring suit directly against the defendant, who then must justify his seizure and delivery of the property. Even if the writ under which he acted was regularly returned, and under *Tubbs v. Tukey*, 3 Cush. 438, 440, 50 Am. Dec. 744, this afforded him as ample protection as if it had been entered, he rightfully could not deliver the chattels, except upon a strict compliance with the provisions of Rev. Laws, c. 190, § 9, which, among other precedent conditions, required sufficient sureties to be furnished before the replevin fully could be executed. Under the course pursued, without the examination or approval by any one authorized to act, adequate security was not taken, and this neglect to comply with an essential condition deprives him of any justification which otherwise might have been afforded by the replevin writ. *Moors v. Parker*, 3 Mass. 310; *Morse v. Hodsdon*, 5 Mass. 315, 317; *Cushman v. Churchill*, 7 Mass. 97; *Purple v. Purple*, *ubi supra*; *Dearborn v. Kelley*, *ubi supra*; *Hall v. Monroe*, 73 Me. 123.

If the original taking of the chattels was lawful, their delivery being unlawful, he became a wrongdoer from the beginning, and liable, at the election of the plaintiff, either in trespass or trover for the damages sustained. *Nelson v. Merriam*, 4 Pick. 249, 250; *Woodbury v. Long*, 8 Pick. 542, 544, 19 Am. Dec. 345; *Pierce v. Benjamin*, 14 Pick. 356, 360, 25 Am. Dec. 396; *Stanley v. Gaylord*, 1 Cush. 536, 547, 48 Am. Dec. 643. Inasmuch as the act of delivery was an exercise of authority and dominion which deprived the plaintiff of his property, this furnished evidence of a conversion sufficient to support the present action, without proof of a previous demand. *Stanley v. Gaylord*, *ubi supra*; *Riley v. Boston Water Power Co.*, 11 Cush. 11, 14; *Spooner v. Holmes*, 102 Mass. 503, 506, 3 Am. Rep. 491; *Spooner v. Manchester*, 133 Mass. 270, 274, 43 Am. Rep. 514; *Scollard v. Brooks*, 170 Mass. 445, 49 N. E. 741.

Exceptions sustained.

(189 Mass. 190)

CRONAN v. ADAMS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 14, 1905.)

ADMINISTRATOR—POWER TO SELL REAL ESTATE—COMPROMISE AGREEMENT.

Testator gave the remainder of his estate to a hospital, in trust to pay annuities, and directed it, on the death of the annuitants, to take one-fourth thereof to its own use, and "to convey the remainder" in a manner designated. A compromise between the parties interested provided that the residue of the estate should "be paid" to four persons named equally. Held, that the administrator with the will annexed had no power, either under the will or under the agreement, to sell real estate to pay the persons named, nor to make partition among them, but could only convey the same to them as tenants in common.

Case Reserved from Supreme Judicial Court, Suffolk County; John W. Hammond, Judge.

Petition by one Cronan, as administrator with the will annexed of Julius Adams, deceased, against one Adams and others, for instructions with respect to the authority of the administrator to sell land. Case reserved for the full court. Decree rendered.

John F. Cronan, for petitioner. Arthur H. Russell, for Durward Adams. Chas. H. Donahue, for respondents.

LATHROP, J. This is a petition by the administrator with the will annexed of the estate of Julius Adams. The case was heard by a single justice of this court, who has found certain facts and reserved the case for our determination.

The will of Julius Adams was before this court on a petition to compromise a controversy relating thereto. *Elder v. Adams*, 180 Mass. 303, 62 N. E. 373. It was again before the court in *Cronan v. Adams*, 185 Mass. 436, 70 N. E. 423. The original will, after certain specific bequests, gave the remainder of the estate to the Carney Hospital, in trust to pay certain annuities, and directed the remainder of the income to be added to the principal during the lives of the annuitants, and on the death of all directed the Carney Hospital "to take to its own use one-quarter of all the estate, and to convey the residue" in a manner pointed out. By the terms of the compromise, as shown by the final decree entered in this court, the Carney Hospital received a certain sum in money in lieu of all claims under the will, whether as legatee or trustee. Provision was also made for the legatees and annuitants. By the second clause of the compromise the executor named in the will was to resign, and John F. Cronan and Edmund H. Talbot were to be appointed administrators of the estate of Julius Adams with the will annexed. The tenth clause of the agreement of compromise provided: "All the residue of the estate, both real and personal, of said Julius Adams, of every name or nature and description whatsoever, after the payments aforesaid, shall be paid to Durward

Adams, Elizabeth A. Ulman, Isaac Adams, and Aquila Adams, in the proportions following, viz.: One-fourth thereof to Durward Adams, one-fourth thereof to Elizabeth A. Ulman, one-fourth thereof to Isaac Adams, and one-fourth thereof to Aquila Adams." The petitioner in this case was appointed sole administrator with the will annexed of the estate of Julius Adams. The petition represents that Julius Adams died December 18, 1899, possessed of both real and personal estate, and that the parcels of real estate differ so much in value and productiveness that the same cannot be fairly or justly divided among the parties interested.

The questions upon which the administrator requests the instructions of the court are: (1) Whether under the will of Julius Adams, as modified by the decree of this court approving the agreement of compromise, the petitioner has the power to sell and convey the real estate at either public or private sale as may be deemed most advantageous. (2) Whether the administrator has power to make partition of the real estate among the persons entitled thereto. (3) Whether the administrator has power to convey the real estate directly to the respondents as tenants in common.

The single justice of this court has found: "It is not necessary to resort to the sale of said estate, except for the purpose of distribution among the residuary legatees. Said real estate consists of several parcels of unequal value, and is not susceptible of equal division in severalty."

The petitioner contends that under the will the Carney Hospital had the right to sell the land, and that the petitioner has, by the agreement of compromise, the same right. By the terms of the will the Carney Hospital was given the remainder of the estate, in trust to pay certain annuities from the income, to add the balance of the income to the principal, and, on the death of all the annuitants, to take to its own use one-quarter of all the estate, and to convey the residue to a person then unascertained. *Cronan v. Adams*, 185 Mass. 436, 70 N. E. 423. There was no direct power given to sell the land. Nor was there anything from which it could be implied, as in *Going v. Emery*, 16 Pick. 107, 112, 28 Am. Dec. 645, where the clause was: "And I do order and direct my executor to collect all the above-specified property as soon as can be done consistently, without sacrificing too much by forcing the sale thereof in an improper manner." So, in *White v. Ditson*, 140 Mass. 351, 359, 4 N. E. 606, 54 Am. Rep. 478, it was said by Mr. Justice Devens: "Had the executor applied to the probate court for leave to sell real estate for the payment of legacies, assuming that there was no provision in the will in relation to the subject, it could not have been granted, if there was no existing unpaid legacy, but only a gift of residuum." In *Allen v. Dean*, 148 Mass. 594, 20 N. E. 814, a testatrix authorized her exec-

utor "to sell and make conveyance of any personal or real estate, either at public or private sale, as the proper and convenient settlement of my estate may require." It was held that the executor could not sell for the purpose of making partition or distribution among the devisees. See, also, *Heard v. Read*, 171 Mass. 374, 50 N. E. 638, which seems to us conclusive of the question under consideration. See, also, *Heard v. Trull*, 175 Mass. 239, 54 N. E. 875.

We are of opinion, therefore, that under the original will the Carney Hospital had merely a power to convey three-quarters of the residue to the remainderman. Under the agreement of compromise no direct power to sell the real estate is given. If any power is to be implied, it is in the tenth clause, above cited, and is in the words "shall be paid." These words are not strictly applicable to real estate, but are the words which the parties have seen fit to use in regard to both real and personal property. Considering that the agreement of compromise was drawn by able lawyers, and was twice modified before it was approved by this court, it is singular that no express power was given to the person to be appointed administrator with the will annexed to sell the real estate, if such had been the intention of the parties. The words "shall be paid," standing by themselves, we do not think are sufficient to authorize the administrator with the will annexed to sell, except for the purpose of paying debts and legacies. Nor do we think that, taking the will as modified by the agreement, the petitioner has power to sell the real estate.

We are of opinion, therefore, that the first and second requests must be answered in the negative, and that the third request should be answered in the affirmative.

Decree accordingly.

(189 Mass. 189)

BURBANK v. HAMMOND.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 14, 1905.)

EVIDENCE—DECLARATIONS OF AGENT—ADMISSIBILITY—FALSE REPRESENTATIONS.

Where, in an action for false representations inducing an exchange of real estate, the issue was whether defendant disclosed to plaintiff or his broker the fact that the tenants in possession of defendant's property were allowed rebates from the rent called for by the leases, a letter written by plaintiff's broker subsequent to the transaction resulting in the exchange of the properties, and while he was acting for plaintiff in caring for the property conveyed to plaintiff, showing that the broker knew of the rebates, was inadmissible, because not made within the scope of his employment.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 893-907.]

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Action by one Burbank against one Hammond. There was a verdict for defendant, and plaintiff excepts. Exceptions sustained.

F. T. Benner and S. H. Foster, for plaintiff.
Chas. F. Choate, Jr., for defendant.

KNOWLTON, C. J. This is an action of tort to recover damages for false representations alleged to have been made by the defendant as an inducement to an exchange of real estate. At the trial there was evidence tending to show that the defendant represented his property as then producing income amounting to more than \$6,000 per year, in the form of rent, under five different leases, yielding \$1,000 each, and the use of another tenement occupied by the defendant's family, whose estimated annual rental value was \$1,200. There was proof that the defendant was then allowing to several of the tenants substantial rebates from the rent called for by the leases, and the principal question at the trial was whether this fact was concealed from the plaintiff, or disclosed to his agent, the broker through whom the negotiations on his part were conducted.

The exchange was consummated by the delivery of the deeds and the payment of the money on May 20, 1902. The defendant, to prove his disclosure of these rebates to the plaintiff, was allowed to put in evidence a letter in the handwriting of the plaintiff's broker, dated June 30, 1902, which contained language tending to show that the writer knew of the rebates. This was about six weeks after the conclusion of his agency for the plaintiff. His right to represent his employer in making statements about the business had been terminated. He was then employed to take care of the property, but this was a distinct and independent employment, which gave him no authority to make declarations to affect the plaintiff in regard to what occurred in the previous negotiations for the exchange of the property. It is familiar law that the declarations or representations of an agent cannot be used as evidence against his principal, unless they are made within the scope of his employment. *Stiles v. Western Railroad Corporation*, 8 Metc. 44, 41 Am. Dec. 486; *Sumner v. McNeil*, 12 Metc. 519; *Lane v. Bryant*, 9 Gray, 245, 69 Am. Dec. 232; *Williamson v. Cambridge Railroad Company*, 144 Mass. 148, 10 N. E. 790; *Geary v. Stevenson*, 169 Mass. 23-31, 47 N. E. 508. Very likely this declaration in writing influenced the jury to return their verdict for the defendant.

The evidence having been admitted erroneously, the entry must be:

Exceptions sustained.

(189 Mass. 123)

PHINNEY v. FOSTER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11, 1905.)

1. LANDLORD AND TENANT—LEASE—STIPULATIONS AS TO PAYMENT OF TAXES—CONSTRUCTION.

A stipulation in a lease binding the lessor to "save the lessee harmless from all taxes * * * levied upon said premises," preceded by a description of the land, a reservation of rent, and an agreement giving the lessee a conditional right to purchase the premises, and followed by provisions as to the use which the lessee may make of the land, including a right to erect buildings thereon, which shall be his personal property and subject to removal at the termination of the lease, confines the liability of the lessor in favor of the lessee to the taxes assessed on the valuation of the land, exclusive of the buildings erected by the lessee; the stipulation being a "different agreement," within Rev. Laws, c. 12, § 20, authorizing a tenant paying rent for real estate to recover the taxes paid by him, unless there is a different agreement between them.

2. SAME—PAYMENT OF TAXES BY LESSOR—RIGHT OF RECOVERY FROM LESSEE.

Rev. Laws, c. 12, § 3, provides that real estate, for the purpose of taxation, shall include buildings thereon. Section 60 makes it the duty of assessors to make a table containing the value of real estate assessed, specifying the value of buildings exclusive of the land. Chapter 18, § 35, makes unpaid taxes on land a lien thereon. A lessee erected buildings on the land under a stipulation in the lease authorizing him to do so, and declaring that the buildings should be his personal property and subject to removal by him. The land and buildings were valued for taxation as the property of the lessor. The lessor was compelled to pay the whole tax, including the portion assessed on the value represented by the buildings, in order to avoid a tax lien on the whole property. *Held*, that he was entitled to recover from the lessee the tax chargeable against the buildings.

Appeal from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Action by Horatio A. Phinney against Thomas N. Foster. The court overruled a demurrer to the complaint and found for plaintiff, and assessed his damage in the sum of \$583.20. From the order overruling the demurrer, defendant appeals. Affirmed.

This was an action to recover taxes alleged to have been paid by plaintiff, for which defendant was liable under a lease. The complaint alleged the execution of the lease, whereby the lessor covenanted to save the lessee harmless from all taxes on the premises; the payment by plaintiff of taxes levied on the premises and buildings erected thereon by the lessee pursuant to the authority conferred on him by the lease, which declared that the buildings should be the personal property of the lessee; the failure of defendant to pay the tax chargeable against the building; and the demand on defendant by plaintiff for contribution to the amount of such tax. Defendant demurred on the grounds that the lease bound plaintiff to save defendant harmless from all taxes on the premises, and that it did not appear that defendant agreed to pay taxes levied thereon.

Herbert Henry Darling, for plaintiff.
George Chandler Coit, for defendant.

HAMMOND, J. Since the plaintiff and defendant have respectively succeeded to the rights and liabilities of the original parties to the lease, we shall treat them as though they were such parties. The first question is whether the lessor's covenant to "save the lessee harmless from all taxes, assessments, and betterments levied upon said premises until the termination of the lease" applies to the taxes upon the buildings which were subsequently erected by the lessee, and by the terms of the lease were his own property. The question seems to turn upon the meaning to be given to the words "said premises." Do they mean simply the land, which was the only thing in existence at the time of the lease, or do they mean the land with such buildings as may be upon it at any time during the existence of the lease?

It is to be noted that the covenant is preceded in the lease only by the description of the land, the reservation of rent, and an agreement giving to the lessee a conditional right to exercise certain options for the purchase of "said premises" and adjoining land. It is followed by provisions relative to the use which the lessee may make of the land. It is evident that the parties contemplated that the lessee might make some changes in the surface of the land, and might erect buildings of considerable value. The buildings were to be the property of the lessee, and he had the right to remove them, either before or after the termination of the lease, except in case of forfeiture of the lease on his part. Under the lease, buildings to the assessed value of \$30,000 were erected. There was no restriction as to the nature, size, or cost of the buildings which the lessee could erect. For aught the lessor knew, they might have been so valuable that the tax assessed on their account would exceed the whole amount of the rent. The lessor does not seem to have had any interest whatever in the "amusement enterprise" for which the lessee intended to use the premises. The amount of the tax which would be assessed upon the land alone could be fairly estimated by the lessor, while the value of the buildings to be erected was entirely within the discretion of the lessee. As between the parties to the lease, the land belonged to the lessor and the buildings to the lessee. Neither owned the whole. In view of the particular location of this covenant in the lease and the other provisions of the lease, the majority of the court are of the opinion that the term "said premises" in the covenant embraces simply the land; that the covenant considered as a whole was restrictive in its nature as to the portion of the ordinary taxes which the lessor was to pay, and was intended to confine his liability to the portion of the taxes which might be assessed upon

the valuation of the land exclusive of the buildings; or, in other words, that as between the parties the lessor was not bound to pay the increase in the taxes due to the valuation of the buildings. It was a "different agreement," within the meaning of Rev. Laws, c. 12, § 20. The case is clearly distinguishable from *Milligan v. Drury*, 130 Mass. 428, cited by the defendant.

The next question is whether the lessor, who has paid the tax on the buildings, can recover the amount from the lessee. Strictly speaking, there has been no tax on the buildings as such; but we use the phrase as a convenient one to designate the increase in the tax which is due to their assessed valuation. Whatever may be the agreement of owners as to whether buildings shall be personal property or real estate, the statutes provide that "real estate for purposes of taxation shall include not only all land within the commonwealth, but also all buildings and other things erected on or affixed to the same." Rev. Laws, c. 12, § 3. While it is true that the statutes provide that there shall be a valuation of the land exclusive of the buildings, and of the buildings exclusive of the land, still the tax is assessed as one indivisible real estate tax upon the whole property, and a lien for the whole tax exists upon the whole property. Rev. Laws, c. 12, § 60, and chapter 13, § 35; *Milligan v. Drury*, *supra*; *McGee v. Salem*, 149 Mass. 238, 21 N. E. 386, and cases cited.

On May 1, 1903, the plaintiff was the owner of this land, and also of a parcel of land adjoining, and on that day there was assessed to him a tax upon both of these parcels and upon all the structures existing on the parcel named in the lease. The whole property was valued at \$70,000, of which \$30,000 was the valuation placed upon the buildings owned by the defendant. The whole tax was \$1,989, of which \$540 was the portion assessed upon the value represented by these buildings. The plaintiff requested the defendant to pay the tax upon the buildings, and the defendant refused. The situation, then, was this: There was no tax upon the buildings as such, and hence there

was no personal liability on the part of the defendant to pay anything to the collector. The tax was wholly upon the real estate, which included for purposes of taxation the buildings owned by the defendant. This tax was a lien upon the whole property, including the buildings; and, while there was no personal liability which the collector could enforce against the defendant, yet the defendant's property was held liable, and the payment of the tax incurred to the benefit of the defendant's estate by discharging that liability. The plaintiff could not release his own property by paying a part of the tax. He must pay the whole, or allow the property, land, and buildings to be sold. He was therefore compelled by law to pay an obligation which, although not personal to the defendant, was nevertheless in the nature of a charge upon the latter's estate.

It is a familiar principle of law that, while one cannot make himself the creditor of another by voluntarily paying the debt of the latter without his request, still, where one to save his property from being sold on legal process is compelled to pay money which another is under a legal obligation to pay, and which as between the two the latter should pay, then in law the payment is made at the request of the latter, and the former may recover from him. *Exall v. Partridge*, 8 T. R. 308; *Hale v. Huse*, 10 Gray, 99; *Nichols v. Bucknam*, 117 Mass. 488. In the case before us there was, it is true, no legal personal liability on the part of the lessee to pay the tax upon the buildings, and there was only a lien upon them; but, as was said by Gibbs, C. J., in *Taylor v. Zamisa*, 6 Taunt. 524, "nothing can rest on that distinction." The principle is the same, whether the debt be personal or only a lien upon the property. In either case the law implies a request by the person relieved, and the person who pays may recover of him whose estate is benefited. For a short discussion of the point see the notes to *Lamplugh v. Brathwait*, 1 Smith's Lead. Cases (6th Am. Ed.) 277 et seq.

In the opinion of the majority of the court the demurrer should be overruled.
Demurrer overruled.

(216 Ill. 345)

CITY OF VENICE v. MADISON COUNTY FERRY CO.

(Supreme Court of Illinois. June 23, 1905.)

1. DEDICATION—ACCEPTANCE—NECESSITY.

A municipality acquires no rights in the streets, alleys, and public grounds shown on a plat, unless it has accepted the dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 64-71.]

2. SAME—ACTS CONSTITUTING.

The inclusion, within the limits of a municipality, of territory covered by a plat, is not an acceptance of the streets, alleys, and public grounds shown on the plat.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 70.]

3. SAME—TIME OF MAKING.

An acceptance by a municipality of a dedication of streets, alleys, and public grounds shown in a plat must be made within a reasonable time after the proffer of the dedication, and, if not so made, the owner may recall the dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 67, 74.]

4. SAME—WITHDRAWAL—EVIDENCE.

The action of the owner of a tract of land, who had dedicated streets and alleys to the public, in selling the land and in permitting the same to be traveled and cultivated without reference to the dedicated streets and alleys during a period of over 30 years, and before the dedication was accepted by the municipality, constituted a withdrawal of such dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 77-79.]

5. SAME—ACCEPTANCE.

The action of village officials in entering on the public streets and alleys shown on a plat, and taking therefrom sand to build up streets in the village, did not constitute an acceptance of the dedication of the streets and alleys from which the sand was removed, where such sand was taken without regard to street and lot lines, and outside of as well as within the limits of the platted tract, and was either paid for by the village or taken with the consent of the proprietor of the platted territory.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 70.]

6. SAME.

A survey by a municipality of streets and alleys shown on a platted tract, made more than 55 years after the execution of the plat, and 23 years after the incorporation of the municipality, and long after the dedication had been abrogated and revoked, did not constitute an acceptance of the dedication.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 67, 71, 79.]

7. SAME.

The building by a city of a pesthouse on territory platted as a public square did not constitute an acceptance of the dedication, where the pesthouse was built on the square with the consent of the proprietor of the platted tract, and because it was a suitable place for that purpose, and not because the land was dedicated.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 75, 76.]

Appeal from Circuit Court, Madison County; Charles T. Moore, Judge.

Consolidated suits, by the city of Venice, against the Madison County Ferry Company, and by the ferry company against the city

and another. From the decree rendered, the city appeals. Affirmed.

Rehearing denied October 5, 1905.

Terry & Williamson, for appellant. Travous, Warnock & Burroughs, for appellee.

BOGGS, J. A bill in chancery was filed by the appellant city against the appellee ferry company, and the same was afterwards consolidated with a bill in chancery subsequently filed by the appellee ferry company against the appellant city and D. R. Francis, Jr., for partition of certain lands. A decree was rendered in the consolidated cause, from which the appellant city has prosecuted this appeal, all other parties to the two causes being satisfied with the decree as rendered.

The controversy brought into this court by the appeal relates to the ownership of certain territory, which, as platted in the year 1841, constituted the streets, alleys, and public grounds of what is called by the parties "Old Venice," in Madison county, Ill. The village of Venice was incorporated in 1873 (the date is not more specifically disclosed by the record), and the appellant city is the successor of the village. The appellant city claimed that the plat of Old Venice was in 1841 executed and recorded in accordance with the statute of the state, and that such execution and recording of the plat constituted an offer to dedicate the streets, alleys, and public grounds shown upon the plat; that, as there was then no municipality having corporate existence, the fee to the streets, alleys, and public grounds remained in abeyance, subject to vest in the corporation as soon as created; that the village of Venice was organized in 1873, and that it accepted the dedication, and that thereby the title to such streets, alleys, and public grounds then vested in the village, and passed to and is now vested in the appellant city of Venice, in trust for the use of the public. The appellee, the ferry company, and D. R. Francis, Jr., claimed to be the owners, as tenants in common, of the land so shown upon the plat of Old Venice as streets, alleys, and public grounds, and their contention was sustained by the chancellor on a hearing.

The chancellor found and recited the following facts in the decree: "The court finds that on the 9th day of November, A. D. 1841, Charles F. Stamps and Cornelius Campbell, who the court finds were the owners and proprietors of certain premises described in the pleadings, attempted to plat the same into proposed lots, blocks, streets, alleys, and public grounds, which said plat was known as 'Old Venice,' and was filed for record in recorder's office of Madison county, Illinois, on the 22d day of November, A. D. 1841, and duly recorded in book 14, page 595. The court further finds that afterwards, to-wit, on or about the _____ day of _____, A. D. 1873, the said city of Venice (then the village of Venice) was duly incorporated under the laws of the state of

Illinois, and that the said city of Venice now claims to be the owner in fee simple of all the alleged streets, alleys, and public grounds attempted to be designated in said plat of Old Venice; but the court finds the facts to be that said plat was never accepted nor in any way recognized by the said city of Venice or the said village of Venice, nor were the proposed streets, alleys, and public grounds, attempted to be designated thereon, accepted in any way by said city or village. The court further finds the fact to be that prior to the incorporation of the village (now city) of Venice, as aforesaid, the proposed streets, alleys, and public grounds represented on said plat had never been used, opened, or traveled, or in any way improved or recognized as such, by any one, nor had they ever been staked out or designated upon the ground in any manner, but, on the contrary, the court finds that the lands embraced within said plat of Old Venice, including the proposed streets, alleys, and public grounds therein represented, during all of said time were allowed to be and remain partly in cultivation as acre property, when not overflowed by the waters of the Mississippi river, and partly in willows and underbrush, and unfit even for cultivation or public travel. The court further finds the fact to be that all the land embraced within said plat is subject to overflow by the waters of said Mississippi river, the largest part of which said land the court finds has heretofore been overflowed annually. The court further finds the fact to be that at the time of the incorporation of the said village of Venice a large part of said proposed Old Venice, to wit, more than one-half thereof, had been washed away by the waters of the said Mississippi river, and that the east bank of said river was several hundred feet east of what was attempted to be designated on said plat as Water street, and that the balance or remainder of said proposed Old Venice was then partly in cultivation and partly in willows and underbrush, and that none of the proposed streets and alleys or the public grounds as attempted to be represented upon said plat were then opened or being used or traveled as such by the public, nor were they, or any of them, designated in any way on the ground or capable of being physically located. The court further finds that since the incorporation of said village (now city) of Venice the waters of the said Mississippi river have gradually receded, and accretions have formed from time to time along, over, and upon that part of said Old Venice, as proposed by said plat, which has previously been washed away, until the east bank of said Mississippi river is now several hundred feet west of the west line of said proposed Water street; and the court further finds that as said water receded and accretions formed, as aforesaid, the said village (now city) of Venice never in any way opened, improved, or used the proposed streets and alleys or the public

square as proposed by said plat, or did anything by which said proposed streets and alleys and public grounds could be designated or located upon the grounds; and the court further finds that since the incorporation of said village of Venice the larger part of the lands attempted to be shown on said plat, including the proposed streets, alleys, and public grounds, have been allowed to grow up in willows, and that in many places over and upon which said pretended streets and alleys passed, said land has been so low and swampy and so grown up in willows that it was and has been physically impossible for any one to travel or pass thereover, and that the remaining portion of said Old Venice, as proposed upon said plat, has from time to time since the incorporation of said village been mostly in cultivation as farm property, and that at no time since the incorporation of said village have the pretended streets and alleys or the public grounds as proposed in said plat been used, opened, laid out, worked, or improved as such by said village of Venice or been traveled by the public; and the court further finds that whatever travel there may have been by private parties since the incorporation of said village, over and upon the land attempted to be embraced within said plat, has at no time been confined to the pretended streets and alleys attempted to be designated upon said plat or to any particular or well-defined road or street, but that the same has from time to time been promiscuously traveled by private parties, regardless of said proposed streets, alleys, or public grounds, and without any regard whatever to them or their proposed location. The court further finds the fact to be that the defendant the city of Venice has no interest, right, or title of any kind whatever in and to the proposed streets, alleys, and public grounds proposed and attempted to be shown by said plat, nor has the said city of Venice any right, title, or interest of any kind whatsoever in and to any of the real estate herein described, except as to so much of said tract No. 2 hereinbefore described, extending two hundred and twenty-five feet westerly from the center of Dry slough, which is now used and occupied as a public highway known as the 'National way,' as aforesaid, as to which the complainant, the Madison County Ferry Company, and the defendant D. R. Francis, Jr., own the fee in the proportions aforesaid, subject to an easement in the public to so occupy and use the same for public travel as a highway, as aforesaid." The chancellor also made other findings to the effect that the plat of Old Venice had been legally vacated by the proprietors and owners of all the lots shown on the plat, and that therefore the appellant city had no title thereto; but, in the view we have taken of the case on other branches appearing in the findings, it is not necessary to lengthen this opinion by ref-

erence to and consideration of such last-mentioned finding. The decree, in pursuance of these findings, was adverse to the contentions of the appellant city, and it has appealed from that portion of the decree.

It is familiar law that a municipality acquires no right in the streets, alleys, or public grounds shown on a plat unless it has accepted the dedication. The chancellor, on facts recited in the decree, found the dedication of the streets, alleys, and public grounds of Old Venice had never been accepted by the village of Venice or the appellant city. The appellant insists that this finding is so manifestly against the weight of the testimony that this court should reject it. We have carefully read what counsel for appellant have, in their brief, urged for consideration on this point. They first state "that the record shows that whenever there was any need or necessity for the city to act with reference to this plat and its property it has always done so"; and this is not necessarily inconsistent with the insistence of counsel for the appellee that the municipality has never done anything to show that it had accepted the dedication. Counsel for the appellant insist the village acted "when it incorporated as a city, and included the lands of Old Venice to the Mississippi river within its boundaries." But we declared in *Russell v. Chicago & Milwaukee Electric Railway Co.*, 205 Ill. 155, 68 N. E. 727, that the inclusion within the limits of a municipality of territory covered by a plat was not an acceptance of the streets, etc., shown upon the plat.

While it is the doctrine that, if a dedication of streets and alleys is offered before there is a municipality incorporated and empowered to accept or reject the tender, the fee to the streets and alleys shown on the plat remains in abeyance until a municipality shall have corporate existence, still it is also a well-settled principle that an acceptance must be made within a reasonable time after the dedication is proffered, and that the owner may recall the dedication if not accepted within a reasonable time. *Elliott on Roads and Streets*, § 155; 9 Am. & Eng. Ency. of Law (2d Ed.) 50. We have not been able to ascertain from the record when the village of Venice was re-incorporated as a city, but the village was not incorporated until 1873. The plat of Old Venice was made and recorded in 1841—a period of 32 years before the village was organized. During that long period the proprietors of the plat, and those who succeeded them in title, evinced very clearly that they had withdrawn the dedication. When the plat of Old Venice was executed, the National way or road was in use by the general public as a means of reaching the ferry landing, and the National way was platted as one of the streets of Old

Venice. In 1858, 15 years before the incorporation of the village of Venice, the ferry landing was moved south along the bank of the river to a point entirely beyond the limits of the territory platted as Old Venice. The National way in the platted portion of Old Venice was then abandoned, and the public traveled to the new ferry landing by another route not within the limits of Old Venice. The National way within the limits of the territory platted as Old Venice was used as a road afterwards, but only for a period of two weeks, while, owing to low water, the ferryboats for that period of time temporarily landed near where the National way had formerly reached the banks of the river. The ferryboats, within about two weeks, landed at the lower landing, and since then the only travel through Old Venice has been by John Byrnes, who owned a farm north of the Merchants' Bridge, and members of his family, and tenants of the ferry company, and teamsters having occasion to haul sand from the river. The travel by these parties was by the most convenient routes, and entirely without reference to any of the streets in Old Venice. The road used by Byrnes and the tenants of the ferry company crossed the slough at the National way, and entered Old Venice somewhere in block 2, and ran northerly along or near a small levee, without reference to any streets whatever. So far as we can discover from the testimony, when the ferry landing was moved, in 1858, there was but a single house within the limits of Old Venice. It was an old brick building, which we think it most probable, from the testimony, had been constructed before the town of Old Venice was platted. This building was abandoned when the ferry landing was moved, and was not again occupied, but fell into decay and ruins. Long prior to the incorporation of the village of Venice, in 1873, the territory embraced in the plat of Old Venice had been conveyed and reconveyed by its various owners in tracts and parcels described by metes and bounds. Such of the land as was susceptible of tillage was being cultivated as farm lands at the time of the incorporation of the village of Venice, and had been so in use for agricultural purposes for many years before, and without any reference to the streets or alleys of Old Venice. Houses which had been built for tenants years before the incorporation of the village stood on the ground now sought to be declared to be streets and alleys. The owners during this long series of years clearly acted upon the theory that the use of the lands as a village had been abandoned, and that the proposed dedication of streets and alleys had been abrogated and withdrawn. The territory was subject to the annual overflow of the Mississippi river, which at times washed away parts of grounds which had

been platted as streets and alleys. On higher lands, farther from the river and separated from the territory that had been platted as Old Venice by what is known as "Kerr Slough," houses were built and a small village grew up, and in 1873 it constituted the inhabited part of the territory that was embraced within the village of Venice. At that time the territory covered by the plat of Old Venice was cultivated fields, where cultivation was possible, and the remainder was sand banks and sloughs, overgrown with willows, and such has practically remained its condition to the present time.

As indicating an acceptance of the streets and alleys of Old Venice by the authorities of the appellant, it is urged that it was proven that after the incorporation of the village its officials went on the public streets and alleys of Old Venice, and the accretions thereto, and took sand therefrom to build up the streets in the new village. The evidence upon that point was that the sand was taken without regard to street and lot lines, and outside of the limits of Old Venice as well as within the boundaries thereof, and that prior to the year 1892 the village accounted to the appellee ferry company for the sand so taken by it, and paid the ferry company for it. In 1892 the territory of the new village was inundated by the waters of the Mississippi river, and much damage was thereby inflicted, and it appeared from the testimony that in consideration of this calamity the ferry company permitted the village to take the sand without exacting pay therefor.

It is urged as an act of acceptance that the appellant city caused the streets and alleys of Old Venice to be surveyed. But this was not done until about 1896—a period of more than 55 years after the execution of the plat of Old Venice, and more than 23 years after the organization and incorporation of the village, and long after the dedication had been abrogated and revoked.

The appellant city built a pesthouse on territory platted as the public square of Old Venice. But that cannot serve as an indication of acceptance of the dedication. The pesthouse was not built until after the institution of this litigation, and the evidence tends to show that it was built there with the consent of the appellee company. The evidence shows, also, that the site was selected, not because it had been platted as the public square, but because it was the "most unfrequented place on suitable ground for it," as testified to by the mayor of the city.

Many questions other than that of acceptance of the dedication are argued, but as all other parties to the litigation except the appellant city are satisfied with the decree entered by the trial court, and as the only interest which the city has in the subject-matter of the litigation is its alleged claim of title to the territory which was platted

as the streets, alleys, and public grounds of Old Venice, and as its claim of title cannot be maintained if, as we find the facts to be, the proffered dedication of the streets and alleys made in 1841 was not accepted, but was revoked years before the village of Venice had corporate existence, it is unnecessary to lengthen this opinion by the discussion of such other questions. The finding of the chancellor that the proffered dedication was not accepted is amply supported by the proof, and this finding alone warrants the decree. Furthermore, the evidence abundantly established the fact to be that during the many years which elapsed after the making of the plat of Old Venice, and before the incorporation of the village of Venice, the owners of the territory embraced within the plat of Old Venice revoked, as they had lawful right to do, the dedication proffered by the makers of the plat in 1841.

The decree is affirmed.

Decree affirmed.

(216 Ill. 354)

O'BRIEN v. PEOPLE ex rel. KELLOGG SWITCHBOARD & SUPPLY CO. (two cases). QUEENAN v. SAME. FISHER v. SAME. CHRISTENSEN v. SAME. MASHKE v. SAME.

(Supreme Court of Illinois. June 23, 1905.)

1. COURTS—JURISDICTION—SERVICE OF PROCESS.

Where, in a suit to obtain an injunction against strikers, defendants were served with process, but failed to file answers or demur, the court thereby acquired jurisdiction of the parties and subject-matter, which was not affected by defects in the bill.

2. SAME—SUFFICIENCY OF BILL.

Where, in a suit to restrain acts of strikers, the bill charged that the strikers stationed themselves in the streets, alleys, and approaches to complainant's place of business and began a systematic course "of intimidation," and "warned" the employees not to return to work, and assumed a "menacing and threatening" attitude, and continued to "menace and threaten such employees, who were willing to work, but were so "frightened and intimidated" that they refused to continue work, and that the strikers intercepted the employees and induced them by threats and unlawful persuasion not to enter complainant's employ, such allegations were not mere conclusions, but sufficiently charged the acts of the defendants to give the court jurisdiction to pass on the sufficiency of the bill.

3. INJUNCTION—VIOLATION—CONTEMPT.

That the terms of a strike injunction were broader than the allegations of the bill was no defense in a proceeding to punish for contempt in violating the injunction.

4. SAME—DEFENSES.

In proceedings for contempt in violating a strike injunction, defendants could not collaterally attack the bill on which the injunction was granted.

5. SAME—NOTICE—PARTIES.

Where, in a proceeding for contempt in violating a strike injunction, it appeared that defendants had actual notice of the contents of the injunction issued, it was immaterial that some of them were not parties to the suit, were not served with process, had no notice

of the application, and were not served with a copy of the injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 446.]

6. SAME—PROCEDURE—BILL OF PARTICULARS.

In contempt proceedings for violation of a strike injunction, defendants were not entitled to a bill of particulars specifying the acts charged to constitute the contempt.

7. SAME—SWORN ANSWERS.

Where a strike injunction was issued to protect private rights, proceedings to punish certain strikers for contempt thereunder were not criminal, and hence defendants' sworn answers were insufficient to purge them of contempt.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 508.]

8. JURY—RIGHT TO JURY TRIAL—CONTEMPT PROCEEDINGS.

Laws 1893, p. 96, providing for a trial by jury in all cases, where a judgment is to be satisfied by imprisonment, does not apply so as to entitle defendants, in a proceeding to punish them for contempt, to a trial by jury.

9. TORTS—INTERFERENCE WITH BUSINESS—STRIKE.

A manufacturing corporation conducting an "open shop," in which both union and non-union mechanics were employed, was approached by the agents of a labor union and requested to sign a contract wherein it was agreed that the corporation would employ none but mechanics belonging to the union, that a steward of each craft employed should see that the employees belonged to the union, and that a business agent of the union should have the privilege of interviewing every member of the corporation at its offices during business hours. The contract further provided that all apprentices should belong to the union, that their number should not exceed one for every ten mechanics or less of the different crafts, and that a sympathetic strike to protect union principles should not be considered a violation of the contract. The corporation refused to sign the agreement, whereupon the agents of the union threatened to, and did, call a strike. *Held*, that the attempt to coerce the corporation into signing the contract by threats to order a strike was an unlawful interference with the business of the corporation.

10. INJUNCTION—VIOLATION—CONTEMPT.

Acts of strikers in coercing, intimidating, and beating relator's employees *held* a violation of a strike injunction, sufficient to sustain a judgment for contempt against persons guilty thereof.

Scott, J., dissenting.

Error to Appellate Court, First District.

Proceedings for contempt by the people, on the relation of the Kellogg Switchboard & Supply Company, against John O'Brien, Thomas Queenan, Lee S. Fisher, Jacob Christensen, and Albert Mashek. From judgments sentencing defendants, to various penalties, affirmed by the Appellate Court (114 Ill. App. 40), they bring error. Affirmed.

Rehearing denied October 5, 1905.

These several cases come to this court on writ of error to the Appellate Court for the First District. On May 25, 1903, the Kellogg Switchboard & Supply Company, a corporation organized under the laws of the state of Illinois, and engaged in the business of manufacturing and selling telephones, switchboards, and electrical supplies, with its principal office in Chicago, filed its bill for an injunction in the superior court of Cook county

against certain parties named therein as defendants. The bill alleged that complainant employed from 500 to 800 men and girls in its factory, and had invested about \$500,000 in machinery, patents, equipments, etc.; that it had in its employ a large number of mechanics who were members of various labor unions with local lodges in Chicago, and it also had a large number of skilled mechanics who were not associated or affiliated with any union; that a large majority of its employees were well satisfied with their wages and salaries paid, the hours of service, and the general conditions of their employment, yet notwithstanding such facts the defendants wrongfully and maliciously called a strike, and forced all of its employees who were members of the union to cease work; that on May 7, 1903, James J. Lamb, business agent of the International Brotherhood of Electrical Workers, Lee S. Fisher, business agent of the International Association of Machinists, R. G. Crane, business agent of the Brassworkers' Union, and J. E. Johnson, business agent of the Brass Moulders' Local, called upon the complainant concerning proposed articles of agreement governing the method in which complainant's factory should be operated, and insisted that said articles should be signed; that the terms of the proposed articles were arbitrary, unreasonable, and of such a nature as to deprive complainant of the free and unrestricted supervision and conduct of its business and force it to discharge nonunion men and girls in its employ; that complainant refused to sign said articles, and on May 7, 1903, a strike was called by said business agents, and the employees, upon leaving complainant's factory, gathered about the streets and alleys around said factory and began to intimidate the employees of said company who insisted upon remaining at work, and instituted and inaugurated what is commonly known as a system of "picketing," and began a systematic course of intimidation, and by threats and personal violence sought to prevent persons from working in said factory. The bill further alleged that these acts of violence and intimidation had continued from the date of said strike until the time of the filing of the bill, and that prior thereto the complainant had entered into numerous contracts for the furnishing of the products of its factory, and by these acts of intimidation it had been prevented from operating its factory so as to fulfill its contracts, and as a result had sustained great and irreparable damage, loss, and injury, against which it had no relief or remedy except in a court of chancery; that the persons who were made parties defendant to the bill, and others, had entered into a conspiracy to prevent complainant from carrying on its business; and prayed for an injunction restraining said defendants from doing certain things mentioned in said bill.

The bill was supported by numerous affidavits. A preliminary injunction was issued, which restrained the defendants and their confederates from in any manner interfering with, hindering, obstructing, or stopping any of the business of the said Kellogg Switchboard & Supply Company, or its agents, servants, or employes, in the operation of the business of such complainant; from entering upon the ground or places where the employes of said complainant are at work, for the purpose of interfering with, hindering, or obstructing the business of said complainant in any manner whatsoever; from compelling or attempting to compel, by threats or intimidation, force or violence, any of the employes of said complainant to refuse or fail to do their work or discharge their duties as such employes; from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employes of said complainant to leave the service of said complainant; from preventing or attempting to prevent any person or persons, by threats, intimidation, force, or violence, from freely entering into the service and employ, or continuing in the service and employment of said complainant; from compelling and inducing, or attempting to compel and induce, by threats, intimidation, force, violence, or persuasion, the said complainant, against its will or the will of its officers, to employ or discharge any person or persons whomsoever; from doing any act whatever in furtherance of any conspiracy or combination to restrain or obstruct either said complainant or any of its officers and employes in the free, uninterrupted, and unhindered control and direction of its business and affairs; from ordering, asking, aiding, or abetting, in any manner whatever, any person or persons to commit any or either of the acts aforesaid; from congregating or being upon or about the sidewalks, streets, alleys, or approaches adjoining or adjacent to the premises so occupied by said complainant, for the purpose of intimidating its employes, or coercing said employes, or any of its officers or agents, or preventing them, or any of them, from rendering their services or discharging their duties to said complainant; from inducing or coercing, by threats, intimidation, force, violence, or persuasion, any of the employes of said complainant to leave the service or employment of said complainant; from in any manner interfering with said complainant in carrying on its business in its usual and ordinary way; from in any manner interfering with or molesting any persons who may be employed by, or who may be seeking employment with, said complainant in the operation of its business; from either singly, or in combination with others, collecting in or about the approaches to the factory, building, and place of business of said complainant for the purpose of picketing or patrolling

or guarding the streets, avenues, gates, and approaches to the place of business of said complainant, for the purpose of intimidating, threatening, or coercing any of its employes or any person or persons seeking employment with it; from interfering with its employes in going to and from their daily work at its place of business, or whatever the said employes may be employed at in the business of said complainant; from going, either singly or collectively, to the homes of said employes of said complainant, or any or either of them, for the purpose of intimidating, coercing, or persuading any or all of said employes to leave the employment or service of the complainant or from entering the employment or service of the complainant, and from intimidating or threatening in any manner the wives and families of said employes, at their homes or elsewhere, until the further order of this court. From this interlocutory order an appeal was perfected to the Appellate Court for the First District, where the decree of the superior court was affirmed. *Christensen v. Kellogg Switchboard and Supply Co.*, 110 Ill. App. 61.

On June 3, 1903, the complainant filed a petition in the superior court, stating, in substance, that immediately after the issuance of the injunction it caused 500 copies of it to be posted in conspicuous places around its factory buildings, and also caused notices of said injunction to be given as wide a circulation as possible among its employes and ex-employes, and on May 26, 1903, caused a printed copy of said injunction writ to be mailed to each defendant, and also caused a copy of said writ to be served by a deputy sheriff upon all of the defendants in the neighborhood of its said factory. The petition further stated that persons named therein since the issuing of said injunction, had been picketing and patrolling complainant's place of business, stopping persons on their way to take employment with complainant, and had been endeavoring, by threats, intimidation, and persuasion, to compel complainant's employes to leave its service, and to prevent persons from seeking employment with complainant, and that the persons named therein had congregated on the streets and approaches to the complainant's factory in order to accomplish these purposes. This petition was verified by certain affidavits filed with it.

On June 5, 1903, the complainant filed a supplemental petition substantially the same as the one of June 3d, naming other persons who had violated said injunction and who had received personal notice of the existence of the same. This supplemental petition was answered by certain of the defendants named therein, who denied the use of threats, intimidation, coercion, or violence towards any persons, or in any manner interfering with the workmen going to or leaving the factory, but admitted that since the entry

of the injunction order they had during a part of the day stood at Peoria and Congress streets, near complainant's factory, and, when they saw any one going to work for complainant, requested permission to speak to them, and, when granted such permission, asked such persons if they knew there was a strike at the factory, and if such persons refused to talk they said nothing further, and that in no case had they used threats or improper language or talked in a threatening or improper manner, but had endeavored only by proper and lawful means and persuasive words to inform and notify persons about to go to work, of the situation at the factory.

At a hearing on the petition and affidavits, on June 15, 1903, the court found that Jacob Christensen, S. E. Doty, Charles Heinig, Andrew Emerson, Fred Waggoner, Albert Mashek, and others were guilty of violating the injunction order, and they were each fined the sum of \$10.

On June 22, 1903, the complainant filed another petition, in which it averred that the conspiracy described in its bill had been substantially kept up by the defendants and others co-operating with them; that pickets maintained by defendants had been constantly on the watch in the streets, alleys, and approaches to complainant's factory, and had intercepted complainant's employes in going to and from their work, and in many cases had succeeded in intimidating and frightening away the said employes and persons seeking employment; that pickets and patrols constantly met the said employes and followed them to their homes, and that by reason of such conduct many of complainant's employes had left its employment; various assaults had been made upon the employes of complainant, and, among others who had been guilty of violating the said injunction, were John O'Brien, Thomas Queenan, George Christensen, Charles Kreuster, El. R. Frick, F. Dusek, Peter Robinson, A. Emerson, William Lynch, and Albert Mashek. Affidavits were filed in support of this petition, and a rule was entered against the defendants to show cause why they should not be punished for contempt of court. Separate answers were filed by some of them, and upon a hearing the court found plaintiffs in error John O'Brien and Thomas Queenan guilty of contempt of court in violating said injunction, and imposed a fine of \$100 upon each of them.

On July 14, 1903, the complainant filed still another petition, in which it charged Lee S. Fisher, John Brent, Jacob Christensen, Charles Evans, Albert Mashek, John O'Brien, and 19 others, on numerous occasions with having knowingly and deliberately violated said injunction. Answers were filed by these several defendants, and on July 24, 1903, the court found that George Christensen, Albert Mashek, Lee S. Fisher, John

Brent, Charles Evans, and John O'Brien had violated said writ of injunction, and ordered that Lee S. Fisher be fined \$100, that George Christensen be committed to the county jail for 30 days, that John O'Brien be committed to the county jail for 10 days, that Albert Mashek be committed to the county jail for 60 days, that Charles Evans be fined \$25, that John Brent be fined \$25, and that R. S. Schoenbacker be discharged. A writ of error was prosecuted to the Appellate Court, where the judgment of the superior court was affirmed, except that the sentence of Mashek was reduced from 60 to 30 days.

The cases were consolidated in the Appellate Court by the agreement of the parties, which agreement is re-entered into in this court.

Darrow & Masters, for plaintiffs in error Tenney, Coffeen, Harding & Wilkerson and Allen & Wesemann (Horace Kent Tenney and James H. Wilkerson, of counsel), for defendants in error.

WILKIN, J. (after stating the facts). The briefs and arguments in the case are exceedingly voluminous on behalf of plaintiffs in error. Thirteen district grounds of reversal have been urged, and many of these are subdivided into several heads. It would be impracticable within the reasonable limits of an opinion to even notice all of these points, even if it were profitable to do so. Most of them go to the sufficiency of the original order for the injunction, and the petition to punish for contempt for the alleged violation of the writ, the right of trial by jury and of free speech, and of the guilt of the plaintiffs in error. These we will consider, as far as we deem it necessary, in the proper disposition of the case.

It is insisted that the injunction ordered is void because the bill of complaint states no jurisdictional facts, but merely the conclusions of the pleader. When the bill for injunction was filed, the defendants were served with process. They failed to file answers, and a writ of injunction was duly ordered to issue. From that order an appeal was prosecuted to the Appellate Court for the First District. Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61. The Appellate Court, in passing upon the case, held that the court had jurisdiction of the persons of the defendants and of the subject-matter of the suit, and that the bill was sufficient to sustain the injunction.

The chief argument against the jurisdiction of the court is that the allegations of the bill of complaint are not sufficient to sustain the prayer of the bill, and do not set out specific facts which would give the court jurisdiction; in other words, that the bill would have been obnoxious to a demurrer. It is well settled that jurisdiction does not depend upon the sufficiency of the bill. If the court

has jurisdiction of the subject-matter and of the parties, nothing further is required. The cause of action may be defectively stated, but that does not destroy jurisdiction. A bill may state conclusions, but if not demurred to, and the evidence supports a decree conforming to the general allegations of the bill, and the decree is within the power of the court to render, the court has jurisdiction. Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties to a suit. If the law confers the power to render a judgment or decree, then the court has jurisdiction. *State of Rhode Island v. State of Massachusetts*, 12 Pet. 657, 9 L. Ed. 1233; *United States v. Arredondo*, 6 Pet. 709, 8 L. Ed. 547; *Grignon's Lessees v. Astor*, 2 How. 338, 11 L. Ed. 283; *Applegate v. Lexington Mining Co.* 117 U. S. 267, 6 Sup. Ct. 724, 29 L. Ed. 892. Jurisdiction of the particular matter does not mean simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. *State ex rel. v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Fields v. Maloney*, 78 Mo. 172; *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489. Whether a complaint does or does not state a cause of action is, so far as concerns the question of jurisdiction, of no importance, for if it states a case belonging to a general class over which the authority of the court extends, then jurisdiction attaches, and the court has power to decide whether the pleading is good or bad. 1 *Elliot's Gen. Practice*, § 230; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Wilmington v. Trueblood*, 149 Mo. 572, 51 S. W. 399. Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be. *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Young v. Lorain*, 11 Ill. 624, 52 Am. Dec. 463; *Lane v. Bommelmann*, 17 Ill. 93; *Cody v. Hough*, 20 Ill. 43; *Iverson v. Loberg*, 26 Ill. 179; *Feaster v. Fleming*, 56 Ill. 457; *Hobson v. Ewan*, 62 Ill. 146, 79 Am. Dec. 364; *Spring v. Kane*, 86 Ill. 580; *Allman v. Taylor*, 101 Ill. 185; *St. Louis & Sandoval Coal Co. v. Sandoval Coal Co.*, 111 Ill. 32; *Reid v. Morton*, 119 Ill. 118, 6 N. E. 414; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 93 Am. St. Rep. 331; *State ex rel. v. McMahon*, 69 Minn. 265; 72 N. W. 79, 38 L. R. A. 675; *People ex rel. v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211.

In this case the bill alleged, as stated by counsel for the relator, that the strikers stationed themselves in the streets and alleys and approaches to complainant's place of business and began to "intimidate" the employes, and began a systematic course of "intimidation," and "warned" the employes not to return to work, and assumed a "menacing and threatening" attitude, and now continue to

"menace and threaten" said employes; that the employes were willing to work, but were so "frightened and intimidated" that they have refused to continue in the company's employ, and that the strikers have intercepted the employes, and have induced them, by "threats and unlawful persuasion," not to enter the company's employ. It is urged that these are conclusions of the pleader and that, consequently, the bill of complaint is insufficient. But with this contention we do not agree. The allegations sufficiently charge acts of the defendants to give the court jurisdiction to pass upon the sufficiency of the bill. In such case, whether the court decided correctly or incorrectly could not affect the question of jurisdiction, nor the duty of all persons having notice to obey the order until reversed by a court of competent jurisdiction. The court having jurisdiction of the general subject-matter of the bill, the bill, if defective, could have been amended, and the rule is that judicial proceedings which are amendable are not void. *Rosenheim v. Hartsack*, 90 Mo. 357, 2 S. W. 473. Even if the terms of the injunction are broader than the allegations of the bill, that fact is no defense in a proceeding to punish for a contempt in violating the injunction. *Loven v. People*, 158 Ill. 159, 42 N. E. 82.

It is also urged that the intent with which an otherwise lawful act is done is not material to characterize the act itself. In a recent case, where a malevolent purpose was alleged, the Supreme Court of the United States said: "A purely malevolent act may be done even in trade competition." The court also said that in some cases justification "may depend upon the end for which the act is done." * * * It is not sufficient answer to this line of thought that motives are not actionable and that the standards of law are external. That is true in determining what a man is bound to foresee, but not necessarily in determining the extent to which he has foreseen." *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154. In *Swift & Co. v. United States*, 25 Sup. Ct. 276, 49 L. Ed. 518, the court said: "A general allegation of intent may color and apply to all the specific charges of a bill which seeks relief against the act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], to protect trade and commerce against unlawful restraints and monopolies." Also: "It is suggested that the several acts charged are lawful, and that intent can make no difference. * * * Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But when that intent, and the consequent dangerous probability,

exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability, as well as against the completed whole. * * * The unity of the plan embraces all the parts."

We are, for the reasons stated, of the opinion that the court had jurisdiction of the subject-matter and of the parties.

It is a well-known rule of law that, in proceedings for contempt in failing to obey an order of court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrant it may appear to be. The judgments of courts cannot be attacked collaterally for mere irregularities. *Clark v. Burke*, 163 Ill. 334, 45 N. E. 235; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348. Therefore plaintiffs in error cannot question in this proceeding the sufficiency of the bill upon which the writ of injunction was granted.

Immediately after the writ of injunction was issued the Kellogg Company had 500 copies of it posted in the immediate vicinity of its works. It also had copies served upon some of defendants personally by the sheriff, and sent copies to others through the mail. The fact that some of the plaintiffs in error were not parties to the injunction suit and were not served with process, and had no notice of the application for the injunction, or were not served by the officer of the court with such injunction, is immaterial, so long as it is made to appear that they had actual notice of the contents of the injunction ordered and issued by the court. "To render a person amenable to an injunction, it is not necessary that they should have been a party to the suit, so long as they had actual notice of the contents of such injunction." *High on Injunction*, § 1444. With the exception of Fisher and Brent, it is admitted that all of the other plaintiffs in error knew of the injunction, and, in view of the prominent part which they both took in the matter, it is unreasonable to suppose that they (Fisher and Brent) did not have knowledge of its existence. If they did not, it was their duty to properly present that fact to the trial court upon the hearing, which they failed to do.

It is next insisted that the petition and affidavits upon which the attachment for contempt was based were not sufficient, for the reason that they did not clearly and specifically inform plaintiffs in error as to the offense with which they were charged. We do not think this position tenable. Courts of chancery have within themselves full power and authority to enforce their official mandates in a summary and effective manner. To say otherwise, would render them powerless and inefficient. When the original bill for injunction was filed, certain persons were made parties defendant and

were duly served with process. As we have said, the court had jurisdiction of the persons and the subject-matter of the suit, and issued the injunction, which was not only binding upon the persons who were actual parties defendant to the bill, but was also binding upon all persons who had actual notice of the contents of the writ, and the decree granting the injunction could only be attacked in a collateral proceeding upon the ground that it was absolutely void. We think all the plaintiffs in error are chargeable with actual notice of the writ and its contents, and are therefore liable for contempt if they violated it. Various petitions were filed in the superior court to the effect that the terms of the writ of injunction had been violated by parties therein named. Many affidavits were filed in support of these petitions, and the affidavits and petitions, together with the writ of injunction, notified these parties of the specific respects in which it was claimed the order of court had been violated, namely, by picketing, patrolling, persuading, threatening, and assaulting. We are unable to see how it can be successfully maintained that defendants below did not have sufficient notice of the charge made against them to intelligently prepare their defense, if they had any. They were not entitled to a specific bill of particulars, nor was it necessary to set out the charge with the same particularity that would be required in an indictment. 1 *Bishop on Crim. Proc.* § 643. It has often been held that in an attachment proceeding for contempt, alleged to have been committed out of the presence of the court, it should be brought to the attention of the court by an affidavit setting out the particular respects in which the injunction is alleged to have been violated, but that was sufficiently done in this case. 4 *Ency. of Pl. & Pr.* 776, 780; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Oster v. People*, 192, Ill. 473, 61 N. E. 460, 56 L. R. A. 462.

It is again insisted with much earnestness that this proceeding is criminal in its nature, and therefore the defendants below were entitled to be discharged upon their sworn answer, and, if their answer was not sufficient, they could only be punished after they had been tried and convicted by jury. Proceedings for contempt of court are of two classes: those which are criminal in their nature, and those which are designated as purely civil remedies. When the contempt consists of something done or omitted in the presence of the court tending to impede or interrupt its proceedings or lessen its dignity, or out of its presence in disregard or abuse of its process, the proceeding is punitive or criminal, and the penalty is inflicted by way of punishment for the wrongful act, and to vindicate the authority and dignity of the people as represented by their judicial tribunals. In such cases the application for attachment

may be made in the original cause, yet the contempt proceeding will be a distinct case, criminal in its nature. Cases of this kind are clearly distinguished from cases where the parties to a civil suit, having the right to demand that the other party do some act for their benefit, obtain an order from a proper court commanding the act to be done, and, upon refusal, the court, by way of executing its orders, proceeds as for contempt, for the purpose of advancing the civil remedy of the other party to the suit. In this class of cases, while the authority of the court will be incidentally vindicated, its power has been called into exercise for the benefit of a private litigant, and not in the public interest, merely. If imprisonment is ordered, it is not as a punishment, but to the end that the other party to the suit may obtain a remedy for the advancement of his own private interest and rights which he could not otherwise maintain. *Loven v. People*, 158 Ill. 159, 42 N. E. 82; *Crook v. People*, 16 Ill. 534; *People v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. People*, 150 Ill. 408, 37 N. E. 1004, 41 Am. St. Rep. 375; *Leopold v. People*, 140 Ill. 552, 30 N. E. 348. The bill for the writ of injunction which the defendants are charged with having violated alleged that the complainant had vast interests at stake in the business enterprise in which it was engaged, and that the defendants had conspired together unlawfully to injure that business. Upon this bill being filed, a writ of injunction was ordered for the purpose of protecting the company against the unlawful acts of certain persons; and when the injunction was issued, and the plaintiffs in error were attached for contempt of court, it was primarily because they were injuring the business of the Kellogg Company, and the punishment was inflicted to prevent such injury. While it is true that the dignity of the law and the order of the judicial tribunal have been violated, this was merely incidental to the rights of private individuals. The proceeding for the attachment was civil, and in no sense criminal. The rule is that, when the defendant is attached for contempt of court for a criminal offense and files a sworn answer, that answer, if sufficient to purge him of the alleged contempt, may be taken as true and the defendant discharged. But this rule applies only where the proceeding is brought to vindicate the law or the dignity of the court, and does not apply to acts treated as contempts, for the enforcement of orders and decrees as a part of the remedy sought to be enforced. *Loven v. People*, 158 Ill. 159, 42 N. E. 82. In the case at bar plaintiffs in error filed their sworn answer to the petition for attachment for contempt, and, as these proceedings were not purely criminal in their nature, the answers filed did not entitle them to be discharged, and the chancellor committed no error in so holding.

It is, however, contended that, even though

they were not entitled to be discharged upon their sworn answers, they still had the constitutional right to a trial by jury, and could not be legally deprived of their liberty or property without such a trial. Upon the filing of the petitions for contempt and the appearance of the defendants thereto, the court proceeded in the summary to hear the case upon the petitions, answers, and affidavits filed by the respective parties. In 1893 the Legislature of this state passed an act providing for a trial by jury in all cases where a judgment was to be satisfied by imprisonment. Laws 1893, p. 96. In the case of *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 821, we decided that this act did not apply to the case of proceedings for contempt of court, where it was sought to coerce defendant into the performance of the duty which the court had ordered him to perform. See, also, *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *United States v. Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. These authorities are decisive of the question here raised, and hold that the defendants in such a proceeding as this are not entitled to a trial by jury.

It is insisted and argued at great length that the alleged acts of plaintiffs in error were not in violation of the injunction, and that they were not shown to be guilty of those acts. The determination of these questions involves a consideration of the facts and circumstances under which the alleged strike was ordered and the purpose which was sought to be accomplished by it.

The Kellogg Company employed from 500 to 800 men and women, some belonging to labor unions, while others did not. On May 7, 1903, several of the leaders of labor unions called upon the company and submitted a certain agreement which they sought to have it sign. Among the conditions in that agreement are the following:

"Art. 2. Party of the first part hereby agrees to employ none but members of the aforesaid organizations or those who carry the regular working card of the said organization, provided the various crafts will furnish such competent help as may be required by the party of the first part within twenty-four hours after notification."

"Art. 7. There shall be a steward for each craft in each factory bound by the organization, whose duty it shall be to see that the men working in said factory belong to the organizations."

"Art. 8. It is hereby agreed by the party of the first part that the business agent of the party of the second part shall have the privilege of interviewing any member of the party of the second part in the offices of the party of the first part during business hours."

"Art. 10. A sympathetic strike to protect union principles shall not be considered a violation of this agreement."

"Art. 11. All the apprentices shall belong

to the union and carry the working card of the organization.

"Art. 12. The number of apprentices shall not exceed one for every ten men or less of the different crafts."

The Kellogg Company refused to sign the agreement, and was informed by the business agents of the unions that a strike would be called if the agreement was not signed. In other words, these business agents sought to obtain the signing of the contract by threats, or to induce the company to sign it in order to avoid a strike. A contract executed under duress is voidable, and duress is present where a party is constrained, under circumstances which deprive him of the exercise of free will, to agree to or to perform the act sought to be avoided. 10 Am. & Eng. Ency. of Law (2d Ed.) p. 321. The law is well settled that every person shall be protected in the right to enter into contracts, or in refusing to do so, as he shall deem best for the advancement of his own interests, without interference by others. No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any attempt to compel an individual, firm, or corporation to execute an agreement to conduct his or its business through certain agencies or by a particular class of employees is not only unlawful and actionable, but is an interference with the exercise of the highest civil right. Thus we said in *Doremus v. Hennessey*, 176 Ill. 608, 614, 52 N. E. 924, 925, 43 L. R. A. 797, 68 Am. St. Rep. 203: "The common law seeks to protect every person against the wrongful acts of others, whether committed alone or by combination and an action may be had for injuries done which cause another loss in the enjoyment of any right or privilege of property. No persons, individually or by combination, have the right to directly or indirectly interfere or disturb another in his lawful business or occupation, or to threaten to do so, for the sake of compelling him to do some act which, in his judgment, his own interest does not require. * * * It is clear that it is unlawful and actionable for one man from unlawful motives to interfere with another's trade by fraud, misrepresentation, or by molesting his customers or those who would be customers, or by preventing others from working for him, or causing them to leave his employ by fraud or misrepresentation, or physical or moral intimidation or persuasion, with an intent to inflict an injury which causes loss. * * * Every man has a right under the law, as between himself and others, to full freedom in disposing of his own labor or capital according to his own will, and any one who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of

action for such wrong. Damage inflicted by fraud or misrepresentation, or by the use of intimidation, obstruction, or molestation, with malicious motives, is without excuse, and actionable. Competition in trade, business, or occupation, though resulting in loss, will not be restricted or discouraged, whether concerning property or personal services. Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set, and actually accomplishing that result, be actionable unless there was actual malice. Malice, as here used, does not merely mean intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another it is malicious, and an act maliciously done with the intent and purpose of injuring another is not lawful competition. In this case it is clear the evidence sustained the allegations of the plaintiff's declaration, and there is here no contention on the facts. The principles herein announced are sustained by the weight of authority in England and in this country. *Lumley v. Gye*, 2 E. & B. 216; *Blake v. Lanyon*, 6 T. R. 22; *Sykes v. Dixon*, 9 A. & E. 693; *Pilkington v. Scott*, 15 M. & W. 657; *Hartley v. Cummings*, 5 Com. B. 247; *Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Chipley v. Atkinson* (Fla.) 1 South. 934, 11 Am. St. Rep. 367; *Delz v. Winfree*, (Tex. Civ. App.) 25 S. W. 50, 26 Am. St. Rep. 755; *Curran v. Galen* (Sup.) 22 N. Y. Supp. 826; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485, 10 L. R. A. 184." See, also *Aikens v. Wisconsin*, 195 U. S. 194, 25 Sup. Ct. 8, 49 L. Ed. 154.

Under the foregoing authorities there can be no doubt that any attempt to coerce the Kellogg Switchboard & Supply Company into signing said agreement by threats to order a strike was unlawful. It was violative of the clear legal right of the company, and was unjust and oppressive as to those who did not belong to the labor organizations. Nevertheless the strike was ordered, and thereafter plaintiffs in error sought by threats, intimidation, and violence to prevent men and women from taking the places of the strikers.

In the case of *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241, in considering the free employment act, we said (page 401, 202 Ill., page 32, 67 N. E.): "An employer whose workmen have left him and gone upon a strike, particularly when they have done so without any justifiable cause, is entitled to contract with other la-

borers or workmen to fill the places of those who have left him. Any workman seeking work has a right to make a contract with such an employer to work for him in the place of any one of the men who have left him to go out upon a strike. Therefore the prohibition contained in section 8 strikes at the right of contract, both on the part of the laborer and of the employer. It is now well settled that the privilege of contracting is both a liberty and a property right. Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property. To deprive the laborer and the employer of this right to contract with one another is to violate section 2 of article 2 of the Constitution of Illinois, which provides that 'no person shall be deprived of life, liberty or property without due process of law.' It is equally a violation of the fifth and fourteenth amendments of the Constitution of the United States, which provide that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deprive any person of life, liberty, or property without due process of law, 'nor deny to any person within its jurisdiction the equal protection of the laws.' *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222; *Gillespie v. People*, 188 Ill. 176, 58 N. E. 1007, 52 L. R. A. 283, 80 Am. St. Rep. 176; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291. The provision embodied in section 8 'is a discrimination between different classes of citizens founded on no justifiable ground, and an attempt to exercise legislative power in behalf of certain classes and against other classes, whether laborers seeking work or employers. It falls under the condemnation of the Constitution.'"

Between the time the strike was called in this instance and the date of the application for an injunction, it appears from the evidence that acts of lawlessness were committed, and plaintiffs in error attempted to compel the Kellogg Company to sign the foregoing labor contract, and to prevent other laborers from taking the places of the strikers until it did so. The injunction was issued by the court restraining these various unlawful acts, but after the writ was issued, and served as far as it could be, there was no change in the conduct of plaintiffs in error, and the several petitions were filed in the superior court charging the violation of the writ. In support of such petitions more than 100 affidavits were filed. A general review of the evidence disclosed by these affidavits is wholly impracticable. Some of plaintiffs in error are expressly mentioned in a part of the affidavits, to which reference should be made,

In support of the petition of June 22d, it was alleged in one of the affidavits that Thomas Queenan, at the east door of the factory, spoke to one Hall and tried to persuade him to quit working for complainant, and said to him, "Do you know that they have got to come to terms with us?" and Hall answered, "No, I don't know that," when Queenan replied, "Well, you should know."

An employé of complainant was stopped by plaintiff in error John O'Brien as the former was going to his lunch at the noon hour. O'Brien said to him: "You boys ought to stay out and join the union; you want to try and get the other fellows out and join the union also." When the employé said he was satisfied with his work and did not want to quit, O'Brien responded, "If you don't come out to-night I will lick you."

The affidavits in support of the petition of July 14th show that, on divers days between June 22d and July 14th, plaintiffs in error Fisher, Christensen, Evans, Mashek, and Brent picketed and patrolled around and about complainant's place of business, watching the streets, alleys, and approaches thereto, daily shifting their positions; that they stationed themselves where the laborers employed in the factory were obliged to pass through the picket lines, and their attitude was ugly and menacing, and such as to cause fear in the minds of an ordinary person; and that John O'Brien picketed and patrolled in a similar way. O'Brien in his answer states that he was fined July 2, 1903, which was under the rule to show cause entered on the petition filed June 22d. He said in his answer that since July 2d he had not in any way participated in the strike, thereby admitting, by inference, that prior to that time he had taken part in the same.

In addition to the specific instances mentioned, the evidence abundantly shows that employés of the Kellogg Company, and persons seeking employment there, were waylaid on their way to and from the factory, insulted, threatened, and in many instances assaulted and beaten, by strikers, pickets, and patrollers, and that on June 30, 1903, when a number of men and girls were being escorted from the factory to their homes, they were met by a crowd of men and boys, bringing on a series riot. The employés were hissed, called "scabs," bricks and stones were thrown at some of them, and more or less shooting occurred. Large numbers of the strikers surrounded the plant, in company with at least a part of plaintiffs in error, and sought by every means in their power to embarrass and hinder the company in the peaceable pursuit of its business. The evidence, considered as a whole, is convincing that each of the plaintiffs in error was actively engaged in one or more of these unlawful acts, or aided, abetted, advised, assisted, or encouraged others to commit them. That the acts were unlawful and in disre-

gard of the expressed commands of the injunction cannot be denied.

The importance and far-reaching consequences of the cases are fully appreciated. We have endeavored to give the material questions raised and discussed in the argument due consideration, and have reached the conclusion that the judgments of the superior court were properly affirmed by the Appellate Court. The judgment of the latter court will accordingly be affirmed.

Judgment affirmed.

SCOTT, J., dissents.

(216 Ill. 377.)

CITY OF CHICAGO v. McCARTNEY.

(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—REVIEW—FINDINGS OF FACT.

A finding of fact that, in original proceedings to condemn land for the widening of a street, the benefits of the property in question were presented, involved, considered, and determined, cannot be reviewed for insufficiency of the evidence to sustain it, in the absence of a bill of exceptions.

2. JUDGMENT—RES JUDICATA—EMINENT DOMAIN—AWARD OF DAMAGES—BENEFITS.

Where a petition for condemnation of land to widen a street prayed that the just compensation to be paid for private property for the improvement should be ascertained by the jury, the jury, though authorized to consider benefits to land not taken, for the purpose of setting off such benefits against damages, had no power to award a judgment for benefits in excess of such damages, and hence a judgment that the land not taken was not damaged was not res judicata of the question of benefits, precluding an assessment of such land for benefits accruing from the improvement.

Magruder, J., dissenting.

Error to Circuit Court, Cook County; O. P. Thompson, Judge.

Proceedings by the city of Chicago to condemn land for the widening of a street. An assessment for benefits was levied on the property of Henry S. McCartney, and from a judgment setting the same aside on his objections the city brings error. Reversed.

Rehearing denied October 5, 1905.

Robert Redfield and William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, of counsel), for plaintiff in error. Enoch J. Price, for defendant in error.

CARTWRIGHT, C. J. Plaintiff in error filed a petition in the circuit court of Cook county to condemn 37 feet off the east side of lands owned by the defendant in error and other persons for widening South Park avenue, under the provision of article 9 of the city and village act providing for making local improvements by special assessment. On a trial by jury there was a verdict awarding \$7,474.88 as compensation for the 37 feet taken from lots owned by defendant in error, and finding that there was no damage to the remainder. Plaintiff in error afterward filed a supplemental petition for a special assessment upon property benefited by the improvement to pay the total compensation awarded

to all the owners, with the costs and expenses. Commissioners were appointed by the court to make such assessment, and an assessment roll was returned into court, amounting to \$21,233.81. Lots 1 to 8, inclusive, in Edgar M. Snow & Co.'s subdivision, platted subsequent to the condemnation, owned by defendant in error, were separately assessed in amounts aggregating \$9,017.04. Defendant in error filed numerous objections to the assessment, one of which was that the benefits had already been paid in the condemnation proceedings; and after a trial by jury, in which the issues were found for the plaintiff in error, a new trial was granted, and the defendant in error, by leave of court, filed an amended objection as follows: "The former judgment of condemnation, to which this proceeding is limited, finding the value of the portions of lots 15 and 16 in said block 2, Yerby's subdivision, aforesaid, and also finding no damages to the parts of said premises not taken, necessarily included a consideration of the question of special benefits to the part not taken; secondly, evidence was in fact taken as to such benefits, and considered by the jury as an offset to damages to the parts not taken, and the objector pleads said judgment in bar to this proceeding, and shows that the same is res judicata as respects the subject-matter of this proceeding." The cause was then heard by the court without a jury, and a judgment was entered in favor of the defendant in error, refusing confirmation of the assessment, and dismissing the petition, as to his lots. The judgment so entered contained the following finding: "In the original condemnation proceedings in this case the benefits to the property in question, hereinabove mentioned, were, under the issues there presented, involved, considered, and determined, and, having been litigated in that case, cannot again be the subject of litigation. The city is estopped by the former verdict and judgment, and the court, for the reasons aforesaid, finds the issues for the said objector." The writ of error in this case was sued out to review that judgment.

There is no bill of exceptions in the record, and for that reason the finding of fact that in the original condemnation proceedings the benefits to the property in question were presented, involved, considered, and determined cannot be questioned on account of any insufficiency of the evidence to sustain such finding. The court will not inquire into the sufficiency of the evidence to support a finding unless there is an exception preserved in a bill of exceptions. The office of a bill of exceptions is to preserve in the record such matters as occur during a trial which would not otherwise become a part of the record, and as to such matters an alleged erroneous ruling or finding must be excepted to, and the exception preserved in a bill of exceptions. *Martin v. Foulke*, 114 Ill. 208, 29 N. E. 683;

Firemen's Ins. Co. v. Peck, 126 Ill. 493, 18 N. E. 752; *Cochran v. Village of Park Ridge*, 133 Ill. 295, 27 N. E. 939. But no bill of exceptions is necessary where the error appears in the record and judgment of the court. *Kitchell v. Burgwin*, 21 Ill. 40; *Van Dusen v. Pomeroy*, 24 Ill. 289; *Wiggins Ferry Co. v. People*, 101 Ill. 446; *McChesney v. City of Chicago*, 151 Ill. 307, 37 N. E. 872. The error alleged in this case appears in the record, which shows that there was an original condemnation proceeding, in which compensation was awarded for a part of the lots taken to widen the street, and the jury found that there were no damages to the remainder. The objection of defendant in error was based on that verdict, and alleged that the judgment was *res judicata* in this proceeding. If, as a matter of law, the amount of special benefits accruing to the property of defendant in error could have been considered and determined in the condemnation proceeding by a verdict finding that there was no damage to such property, so that the judgment entered on such verdict would become *res judicata* of the question raised in this case, the finding of the court that such special benefits were presented, considered, and determined must be regarded as conclusive. On the other hand, if no such question could have been determined by such verdict, and no judgment could have been or was entered assessing the benefits to the property, then, as a matter of law, this judgment is wrong.

The issues in the condemnation case were different from the issues in this case. The petition for condemnation prayed that the just compensation to be paid for private property to be taken for the improvement should be ascertained by a jury. The jury were required by law to ascertain such just compensation to be paid for the property taken, and the damages, if any, to the residue, but not to assess benefits, however great such benefits might be in excess of any damages sustained. The benefits to the property not taken could not be set off against the compensation to be paid for the land taken, as has been decided in numerous cases. The jury awarded compensation for the 37 feet taken for widening the street, and were bound to allow the full value, without deducting benefits. When the jury came to consider the question whether the portion of the property not taken was damaged, they were limited to that single question. On that question they were authorized to consider any special benefits for the purpose of reducing or balancing damages; but that was only for the purpose of determining whether the remaining property was damaged, and the amount of such damage. The consideration of special benefits to property claimed to be damaged, but not taken, goes only to the extent of offsetting or balancing damages. The measure of damages is the reduction in value of the residue of the tract by reason of the improvement, and, if

the residue will be worth less, the difference is to be allowed as damages. But if there are special benefits rendering it far more valuable, they cannot be charged to the owner, or recovered from him. As was said in *Page v. Chicago, Milwaukee & St. Paul Railway Co.*, 70 Ill. 324: "This is not deducting benefits or advantages from damages, but it is ascertaining whether there be damages or not." If it is found that the special benefits accruing equal the damages, the owner cannot recover anything, for the simple reason that there are no damages. If the benefits are less than the damages, the owner will be entitled to recover the excess as his just compensation, which is only saying that, upon considering the value of the property before and after the improvement, there is a certain amount of damage. *Harwood v. City of Bloomington*, 124 Ill. 48, 16 N. E. 91; *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15; *Leopold v. City of Chicago*, 150 Ill. 568, 37 N. E. 892. If the jury in a condemnation proceeding award damages for property not taken, the judgment is conclusive against a subsequent proceeding to assess it for benefits, because the judgment is conclusive that there are damages, and not benefits; but, where a jury simply find that there are no damages, the verdict and judgment are not, and cannot be, conclusive that there are no benefits. The fact that property is greatly benefited and doubled in value by an improvement is not inconsistent with a verdict that it is not damaged, but perfectly consistent with it. It would seem to be an absurdity to say that the finding of a jury that the property of defendant in error was not damaged was also a finding that it was not benefited—a question which the jury could not legally consider.

The purpose and effect of this proceeding are different. The commissioners were required to assess against the lots of defendant in error the benefits that would accrue from the improvement. They were not authorized to award damages for depreciation of the lots resulting from the taking of a part of them, the fact that there were no damages having been determined in the condemnation proceeding. *Leopold v. City of Chicago*, *supra*. As to the case just cited, it may be said that the legal principles stated in the opinion are correct and in accordance with previous decisions, although the conclusion drawn from them is perhaps a non sequitur, which should not be followed. In the assessment roll the property of the defendant in error was assessed \$9,017.64 for benefits accruing from the improvement. Assuming that the property is benefited to the amount assessed, his reply is that those benefits have already been considered and allowed by the verdict of the jury that his property was not damaged. Manifestly the verdict and judgment in the condemnation case could have no such legal effect. The jury in that proceeding could not have returned a ver-

dict for such benefits, or the court have entered a judgment under which plaintiff in error could have recovered them. Such a judgment would have been unauthorized by law, and beyond the power of the court. Plaintiff in error in the condemnation proceedings was entitled to offset benefits against damages not exceeding the amount of damages, but the jury did not return any finding that there were or were not any benefits, but only that there were not damages. While, under the constitution, benefits cannot be offset against compensation for land taken, and the owner must be paid in money the full value of land taken, the constitution authorizes the General Assembly to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment. In the condemnation proceeding the owner must be paid the full value of his property which is taken for public use; but if a part only is taken, and the remainder is enhanced in value by the improvement, it may be specially assessed, under the constitution, to pay for the improvement. If a proceeding is instituted for such special assessment, the requirement of the constitution for compensation is satisfied. *Goodwillie v. City of Chicago*, supra; *City of Bloomington v. Latham*, 142 Ill. 462, 32 N. E. 506, 18 L. R. A. 487. The verdict of the jury in the condemnation proceeding finding that the property of the defendant in error was not damaged, and the judgment entered in pursuance of such verdict, did not and could not legally settle the question whether there were benefits to the property or not. It is in no manner inconsistent with the verdict and judgment that there are substantial benefits, and the property is greatly enhanced in value. The finding that benefits were considered in the condemnation proceeding cannot be regarded as a finding that defendant in error was charged with any excess of benefits above damages, since that could not be done, but only as a finding that benefits were considered as offsetting or balancing damages. The judgment must therefore be reversed for error apparent in the record.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MAGRUDER, J. (dissenting). This is a supplemental petition filed by the city of Chicago on February 20, 1897, under section 58 of article 9 of part 1 of the city and village act (1 Starr & C. Ann. St. 1896, [2d Ed.] p. 778,) praying that steps be taken for an assessment to raise the money necessary to pay the compensation and damages theretofore awarded for property taken or damaged for opening South Park avenue from Fifty-fifth street to Fifty-sixth street. An assessment roll was finally filed on July 17, 1897, which assessed the total sum of \$9,017.64 as special benefits upon the land herein involved,

remaining after taking the east 37 feet under the description of sublots 1 to 8 in Edgar M. Snow & Co.'s subdivision, etc. Various objections were filed to the assessment by defendant in error. On the issues found, trial was had before the circuit court without a jury, and finding was made and judgment was rendered refusing confirmation of the assessment, and dismissing the petition as to the land herein involved. This writ of error is sued out for the purpose of reversing such judgment of confirmation.

Among the objections filed to the confirmation of the assessment in this supplemental proceeding was the objection that the defendant in error, owner of the property condemned in the condemnation proceeding, has, by virtue of the judgment in that proceeding under the issues therein submitted to the jury, already paid for the special benefits to the land not taken for the improvement, in that the verdict and judgment of condemnation, finding the value of the land taken, and also finding no damages to the parts of said land not taken, included a consideration of the question of special benefits to the parts not taken, and that evidence was in fact taken therein as to such benefits, and considered by the jury as an offset to damages to the parts not taken; "and the objector pleads said judgment in bar of this proceeding, and shows that the same is *res judicata* as respects the subject-matter of this proceeding." In other words, the defense made in this supplemental proceeding is that in the condemnation proceeding the amount of special benefits to the land of defendant in error which was not taken, and which is here sought to be assessed, was passed upon in determining the damages to the land not taken, and that therefore the question of such benefits is *res judicata*, and cannot be again litigated in this supplemental proceeding.

It has been held by this court that, in a condemnation proceeding, benefits to the property not taken cannot be set off against the compensation to be paid for the land actually taken, but that, in determining the amount of damages to land not taken for public use, special benefits to the property damaged may be set off against the damages accruing to the property. *Leopold v. City of Chicago*, 150 Ill. 568, 37 N. E. 892; *Concordia Cemetery Ass'n v. Railroad Co.*, 121 Ill. 199, 12 N. E. 536. In *Leopold v. City of Chicago*, supra, we said (page 572 of 150 Ill., page 893 of 37 N. E.): "In the condemnation proceeding the court properly instructed the jury, as we have seen it did, that, in determining whether the taking of a portion of the lot materially impaired the value of the remaining part not taken, the jury must consider all special benefits accruing from the proposed improvement to the part not taken. If it be found that the special benefits thus accruing equal the damages, the owner can recover nothing. If, however, the benefits are less than the damages

occasioned, the owner will be entitled to recover the excess as his just compensation for the damage to his land, and provision must be made for the payment thereof." *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15. In *Goodwillie v. City of Lake View*, supra, it affirmatively appeared that in the condemnation proceeding the amount of the special benefits accruing to the land of the objector not taken was in issue, and the question as to such amount was submitted by the court to the jury; and, the benefits having been there set off against damages to the part of the land not taken, it was held that an attempt to raise money to pay for the property taken or damaged by the assessment of special benefits on the same land, under section 53 of article 9 of the City and Village act, and thus require the owner to pay the benefit twice, was in palpable violation of the Constitution, and that the recovery of special benefits in such a condemnation proceeding will estop the city from again imposing the same by way of special assessment upon the same property, and that the landowner could not be required to pay twice the special benefits to his property.

The question then arises whether, in the case at bar, special benefits were set off against damages to the part of the land of defendant in error which was not taken in the condemnation suit. The judgment in the case at bar in this supplemental proceeding, confirming the assessment, was entered on June 22, 1901, nunc pro tunc as of the 13th day of May, 1901; and after reciting that the court had heard the evidence both on the objections usually triable by the court alone, and, by stipulation of the parties, had also heard the evidence upon the issues usually triable by a jury, the circuit court rendered the following judgment: "In the original condemnation proceedings in this case the benefits to the property in question hereinabove mentioned were, under the issues there presented, involved, considered, and determined, and, having been litigated in that case, cannot again be the subject of litigation; the city is estopped by the former verdict and judgment; and the court, for the reasons aforesaid, finds the issues for the said objector, and that as to said objector and as to said premises the application for judgment of confirmation should be refused, and the petition for a special assessment should be dismissed; and to the above findings the said city of Chicago, by its counsel, here and now excepts, and moves the court to grant a new trial herein, which motion by the court is here and now overruled and denied, to the overruling and denying of which said motion said city of Chicago, by its counsel, here and now excepts, whereupon it is ordered and adjudged by the court that, as to the objections filed by said Harry S. McCartney to the said special assessment petition and the assessment roll, and filed on behalf

of the premises described as lots 1 to 8, * * * judgment of confirmation of the assessment roll is refused, and judgment is hereby rendered for the objectors, and the said petition as to the said premises is hereby dismissed; and from the aforesaid judgment and order the said city of Chicago prays an appeal to the Supreme Court of Illinois," etc. It will be observed that the judgment of confirmation finds as a fact that in the condemnation proceeding the benefits to the property in question "were, under the issues there presented, involved, considered, and determined." Whether the benefits to the property in question were presented, involved, considered, and determined in the condemnation proceeding was a question of fact. There is no bill of exceptions in this record, and therefore we cannot know what the evidence was, upon which the circuit court decided the question of fact above indicated. None of the evidence is preserved. It must, from the recital in the judgment, have been made to appear to the trial court that the benefits to the property in question were involved, considered, and determined in the condemnation proceeding, and this court will presume, in support of the judgment, that such evidence was heard. In *Kelley v. City of Chicago*, 148 Ill. 90, 35 N. E. 752, we said (page 93 of 148 Ill., page 752 of 35 N. E.): "There is in this case no bill of exceptions containing the evidence upon which the court acted in overruling objections 2, 3, and 4, or upon which the jury rendered their verdict; and, in its absence from the record, it must be presumed the facts shown were sufficient to sustain the finding. The presumption of the correctness and regularity of judicial proceedings will obtain until error therein is shown by the record." In *Boyles v. Chytraus*, 175 Ill. 370, 51 N. E. 563, we said (page 373 of 175 Ill., page 564 of 51 N. E.): "There being no bill of exceptions in the case, the presumption arises that the necessary proof was introduced in the court below to sustain the findings of the judgment and the allegations of the pleadings. * * * Where a court of superior general jurisdiction has proceeded to adjudicate and render judgment in a matter before it, all reasonable inferences will be indulged in favor of its jurisdiction." *Osgood v. Blackmore*, 59 Ill. 261. The portion of the judgment which recites that such benefits, "having been litigated in that case, cannot again be the subject of litigation, [and] the city is estopped by the former verdict and judgment," is a conclusion of law, but is a conclusion which necessarily follows from the fact stated, and does not in any way militate against the finding of the fact as indicated above.

The fact of the absence of a bill of exceptions is sought to be avoided by the contention that the proceedings in the condemnation case are a part of the record in the supplemental assessment proceeding, and that

it was not necessary to embody such proceedings in a bill of exceptions. The petition in the condemnation proceeding and the verdict of the jury and the judgment of condemnation therein do appear in the present record, but they are mere surplusage, and cannot be taken notice of by this court, because they are not presented to the court by a bill of exceptions. This court has held in a number of cases that, as between the condemnation judgment and the supplemental proceeding instituted under section 53 of article 9, the supplemental proceeding is collateral to the condemnation judgment. *Goodwillie v. City of Lake View*, 137 Ill. 51, 27 N. E. 15; *Gage v. City of Chicago*, 146 Ill. 499, 34 N. E. 1034; *Newman v. City of Chicago*, 153 Ill. 469, 38 N. E. 1053; *Philadelphia & Reading Coal Co. v. City of Chicago*, 158 Ill. 9, 41 N. E. 1102; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437; *Le Moyne v. City of Chicago*, 175 Ill. 356, 51 N. E. 718; *Dickey v. City of Chicago*, 152 Ill. 468, 38 N. E. 932; *Bass v. People*, 203 Ill. 206, 67 N. E. 806; *Thomas v. City of Chicago*, 204 Ill. 611, 68 N. E. 653.

In *Goodwillie v. City of Lake View*, supra, we said (page 62 of 137 Ill., page 17 of 27 N. E.): "Although a supplemental petition is filed in the condemnation proceeding, the relief sought thereby is supplemental and collateral to the proceeding in which the judgment of condemnation was rendered, and the questions arising in the original proceeding cannot be relitigated upon the supplemental petition. It is for a distinct, separate purpose, that is, to raise funds to pay the judgment already entered. In the condemnation proceeding the court had jurisdiction of the subject-matter and of the persons of appellants, and the judgment therein was binding and conclusive upon them, and they cannot be permitted to attack it thus collaterally." In *Bass v. People*, supra, we said (page 208 of 203 Ill., page 806, of 67 N. E.): "The supplemental proceeding is collateral to the one on which the judgment of condemnation was rendered, and the questions involved in the original proceeding cannot be relitigated on the supplemental petition for a special assessment; but, if the condemnation judgment is entered without jurisdiction, it may be collaterally attacked in the proceeding to confirm the special assessment." In *Goodwillie v. City of Lake View*, supra, we also said: "The judgment in the condemnation proceeding was final, conclusive, and binding upon the appellants and all others who were parties thereto until reversed, vacated, or set aside in some direct mode known to the law;" and, this being so, the party who desires to use the proceedings in the condemnation proceeding as evidence in the supplemental proceeding must introduce the papers and records in the condemnation proceeding in evidence, and embody them

in the record by a bill of exceptions. In *Gage v. City of Chicago*, supra, where there was an application for the confirmation of a special assessment made for the purpose of raising money to pay the compensation for land condemned for a street, an objection was made that the description of the land condemned was illegal and void; and there, in discussing that objection, the court say (page 503 of 146 Ill., page 1035 of 34 N. E.): "On examining the verdict, as the same was offered in evidence and is preserved in the bill of exceptions in this case, we find that, while the description which it gives of the land condemned is somewhat informal, it is not so imperfect as to make the identity of the land intended to be described at all uncertain." It thus appears that in the *Gage Case*, supra, the verdict in the condemnation proceeding was introduced in evidence, and preserved by a bill of exceptions. In *Leopold v. City of Chicago*, supra, where a supplemental petition was filed under section 53, the objectors offered in evidence therein the petition for condemnation filed by the city, the instructions to the jury, the verdict of the jury, and the judgment in the condemnation proceeding, and also offered evidence to prove that, upon the trial in the condemnation proceeding, evidence was introduced of the damages and the extent thereof to the part of the land not taken, and also evidence tending to show that the special benefits accruing from the improvement to the part of the land not taken would equal the damages sustained by it, and that therefore the remainder of said lot would not be damaged, which evidence the trial court excluded, and thereupon it was held by this court that the trial court "erred in excluding the record in the condemnation proceeding and the offered evidence." Counsel for plaintiff in error rely upon the case of *Guild v. City of Chicago*, 82 Ill. 472, as sustaining their contention that the petition, verdict, and judgment in the condemnation proceeding are a part of the record in the supplemental assessment proceeding, and need not be presented by a bill of exceptions. In that case, however, although the court refer to section 53, which speaks of the assessment as being in "the same proceedings" as the proceeding for condemnation, it appeared that, on the trial below, the ordinance attached to the petition for condemnation was recognized and treated by both parties as a part of the record. But the case of *Guild v. City of Chicago*, supra, was referred to and commented upon by the late Mr. Justice Baker in the case of *Philadelphia & Reading Coal Co. v. City of Chicago*, supra, in reference to the very point here involved; it being said in that case (page 15 of 158 Ill., page 1103 of 41 N. E.), "It is true, the supplemental petition is filed 'in the same proceeding;' but this is a mere matter of convenience, and is done only by vir-

tue of a direct authority given by the statute (chapter 24, art. 9, § 53). And although this court, in *Guild v. City of Chicago*, 82 Ill. 472, says, "This assessment was in the same proceeding," yet it also there speaks of "the original petition in the condemnation proceeding" and "the supplemental petition in the assessment proceeding." This was because there were two distinct and particular suits or proceedings, but joined or yoked together, as we have seen, simply for purposes of convenience." If the condemnation proceeding and the supplemental assessment proceeding are distinct suits, then the proceedings in the condemnation case are not necessarily a part of the record in the supplemental assessment case, and must be introduced in evidence and presented in a bill of exceptions. This was not done here, and therefore, although the verdict and judgment in the condemnation proceeding appear in this record, they are mere surplusage and must be disregarded.

In *Thriffs v. Fritz*, 101 Ill. 457, which was an appeal by an alleged purchaser of mortgaged premises at a master's sale—who was also a party complainant to the bill to foreclose, he holding the senior mortgage—from a decree requiring him to pay the difference between the amount bid by him and the amount realized on a resale, it was held that the original record in the proceedings to foreclose could not be considered by this court as evidence of any facts, unless offered in evidence in the proceeding against the purchaser, and preserved in the record of that case by bill of exceptions or certificate of the judge; and it was also there held that in such case the motion or petition to enforce the liability of the purchaser was a separate and independent proceeding, and essentially a new proceeding, and not the same as the one in which the sale was ordered, and that the transcript of the proceeding in the latter "finds no appropriate place with the record" in the former.

It is contended by the plaintiff in error that the verdict and judgment in the condemnation proceeding show that the benefits to the property in question, and here involved, were not, under the issues in the condemnation proceeding there presented, involved, considered, and determined. It is unnecessary to discuss the question whether this contention is well founded or not, in view of the facts that the judgment in the supplemental assessment proceeding finds to the contrary, and that the proceedings in the condemnation case are not before us by being embodied in a bill of exceptions.

Accordingly, I think that the judgment of the circuit court, sustaining the objections of defendant in error, and dismissing the supplemental proceeding as to him and his property, should be affirmed.

(216 Ill. 392)

HARTSHORN et al. v. ILLINOIS VALLEY RY. CO.

(Supreme Court of Illinois. June 23, 1905.)

1. EMINENT DOMAIN—EVIDENCE OF VALUE.

In a suit to condemn land for a railroad right of way then in possession of a traction company, which had constructed and placed in operation its line of railway over the same, evidence that the best use to which the land in its then condition was adapted was for railroad purposes, and the value of the land for such purposes, was admissible; defendants being entitled to the highest fair cash market value of the land actually taken, for the best use for which it was adapted.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 353, 356.]

2. SAME—BENEFITS.

Where, in a suit to condemn land for a railroad right of way, located at a distance from any populous center, it was claimed that land not taken was valuable as a factory site, evidence that the building of the road would be a benefit and not an injury to such factory site was admissible, though the witnesses were unable to estimate the benefit in money.

3. SAME.

Where, in a proceeding to condemn land for a railroad right of way, located at a distance from any populous center, defendants claimed that the land was especially valuable for factory sites, and at the time the case was tried a line of electric railroad was operated over the land, the maintenance of such road should be taken into consideration in estimating damages and benefits to land not taken.

4. SAME.

Where land at a distance from a populous center was sought to be condemned for a railroad right of way, on which an electric railroad was then being operated, and defendants, on the same day the condemnation petition was filed, subdivided the land, which was agricultural, and filed a plat for record, showing the railroad track, and the lots could only be bought and sold with the expectancy that they would be along the car track, so as to render them accessible, the plat of such subdivision was properly admitted in evidence.

5. SAME—REBUTTAL EVIDENCE.

Where, in a suit to condemn land for a railroad right of way, defendants claimed that the taking of the land would deprive them of switch-track connections with a railroad, and in support thereof offered evidence that the railroad officials refused to connect a switch with the main line at a distance less than 3,000 feet west of a tunnel, no part of which could be on the railroad's right of way, plaintiff was entitled to show in rebuttal that 15 years prior a switch had been placed on the right of way of the railroad company, connecting with the main line 1,762 feet west of the tunnel, for the purpose of shipping clay on a part of the land not taken.

6. SAME—JURY—SECOND VENIRE.

Hurd's Rev. St. 1903, p. 909, c. 47, § 3, provides that, if a petition to condemn land be presented to a judge in vacation, he shall note thereon the day of presentation and the day when he will hear the same, and shall order the issuance of summons to each resident defendant, and the publication. Section 6 requires the court, at the time of issuing the summons or making publication, to write the names of 64 disinterested freeholders on separate slips of paper, and, in the presence of 2 disinterested freeholders, select 12 persons to serve as jurors; and section 7 declares that, if a panel be

not full, the judge hearing the petition shall designate by name the necessary number of persons of proper qualifications to serve as jurors. *Held*, that since a condemnation proceeding is a proceeding in court, whether instituted in vacation or in term time, where the judge before whom the petition was first presented was unable to preside at the trial, and a challenge to the array was sustained, it was the duty of the judge to issue a new venire in the same manner as the first one had been issued.

7. APPEAL—HARMLESS ERROR.

Where, in condemnation proceedings, after challenge to the array of jurors had been sustained, the presiding judge erroneously designated 12 persons, by name, to act as jurors, instead of issuing a new venire, but defendants did not claim that the jury before whom the case was tried after a challenge to the array had been denied were prejudiced against them, or that they were not qualified, the error was harmless.

8. EMINENT DOMAIN—AWARD.

In proceedings to condemn land for a railroad right of way, facts *held* insufficient to show that the damages awarded were grossly inadequate.

Appeal from Circuit Court, La Salle County; R. M. Skinner, Judge.

Proceeding by the Illinois Valley Railway Company to condemn a right of way over certain land. From a judgment assessing damages of Alfred I. Hartshorn and others, they appeal. Affirmed.

Rehearing denied October 5, 1905.

The appellee, the Illinois Valley Railway Company, filed its petition in the circuit court of La Salle county against appellants to condemn a right of way across the northwest quarter and a part of the southwest quarter of section 13 in La Salle township, in said county, for a proposed line of railway extending from Princeton, in Bureau county, to Joliet, in Will county. The origin of this controversy was a condemnation suit between the Illinois Valley Traction Company and appellants, which was decided by this court, and reported in 210 Ill. 609, 71 N. E. 612. The traction company was organized under the general corporation laws of the state, and we held that, under the facts shown in that case, it could not exercise the right of eminent domain. After that opinion was filed, the appellee, the Illinois Valley Railway Company, was organized under the railroad act as a railroad company, and this condemnation suit was commenced to acquire the right of way across the same lands which the traction company had sought to condemn in their former proceeding. The traction company conveyed by deed its line of railway and appurtenances to appellee. Appellant Hartshorn for many years had owned the south half of section 12, on the southeast quarter of which are located veins of lime rock suitable for the manufacture of natural cement. It is claimed that this cement could not be utilized on account of the lack of shipping facilities, and that Hartshorn purchased a part of the northwest quarter of section 13, lying north of the right of way of the Rock Island Railway Company. A ravine called "Swanson's

Ravine" extended north and south across this tract, dividing it into two parts. Located on the part west of Swanson's ravine, it is claimed, are deposits of rock used in the manufacture of Portland cement, and on the part lying east of the ravine are deposits of shale and fire clay used for the manufacture of brick. On February 28, 1903, Hartshorn sold and conveyed to the appellant the Garden City Sand Company that portion of the northwest quarter of section 13 lying east of the ravine, reserving to himself a right of way from the southeast quarter of section 12 across the tract sold to the sand company. The appellant sand company is a corporation organized for the manufacture and sale of brick, lime, cement, and other building materials. The land sought to be taken in this proceeding is a strip 50 feet wide, extending across the lands of appellants in a northeasterly direction, immediately north and parallel with the right of way of the Rock Island Railway Company. Immediately north of the right of way of said railway company, on the lands of appellants in section 13, is a narrow strip of land, of irregular shape, which is practically on a level with the tracks of said railway; said piece being in the form of a triangle, and having a width varying from nothing to 140 feet. From all sides of this small, level strip of land north of the Rock Island right of way, the land rises in bluffs, from the top of which it extends on a rough elevation. The right of way sought to be condemned takes 50 feet off of the south end of this level land, and lies between the remaining portion and the Rock Island tracks; leaving a level strip about 90 feet wide. The traction company, after it procured its judgment in the previous case, proceeded to construct its railway across this strip of land, erecting poles, wires, rails, ties, and other appliances for the operation of an electric railway, and proceeded to operate its cars. In the case at bar appellants claim these improvements as a part of the real estate, and the trial court so held.

The appellants filed separate cross-petitions claiming damages to the property not taken, on the ground that the taking of the strip in question did not leave sufficient room upon which to erect factory plants, and for the further reason that they were deprived of switching privileges and connections with the Rock Island tracks, hence the remainder of the land was destroyed for manufacturing purposes. Close to the east end of the sand company's land the north track of the Rock Island road passed through a long tunnel, cut through a solid rock in the bluff, and through this tunnel ran all of the west-bound trains.

The jury fixed the value of the lands actually taken from Hartshorn at \$2,200 and all the lands actually taken from the sand company at \$1,200, and allowed no damages to the lands not taken. Judgment was entered up-

on the verdict, to reverse which this appeal is prosecuted.

Fullerton & Eldredge, for appellants.
Duncan, Doyle & O'Connor, for appellee.

WILKIN, J. (after stating the facts). It is first insisted that the court erred in the admission and exclusion of evidence. The witnesses introduced by appellee to prove the value of the land actually taken testified that the best use to which the land, in its then condition, was adapted, was for railroad purposes, and gave their value accordingly. It is claimed by appellants that the land was best adapted to manufacturing purposes, and was of no value to appellants for railroad purposes, and hence the admission of this evidence, taken in connection with the twenty-second instruction given on behalf of appellee, was, in effect, telling the jury that if they believed from the evidence that this 50 foot strip, with the improvements thereon, was best adapted to railroad purposes, they should so find, notwithstanding such value might be much less than for manufacturing purposes. Prior to the condemnation proceedings the land had never been used for manufacturing purposes, but for agricultural and pasture purposes. The petition for condemnation was filed on July 26, 1904. The strip sought to be taken was at that time in the possession of appellee by virtue of the sale to it by the Illinois Valley Traction Company, which had constructed and placed in operation its line of railway over the strip, and hence at that time the strip was being used for railroad purposes.

Under the law, appellants were entitled to the highest fair cash market value of the land actually taken, for the best use to which it was adapted. *West Chicago Street Railroad Co. v. City of Chicago*, 172 Ill. 198, 50 N. E. 185. Its best use was to be ascertained from the evidence. The appellants had the right to show the value of the land for the best use to which they thought it was adapted, and the appellee to show the best use to which it thought the premises were adapted. The jury were entitled to inspect the land and form their judgment from such inspection, and, from all the evidence offered, determine what was the best use to which the land was adapted, and what was its fair cash market value for that use. *Phillips v. Town of Scales Mound*, 195 Ill. 353, 63 N. E. 180; *Ligare v. Chicago, Madison & Northern Railroad Co.*, 166 Ill. 249, 46 N. E. 803; *Rock Island & Peoria Railroad Co. v. Lelsy Brewing Co.*, 174 Ill. 547, 51 N. E. 572. It was not the duty of appellee to call upon appellants and ask them to state the use to which they thought their lands best adapted, but it was the privilege of appellee to produce such proper testimony with reference to that use, and the price thereof, as it saw fit. Appellee claimed the land was best adapted, in its then condition, for railroad purposes, and appellants claimed it was

best adapted for manufacturing purposes. Evidence in support of both of these conditions was admitted, and was competent.

It is next contended that the court erred in the admission of evidence as to the amount of benefit or damage to the lands not taken. It is claimed that certain witnesses were permitted to testify from experience in the coal mining business, or from experience as president of a cement company, or from experience in handling men, or from knowledge of the location of the ground, whether the building of the road would be a benefit or an injury to the factory site; and they testified that it was a benefit, but they could not estimate that benefit in dollars and cents. It is insisted that the proper rule as to benefits or damages to land not taken is the difference in the fair cash market value of the land before and after the taking, and that the evidence complained of was not based upon that value, but upon other facts and circumstances. There can be no doubt that the rule as to the benefits or damages to land not taken is as above claimed by appellants. *City of Chicago v. Lonergan*, 196 Ill. 518, 63 N. E. 1018; *Illinois, Iowa & Minnesota Railway Co. v. Easterbrook*, 211 Ill. 624, 71 N. E. 1116. We think, from a careful examination of the evidence and the instructions of the court given upon both sides, that this was the rule adopted by the court. No less than 11 instructions were given on either side, stating the measure of damages to be the difference between the actual fair cash market value of the land as it was before the construction of said railroad, and its actual fair cash market value after the construction of said railroad. Appellants assert that the remaining lands are especially adapted for factory sites. They are located at a distance from any populous center. The question of securing proper freight accommodations and transportation for employes would certainly be of importance in case factories were located thereon. At the time the case was tried, a line of electric railroad was operated over the land, and was clearly an element to be taken into consideration in the estimation of damages or benefits. The evidence complained of was based upon this fact, and we think it was proper for the consideration of the jury.

It is next insisted that the court improperly admitted in evidence the plat of Harts-horn's subdivision of lands located near the right of way. On the same day the petition for the condemnation was filed, appellant Hartshorn filed in the office of the recorder of deeds of La Salle county a plat of his subdivision of a part of section 13. The petition for condemnation stated that said Hartshorn was the owner of the land subdivided. Hartshorn filed his cross-petition, in which he admitted that he was the owner of the land subdivided, and prayed for the assessment of damages to all lands therein described, thereby including the land subdivided. After

Hartshorn had testified to being the owner of this land in section 13, upon cross-examination he was asked if he had not subdivided a part of it. Objection was made to this question, which was overruled by the court, and the plat of the subdivision was offered in evidence, together with certain deeds of conveyance of lands in the subdivision as platted. Thereupon Hartshorn asked permission to amend his cross-petition by eliminating the lands subdivided, and thereby releasing any claim for damages to that land. The court granted the motion, and thereupon the appellee amended its petition by alleging that the land subdivided was one compact, entire tract, and used by the owner thereof, as an entire tract, for agricultural purposes, together with other lands for which damages were sought. It is insisted by appellants that as the original cross-petition claimed no damages to any lands in section 13 except those containing Portland cement rock, and as the amendment to the cross-petition was filed for the purpose of doing away with any possible doubt upon that question, the admission of the plat in evidence was error. It appears from the evidence that all of the land surrounding this proposed right of way was contiguous, and used by Hartshorn for agricultural purposes. The lots were subdivided and the plat filed for record on the same day the petition for condemnation was filed. While it is claimed that the lots were platted with the expectation that this interurban track would be removed, we cannot see how that can be true. The subdivision shows the railroad track. The lots were located some distance from any populous center, in an agricultural district. They could only be bought and sold with the expectation that they would be along the car track, so purchasers might easily get to and from their homes. With this convenience they would be increased in value and benefited by the condemnation. For this reason, evidence of the subdivision was properly admitted.

The appellants contend that the taking of the 50 feet in question would deprive them of switch-track connections with the Rock Island Railroad, and in support of this contention offered evidence showing that, when the sand company was contemplating the purchase of the land from Hartshorn, one condition upon which that purchase was made was the acquisition of switch-track connections with the Rock Island Railroad. Accordingly the officials of the sand company interviewed the officials of the Rock Island Railroad for the purpose of making an agreement in regard to the switch. It was claimed by the Rock Island officials that on account of the tunnel it would be too dangerous to connect a switch with the main line at a distance of less than 3,000 feet west of the tunnel, and that no part of this 3,000 feet could be on the right of way of the railroad. A letter containing this statement was offered in evidence by appellants. In rebuttal of

this letter the court permitted appellee to introduce evidence showing that 15 years prior a switch track had been placed on the right of way of the Rock Island Company, connecting with the main line 1,762 feet west of the tunnel, for the purpose of shipping clay from the land now owned by the sand company. It is insisted by appellant that the admission of this evidence was error. The question at issue was whether or not appellants would be damaged by building the road by reason of being deprived of switching facilities. The written refusal of the railroad company to build the switch not less than 3,000 feet was offered to show that appellants would be specially damaged. In rebuttal of this evidence, appellee offered evidence to show that just such a switch had been in that particular place 15 years before, and could be put there again. The evidence was proper to be considered by the jury in determining the amount of appellants' damages in this respect.

The petition in this case was presented in vacation to Judge Charles Blanchard, who made an indorsement thereon as to the date of the return of summons. The summons was issued, and also a venire for the jury. When the case came on to be heard, Judge Blanchard was ill, and Judge Richard M. Skinner, of the same circuit, presided. Appellants challenged the whole array of jurors on the ground of certain alleged incompetency. The challenge was sustained, and the jurors discharged. Thereupon Judge Skinner designated by name 12 men to act as jurors, and appellants challenged this array on the ground, first, that the petition had been presented to Judge Blanchard, and Judge Skinner was without authority to issue the new venire; second, the petition not having been presented to Judge Skinner, he was without authority to order the venire; third, the law did not authorize the judge to designate the persons for whom a venire should issue. This challenge was overruled, and the ruling is assigned as error. It is claimed that it is the well-established rule that when the power of eminent domain is sought to be exercised, and the property of the individual taken against his will, such proceedings must strictly comply with the provisions of the statute, and the presentation of the petition in vacation and the summons of the jury must also be in strict compliance with the statute, and that Judge Skinner had no authority to call a new venire of jurors, and that no such power existed under the eminent domain act. Section 3 of the eminent domain act (Hurd's Rev. St. 1903, p. 909, c. 47) provides: "If such petition be presented to a judge in vacation the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issuance of summons to each resident defendant, and the publication," etc. Section 6 of the same act provides that it shall be

the duty of the court, at the time of the issuing of summons or making publication, to write the names of 64 disinterested freeholders on separate slips of paper, and in the presence of two disinterested freeholders, select 12 persons to serve as jurors. Section 7 of the same act provides that if the panel be not full, by reason of nonattendance or be exhausted by challenges, the judge hearing such petition shall designate by name the necessary number of persons of proper qualifications to serve as jurors. In the case of *Bowman v. Venice & Carondelet Railway Co.*, 102 Ill. 459, in passing upon this statute, we held that courts are political agents established under the Constitution, and, in contemplation of law, have separate existence distinct from the judges who preside over them; that a judge has no judicial power outside of the court in which he officiates, and when discharging the functions of his office he is the court in concrete form, and in this sense is often called the "court," but, strictly and technically speaking, the judge and court are wholly distinct; that a condemnation proceeding can only be instituted and conducted in the circuit court or the county court, and, whether instituted in vacation or term time, it is equally a proceeding in court. To the same effect are many other decisions of this court. *Hercules Iron Works v. Elgin, Joliet & Eastern Railway Co.*, 141 Ill. 491, 30 N. E. 1051; *St. Louis & Cairo Railway Co. v. Postal Telegraph Co.*, 173 Ill. 508, 51 N. E. 382. In the latter case we said (page 514 of 173 Ill., page 384 of 51 N. E.): "While it is true that the act makes use, in several of its sections, of the expression 'judge or court,' yet it was not the intention of the act to provide two tribunals for the hearing of condemnation cases—one the judge, as an individual, and the other the court as a judicial tribunal. The judge cannot exercise judicial power except when sitting as a court, and not as an individual. Whether the proceeding be in vacation or term time, it is a proceeding in court." The petition was first presented to Judge Blanchard. On account of sickness he was unable to preside at the trial, and Judge Skinner was called. The acts of both were not in their individual capacity as men or as judges, but were the acts of the circuit court. Upon the challenge to the array being sustained, it placed the proceeding in substantially the same position as if no venire had been issued, and the proper practice would have been to issue a new venire in the same manner as the first one had been issued. But even if this were not true, we do not see that appellants have any cause for complaint, as no attempt has been made to show any injury from the court's action. The appellants do not claim that the jury before whom the case was tried were prejudiced against them, or that they were not fair-minded men,

and of sufficient intelligence to faithfully and intelligently discharge their duty as jurors; but, on the other hand, the jury seem to have been satisfactory to them, as they exhausted only one-half of their peremptory challenges in their selection. We have frequently held that the judgment of the court below will not be reversed because a challenge to the array was overruled unless it appears that some substantial right was thereby impaired. *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *Henry v. People*, 198 Ill. 162, 65 N. E. 120; *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748.

Complaint is next made of the twenty-second and twenty-ninth instructions given by the court on behalf of appellee. Both of these instructions lay down the rule for the assessment of damages and benefits, and, taken in connection with all of the other instructions, we think the jury were fully informed as to the measure of damages, and appellants were not injured thereby.

It is next insisted that the damages awarded by the jury were grossly inadequate. It was contended by appellants that the lands taken were particularly adapted for manufacturing purposes, and their measure of damages was based upon this fact. The evidence shows that the lands had never been used for manufacturing purposes, but had always been used for agricultural purposes. Evidence was also offered by appellee that the best use to which the land could be put in its then condition, was for railroad purposes. The amount of damage for these different purposes must necessarily vary considerably. In a prior condemnation case the jury found that the total damage was \$528. In this case the jury found that the damages were \$3,400. It was a question for the determination of the jury, and we cannot see from the evidence that the jury so far made a mistake as to reverse the case, but, on the contrary, we are of the opinion that the damages given are substantially in accordance with the weight of the evidence.

There are several other grounds of objection urged by appellants, but, upon a consideration of the whole case, we find no reversible error, and the judgment of the circuit court will be affirmed.

Judgment affirmed.

(189 Mass. 194)

ADAMIAN v. HASSANOFF.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 22, 1905.)

CREDITORS' SUIT—PROPERTY NOT SUBJECT TO ATTACHMENT AT LAW—WHEN MAINTAINABLE.

Rev. Laws, c. 159, § 3, cl. 7, authorizing suits by creditors to reach any property of a debtor which cannot be reached at law, authorizes a creditor to maintain a bill to reach his debtor's property after the court in which the suit is brought has appointed a receiver with authority

to obtain a warehouse receipt for the property as receiver and to transfer the same to another warehouse, subject to the import duties due the government, and impound the warehouse receipt in the office of the clerk of the court, where the appointment was made after attempted attachments at law by other creditors while the property was in a warehouse subject to a lien for import duties after the discharge of the trustees in the attachment suits.

Appeal from Superior Court, Suffolk County.

Suit by Parnag Adam Adamian against Hadji Nour Mohamed Hassanoff. From a decree dismissing the bill, plaintiff appeals. Reversed.

W. B. Grant, for plaintiff. David A. Ellis and Maurice D. Abrams, for respondent.

KNOWLTON, C. J. This is a bill in equity, brought under Rev. Laws, c. 159, § 3, cl. 7, to reach and apply property of the defendant which cannot be reached to be attached or taken on execution in an action at law. The property was a quantity of oriental rugs in a storage warehouse, upon which there was a lien for import duties due the United States government and another lien for warehouse charges. Three actions at law had successively been brought against the defendant by other creditors, on each of which there had been an attempted attachment of the rugs by trustee process. The warehouse receipt for the goods was held in pledge by one of these plaintiffs. Probably because of obvious difficulties in sustaining the attachment, the plaintiff Bakshian on January 20, 1902, changed his action from an action at law to a suit in equity to establish an equitable lien in his behalf against the rugs of the defendant in the bonded warehouse, in which he prayed for a receiver to make payment of the duties and for the surrender to the receiver of the warehouse receipt then held by the plaintiff Bogigian as a pledgee. On January 31, 1902, by agreement of the parties a decree was entered restraining the defendant from disposing of the goods and transferring the suits brought by Bogigian and Manuel, respectively, to the equity side of the court, to be considered in connection with the suit in equity of Bakshian, with leave to amend their pleadings, and referring all of the cases to a master. In the suit of Manuel v. Hassanoff, the finding of the master was for the defendant, and that case was not further pressed. Afterwards, upon the failure of the defendant to file bonds to settle the claims of the other two plaintiffs, the court appointed a receiver to take possession of the goods and hold them, subject to the further order of the court, and the defendant was ordered to sign such papers as would enable the receiver to take possession of them and discharge them from the existing liens upon them. The court ordered the discharge of the trustees in the suits,

and authorized the receiver to obtain a warehouse receipt for the goods in his name as receiver, and to transfer them to another warehouse, subject to the United States custom duties thereon, and to impound the warehouse receipts in the office of the clerk of the court. This having been done, the receiver was relieved from the obligation of giving a bond. Afterwards, upon applications of the defendant at different times, the defendant was permitted to withdraw the goods upon his depositing in the office of the clerk sums amounting in the aggregate to \$2,300, to be held to satisfy any judgment obtained against him in the cases of Bakshian and Bogigian against him, and also to satisfy any judgment obtained by this plaintiff, Adamian, if it should be determined that he is entitled to share in the goods or the money substituted for them, and to satisfy the charges of the receiver and of the defendant's counsel. The suit of this plaintiff was brought after the appointment of the receiver and the impounding of the receipt, but before the deposit of the money. On February 8, 1904, an order was made that this case be heard in connection with the other cases. The question before us arises upon an appeal from a decree, afterwards entered, sustaining the defendant's demurrer and dismissing the bill.

The provision of Rev. Laws, c. 159, § 3, cl. 7, is very broad and inclusive as to the property which may be reached by this equitable process. There is no doubt that at the time of the filing of this bill the property of the defendant could not be come at to be attached in an action at law. It was within the language of the statute and within the purpose of the Legislature in enacting the statute. It should therefore be held for the plaintiff by a court of equity, unless there is some good reason for declining to hold it. It is said that it is in the custody of the law, and therefore cannot be taken for the satisfaction of the defendant's debts. But the rule that property in custodia legis cannot be reached by a creditor is not a rule strictissimi juris, but is founded on convenience, and is subject to exceptions. Personal property held by an officer under attachment is in custodia legis. Yet the same officer can make any number of successive attachments upon it for different plaintiffs. No other officer can attach it, because, being in the hands of the law, it is beyond his reach.

The cases in which it has been held that property cannot be reached by a creditor on a bill in equity are all founded on reasons that do not exist in this case. A court cannot interfere with property which is in the control of another court. That was the ground of the decisions in *Columbian Book Co. v. De Golyer*, 115 Mass. 67, in *Gregory v. Merchants' National Bank*, 171 Mass. 67, 50 N. E. 520, and in *Gregory v. Boston Safe Deposit & Trust Co.*, 178 Mass. 419, 53 N. E.

889. That would be a sufficient reason for refusing this plaintiff relief, if he had brought his suit in the Supreme Judicial Court. It has also been held that, where a court is administering a fund for distribution among creditors who are entitled to it, it would be too great an embarrassment of the regular proceedings to permit a creditor of one of these creditors to come into court and litigate his claim against the creditor who is primarily entitled to share in the fund. That was the ground of the decision in *Commonwealth v. Hyde & Leather Insurance Co.*, 119 Mass. 155, and *Williston Seminary v. Easthampton Spinning Co.* (Mass.) 72 N. E. 67. *Tuck v. Manning*, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666, although differing somewhat in its facts, was brought within the same general principle. But the present case is of a different kind. It presents analogies to the rule which allows successive attachments to be made in favor of different creditors upon the same property by the same officer. The property in this case is held by the court, under what is often called an "equitable attachment," for two creditors in different suits. Another creditor comes into the same court and asks to have a similar attachment put upon it for his benefit. This additional attachment would not delay the proceedings in the other suits or introduce any new question into them. The proceedings in those would go on to a determination, without reference to the last claim. If the question should arise whether the plaintiffs in them should be held to have acquired liens that take precedence of this plaintiff's claim, in case the property should be insufficient to pay all of them in full, it would be decided according to the law applicable in such cases. But the possibility that such a question may arise is not a reason why the property should not be held subject to appropriation to the payment of the defendant's debts, so long as any of it remains. The fact that the property is held by the court for the payment of claims in litigation there is no good reason why the court should refuse to permit others having like claims to come in and obtain their pay from the same property, if there is enough for all. We are of opinion that the case is within the statute.

Decree reversed, and demurrer overruled.

(188 Mass. 565)

WILSON v. MASSACHUSETTS INSTITUTE OF TECHNOLOGY.

WELLS v. SAME.

(Supreme Judicial Court of Massachusetts, Suffolk. Sept. 6, 1905.)

GRANT BY STATUTE—EQUITABLE RESTRICTION ON USE.

St. 1861, p. 492, c. 183, §§ 1, 2, incorporated an institute. Section 3 provided that a certain square of land should be reserved from sale forever, and kept as an open space or for the use of that and another society. Section 4 (page 493) provided that the institute should

hold, occupy, and control the westerly two-thirds of the square, subject to the stipulations specified. Section 5 provided that the other society should be entitled to hold, occupy, and control the easterly one-third on specified provisions. Section 6 provided that the rights and privileges given by the last two sections were granted subject to further conditions there specified. Section 7 (page 494) provided that said societies should not cover with their buildings more than one-third of the area granted to them. Sections 8 and 9 provided that there should be reserved from sale the lots fronting on the square till the societies should put the square in an attractive condition; that an appraisal should be made of the surrounding lots and the square, and, if the lots did not sell for the appraised value thereof and of the square, the societies should make good to the state the deficit. *Held*, that though, prior to sale of the surrounding lots, sections 8 and 9 were repealed by St. 1863, p. 531, c. 226, sections 3 and 7 imposed an equitable restriction on the square in favor of the surrounding lots, so that it could not be sold or built over to exceed a third of its area, though St. 1903, p. 456, c. 438, in terms authorizes it.

Morton and Hammond, JJ., dissenting.

Cases Reserved from Supreme Judicial Court, Suffolk County; Jas. M. Barker, Judge.

Two suits, one by Cecil P. Wilson, and the other by one Wells, against the Massachusetts Institute of Technology. Cases reserved for the full court. Decrees for plaintiffs.

John C. Gray, Edwd. L. Rand, and Roland Gray, for plaintiffs. Geo. Putnam and Wm. L. Putnam, for defendant.

LORING, J. These are two bills in equity reserved for the consideration of the full court upon the pleadings and agreed facts. They are brought by owners of two lots of land on Newbury street, in the city of Boston, facing the square on which the buildings of the defendant institute and those of the Society of Natural History now stand, for the purpose of having the defendant institute enjoined from covering with its buildings more than one-third of the land "granted" to it by St. 1861, p. 492, c. 183, as it is authorized to do by St. 1903, p. 456, c. 438, "subject to the rights, if any, of other parties." The bills proceed on the ground that by the sale of these and other lots surrounding the square under this act (St. 1861, p. 492, c. 183), an equitable restriction was imposed upon this square for their benefit, which includes the right they now seek to enforce.

By St. 1861, p. 492, c. 183, §§ 1, 2, the defendant institute is incorporated. By section 3 it is provided that the square in question "shall be reserved from sale forever and kept as an open space or for the use of such educational institutions of science and art as are hereinafter provided for." By section 4 (page 493) it is provided that the defendant institute shall hold, occupy, and control the westerly two-thirds of said square, subject to the "stipulations" specified, and by section 5 it is provided that the

Boston Society of Natural History "shall be entitled to hold, occupy and control" the easterly one-third on certain provisions there specified. By section 6 it is provided that the rights and privileges given in the last two sections are granted subject to certain "further conditions" there specified. Then comes the section which is here relied on by the plaintiffs, to wit: "The above named societies shall not cover with their buildings more than one-third of the area granted to them respectively." By sections 8 and 9 (page 494) the commissioners on the Back Bay are "instructed to reserve from sale the lots fronting on said square on Boylston, Clarendon and Newbury streets, until said societies shall, by inclosure and improvements, put said square in a slightly and attractive condition," and that an appraisal should be made of all the surrounding lots (except those on Berkeley street which had been already sold) and of the square in question; and if the surrounding lands when sold do not equal the appraised value of the two (the surrounding lots and the square) the two societies shall pay the amount of the deficit to the commonwealth for the school fund, to which the proceeds of the sale of these lands had been appropriated by the Legislature.

St. 1861, p. 492, c. 183, was enacted on a petition asking for the incorporation of an institution to be entitled the "Massachusetts Institute of Technology," and that "a section of land on the Back Bay may be reserved and granted to the use of said institute on such terms and conditions as may be deemed most conducive to the objects of the institute and the industrial and educational interests of the commonwealth," and on a petition by the Boston Society of Natural History asking for a similar grant. These petitions were referred to the joint standing committee on education, who made a report set forth in the agreed facts hereinafter set forth in part in this opinion. This committee reported a bill, which is not made a part of this case, but "shortly afterwards St. 1861, p. 492, c. 183, was passed," on April 10, 1861. On September 5, 1861, the appraisal called for by section 9 was completed, and the land in the square and the land in the surrounding lots on Boylston, Newbury, and Clarendon streets was appraised at \$1.05 a foot.

A word as to what the Back Bay lands were will explain the occasion of the "grant" to these petitioners. What is now known as the "Back Bay District" of Boston was originally flats covered by the ebb and flow of the tide, and used for mill purposes. It became desirable to change the use of these flats from mill purposes to land purposes. The title to these flats was in the commonwealth and the companies which owned the right of flowage for mill purposes. Prior to 1857 the commonwealth had by an adjustment got title to all the land shown on the

following plan, which was adopted by the Back Bay commissioners appointed under Resolve 1852, p. 299, c. 79, and annexed to their fifth annual report rendered in January, 1857. It had determined to fill and sell these lands, and had laid out the land for that purpose by the adoption of this plan. See *Commonwealth v. Roxbury*, 9 Gray, 451; Fifth Annual Report of the Commissioners on the Back Bay; Report of the Commissioners appointed under Resolve 1856, p. 284, c. 76, with accompanying documents, printed in Senate Doc. No. 17, for the year 1857; Resolve 1852, p. 299, c. 79; Resolve 1855, p. 964, c. 60; Resolve 1856, p. 284, c. 76; Resolve 1857, p. 688, c. 70; St. 1857, p. 514, c. 169; St. 1859, p. 314, c. 154; St. 1860, p. 156, c. 200, § 5. The commonwealth had thus come into an extensive territory, from the sale of which a large profit was expected to result, after the cost of filling had been met. In 1861, when the act in question was passed (St. 1861, p. 492, c. 183), these flats or lands were "being filled, but at that time, with other large tracts to the west and south, were almost entirely vacant, the residence portion of the city being east of Arlington street and the business portion still more to the east." The lots surrounding the square in question (46 in number) were sold at four different auction sales, severally held on September 29, 1863, May 19, 1864, October 26, 1865, and April 10, 1869. The lot now owned by the plaintiff Wilson was bought at the second, and the lot now owned by the plaintiff Wells at the third, of these sales. A plan annexed to the agreed facts sets forth the actual price received by the commonwealth from the sale of the 46 surrounding lots. It is stated by the plaintiffs, and not contradicted by the defendant, that this plan shows that these 46 surrounding lots were sold for \$2.46 $\frac{1}{2}$ a foot, and that the commonwealth received from these sales \$90,884.06, over and above the appraised value of the square here in question, plus the appraised value of the surrounding lots made under St. 1861, p. 494, c. 183, § 8. As both the plaintiffs on the one hand and the defendant on the other hand have sought support from the way these sales were conducted, a short statement of it is necessary:

The surrounding lots consisted of 22 on Boylston street, 22 on Newbury street, and 2 on Clarendon street. The lots fronting the square on Berkeley street had been sold before St. 1861, p. 492, c. 183, was enacted, as we have already said; and, as we have said, all that were sold after that act were sold at public auction. Those on Boylston street were sold on September 29, 1863. The 22 lots on Newbury street were offered for sale on May 19, 1864, and 15 of them were sold then. The remaining 7 were sold on October 26, 1865, and the 2 lots on Clarendon street were sold on April 10, 1869. In case of all 46 lots the purchaser took a bond

for a deed, followed by a conveyance later—in one instance 28 years later. The explanation for this course of conducting the transaction is obvious. So long as the title to it stood in the commonwealth, a lot of land was not subject to taxation by the local authorities. The four auction sales were advertised. The advertisements of the sales at which the two lots now owned by the plaintiffs were bought ended with this statement: "Catalogues with plans showing the situation and area of the several lots to be sold, and the minimum price of each, together with form of deed to be given by the commissioners and full particulars in regard to the restrictions and stipulations to be incorporated therein, may be obtained" at the office of the commissioners.

The catalogue in case of the first of these two auction sales (the second of the four) covered lots on Commonwealth avenue, as well as the 22 lots in question on Newbury street, and, in case of the second of these two sales (the third of the four), besides the seven lots here in question, other lots on Newbury street and lots on Commonwealth avenue and Beacon street. The plan referred to in the concluding paragraph of the advertisement was pasted inside the catalogue. It was the only statement contained in the catalogue of what was to be sold and of the upset prices fixed by the commissioners with the approval of the Governor. It was not otherwise referred to in the catalogue. A copy of the plan so referred to in the advertisement and pasted in the catalogue at the first of these two sales (the second of the four) shows this square laid out as provided in St. 1861, p. 492, c. 183. The plan referred to in the advertisements and pasted in the catalogue at the second of these sales (the third of the four) was the same as the one above set forth, with this difference: In the one used at the later sale the names of the purchasers of the several lots sold at the former sale were added. The plans used at the first and fourth sales were also the same, with similar differences as to the absence or presence of the names of purchasers of lots.

The form of deed referred to in the catalogues for the first three of the above four sales was a printed form adopted prior to St. 1861, p. 492, c. 183, and apparently used for the sale of all lots on the Back Bay indifferently. It referred to the plan of 1857 alone. It will be observed that on this plan the land is not divided into lots. After November, 1866, the form of deed set forth in the catalogues referred "also to the plan recorded with Suffolk Deeds at end of Book 885," which is in fact a plan showing the square here in question laid out as provided in St. 1861, p. 492, c. 183. Of the 46 lots here in question only 2, namely, those on Clarendon street, were sold under such a catalogue. Two plans were referred to in the bonds for a deed given for all the lots, except those given for three, namely, the plan of 1857

above set forth and a sale plan of lots on Commonwealth avenue and Marlborough street, recorded November 5, 1860, in Book 788, p. 159, which apparently differs from the plan of 1857 in showing the division of the land into lots. The reference to these plans was a part of the printed form of bond used for Back Bay lots generally. In case of the other three lots (not including, however, either of the two here in question) the second of the above plans was not referred to, and the plan showing the square here in question, laid out as provided in St. 1861, p. 492, c. 183, was referred to as well as the plan of 1857. In the deeds of 16 of the lots on Boylston street the only plan referred to is the plan of 1857. In the other 6 the other plan set forth in this opinion is also referred to, showing the square in question laid out as provided by St. 1861, p. 492, c. 183. In case of Newbury street the deeds of 12 lots refer to the 1857 plan only, while both plans set forth in this opinion are referred to in the deeds of the other 10 lots, including the lots now owned by the plaintiffs.

All the 46 surrounding lots are now built upon. The buildings on Boylston street are occupied "by the Young Men's Christian Association and for sundry mercantile uses, by the Hotel Brunswick, and by four dwelling houses used for residences"; the lots on Clarendon street by apartment houses, the one on Boylston street having "stores beneath"; those on Berkeley street by a private apartment house and by an apartment and mercantile building; and those on Newbury street as follows: Corner of Newbury and Berkeley streets, by a church; the next seven, by dwelling houses used as residences; the next, by a club house; the next, No. 85, by a doctor's office and lodging house (which the owner "intends within a few months to occupy * * * again for a residence as well as for his office, as formerly"); the next, by a lodging house; the next four, by residences (in the last of which the owner also "carries on her business as a dressmaker and lets rooms for doctors' offices"); the next, by a lodging house; and on the other corner is the rectory of Trinity Church.

The contest here is on the application of well-settled principles of law to new surroundings. Counsel for both parties agree that it is not necessary to decide whether the effect of St. 1861, p. 492, c. 183, was to convey to the two societies the fee in the square in question or only certain rights of occupation; the fee being retained in the Commonwealth. If we speak of the grant as one or the other, it will be for convenience only, and not as expressing any opinion on this point. We agree with the counsel for the defendant in their contention that if St. 1861, p. 492, c. 183, was not intended to give to persons buying the surrounding lots under it the right here claimed by the plaintiffs, they cannot make out a case because of the form given to the transaction by the officers of the com-

monwealth. If St. 1861, p. 492, c. 183, was not intended to give such a right, such acts of these officers would not bind the commonwealth, on the principle lately enforced in *Wormstead v. Lynn*, 184 Mass. 425, 68 N. E. 841.

In construing this act the first fact and the most important consideration is that the grant to these two societies was not to cost the commonwealth a penny, and that this was to be effected by dealing with the square granted to the societies in such a way as so to enhance the value of the surrounding lots that they would yield as much as or more than the aggregate value the two had under the conditions prevailing before St. 1861, p. 492, c. 183, was enacted. And it is perhaps of some interest that this scheme was suggested to the commonwealth by the petitioners for these grants, including among them the petitioners for the incorporation of the defendant institute. It is stated in the report of the committee of the Legislature to whom these petitions for a grant of land were referred: "According to the plan of the memorialists, sufficient space is to be reserved to leave wide openings around the buildings of the societies." And again: "Common experience shows that such open ornamental grounds surrounding the buildings, together with the attractive exterior of the latter, could not fail to increase the value of the adjacent lands, and to this extent would reimburse the treasury for the space withdrawn from sale. As regards the amount of this enhancing influence, your committee have been furnished by the memorialists with a large array of facts derived from the sales of lands on the Back Bay and other open parts of the city, going to show that improvements of the kind contemplated have been found in every case not only to hasten the sale and occupation of the adjacent lands, but to add very largely to their market value, making the net proceeds of the adjacent lands in most cases as great or even greater than the value of the total area supposing no such reservation to have been made."

St. 1861, p. 492, c. 183, adopted to carry into effect this scheme of the "memorialists" (including the defendant institute), provided, first, that the square in question "shall be reserved from sale forever"; second, "and kept as an open space or for the use of" the two societies; and, third, "the 'above-named societies shall not cover with their buildings more than one-third of the area granted to them respectively." The plaintiffs contend that these declarations were addressed to the purchasers of the surrounding lots as the basis on which those lots were to be sold, and were made for the benefit of such purchasers, and that, having bought on the faith of them, these purchasers are entitled to have them specifically enforced. The defendant, on the contrary, insists that on a fair construction of the provisions of the act the Legislature in-

tended to keep and did keep the control of all restrictions in its own hands, and that the value of the surrounding lots was to be enhanced by the square in question being physically laid out before they were sold, and that the square was to continue in that condition so long as the commonwealth, having regard to the interests of all concerned, should think it ought so to continue, and no longer; that St. 1903, p. 456, c. 438, was an exercise of the control so reserved, and brought to an end as of right the advantages for which the purchasers of the surrounding lots paid an enhanced price.

When the defendant contends that in St. 1861, p. 492, c. 183, the Legislature kept the control of the whole situation in its own hands, it relies on the fact that, having regard to the words "further conditions" in section 6, what are called "stipulations" in section 4 are really conditions, and, being conditions, the subject-matters covered by them are matters between the commonwealth and the grantees, and between them alone. Were that the whole story, the result would not necessarily follow. The fact that a provision of a deed is put in the form of a condition, and in no other form, even when coupled with an express statement that the "nonfulfilment or breach * * * shall work a forfeiture of the estate hereby conveyed and reinvest the same in the grantor," is not decisive against its operating as an equitable restriction in addition to its operating as a common-law condition. That was decided in *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122, and is laid down in the recent case of *Welch v. Austin*, 187 Mass. 256, 258, 72 N. E. 972, 68 L. R. A. 189. The same principle would govern in case of a grant made by act of the Legislature. The doctrine of *Hopkins v. Smith* is that, in spite of the parties to a deed having put the thing agreed upon in the form of a common-law condition, and a common-law condition only, the question whether it does not operate also as an equitable restriction is one of intention. The fact that the thing agreed upon has been put in the form of a common-law condition, and in that form alone, is of itself a matter to be taken into consideration in arriving at the intention of the parties. But that fact has no greater or further effect. The opposite results severally reached in the cases of *Peck v. Conway*, 119 Mass. 546, and *Clapp v. Wilder*, 176 Mass. 332, 57 N. E. 692, 50 L. R. A. 120, are examples of the application of this rule.

The cases of *Episcopal City Mission v. Appleton*, 117 Mass. 326, and *Skinner v. Shepard*, 130 Mass. 180 (as to which see *Welch v. Austin*, 187 Mass. 256, 259, 72 N. E. 972, 68 L. R. A. 189), would raise an additional difficulty in construing the matters covered by St. 1861, p. 493, c. 183, § 4, to be equitable restrictions as well as conditions, if the provisions of section 4 were what is here relied on by the plaintiffs as the creation of

the equitable restrictions insisted upon by them. That additional difficulty consists in the fact that section 4 deals alike with matters with which the purchasers of surrounding lots have nothing to do, and with inclosing, adorning, and cultivating the open ground around its building, and thereafter keeping said ground and building in a slightly condition. We refer to the "stipulation" that "persons from all parts of the commonwealth shall be alike eligible as members of said institute, or as pupils for its instruction; and its museum or conservatory of arts, at all reasonable times, and under reasonable regulations, shall be open to the public."

But, as we shall see, section 4 and its provisions are not what the plaintiffs rely upon. We come, then, to the question of the true construction of St. 1861, p. 492, c. 183.

In the first place, it is provided (and this provision is in section 3, and is not one of the "stipulations" of section 4, nor one of the "further conditions" of section 6) that the square in question "shall be reserved from sale forever." It is true that the only thing here complained of is a threat by the defendant institute to build over more than one-third of the area granted to it. But the right to build over more than that area and the right to sell the whole area to others to be built over by them is treated in St. 1861, p. 492, c. 183, as one and indivisible, and no distinction is made in St. 1903, p. 456, c. 438, between the right to build over the whole area and the right to sell the whole area to others to be built over by them. The two rights alike are granted to the defendant institute by the act of 1903. The true construction of St. 1861, p. 492, c. 183, cannot be determined without considering the validity of the provision of St. 1903, p. 456, c. 438, which permits the sale by the defendant institute of the whole area to others to be built over by them. In construing St. 1861, p. 492, c. 183, we start, first, with a declaration that this square was "to be reserved from sale forever." And, having in mind the purpose for which St. 1861, p. 492, c. 183, was enacted, we are of opinion that this was a declaration addressed to future purchasers of surrounding lots, to induce them to pay for those surrounding lots more than they otherwise would pay for them.

We next come to the declaration that the square which is "to be reserved from sale forever" is to be "kept as an open space or for the use of" the two societies, and that "the above named societies shall not cover with their buildings more than one-third of the area granted to them respectively." These provisions state the details of what is to be done with this square which is "to be reserved from sale forever," and, like that declaration, are addressed to future purchasers of surrounding lots. Being details, the duration of them is fixed by that of the main provision of which they are details, unless

there is something to control that result. It is of importance that these provisions are not found among the "stipulations" of section 4, nor among the "further conditions" of section 6, but are in separate sections (sections 3, 7), which are not put directly or indirectly in the form of conditions. The case now before us, therefore, is not such an extreme case as *Hopkins v. Smith*, where there was no provision outside of or in addition to the condition which was coupled with an express defeasance and right of re-entry.

In the case at bar the broad principles on which the surrounding lots are to be sold are stated in sections (sections 3, 7) addressed to the purchasers of them; and these are not put in the form of conditions. In addition, we have sections 4 and 6, which are put in the form of conditions. These sections deal (inter alia) with the machinery adopted for carrying into effect the details of the broad principles stated in sections 3 and 7. Apparently the Legislature thought that the best results could not be secured to the purchasers of surrounding lots unless some one person or body could act for all of them in matters of detail, and for that reason it intrusted the matter of dealing with the details to the Governor and Council. Apparently the Legislature further thought that the best way of enforcing compliance with directions as to details so made was to give to the Governor and Council a right of re-entry on noncompliance with the directions adopted by them; and it gave such a right of re-entry. But that did not interfere with the declarations (on which these surrounding lots were to be sold) constituting a right in the purchasers of them, namely, that this square was "to be reserved from sale forever," and, if not used as an open space, it was not to be covered by buildings to an extent greater than one-third of its area. The result is that the design of the buildings to be erected, the laying out of the grounds, and the proper maintenance of both are matters left to the discretion of the Governor and Council.

But the broad principles were not left to them. Under St. 1861, p. 492, c. 183, the Governor and Council were authorized to approve such a building as they saw fit, and they might give their approval to what might be thought by others to be the laying out of the grounds in a way injurious to the surrounding residences, and they might allow the grounds to fall into what might be thought by others to be a deleterious state of maintenance. On these matters of detail their decision, honestly exercised, is final. But they have not now and never had jurisdiction to abridge the rights of the purchasers of surrounding lots, first, to have the square "kept from sale forever," and, second, in case it is not used as an open space, to have the buildings of the two societies not cover "more than one-third of the area granted to them respectively." Such, in our opinion, was the intention of the Legislature in enacting St.

1861, p. 492, c. 183, and that is what the Legislature provided by that act. It is true that St. 1863, p. 531, c. 226, repealed sections 8 and 9 of St. 1861, p. 494, c. 183, requiring the two societies to make good the deficit in case the amount realized from the sale of the surrounding lots under St. 1861, p. 492, c. 183, did not equal the value of those lots plus the value of the square here in question before St. 1861, p. 492, c. 183, was enacted, and that all the lots (with the exception of those on Berkeley street, sold before the enactment of St. 1861, p. 492, c. 183) were sold after the repealing act of 1863. But the repeal of these sections was not intended to change the scope of the act (St. 1861, p. 492, c. 183). It was intended to release the societies from a burden which was assumed, and rightly assumed, to have ceased to exist. As was said by the commissioners in their report of 1863, when speaking of the sales made in the previous year, the "policy of this repeal was justified by the sale" on account of the great rise above the appraised values—a rise which was created by the scheme of St. 1861, p. 492, c. 183, in favor of the surrounding lots.

We are of opinion that on the facts stated the plaintiffs have sustained the burden of proving that the surrounding lots generally, and the lots now owned by them in particular, were sold and bought under St. 1861, p. 492, c. 183, and that they became entitled by such purchase to the benefits granted to them by that act, including the right to have the buildings of the defendant corporation confined to an area not exceeding one-third of the land assigned to it by St. 1861, p. 492, c. 183. Although the commonwealth is a sovereign state, it can no more change the grant thus made than can an individual. That has been the law, at least since *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 469. We see nothing in the agreement of the parties that should disentitle the plaintiffs from having this agreement specifically enforced. What that agreement amounts to is that the square in question would have a greater market value than it has if the surrounding lots had not been sold on the terms on which they were sold. The plaintiffs have a right to use their property as they please, even if that property would have a greater value if devoted to another use. The facts agreed to do not bring the case within the doctrine of *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 82 Am. St. Rep. 476, nor within the concluding paragraph of the opinion in *Parker v. Nightingale*, 6 Allen, 341, 349, 83 Am. Dec. 632.

The plaintiffs are severally entitled to a decree, with costs, enjoining the defendant from proceeding with the erection of any building or buildings covering more than one-third of the area assigned to it by St. 1861, p. 492, c. 183.

So ordered.

KNOWLTON, C. J., being an ex officio member of the corporation, did not sit in

this case and did not take any part in the decision. MORTON and HAMMOND, JJ., dissent. They think that the square occupied in part by the defendant is not subject to any equitable or other restrictions in favor of the plaintiffs or surrounding lot owners, and that the bills should be dismissed.

(189 Mass. 110)

PECK v. HARTSHORN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11, 1905.)

DEEDS—RESTRICTIONS—CONSTRUCTION.

A restriction in a deed that "no building shall be erected upon the granted premises to cost less than \$2,500, and but one building, a private stable excepted, shall be erected" thereon, does not limit the kind of building that may be erected on the land, so long as it costs \$2,500; and a private stable costing \$2,500 may be erected thereon, without being made adjunct to a building already on the lot or in process of construction.

Appeal from Superior Court, Suffolk County.

Suit by Lilla E. Peck against Harriet E. Hartshorn. From a decree granting insufficient relief, plaintiff appeals. Affirmed.

Edgar O. Achorn, for plaintiff. Frank O. White, for defendant.

MORTON, J. The plaintiff owns a house and lot in Winthrop, and the defendant owns an adjoining lot. This is a bill in equity by the plaintiff to prevent the defendant from erecting a private stable upon her lot. The plaintiff and defendant both bought from the Winthrop Shore Land Company, a voluntary association operating under a deed of trust to develop and sell an extensive tract of land in Winthrop. The plaintiff relies upon certain restrictions inserted in her deed and in the defendant's deed, which the master finds were inserted by the common grantor for the benefit of these two and other lots, pursuant to a general scheme of development of the land, and that "the owner of each lot has, as appurtenant to his lot, a right in the nature of an easement upon the other lots, which he may enforce in equity in case the owners of the other lots violate the restrictions." The restriction relied on is that "no building shall be erected upon the granted premises to cost less than \$2,500, and but one building, one private stable excepted, shall be erected or placed thereon." The defendant has begun the erection of a stable on the rest of her lot as an adjunct to her dwelling house situated upon another lot on the opposite side of the street; and the master finds that, though as originally planned the stable was to cost about \$1,600, if finished as begun, with all the additions and improvements enumerated in the defendant's latest testimony and statement of her intentions, it will cost at least \$2,500. There is no finding that she does not intend to proceed in good faith according to the latest announcement

of her intentions. Unless, therefore, a stable by itself is not a building within the meaning of the restriction, or a stable cannot be built except in connection with or as an adjunct to a dwelling house or other building on the same lot, which are the plaintiff's contentions, it would seem to follow that the decree of the superior court overruling the plaintiff's exceptions to the master's report, and enjoining the defendant from erecting any stable on the lot at a cost less than \$2,500, should be affirmed.

We think that the decree was right. The word "building" is used several times in the restrictions, and there is nothing to show that it is used in an exclusive sense. The restriction that no building shall be placed within 15 feet of the street would apply as well to a stable as to a dwelling house; and the exception of a private stable from the restriction, that "no building shall be erected," etc., classifies a stable as a building within the meaning of the restriction. In no event can there be more than two buildings, one of which may be a private stable, erected on the lot. The restriction as to cost applies as well to stables as to other buildings. As the restriction is drawn, there is no limit to the kind or character of building that may be erected, so long as it costs \$2,500; nor is there anything forbidding the erection of a private stable, except as an adjunct to a building already on the lot or in the process of erection. It is possible that the scheme contemplated the sale of lots for the erection of dwelling houses, with the right to erect a private stable in connection with or as an adjunct to a dwelling house on the lot; but not otherwise. If so, the restrictions embodied in the deeds have failed to accomplish the purpose, intended; but we must take them as they stand, and there is nothing in the circumstances under which the deeds were given to warrant a different construction.

Decree affirmed.

(189 Mass. 116)

OLD COLONY R. CO. v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11, 1905.)

1. EVIDENCE — CONTRACTS — CONSTRUCTION — PAROL EVIDENCE.

Circumstances leading to the passage of a statute authorizing the making of a contract between a city and a railroad company with reference to the abolition of certain crossings were competent in an action to enforce the same to aid in the construction of the agreement.

2. RAILROADS—ABOLITION OF GRADE CROSSINGS—CONTRACTS—ADVANTAGES TO PARTIES.

In a suit to enforce a contract between a city and a railroad company authorized by special statute, evidence to show that the agreement was advantageous to the railroad company and disadvantageous to the city was incompetent and immaterial.

3. SAME—VALIDITY.

Plaintiff railroad company refused to consent to a plan of street improvement involving

the railroad's property, unless some arrangement was made so that the net expense to plaintiff should not exceed the expense to which it would be put by the abolishing of a certain crossing, estimated at \$375,000. At that time the proposed improvements could not be made without the railroad's consent, whereupon the city agreed to pay plaintiff the difference between its share of the estimated cost of abolishing such crossing and the cost of making the changes as desired by the city, whereupon St. 1897, p. 550, c. 519, was passed, authorizing such contract. Held that, there being nothing in the statute requiring that the amount to be paid by the city should be fixed and ascertained, the contract was not invalid, because such amount was unliquidated and left for future ascertainment.

4. SAME—MUNICIPAL DEBT LIMIT.

The contract was not objectionable, because, unless the amount was fixed in the agreement, the city might exceed its debt limit; that matter being within the city's control, for which the railroad company could not be held liable.

5. SAME—INTEREST.

Where, by a contract between a city and a railroad company with reference to a municipal improvement, the city agreed to pay the railroad company its share of the cost in excess of \$375,000, and the agreement provided that the city should pay the railroad company interest at 4 per cent. "on the payments from time to time made by said railroad company as its 65 per cent. in excess of the sum of \$375,000, until the amount to be paid under this agreement" was paid, the fact that the railroad was not entitled to payment until it had abandoned land comprised in the old location to the city did not prevent the running of interest as provided.

6. SAME—METHOD OF COMPUTATION.

A computation of interest, by adding interest at 4 per cent. on each item of expenditure by the railroad company, including payments to the city, after the expenditures reached the sum of \$375,000, to the day of the last payment made by the railroad company under decree of court, and subtracting from the total interest on all sums received by the railroad company from the city, and then computing interest from the date of such last payment on the principal sum, was correct.

Report from Superior Court, Suffolk County; Henry N. Sheldon, Judge.

Action by the Old Colony Railroad Company against the city of Boston. A judgment was rendered in favor of plaintiff, and the case was reported to the Supreme Judicial Court. Affirmed.

J. H. Benton, for plaintiff. Thos. M. Babson, for defendant.

MORTON, J. The main question in this case is whether the agreement entered into with the plaintiff by the defendant, through its street commissioners, with the approval of the mayor, and on which this action is brought, is valid. There were also questions of interest and of the admission and exclusion of evidence. The questions of evidence may be disposed of shortly with the remark that the circumstances which led to the passage of the statute and the making of the agreement in suit under it were competent, and were rightly admitted to aid in the construction of the agreement, and evidence to show that the agreement was advantageous to the plaintiff and disadvantageous to the defendant was incompetent and imma-

terial, and was rightly excluded. We see no error on the part of the auditor or of the court in dealing with matters of evidence.

We come, then, to the main question, and it seems to us plain that the agreement is valid. The mayor and aldermen of the defendant city filed a petition in 1892, under the grade crossing act, for the abolition of the grade crossing of the Old Colony Railroad Company and Dorchester avenue. Commissioners were appointed and hearings were had, with the result that the public authorities came to the conclusion that the public benefit would be promoted by and required improvements of greater scope than that contemplated by the abolition of the single crossing to which the petition related. A plan was agreed upon, which was satisfactory to the commonwealth and the city, and to which the plaintiff made no objection from an engineering point of view. This plan contemplated extending a number of streets across the location of the railroad, and changing the existing location for another, and laying out a street or boulevard along so much of the old location as the railroad would thus cease to occupy. The railroad company objected to this plan on account of the expense to which it would thereby be subjected, and refused to consent unless some arrangement was made so that the net expense to it should not exceed the expense to which it would be put by abolishing the Dorchester avenue crossing, which was estimated at \$375,000. As the law then stood, the proposed improvements could not be carried out without the consent of the railroad company. The mayor of the defendant city thereupon proposed to the railroad company, in substance, that if it would agree to the plan, and would also agree that the commissioners might go on under the proceedings then pending and make the changes required by the proposed plan, the city would pay to the railroad company the difference between its share of the estimated cost of abolishing the Dorchester avenue crossing, \$375,000, and the cost of making the changes and abolishing the crossing in the manner desired by the city. The railroad company agreed to this proposition, and thereupon the city was allowed, with the assent of the railroad company, to amend its petition, so as to ask for the abolition of the crossing in accordance with the plan thus agreed upon. St. 1897, p. 550, c. 518, was then passed by the Legislature, and the agreement in suit was entered into under the authority which was supposed to be conferred by it on the city, and which we think it is plain was conferred. It is expressly provided in section 3 (page 551), of that act that "the board of street commissioners of said city, with the approval of the mayor, may agree with the directors of said Old Colony Railroad

Company upon an amount to be paid by said city to said railroad companies [i. e., the Old Colony and the New York, New Haven & Hartford Railroad Companies] for land taken from and for damages sustained by said railroad companies under this act, taking into consideration in determining the same the benefit to the public by the carrying out of the provisions of this act, and the amount so determined shall not be included in the cost aforesaid to be paid by said railroad company, state and city." It is objected that the amount is not fixed by the agreement. But there is nothing in the statute which requires that it should be. That is certain which can be made certain, and it is plain that the amount could be ascertained by deducting, from the total amount which the plaintiff was obliged to pay as its share of the improvement, the sum of \$375,000, which was agreed upon as its share of the estimated cost of abolishing the Dorchester avenue crossing. It is also objected that, unless the amount was fixed in the agreement, the city might exceed its debt limit. But that was a matter within the control of the defendant, and for which the plaintiff cannot be held liable.

The remaining question relates to interest. The agreement provides that the city shall pay the plaintiff the sum agreed upon, "with interest at 4 per cent. upon the payments from time to time made by said railroad company as its 65 per cent. in excess of said sum of three hundred seventy-five thousand dollars, until the amount to be paid under this agreement is paid." This clearly fixes the rate of interest, and provides expressly for the payment of interest until the amount to be paid by the city under the agreement shall have been paid. The fact that the plaintiff could not call upon the city for payment until its president gave notice to the mayor that the land comprised in the old location had been abandoned, and that the city might enter and take possession thereof, would not prevent the running of interest as agreed. The auditor computed the interest by adding together the interest at 4 per cent. on each item of expenditure by the railroad company, including payments to the city, after the expenditures reached the sum of \$375,000 down to February 4, 1903, which was the date of the last payment made by the railroad company under decree of court, and subtracting from the total interest on all sums received by the company from the commonwealth, and then computing interest from February 4th on the principal sum. This method was adopted and confirmed by the justice of the superior court who heard the case, and was, we think, correct.

The result is that the finding of the superior court is affirmed, and judgment ordered accordingly.

(189 Mass. 53)

VICKERY v. RICHARDSON.(Supreme Judicial Court of Massachusetts.
Norfolk, Sept. 11, 1905.)**1. MECHANICS' LIENS—NOTICE OF LIEN—SUFFICIENCY.**

Under Rev. Laws, c. 197, §§ 1, 7, authorizing a lien for labor and materials in the construction of a building, and declaring that the validity of a lien shall not be affected by an inaccuracy in the statement relative to the amount due, unless the petitioner willfully claims more than is due, the inaccuracies in a statement for a lien, arising from inadvertently omitting a credit and understating the amount due, do not affect the validity of the lien; it not affirmatively appearing that the owner was misled.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 273.]

2. SAME—AGREEMENT OR CONSENT OF OWNER—NECESSITY.

Under the express provisions of Rev. Laws, c. 197, § 1, a lien for labor and materials in the construction of a building does not attach, unless the labor was performed and the materials furnished by virtue of an agreement with or by consent of the owner.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 77.]

3. SAME—RIGHTS OF SUBCONTRACTOR.

An owner, who contracted with a member of a firm of architects for the construction of a house which the firm had planned, authorized the member to employ others to perform either a part or all of the work, and such employes were entitled to a lien for their labor.

4. CONTRACTS—CHARGES FOR CHANGES OF PLANS—PROVISIONS IN CONTRACT.

Though a contract for the construction of a building provides that changes in the plans shall be made without any increase in the total cost, an owner who repudiates the entire contract cannot claim the benefit of the provision to avoid payment for the alterations.

5. MECHANICS' LIENS—EMPLOYMENT—SUBCONTRACTOR—LIEN.

An owner contracted with a member of a firm of architects for the construction of a house planned by the firm. Subsequently the member contracted with a third person for the construction of the house at an advance in the price. After the third person had submitted his proposal, but before its acceptance, the owner was informed that he would probably build the house. During the construction of the house, the owner gave the third person directions for alterations, which were complied with. A short time before the completion of the house the third person furnished the owner a written statement of the amount due to him, which included the contract price. This was the first information that the owner had of the increased price, but there was no disclaimer of liability or disclosure of the first contract, and the third person was permitted to complete the house. *Held*, that the third person was, under Rev. Laws, c. 197, § 1, providing for a lien for labor in the construction of a building performed with the consent of the owner, entitled to a lien.

Report from Supreme Judicial Court, Norfolk County; Chas. W. Bell, Judge.

Petition by one Vickery against one Richardson to enforce a mechanic's lien. The cause was reported to the Supreme Judicial Court. Judgment for plaintiff directed.

Robert W. Light, for petitioner. Philip S. Parker, for respondent.

BRALEY, J. If the statement of lien, though duly filed, was inaccurate, by reason of the omission of an item of credit and in understating the amount due the petitioner, yet, as these errors are found to have been made inadvertently, its validity was not impaired; for it does not affirmatively appear that the respondent was misled. Rev. Laws, c. 197, §§ 1, 7; *Burrell v. Way*, 176 Mass. 164, 57 N. E. 335; *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628. Notwithstanding there was a sufficient compliance, with all preliminary requirements, the lien would not attach unless the labor was performed and furnished with the consent of the respondent. Rev. Laws, c. 197, § 1; *Donahy v. Clapp*, 12 Cush. 440, 441; *Parker v. Bell*, 7 Gray, 429, 431.

Under the findings of fact, shown by an auditor's report, which was adopted by the superior court, the question presented for our decision is whether as a matter of law these findings are sufficient to support a further finding that the petitioner performed and furnished the labor under such conditions that her consent must be presumed. See *Walls v. Ducharme*, 162 Mass. 432, 38 N. E. 1114. By the written contract made with a member of the firm of architects who planned the house, he agreed to build and complete it for a round sum. Afterwards, and without her knowledge at the time, he made a verbal contract with the petitioner for its full construction, but at an enhanced price. It was fairly within the contemplation of the parties, under the first agreement, that from the very nature of the undertaking the contractor would not do the work himself, but necessarily would employ others to perform either a part or all of it. *Donahy v. Clapp*, *ubi supra*; *Parker v. Bell*, *ubi supra*. Generally, when mechanics are thus employed, they would be entitled to a lien on the land for their labor. *Bowen v. Phinney*, 162 Mass. 593, 39 N. E. 283; *Daley v. Legate*, 169 Mass. 257, 259, 47 N. E. 1013; *Perry v. Potashinski*, 169 Mass. 351; *Wahlstrom v. Trulson*, 163 Mass. 429, 434, 43 N. E. 183.

But it is claimed that this implied authority, although it empowered him to make such contracts, did not confer any authority to bind the respondent to pay an increased price, as he was limited to the amount specified in the contract with himself. This would be true, if the petitioner sought to recover in an action of contract where there was no evidence of ratification. *Mussey v. Beecher*, 3 Cush. 511. Until informed to the contrary, she supposed and believed that the petitioner was building the house for the original price. The consent given, however, is to the performance of the work, not to the lien, or the amount for which, under it, the interest of the owner in the land can be charged. Rev. Laws, c. 197, § 1. By the operation of the statute, the right of the lienor attaches from day to day as he per-

forms the work. *Rochford v. Rochford*, 188 Mass. 108, 74 N. E. 299. If the petitioner had been employed as a subordinate contractor to perform or supply labor for a part only of the house, the auditor's findings would have been sufficient to sustain a lien in his favor, though the amount due might have been in excess of the first contract price. *Beatty v. Parker*, 141 Mass. 523, 6 N. E. 754; *Bowen v. Phinney*, *ubi supra*; *Perry v. Potashinski*, *ubi supra*. In the exercise of a reasonable discretion, the architect, under these decisions, could have made subordinate contracts for the masonry, the carpentry, or the plumbing, by which the respondent would have been bound, though the price of this labor, singly or combined, might have exceeded the amount of the first contract. There is, therefore, no satisfactory reason why this principle should not apply, when labor is furnished by a single subordinate contractor for all parts of the building under construction. *Donahy v. Clapp*, *ubi supra*; *Bowen v. Phinney*, *ubi supra*; *Borden v. Mercer*, 163 Mass. 7, 39 N. E. 413; *Wahlstrom v. Trulson*, *ubi supra*; *Daley v. Legate*, *ubi supra*.

Apart, however, from any limitation of this character upon the implied agency of the architect under a contract of which the petitioner was ignorant until the house was substantially completed, his lien for labor would not be defeated. For, if consent follows as of course where there is a valid agreement with the owner through an authorized agent, it may also follow from the owner's conduct when accompanied with knowledge of the circumstances under which the work is being done. *Gannon v. Shepard*, 156 Mass. 353, 31 N. E. 296. After the petitioner had submitted his proposal, but before its acceptance, and when the parties, with the architects, were upon the premises for the purpose of laying out the foundations, the respondent was informed that the petitioner would probably build the house. Neither then, nor at any time until it was finished, did she indicate that his employment was unauthorized, or that he was not lawfully upon her premises, or that the architect with whom he dealt was not her representative. During its construction she was frequently present, either alone or in company with the architect, engaging in conversation with the petitioner or his foreman, to whom she gave directions for alterations not shown by the plans or called for by the specifications. These changes were made as requested, and with their cost are referred to in the report as extra work, forming part of the labor for which the lien is claimed. A short time before the house was finished, in a conversation with the petitioner and in reply to her inquiry, he furnished a written statement of the amount due to him, which included the contract price. It is, indeed, found that this was the first information she had of this fact; but even then there was no dis-

claimer of liability or disclosure of the existence of the first contract, while she permitted him to go on and complete the house. These several findings, when given their natural probative effect, show that she assented to the employment of the petitioner, and after his employment recognized him as the master mechanic; and upon being informed of the second contract, without protest allowed him, at his expense, to increase the value of her property by the addition of materials and labor. While no discrimination is made in the auditor's report, it should be observed that this contention could not justly be held to include the items for labor required for the alterations ordered. The provisions of this contract are not reported; but, if they provided for changes which were to be made without any increase of the total cost, the respondent, who wholly repudiates the agreement, cannot claim the benefit of it in order to avoid payment. These items, therefore, stand precisely like any work which the landowner may order or request a contractor to perform, though not covered by his contract. There is an implied promise to pay for them, for which a lien can be maintained. *Mulrey v. Barrow*, 11 Allen, 152. No distinction, however, is possible under the form in which the case is before us; and, if the petitioner fails to maintain any part of his claim, he must lose the whole.

It is now urgently contended that, even if her knowledge and conduct were sufficient to show that the petitioner was rightfully upon the land, her acquiescence to his proceeding with the building of the house must be limited to the price shown by the first contract. But if, during a part of the time, the respondent was not informed of the petitioner's contract, yet upon being made acquainted with his full claim she chose to remain silent. At that time, if she intended to qualify what apparently to him was an unrestricted consent, and limit it to the amount originally fixed, it became her duty so to inform the petitioner. *Bassett v. Brown*, 105 Mass. 551, 557. It no longer could be claimed honestly that she was acting under a misconception, or ignorant of the fact that his demand was largely in excess of what she had previously supposed. Being in possession of this information, she deliberately continued her former conduct, when, if she had spoken, he could have saved nearly two months' work, and thus might have materially diminished the amount of his loss. She was content, however, to let him still believe, as he did, that he was rightfully there with her approval. Upon receiving the full benefit of his contract, it was too late, under such conditions, to interpose the defense that her ignorance alone, during a part of the time, of the difference in price, as against an innocent party, was sufficient to destroy what otherwise must have been deemed a full and intelligent assent, sufficient to enable him to maintain

his lien. *Bassett v. Brown*, ubi supra. See *Courtemanche v. Blackstone Valley Street Railway Co.*, 170 Mass. 50, 53, 48 N. E. 937, 64 Am. St. Rep. 275. If the right of recovery is put on the ground of the implied authority of the architect, or of her general conduct and final acquiescence, when taken in connection with knowledge of his actual claim, it follows that there was ample evidence to support a conclusion which charged the interest of the respondent in the land on which the house stood with a valid lien in favor of the petitioner.

By the terms of the report, judgment is to be entered in his favor for the sum of \$3,438.67, with interest thereon at the legal rate, from January 18, 1904, to the date of entry, and an order of sale is to issue for its enforcement. So ordered.

(189 Mass. 112)

GAY v. RAY et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 12, 1905.)

1. APPEAL—FINDINGS—REVIEW.

A finding of a single justice on questions of fact will not be disturbed, unless plainly erroneous, or shown to be due to a misapplication of the rules of law.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3955-3969.]

2. PARTNERSHIP—EVIDENCE.

In a creditors' suit to subject the interest of R. in an alleged firm to the payment of a debt, evidence held sufficient to support a finding of the existence of a partnership, of which defendant R. was a member.

Appeal from Supreme Judicial Court, Suffolk County.

Bill by one Gay against one Ray and others. A decree was rendered in favor of plaintiff, and defendants appeal. Affirmed.

Rogers, North & Johnson and Melvin M. Johnson, for plaintiff. Frank D. Allen and Walter L. Van Kleeck, for defendants.

MORTON, J. This is a creditors' bill, brought under Rev. Laws, c. 159, § 3, cl. 7. The plaintiff alleges that the defendant Ray made a promissory note for \$5,000, with interest at six per cent, payable in one year after date to the complainant or order, and that the plaintiff demanded payment of said note when due, but the defendant has failed and neglected to pay the same, and owes the plaintiff the amount of said note and interest. The bill seeks to reach and apply in payment of the plaintiff's claim the defendant Ray's interest in a partnership alleged to exist between him and one Creelman, under the name and style of the George W. McPherson Store Company. The case was heard by a single justice, who entered a decree for the plaintiff, from which the defendants appealed. The evidence was taken by a commissioner, and what is agreed by the parties to be the substance of it, so far as material to the issue

raised, is before us, with copies of the exhibits.

There are two questions, both questions of fact: Was there a partnership between the defendants Ray and Creelman? and does the defendant Ray owe the plaintiff the amount of the note and interest thereon? The finding of the single justice must be taken to have been against the defendants on both questions, and it will not be disturbed, unless plainly erroneous, or shown to be due to a misapplication of the rules of law. There is nothing to show any error of law, and the findings were well warranted by the evidence.

There was evidence tending to show that the defendants bought from the estate of one George W. McPherson a store on the corner of Hanover and Elm streets, in Boston, which he had carried on, each paying therefor \$2,500 on account, and that they changed the name by putting the word "The" before "George W. McPherson" and the word "Store" after, so as to read "The George W. McPherson Store," and hired a manager, and carried on the business, and paid the expenses, and took the profits, and that one of them represented to the people of whom they bought goods and to the commercial agencies that they were partners. This, with the other evidence, amply warranted a finding that they were partners. There was a conflict of evidence as to the transaction in consequence of which the note in suit was given. It is enough to say that the plaintiff's testimony and the written agreement between the plaintiff and the Coe-Ray-Creelman Company fully justified a finding that the defendant Ray owed the plaintiff the amount of the note, with interest.

No objection is taken by the defendants to the form of the decree, as to which see *Drapier v. Hollings et al.*, 163 Mass. 127, 39 N. E. 793.

Decree affirmed.

(189 Mass. 142)

BLODGETT et al. v. STOWELL et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

ADOPTION—RIGHTS AS HEIRS OR ISSUE.

Under St. 1876, p. 210, c. 213, providing that a person adopted shall take the same share of the property which the adopted parent could have devised by will that he would have taken if born to such parent in lawful wedlock, and that he shall stand in regard to the legal descendants, but to no other of the kindred of such parent, in such position as if so born to him, a child adopted after the enactment of such statute, whose adopted father died in 1903, was not entitled to take as the "issue" or "heir" of her adopted father under the will of her adopted grandfather.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Action by one Blodgett and others, as trustees, against Maude E. Stowell and others. A decree was rendered in favor of complainants,

and the case was reserved for the full court. **Affirmed.**

Chas. F. Kittredge, for respondent Stowell. Harrison M. Davis, for respondents Minot and Roundy. John V. Beal and Francis Burke, for respondents Shaw and others. Bowdoin S. Parker, for respondent Cleaveland.

MORTON, J. The only question presented for decision in this case is whether Maude E. Stowell, the adopted daughter of Lemuel C. Stowell, a son of Caleb Stowell, takes, as heir or issue of Lemuel, certain real estate and the income thereof, devised in trust by the will of said Caleb. It is not contended that the property, with the accumulated income, would not go to the children and grandchildren of the sisters of said Lemuel, as decreed by the probate court, if the said Maude does not take as the adopted daughter of said Lemuel. Caleb Stowell died testate in January, 1867, and his will was duly probated in the following May. He left a widow and three children, Lemuel, Henry, and a daughter, and three grandchildren, the children of a daughter who had died before him. Lemuel died in June, 1903, a widower, never having had a child born in lawful wedlock, but leaving the respondent, Maude E. Stowell, who had been duly adopted by him in 1891, after his wife's death. He died testate, but no question arises under his will.

Under the will of Caleb Stowell, after the death of his widow, the income of the property in question was to go to Lemuel during his life, and after his death one-third of it was to go to his widow, if he left one, so long as she lived, the remainder to go to his issue "if any then living, in equal shares by right of representation," but, if he left no issue, "then to those of his * * * heirs who shall then be living in equal shares, by right of representation," and at the decease of the widow, or, if he left no widow, then at his (Lemuel's) decease the trustees were "to transfer and divide and convey in fee simple the whole of the principal or property from which said income issues or is derived to and among the same persons as said remainder of said income is above provided to be divided, and in the same shares as so provided." The question is, as already observed, whether, according to the proper construction of the will of Caleb Stowell, the respondent Maude E. Stowell takes as "issue" or "heir" of Lemuel. The decree of the probate court was in effect that she did not, and we think that it was right. It is to be noted that she was not adopted till 1891, 25 years after Caleb Stowell's will was executed, and not till long after St. 1876, p. 210, c. 218, had been enacted, which, as the court said in *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729, made a material change in the law in regard to the rights of adopted children, and was probably passed in consequence of the decision in *Sewall v. Roberts*, 115 Mass. 262. It is to be noted, also, that the will which we

are asked to construe is not the will of the parent by adoption, but the will of his father. It is plain that the heirs or issue of Lemuel are to be ascertained as of the date of his death. *International Trust Co. v. Williams*, 183 Mass. 173, 66 N. E. 798; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215. The will expressly so provides.

It is plain, also, we think, that the effect of the adoption is to be determined by the law in force at the time of the adoption, and not at some earlier period—that of the execution of Caleb Stowell's will, for instance. It is true that the testator may be supposed to have had his will drawn with reference to the law as then existing; and, if the respondent Maude had then been adopted by Lemuel, the change in the statute subsequent to the death of Caleb Stowell and the proof of his will could not have affected her rights. But it is equally true that, in using the words "heirs" and "issue" with respect to Lemuel, he must be supposed to have used those terms as describing persons who would be heirs or issue according to the law as it would then be, and with such rights as the law as it then existed would or might give them in his estate under the provisions of his will. It is clear that, as the law stood at the time of the adoption and at the time of the death of Lemuel, the respondent Maude would not take under the will of Caleb Stowell as the heir or issue of Lemuel, unless it plainly appeared to have been his intention to include an adopted child of Lemuel. *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729. There is nothing to show that it does so appear. The words "by right of representation" are inconsistent with such a construction, since they apply to lineal descendants only, and *Wyeth v. Stone*, supra, is a decision directly to the contrary. *Buckley v. Frasier*, 153 Mass. 525, 27 N. E. 768, only decides that an adopted child is "issue" of the adopting parents so far as their property is concerned.

In *Johnson's Appeal*, 88 Pa. 346, relied on by the respondent Maude, the remainder was expressly given to "the person or persons" who would "by the intestate laws of Pennsylvania be entitled to the same if the son had died intestate, seised thereof in fee"; and in *Tirrell v. Bacon*, (C. C.) 8 Fed. 62, also relied on by her, the adoption and the death of the testator had both occurred before the passage of St. 1876, p. 210, c. 218.

Decree affirmed.

(189 Mass. 106)

WELCH et. al. v. TRUSTEES OF EPISCOPAL THEOLOGICAL SCHOOL et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

1. TRUSTS—TERMINATION—SUPREME COURT—JURISDICTION.

The Supreme Court has ample jurisdiction in a proper case to terminate a testamentary trust.

2. SAME—PARTIAL TERMINATION.

A testamentary trust may be terminated as to certain property and continued as to the balance.

3. SAME.

Testator created a trust to divide the balance of the income of the residue of his estate into three equal shares, one to be paid to his wife for life, one to his son or his son's wife, and the other to a theological school; that on the death of testator's wife, two-thirds of the income should be paid to the school, and the other third to the son or his wife or the survivor of them for life; and on the decease of the son and his wife without children, after the death of testator's wife, the trustees should convey the residue to the school. *Held*, that after the death of testator's wife and son, leaving only the son's wife surviving, without issue, the trustees, with the consent of the son's wife, were entitled to have the trust terminated as to two-thirds of the property for the benefit of the school.

Case Reserved from Supreme Judicial Court, Suffolk County; James M. Morton, Judge.

Petition by one Welch and others, as trustees under the will and codicil of Benjamin T. Reed, for the termination of the trust as to two-thirds of the trust res. Case reserved. Decree for petitioners.

John C. Gray, for Episcopal Theological School and others. Edwd. C. Bradley, guardian ad litem.

MORTON, J. This is a petition by the plaintiffs, as trustees under the will and codicil of Benjamin T. Reed, praying that the trust may be terminated as to two-thirds of the property held by them in trust, and that they may be authorized and directed to convey the same to the Trustees of the Episcopal Theological School, who are the ultimate beneficiaries of the whole of the trust property. At the time of his death the said Benjamin T. Reed left a widow and a son, who was his sole heir and next of kin. By a codicil to his will he gave the rest and residue of his estate to trustees, in trust, first, to make up out of the income any deficiency of income from property given in trust for his wife, if the same did not amount to \$15,000 in any one year, and then to divide the rest of the income into three equal shares, one to be paid to his wife for life, one to the son or the son's wife for life, and the other to the Theological School. On the decease of the testator's wife, two-thirds of the income were to be paid to the school and the other third to the son or his wife, or the survivor of them, during their lives. On the decease of the son and his wife, leaving children of the son, the trustees were to convey one-third of the principal to such children, and, if the testator's wife should then have deceased, the other two-thirds to the school. If the son and his wife should decease, leaving no children of the son, and the testator's wife should also have deceased, then the trustees were to convey the residue to the school. At the time of the testator's death the son was married.

His wife afterwards died, and he married the defendant Martha S. Reed, and died without children. A question arose as to whether the present Mrs. Reed was entitled under the codicil as the wife or widow of the son. An agreement of compromise was entered into between the widow and the school, in which the school recognized and conceded that she was entitled to the rights of the widow of the son for her life, and she agreed that on the death of the testator's widow the principal of the trust fund should be divided into three equal parts, two of which should be conveyed to the school, and the other should continue to be held in trust for her benefit for life and then go to the school. The testator's widow has now deceased, and the son's widow and the school and the trustees are all desirous that the trust should be terminated as to the two-thirds, and the agreement between the son's widow and the school carried out as therein provided.

There is no doubt about the power of this court to terminate a trust in a proper case. *Williams v. Thacher*, 186 Mass. 293, 71 N. E. 567; *Matthews v. Thompson*, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320. There is also no doubt that a trust may be terminated as to certain property and continued as to other property. *Williams v. Thacher*, 186 Mass. 293, 300, 71 N. E. 567; *Inches v. Hill*, 106 Mass. 575. All that the trustees are required to do in the present case is to hold the property and pay over the income. They are not required to exercise an active discretion, as in *Danahy v. Noonan*, 176 Mass. 467, 57 N. E. 679. The scheme of the trust is very different from that in *Young v. Snow*, 167 Mass. 287, 45 N. E. 686, and does not contemplate, as that did, the accumulation of income by the trustees and the expenditure by them of so much of it as might be necessary to keep the estate in repair. The case also differs from *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; and *Hoffman v. New Eng. Trust Co. Tr.*, 187 Mass. 205, 72 N. E. 952. The school is the equitable owner of the whole trust estate. It is entitled to the present income of two-thirds of it. The postponement by the testator of the conveyance to it was for the benefit of his wife and his son's wife. The testator's wife is dead and the son's wife agrees to the conveyance. All parties in interest agree to and desire the termination of the trust as to the two-thirds of which the school is entitled to the present income, and we see no valid objection to it. The questions raised and the doubts suggested by the guardian ad litem as to the possibility of reverter in the heirs of the testator, in case the corporation of the trustees of the Theological School should be dissolved, do not seem to us sufficient to warrant us in denying the prayer of the petitioners.

Decree for petitioners.

(129 Mass. 163)

STONE et al. v. FORBES et al.(Supreme Judicial Court of Massachusetts.
Norfolk. Sept. 11, 1905.)**1. POWER OF APPOINTMENT—EXECUTION—RESIDUARY CLAUSE.**

A general power of appointment is well executed, in the absence of anything to show a contrary intention by a general residuary clause in the will of the donee of the power.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Powers, §§ 116, 117.]

2. SAME—CODICIL—REPUBLICATION OF WILL.

Where testator executed a codicil to his will, referring to a power of appointment he was authorized to exercise, the effect of the codicil was to republish the will as of the date of the codicil, and, so far as the power of appointment was concerned, it constituted an attempted execution of the power as of that date.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Powers, §§ 115-118.]

3. SAME—INTENTION.

Testator, having been given a special power of appointment by his father's will, without knowledge of such power executed his own will, which he began by declaring that he intended to dispose of all the property of every kind of which at his death he might be seised or possessed, or over which he might have any power of disposition whatsoever. After his father's death, and when testator was familiar with the power of appointment given to him in his father's will, he executed a codicil to his own will, by which he expressly confirmed the same, except as modified by the codicil. *Held*, that the will and codicil disclosed testator's intent to exercise the power.

4. WILL—CONSTRUCTION—POWER OF APPOINTMENT.

Testator, being entitled to exercise a power of appointment contained in his father's will to dispose of a principal fund among his father's direct descendants, after making several pecuniary bequests to his sons and daughters who should arrive at certain ages and in trust for infant children, bequeathed the residue to trustees to divide the trust estate into three parts, the income of one of which was to be paid to his widow so long as she lived, the principal to fall at her death into the other two-thirds, which were to be held in trust for the benefit in equal shares of testator's children living at his death. *Held*, that the will should be construed as limiting the part from which the wife was to derive her income to testator's own estate, leaving the clause in regard to the children to operate both on testator's estate and that of his father, over which he had the power of appointment.

5. SAME.

Where testator's father established by his will a certain permanent fund, with reference to which he gave testator a power of appointment to the father's "direct descendants," a will bequeathing a certain fund to "testator's children" was a valid exercise of the power; they being the direct descendants of testator's father.

6. PERPETUITIES—EXERCISE OF POWER OF APPOINTMENT.

Where a power must be executed, if at all, by the children of the donee, and therefore could not be exercised beyond the limit of the rule against perpetuities, it was not an infringement of such rule, though an appointment might be made under the power that would be too remote.

7. POWER OF APPOINTMENT—EXECUTION—VALIDITY.

Where testator, authorized to execute a power of appointment by the will of his father, created a trust for the benefit of his children, and provided that, as his sons arrived at the age

of 30 years and the daughters at the age of 25, the principal should be paid to them, the fact that he also gave to children dying under such prescribed age a power of appointment with reference to the principal of his or her share did not render the execution by testator of the power given him by his father invalid.

8. WILLS—TESTAMENTARY TRUST—INTEREST OF DECEASED CHILD.

Where a will creating a trust provided that the trust estate should be held by testator's trustees for the benefit in equal shares of such testator's children as should be living at his death and the then living issue by representation of any child who might die before testator, the share of the issue of a child dying before testator was payable to such issue only on the arrival at the age prescribed for testator's children.

Case Reserved from Supreme Judicial Court, Norfolk County; Henry K. Braley, Judge.

Petition by one Stone and others, as trustees under the will of John M. Forbes, against one Forbes and others, for instructions as to the disposition of the fund. Case reserved for full court.

Joseph B. Warner, for trustees. H. E. Warner, for respondents.

MORTON, J. This is a petition for instructions by trustees under the will of John M. Forbes. The question is whether J. Malcom Forbes, a son of John M. Forbes, who has deceased since his father, leaving a will which has been duly allowed, has executed in and by his will a power of appointment which it is conceded was given to him by the will of his father, and whether the execution is a valid exercise of the power.

John M. Forbes, after establishing a fund called the "Permanent Fund," for the benefit of his children, provided by a codicil, dated May 9, 1885, that "my children shall have the power to dispose by will of their respective shares of the principal of said permanent fund to and among, but only to and among, such one or more of my direct descendants, in such proportions and on such terms, whether in trust for their benefit or otherwise, as they see fit, and I authorize and direct the trustees of said permanent fund, upon the decease of any child or children of mine, leaving such will or wills, to pay over, transfer, and convey the respective share or shares of such deceased child or children of mine to such descendants of mine, or for their benefit, as such deceased child or children of mine shall by their last wills direct." By a codicil dated May 26, 1894, he further provided that "in all cases where I have given the right to my children to dispose by will of their shares of the trust property to their descendants, I now give them the full right to put any and all bequests in trust, and also to make their bequests different in amount, if they deem it advisable so to do, giving more to one than to another, leaving it to the judgment of my children as to what is on the whole best for my descendants." John M. Forbes died Octo-

ber 12, 1898. J. Malcom Forbes, the son, died February 19, 1904, leaving a will dated February 16, 1898, and a codicil, dated February 11, 1904, made a few days before his death. He begins his will by declaring that he disposes "hereby of all the property of every kind of which I may be at my death seised or possessed, or over which I may then have any power of disposition whatsoever, whether the same be in this commonwealth or in any other state or country," and by the codicil he expressly confirms the will "in all particulars except so far as modified by this codicil." The codicil contains nothing further material to the question before us. By his will, after bequests of \$20,000 to each of his sons living at his death who shall then be 25 years of age and to his daughters who shall then be 23 years of age, and like provisions by means of trustees for the benefit of infant children, he gives the rest and residue to the same trustees, in trust to make certain specific conveyances and gifts not now material, and directs that the residue of the trust estate shall be divided into three parts, the income of one of which shall be paid to his widow so long as she lives, the principal to fall at her death into the other two-thirds, and the other two-thirds to be held in trust for the benefit in equal shares of children living at the testator's death and the issue by representation of any deceased child, the income on the shares to be paid to the respective beneficiaries, and as the sons arrive at the age of 30 years and the daughters at the age of 25 years the principal of their respective shares to be paid to them. There is also a provision that, if any child shall die before reaching the appointed age, the principal of his or her share shall be paid as he or she shall by will appoint, and, in default of such appointment, shall be disposed of as a part of such child's estate.

There is a stipulation between the parties that the facts admitted and alleged in the answers are agreed to so far as competent and material. Amongst the facts so alleged, and therefore to be taken as agreed to if material and competent, are the following, namely: That at the time when he made his will, in February, 1898, J. Malcom Forbes was wholly ignorant of the provisions of the will of his father, and had no knowledge of those provisions or of the power of appointment given to him by the will of his father till after the death of the latter; that when he made his will in February, 1898, he was possessed of a large property independent of any expectations from his father; and that after the death of his father his property largely increased, and at the time of making his will and at all times thereafter was sufficient for liberal provision for his wife and children under the terms of his will, without including therein the property over which he was given a power of appointment by his father's will. It is also alleged in one of the answers, and likewise to be taken as agreed, that the amount of the permanent share in the hands of

the petitioner to be paid as the court shall direct is sufficient to satisfy the legacies of \$20,000 given by J. Malcom Forbes to his children and to leave a large excess, and that if the entire amount of that share were to be included in the residuary estate passing under his will, for the purpose of ascertaining the third to be set apart for the benefit of the widow, such third could be set apart from property absolutely owned by him without encroaching on any sum that might be received from the petitioner in satisfaction of the provisions of the will of John M. Forbes.

It is settled in this commonwealth that a general power of appointment is well executed, in the absence of any thing to show a contrary intention, by a general residuary clause in the will of the donee of the power. *Amory v. Meredith*, 7 Allen, 397; *Willard v. Ware*, 10 Allen, 263; *Bangs v. Smith*, 98 Mass. 270; *Sewall v. Wilmer*, 132 Mass. 131; *Cumston v. Bartlett*, 149 Mass. 243, 21 N. E. 373; *Hassam v. Hazen*, 156 Mass. 95, 30 N. E. 469. And, whatever may have been the case formerly, that is now the law in England. *Airey v. Bower* (1887) 12 A. C. 263; *Boyles v. Cook* (1880) 14 Ch. 53. And both in this country and in England the fact that the power is created after the execution of the will does not prevent the will from operating as an execution of the power. *Willard v. Ware*, 10 Allen, 263; *Osgood v. Bliss*, 141 Mass. 474, 6 N. E. 527, 55 Am. Rep. 488; *Airey v. Bower*, supra. In England these results have been arrived at by means of statutory enactments; but in this commonwealth they have been reached by the application of general principles. In this case, however, the power is a special one, and it is contended that different rules apply. It is conceded that, in regard to special as well as in regard to general powers, the question is one of intention on the part of the donee of the power. But it is contended that those claiming under a special power must show affirmatively that the donee intended to execute it, that it is doubtful whether a special power can be exercised by a will executed before the power was created, and that there is nothing in the case before us which fairly warrants the conclusion that the donee of the power intended to execute it.

On principle there would seem to be no just ground for a distinction between general and special powers, so far as relates to the execution of the power before or after it is created. It may be that, by reason of its conditions or limitations, the reasons are stronger for holding that a special power cannot be executed by anticipation than for holding that a general power cannot; but they do not seem to us enough stronger to warrant us in saying that in one case the power can be executed by anticipation and in the other that it cannot. A general power of appointment is hardly less within the range of expectation than a special power. Prior to the wills act, so called (St. 1 Vict. c. 26,

§ 27), it was the law of England that a party claiming under a power must show that the donee intended to execute it; the presumption being that he had not executed it unless the contrary plainly appeared. *Amory v. Meredith*, supra; *Mills v. Mills* (1886) 84 Ch. D. 186, 194; *Foulkes v. Williams* (1889) 42 Ch. D. 93. The wills act changed this with regard to general powers, but, in consequence of the construction given to the act by the courts, left special powers unaffected. *Hayes v. Turnbull* (1900) 2 Ch. 332; s. c. on appeal (1901) 2 Ch. 529; *Foulkes v. Williams*, supra.

In regard to general powers the rule now is that a general devise of property, real or personal, is presumed to include a general power of appointment, unless the contrary appears from the will. 1 Jarm. Wills (6th Ed.) *634, 635. In regard to special powers the rule remains the same as laid down before the passage of the wills act respecting powers generally. If it were necessary to determine the question, we should hesitate to follow the rule laid down by the English cases in regard to special powers of appointment. There is certainly less reason for doing so since *Amory v. Meredith* than before. There would seem to be no good reason why the question whether a special power of appointment had been exercised should not be determined by the same rules that are applied in other cases to the construction or interpretation of wills, or why the distinction between a power and property, which has resulted in many instances, as courts have been compelled to admit, in defeating the intention of the testator, should be adhered to in cases where, as in the present, the donee of the power has the use of the property for his life, and may not unnaturally or unreasonably have failed to distinguish between property strictly and technically belonging to him and that of which he has the use; but we do not think that it is necessary to determine whether the rule laid down by the English cases in regard to special powers should or should not be followed in this commonwealth, for we think that it clearly appears that J. Malcom Forbes intended to exercise the power and that he has done so. As already observed, he begins his will by declaring that he intends by it to dispose of all the property of every kind of which at his death he may be seised or possessed, or over which he may then have any power of disposition whatsoever. Broader language could hardly be used, or language more clearly anticipating a power of appointment; but any doubt that might otherwise exist is removed, it seems to us, by the codicil. When the codicil was executed, John M. Forbes had been dead for several years, and the son was familiar with the terms of the will, and with the power of appointment that it gave to him. By the codicil he expressly confirmed his own will in all particulars, except

as modified by the codicil. The effect of this was to republish the will as of the date of the codicil, and to give to it, at least so far as the power of appointment was concerned, the same effect as if it had then been written, and to constitute the will an execution of the power, if the appointment was a valid one. *Haven v. Foster*, 14 Pick. 534; *Hosea v. Jacobs*, 98 Mass. 65; *In re Blackburn* (1889) 43 Ch. D. 75; *In re Teape's Trusts* (1873) 16 Eq. 442; *Von Brockdorff v. Malcom* (1885) 30 Ch. D. 172; *In re Swinburne* (1884) 27 Ch. D. 696; *Thornton v. Thornton* (1875) 20 Eq. 599; *Ferrier v. Jay* (1870) 10 Eq. 550; *Bailey v. Lloyd* (1829) 5 Russ. 330; *Banks v. Banks* (1853) 17 Beav. 352; *Coux v. Foster*, 1 J. & H. 30.

Treating the will as then executed, as we are bound to, we think, in view of its express confirmation by the codicil, we have the testator with knowledge of the power of appointment expressly declaring his intention to dispose, not only of all property of which he may be seised or possessed at the time of his death, but also of all property over which he "may then have any power of disposition whatsoever" "words," in the language of Lord Selborne in *Re Teape's Trusts*, supra, "applicable to any power of appointment he might possess, but which I am [we are] asked not to apply to the only power which he actually had." Construing the will according to well-settled rules of construction, there is nothing in it inconsistent with the intention thus declared. The testator deals with the property in a mass, that which belongs to himself, that over which he has a power of appointment. And the provision directing a third of the rest and residue of the property which he puts in trust to be set apart and the income thereof paid to his wife can be interpreted without difficulty; applying the rule, "*Reddendo singula singulis*," as relating to his own estate (*Ferrier v. Jay*, supra; *In re Teape's Trusts*, supra; *Thornton v. Thornton*, supra; *In re Blackburn*, supra; *Bailey v. Lloyd*, supra), leaving the clauses in regard to the children to operate, according to the same rule, both upon his own estate and that over which he had a power of appointment, constituting an execution of the power if the appointment is otherwise valid. Any other construction would ignore, it seems to us, his declared purpose to dispose by his will of all property of which at his death he should be seised or possessed, or over which he should "then have any power of disposition whatsoever," and the express confirmation of the will by the codicil. There are, it is true, cases in which it has been held that general words of disposition did not operate to execute a special power, and that the republication and confirmation of the will by a codicil did not give effect to such a power created after the execution of the will. *Hope v. Hope* (1834) 5 Giff. 13; *Clogstown v. Walcott* (1843) 13 Sim. 523; *Foulkes v. Williams*

(1889) 42 Ch. D. 93; *Mills v. Mills* (1886) 84 Ch. D. 183; *Hayes v. Turnbull* (1900) 2 Ch. 332; s. c. on appeal (1901) 2 Ch. 529; *Ames v. Cadogan* (1879) 12 Ch. D. 868; *Wood v. Cotton* (1888) 40 Ch. D. 41; *Sykes v. Carroll* (1903) 1 I. R. 17; *Doyle v. Coyle* (1895) 1 I. R. 205.

But *Clogstown v. Walcott* and *Hope v. Hope* have not been followed in later cases, in *Ferrier v. Jay*, supra, in *Re Teape's Trusts*, supra, and in *Re Blackburn*, supra, and in the other cases cited the courts, following the rules laid down by the English decisions, and considering all the circumstances and the other provisions of the will, we have been unable to find an intention on the part of the testator to exercise the power. We discover no such difficulty in this case. The English cases, as said by Byrne, L. J., in *Turnbull v. Hayes*, supra, are "not easily reconcilable." The appointment is to the children of J. Malcom Forbes, and therefore to the direct descendants of John M. Forbes, in accordance with the power; and, in the absence of anything to show a contrary intention on the part of the donee of the power, there would be strong ground for holding that the appointment of itself would operate as an execution of the power. But it is not necessary to go as far as that, when the appointment is taken in connection with the further fact that the appointer expressly declares in his will his intention to dispose thereby of property over which he may have at his death any power of disposition, and republishes and expressly confirms the will by a codicil a few days before his death, after he has known for a long time of the power of appointment given him by his father. Any other conclusion than that his will operated as an execution of the power would seem to be unwarranted. The express confirmation of the will by the codicil would seem to deprive of any significance which it might otherwise have had from the fact that he did not know of the power when he executed his will, and that his own property was sufficient to make liberal provision for his wife and children according to the terms of his will.

The remaining question is whether the appointment is a valid one. It is, as already observed, to the children of J. Malcom Forbes and therefore to the direct descendants of John M. Forbes, and comes within the express terms of the power, so far as the persons who are to take are concerned. The only question is whether the power and the appointment under it infringe upon the rule against perpetuities. So far as the power it-

self is concerned, the rule laid down by Mr. Gray and sustained by authorities referred to is that "a power which cannot be exercised beyond the limits of the rule against perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote." Gray on the Rule against Perpetuities, 322. Assuming that an appointment could be made under the power in this case that would be too remote, nevertheless the power is a good power, because it must be executed, if at all, by the children of the donee, and therefore could not be exercised beyond the limits of the rule against perpetuities. It is not contended that the gifts to his children under the will of J. Malcom Forbes did not vest at his death, or that the provisions in regard to payment did anything more than postpone the right of possession until the children had respectively reached the ages named (*Wardwell v. Hale*, 161 Mass. 396, 37 N. E. 196, 42 Am. St. Rep. 413; *Eldredge v. Eldredge*, 9 Cush. 516); so that, even if the gifts are treated, as they must be, as made in effect by the will of John M. Forbes, they are not too remote (*Seaver v. Fitzgerald*, 141 Mass. 401, 6 N. E. 73; *Loring v. Blake*, 98 Mass. 253). The power of appointment given by the will of J. Malcom Forbes to children dying under the prescribed age does not render the execution by him of the power given him by his father invalid. *Slark v. Dakyns* (1874) 10 Ch. 35; *Plupim v. Turner* (1838) 9 Sim. 227. The shares vested none the less in his children at his death.

It is contended that in any event the share of the fund in question coming to the granddaughter should be paid to her, and not to the trustees under the will of J. Malcom Forbes. But the will provides that the trust estate "shall be held by my trustees for the benefit in equal shares of such of my children as may be living at my death and the then living issue by representation of any child who may die before me." And we think that it was the intent of the testator that the share of the issue of any child who had died before him should be payable to such issue on arrival at the age prescribed for his children. The result is that the fund in the hands of the trustees under the will of John M. Forbes is to be paid over to the trustees under the will of J. Malcom Forbes, to be held by them to satisfy the gifts to the children and grandchildren of the latter.

Decree accordingly to be entered by a single justice, and the costs of all parties to be paid out of the fund.

(189 Mass. 33)

MOORS et al. v. LADENBURG. et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11, 1905.)

1. LIENS—ACCOUNT—CREDITS—FINDINGS.

Defendants having issued a letter of credit to the purchasers of certain goatskins abroad, a draft was drawn against the bill of lading pursuant to the letter of credit, and accepted by defendants' foreign correspondents. Defendants surrendered the bill of lading to the purchasers, taking from them a receipt that they held the skins as defendants' agents, with liberty to sell and apply the proceeds to the bill of exchange. After the goods were stored the purchasers indorsed warehouse receipts for the skins to plaintiff, after which defendants replevied the skins, sold them, and credited the purchasers with the proceeds on their book of account, and charged them with the amount of the draft, which, not being honored at maturity by the purchasers, was paid by defendants. *Held*, that defendants, on the failure of the purchasers, were estopped to claim that they were not entitled to be credited for the proceeds of the sale of the skins.

2. SAME.

After failure of a firm to which defendants had extended a letter of credit to purchase glycerine abroad, and before complete delivery, defendants canceled the letter of credit, but thereafter, with knowledge of the firm's receiver, induced the seller to deliver the balance of the glycerine to defendants, on it appearing that the same could be sold at a profit. Defendants paid for and sold the glycerine, and carried the receipts therefrom and expenses connected therewith into the insolvent firm's merchandise account. *Held*, that a master's finding that, though the firm's receiver and assignee had never made any claim with reference to such transaction, defendants did not carry out the same for their personal benefit and were bound to account therefor, was not error.

Report from Superior Court, Suffolk County.

Bill by Joseph B. Moors and another, partners composing the firm of J. B. Moors & Co., against Adolph Ladenburg and others, composing the firm of Ladenburg, Thalmann & Co. A decree was entered in favor of complainants on a master's report, and the case was reported to the Supreme Judicial Court. Affirmed.

Robert M. Morse and William P. Everts, for plaintiffs. E. N. Hill, for defendants.

LATHROP, J. This is a bill in equity, filed in the superior court by certain creditors of the Keen Sutterlee Company to restrain the defendants, who were also originally creditors of the Keen Sutterlee Company, from prosecuting a suit brought by the defendants in the superior court against the same company. The bill is reported in full in the case of *Moors v. Ladenburg*, 178 Mass. 272, where it came before the court on an appeal from a decree of the superior court dismissing the bill for want of jurisdiction. It was then held by us that the court had jurisdiction. 59 N. E. 676. On the case going back to the superior court, it was referred to a master, who filed a report, to which the defendants filed many exceptions. A justice of the superior court heard the case on the exceptions, and entered a decree overruling the exceptions and confirming the master's report, and

reported the case to this court; such decree to be entered as should be determined to be equitable.

The plaintiffs attached certain goods of the Keen Sutterlee Company subsequently to an attachment made by the defendants, and the bill proceeds upon the ground that after the bringing of the suit the defendants' claim against the Keen Sutterlee Company had been satisfied. The defendants were bankers doing business in New York. Before the failure of the Keen Sutterlee Company, January 10, 1896, the defendants had issued letters of credit in favor of that company, by which the company was authorized to make drafts. The defendants were entitled to have the bills of lading and other documents of title to the goods bought by the company transmitted to them, and they were to have "a specific claim in lien on all property, goods, or merchandise, and the proceeds thereof, which may have been paid for directly or indirectly by bills drawn under said credit." The controversy between the parties to the present suit relates to whether two transactions, one relating to 40 bales of goatskins, and the other to certain lots of glycerine, should be credited on the defendants' account with the Keen Sutterlee Company. The defendants conceded that, if they should be so credited, the defendants had been paid all that was due them.

The facts found by the master in regard to the goatskins may be stated as follows: On October 23, 1895, the defendants issued to the Keen Sutterlee Company a letter of credit for 50,000 francs, under the form of contract stated in the report. On November 16, 1895, the 40 bales of goatskins, with other goods bought by the Keen Sutterlee Company, were shipped at Naples for New York, and a draft representing the invoice cost of the goods, and maturing March 2, 1896, was drawn against the bill of lading pursuant to the letter of credit. The draft was accepted by defendants' foreign correspondents. On December 30, 1895, the skins arrived in New York. The defendants surrendered to the Keen Sutterlee Company the bill of lading, taking from the latter a receipt in which the Keen Sutterlee Company declared that it held the merchandise as the property of the defendants, with liberty to sell the same as their agent, the proceeds received to be applied to the payment of bills of exchange drawn for the purchase of the goods; the intention of the Keen Sutterlee Company being to protect and preserve unimpaired the rights of the defendant in the property, and to act entirely as its agent in reference thereto. The Keen Sutterlee Company stored the goatskins in a private warehouse belonging to it, and subsequently, about January 4, 1896, in violation of the defendants' rights, indorsed to the plaintiffs for a valuable consideration a warehouse receipt covering the skins. The plaintiffs thereupon replevied the skins and undertook to bring them to Boston, but while they

were in transit the defendants replevied them, and as a result of the litigation regained possession of them, sold them, and credited the Keen Sutterlee Company with the proceeds on their books of account. On January 30, 1896, the defendants charged the Keen Sutterlee Company on their books with the amount of the draft. On March 2, 1896, the draft for the skins matured, and, as funds to meet the same had not been furnished by the Keen Sutterlee Company, it was paid by the defendants.

The contention of the defendants is that, as under the receipt given by the Keen Sutterlee Company the defendants had absolute title to the 40 bales of goatskins, they were under no obligation to credit the Keen Sutterlee Company with the proceeds of the skins. In point of fact they did so credit them, and the master has found that this account was the only account kept by the defendants of their dealings in matters in which the Keen Sutterlee Company might be interested as of a time subsequently to its failure, and that it represented the true state of the account between the defendants and the Keen Sutterlee Company, as the defendants represented it to be; that it was in substance an account kept by the defendants to show the state of account between them and the Keen Sutterlee Company, in which, as of a time subsequently to its failure, the Keen Sutterlee Company was interested. We are of opinion that on the facts found by the master the defendants can not now contend that the proceeds of the bales of skins ought not to be credited to the account of the Keen Sutterlee Company.

The facts as to the glycerine are as follows: The Keen Sutterlee Company, before its failure, had entered into a contract for the purchase of glycerine from Renault & Co., of Paris, France. At the time of the failure of the Keen Sutterlee Company this contract was in existence and binding. The defendants had previously issued letters of credit to the Keen Sutterlee Company, and had paid some of the drafts drawn thereon before the failure of the company and some after the failure. The master has found that Renault & Co., having learned of the failure of the Keen Sutterlee Company, and having been notified by the defendants, through the defendants' agents, Neufize & Co., that the letters of credit were canceled, refused to deliver the undelivered portion of the glycerine called for by the contract. A few days after the defendants had canceled these letters of credit they became convinced that there was profit to be obtained by the delivery of all glycerine embraced in the original contract, and a voluminous correspondence was thereupon entered into between these defendants and Neufize & Co., and Renault & Co.

In substance, in this correspondence, the defendants upon the one side insisted that Renault & Co., were bound to deliver the balance of the glycerine, and Renault & Co.,

were at least hesitating, if not refusing, to make such delivery. The price of glycerine had risen in the market. The result of this correspondence was that these defendants finally prevailed upon Renault & Co., to deliver the balance of the glycerine, and this balance was received by the defendants, was paid for by them, with the drafts above referred to, was sold by them, and the transaction incident to the sale, and incident to their dealings with the glycerine, was carried into the account already referred to in this report. There were also carried into this account in favor of the defendants the amount of the drafts, which they took care of, for the balance of this glycerine. The defendants paid the expenses incident to the importation of the balance of the glycerine to this country—that is, they paid the freight, insurance, cartage, duties, and custom house charges—and the master credited the defendants with such payments by carrying such payments into the debit side of the account.

The defendants' contention (and they introduced evidence tending to prove it) was that what was done by them in reference to the balance of this glycerine was done on their own account and at their own risk; that the receiver of the Keen Sutterlee Company in Pennsylvania had knowledge that they proposed to take the matter up on their own account, and that the receiver not only did not assert any rights in the matter, but consented that the defendants should take up to the matter of the delivery of the balance of the glycerine on their own account; that the receiver in a general way knew of the situation, but did not feel justified in taking any action relative to the glycerine contract, because he felt that such action might require an advance of money, the returns from which were too speculative to justify him in making such advances. And therefore the defendants say that it was their own private transaction, and that, although they carried the transaction and all its details into the account, this was merely a matter for their own convenience; that the account was a merchandise account, and not a personal account; that the Keen Sutterlee Company had and has absolutely no right to call for an accounting as to the dealings relative to the balance of this glycerine; and that, in any event, the plaintiffs have no right to have the transactions as to the balance of this glycerine carried into an account for the purpose of showing the state of the account between the defendant and the Keen Sutterlee Company. It appeared that the balance of the glycerine was in its delivery somewhat delayed beyond the time fixed in the original contract, and it appeared in evidence that in a letter written February 4, 1896, by Neufize & Co., they being the correspondents and agents abroad of the defendants, they said: "In accordance with your reply by cable we have yesterday given Messrs. E. R. D. & Company [meaning

Renault & Co.,] the guaranty against all action by the Keen-S. Co. which they demand, and confirmed the credits, most formally extending by one month their duration."

The master further found on all the evidence, that when the letters of credit issued by the defendant in favor of the Keen Sutterlee Company were canceled, and when they (Renault & Co.,) learned of the failure of the Keen Sutterlee Company, they were in doubt as to what their situation was, and as to what their legal obligations, duties, and privileges were; that the defendants at first, and when they canceled the letters of credit issued in this connection, believed that there was no profit to be obtained in the execution of the balance of the glycerine contract, but that, within about four days from their cancellation of the letters of credit, they became convinced, in consequence of the rise in the price of glycerine, that there was substantial profit in the execution of the balance of the contract, and that at about that time they notified Renault & Co., that the cancellation of the letters of credit was revoked; that they (the defendants) used all their efforts to obtain the performance of the balance of the contract by Renault & Co.; that, at the inception of the matter and immediately after the failure of the Keen Sutterlee Company, the defendants had no settled purpose to profit personally by the execution of the balance of the glycerine contract; that their first efforts in this direction were simply to protect themselves, but that later they were inclined to believe that they were legally justified in taking to themselves the profits which might arise from the execution of the balance of the glycerine contract.

But the master further found as a fact that the defendants were at all times doubtful as to whether they could take to themselves personally the benefit of the possible profits arising from the execution of the balance of the glycerine contract, and that that doubt was evidenced by the way in which they kept their account of these transactions—meaning by that the way in which they kept the account. "To my mind," the master adds, "it is inconceivable, if the defendants had felt certain and were convinced [when they obtained from Renault & Co. a promise of the execution of the balance of the contract] that they [the defendants] were dealing with Renault & Co. solely in their [the defendants'] own rights, that they should have kept the account as it was kept." And the master found and reported as a fact that they did believe that their dealings as to the balance of the glycerine contract were dealings as to which they might have to account to the representative of the Keen Sutterlee Company, or to anybody who might have a rightful claim in that respect; that they hoped, especially in view of their correspondence with the receiver of the Keen Sutterlee Company, and in view of his conduct

in the matter, that they would never be called to account to the representative of the Keen Sutterlee Company, or to anybody who might claim under the Keen Sutterlee Company in this matter.

The master further found that the defendants were justified in believing, and they did believe, that the receiver of the Keen Sutterlee Company did not object, and in fact consented, so far as he was concerned, to the defendants dealing with the balance of the glycerine on their own account. The receiver and assignee of the Keen Sutterlee Company has never made any claim to anything in connection with the glycerine transactions occurring subsequent to the failure of said company. And the master further found and reported as a fact, so far as the matter is a question of fact, that the defendant should account in this case for the proceeds received from the execution of the balance of the glycerine contract, being credited in such account with all proper charges and disbursements suffered by them and made by them in this connection.

It seems to us that it was purely a question of fact whether the defendants obtained the glycerine under the Keen Sutterlee Company's contract, or under their independent contract, with Renault & Co. The master having found that they obtained it under the former contract, it follows that the defendants have been paid, and that the plaintiffs are entitled to a decree in their favor.

So ordered.

(189 Mass. 139)

HILLIS v. O'KEEFE.

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 11, 1905.)

1. TAXATION—SALE OF LAND—REDEMPTION—OWNERSHIP.

Notwithstanding the paramount nature of a tax title, the statute providing that "the owner of land taken or sold for the payment of taxes may redeem the same" recognizes that another person than the purchaser at the tax sale may be the "owner," so as to be entitled to redeem.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1394-1400.]

2. SAME—DEEDS—RECITALS—EVIDENCE.

The recital in a deed that B. was supposed to be one of the heirs or devisees of R. was not evidence, on the issue of ownership, that he was such heir or devisee.

3. SAME—TITLE—POSSESSION—EVIDENCE.

Where complainant claimed certain land under a deed from B. as one of the heirs of R. and testified that he had been on the land and had paid a tax assessed thereon in the name of the heirs of R., he had possession of the land under a claim of right, and hence the evidence was prima facie sufficient to show that he was the owner, within a statute authorizing the owner of land taken or sold for taxes to redeem.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1451.]

4. SAME—TENDER—WAIVER.

Where, in a suit to redeem land from a sale for taxes, the court found that plaintiff's agent offered to pay defendant whatever was due him

on the last day allowed for redemption, and that defendant refused to accept the money, a tender was waived.

Exceptions from Supreme Judicial Court, Middlesex County.

Bill by one Hillis against one O'Keefe to redeem certain land from tax sale. A judgment was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

Jos. G. Holt, for plaintiff. W. O. Childs, for defendant.

MORTON, J. This is a bill in equity to redeem land from a tax title. There was a decree for the plaintiff, and the case is here on exceptions by the defendant to the refusal to rule as requested and to rulings that were made.

The statute provides that "the owner of land taken or sold for the payment of taxes * * * may within two years after the taking or sale redeem the same by paying or tendering," etc. The principal question in the case is whether the plaintiff is an "owner," within the meaning of the statute. The land consisted of woodland, and formerly belonged to one James Rielley, deceased. It was sold January 17, 1890, to the defendant for non-payment of taxes by the collector. Notwithstanding the paramount nature of a tax title, the statute recognizes that another person may be the owner, so as to be entitled to redeem. See *Lancaster v. County Auditor*, 2 Dill. 478, Fed. Cas. No. 8,038. The plaintiff claims title under a deed from Sarah M. Webster, administratrix of the estate of Prentiss Webster. The deed recites that "the title of said Prentiss Webster is derived from a deed to said Webster from Martin Byrne. The said Martin Byrne is believed to be one of the devisees under the will of said James Rielley, and one of his heirs at law, and the interest of said Webster in said Rielley farm, and not estate, is computed and estimated to be one undivided sixth part thereof." The plaintiff testified "that he had been upon the land after he bought it of Mrs. Webster, walking over it, and had paid taxes assessed to the heirs of James Rielley, but that he had not lived on the land, or done anything on it, or attempted to lease it for others to use, and had not used it himself." There was testimony tending to show that the defendant had also been in possession, and that taxes had been assessed to him and he had paid them. The court ruled, as requested by the defendant, that the recital in the deed that Martin Byrne was supposed to be one of the heirs or devisees of James Rielley was not competent evidence that he was such heir or devisee, but found, as a fact on the testimony of the plaintiff, "that he had been on the land, and had paid a tax assessed in the name of the heirs of James Rielley, and that this gave him a possession sufficient to maintain the bill to redeem," meaning, as we understand the ruling, that he was so in possession as to constitute him an owner within the statute.

We think that the ruling was right. The question is not whether the plaintiff had a perfect title or is the true owner, but whether he is owner within the meaning of the statute. He is in, not as a mere trespasser, but under a claim of right by virtue of his deed, though he failed to show that Martin Byrne was an heir of Rielley, and consequently that any title passed by his deed. Possession being the foundation of all title to land, and prima facie evidence of ownership, he could maintain a writ of entry against one who had no right to possession, or who could not show an older or better title. *Sparhawk v. Bullard*, 1 Metc. 95, 100; *Pettingell v. Boynton*, 139 Mass. 244, 249, 29 N. E. 655; *Pollock & Wright on Possession*, 25. He could also maintain a petition to recover damages for the laying out of a way through the land. *Trustees State Lunatic Hospital v. County of Worcester*, 1 Metc. 437; *Hawkins v. County Com'rs*, 2 Allen, 254. In *Rogers et al. v. Rutter*, 11 Gray, 410, it was held that one in possession under an agreement to purchase could "be justly regarded as the owner of the land, within the meaning of the statute, for the purpose of protecting his interest therein." And in *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325, where it was held that, under a statute of Pennsylvania which allowed the owner or owners of the land sold to redeem, the husband could redeem in right of his wife as owner, the court said that "any right which in law or equity amounts to an ownership in the land, any right of entry upon it, to its possession or enjoyment, or any part of it which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem." See *Shearer v. Woodburn*, 10 Pa. 511; *Rice v. Nelson*, 27 Iowa, 148; *Cooley on Taxation* (2d Ed.) 538; *Blackwell on Tax Titles* (4th Ed.) 420. Whether a deed of quitclaim and release is presumptive evidence of seisin on the part of his grantor (See *Ward v. Fuller*, 15 Pick. 185; *Russell v. Coffin*, 8 Pick. 143; *Farwell v. Rogers*, 99 Mass. 33; *Blethen v. Dwinel*, 34 Me. 133; *Tebbetts v. Estes*, 52 Me. 566; *Gibson v. Savings Bank*, 69 Me. 579) would not be considered, in view of the finding, as we interpret it, that the plaintiff is in possession under a claim of right, though the title on which he relies may prove to be invalid, and there is nothing as the case stands to show that the party from whom his grantor derived title had any estate or interest in the land which he could convey.

The defendant further contends that there was no sufficient tender. The court found that Mr. Lapierre, acting for the plaintiff, offered "to pay O'Keefe [the defendant] whatever was due him January 17, 1902, which was the last day of the two years allowed for redemption, and O'Keefe refused to accept the money, and this excused the tender." The evidence justified this finding, and the ruling was clearly right, and rendered immaterial

the rulings that were requested in regard to the matter of tender. *Dubois v. Hepburn*, 10 Pet. 1, 9 L. Ed. 325; *Perry v. Lancy*, 179 Mass. 183, 60 N. E. 472; *Schayer v. Com. Loan Co.*, 168 Mass. 322, 39 N. E. 1110; *Hazard v. Loring*, 10 Cush. 267.

The result is that the exceptions must be overruled. So ordered.

(139 Mass. 176)

MINOT et al. v. PARKER, Atty. Gen., et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 11. 1905.)

1. WILLS—CONSTRUCTION—RESIDUARY DEVISE—RIGHTS OF EXECUTORS.

Where testator, after vesting title to the residue of his estate in his executors, directed that the property was "to be distributed by them," and in a further paragraph declared that in the contemplated distribution the executors should not be legally accountable or subject to any trust, or be liable to any person or corporation, by reason of any memorandum which the testator might leave, the executors were not entitled to the residue of the estate, discharged from any trust as residuary legatees.

2. SAME—UNSIGNED MEMORANDA.

An unsigned memorandum left by testator, which did not appear to have been in existence when the will was executed and was not identified as a paper to which testator referred in his will, could not be admitted to probate with the will, but must be wholly disregarded in settling the estate.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 515.]

3. SAME.

Where testator devised the residue of his property to his executors, to be distributed by them, and directed that they should not be under any legal accountability or subject to any trust or liable to any person or corporation by reason of any memorandum which the testator might leave, the words "by reason of any memorandum," etc., should be construed to refer to antecedent clauses of the will, and to confer full discretionary powers on the executors, not limited by any express trust which otherwise might be claimed to have been created in favor of those named in a subsequent memorandum.

4. SAME—CHARITABLE TRUST—CREATION.

The form of language used in a will to create a charitable trust is not material, if from the words employed the sole intention of the testator to establish such trust clearly appears.

5. SAME—INDEFINITENESS—UNCERTAIN BENEFICIARIES.

Testator bequeathed the residue of his estate to his executors, to be devoted to "charitable or worthy objects," and authorized them to exercise their discretion to devote the property to the benefit of such persons or corporations as might be selected by the executors or designated by the testator in his lifetime, also particularly for the purpose of giving to any of testator's relatives, who "without reason" he might have overlooked, such sum as might seem to testator or his executors under all the circumstances fitting, suitable, and proper. *Held*, that the beneficiaries of such bequest were so uncertain that the whole trust was void for indefiniteness.

6. SAME—RESULTING TRUST—NEXT OF KIN.

Where a charitable trust of the residue of testator's estate, attempted to be created, was void for indefiniteness of beneficiaries, a resulting trust of the residue of his estate would be decreed in favor of his next of kin.

Case Reserved from Supreme Judicial Court, Suffolk County; John W. Hammond, Judge.

Petition by Minot and others, as executors, against attorney general Parker, and others, for the construction of a will. Case reserved for full court.

Robert B. Babson and Wm. E. Waterhouse, for Jane B. Glover. Aaron H. Latham, for Jennie G. Moseley. Moses Williams, for executors.

BRALEY, J.—Upon the final settlement of the testator's estate, there will remain in the possession of the executors a large sum to be disposed of under the residuary clause of his will. The question presented for our decision is to whom shall it be paid.

We first consider the claim, advanced by the executors, that as legatees they are entitled absolutely to the fund discharged from any trust. Though they are not referred to by name, the opening words of the clause would afford some semblance in support of this construction, if the language used remained unqualified by the context; but, after vesting the title in them, its quality is materially affected by the positive direction that the property is "to be distributed by them," which is wholly inconsistent with the purpose to give the residue to them for their own benefit. Nor is this purpose changed by the language employed in the second paragraph, where the direction is found that in the contemplated distribution the executors "shall not be under any legal accountability, or subject to any trust, or be liable to any person or corporation, by reason of any memorandum which I may leave." The testator by his will disposed of what apparently was a large estate by making numerous pecuniary legacies to relatives and friends, as well as a large number of charitable bequests. It appears that an unsigned memorandum was left by him, which does not appear to have been in existence when the will was executed, nor identified as the paper to which he referred; hence it cannot be admitted to probate, and in settling his estate must be wholly disregarded. *Newton v. Seaman's Friend Society*, 130 Mass. 91, 93, 39 Am. Rep. 433. It, however, may be observed that on its face it contains no provisions relating to the distribution of the residue, and there are no extraneous facts found in the record which would make any portion of it applicable.

It is suggested that, notwithstanding this, the language employed negatives the intention to create a trust, and therefore nothing is left for construction, leaving the executors to take as legatees for their own use and benefit; but the words "by reason of any memorandum I may leave" evidently refer to the antecedent clauses, and must be taken to mean that the full discretionary powers vested in them are not to be limited by the terms of any express trust, which otherwise might be claimed

to have been created in favor of those named in his subsequent memorandum. The case of *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. 473, upon which they rely, is plainly distinguishable. Without adverting to the peculiar reasons for the form of bequest there used by the testatrix, it appears that the gift was made absolute in terms. A request, indeed, followed that the fund might be used for advancing a political cause in which she was greatly interested; but the legatees were especially left free from any legal requirement to comply with her request.

This is distinctively different from a bequest to executors, or their successors in office, who are to use their discretion in the selection of those to be benefited by the testator's bounty; for, when this has been done by them, distribution is to follow, not by a division between themselves, but among the persons or corporations selected. For similar reasons, cases in which a testator, after making an unqualified bequest, has used precatory words indicative of a desire that the legatees, though under no legal obligation, will apply some portion to the benefit of others in whom he is interested and to whom he may sustain paternal relations, are not applicable. See *Wells v. Doane*, 3 Gray, 201; *Hess v. Singler*, 114 Mass. 56; *Wells v. Hawes*, 122 Mass. 97; *Davis v. Malley*, 134 Mass. 588; *Bacon v. Ransom*, *ubi supra*; *Sturgis v. Paine*, 146 Mass. 354, 16 N. E. 21; *Durant v. Smith*, 159 Mass. 229, 34 N. E. 190; *Aldrich v. Aldrich*, 172 Mass. 101, 51 N. E. 449. To hold that there was an outright gift to the executors, would be repugnant to, and defeat, his declared purpose. It therefore must be held that it was the intention of the testator to create a trust in some form, and not to make an unlimited bequest to his executors. *Nichols v. Allen*, 130 Mass. 211, 213, 39 Am. Rep. 445; *Olliffe v. Wells*, 130 Mass. 221; *In re Schouler*, 134 Mass. 426; *White v. Ditson*, 140 Mass. 351, 353, 4 N. E. 606, 54 Am. Rep. 473.

If a trust was created, it remains to consider whether under its provisions it can be executed either as a charity, or for the benefit of such private objects or persons that are capable of being clearly determined. Among the accepted definitions of a charity is that given in *Jackson v. Phillips*, 14 Allen, 539, 556. This requires that the purpose shall be wholly charitable, or the gift is void. The form of language used is not material, if from the words employed the sole intention of the testator to establish a charitable trust clearly appears. *Jackson v. Phillips*, *ubi supra*; *Rotch v. Emerson*, 105 Mass. 431, 433. A bequest to be devoted to the furtherance of such charitable objects as the executors might select would be consistent with such general intention, and hence valid. *Weber v. Bryant*, 161 Mass. 400, 37 N. E. 203; *Minns v. Billings*, 133 Mass. 126, 66 N. E. 593, 97 Am. St.

Rep. 420. It is possible, if the first paragraph of this clause had stopped with the phrase "charitable or worthy objects," that by construction these words, as used by the testator, could be coupled so that they might be understood as used in a synonymous sense. If this were done, then under our construction, not being inconsistent with the second paragraph, such an intention could be given effect as a public charity, and they might be construed to mean charitable and worthy objects, or charitable and deserving objects, either of which would be sufficient to sustain the gift. *Saltonstall v. Sanders*, 11 Allen, 446; *Rotch v. Emerson*, *ubi supra*; *Chamberlain v. Stearns*, 111 Mass. 267; *In re Sutton*, 28 Ch. D. 464.

But the discretionary power conferred is not confined to charity alone. It may be exercised for the benefit of such persons or corporations as may be selected by the executors or designated by the testator in his lifetime, though the recipients might not have been capable of classification as coming within the provisions of St. 43 Eliz. c. 46, which has been followed in this Commonwealth, so far as to ascertain what shall be considered charitable gifts. *Sanderson v. White*, 18 Pick. 328, 333, 29 Am. Dec. 591. Although the testator may have intended by a memorandum to have named the "charitable or worthy objects" among which this portion of his estate was to be distributed, yet he went still further in the expression of his general design, by declaring that the bequest also was "particularly for the purpose of giving to any relatives of mine, who without apparent reason I may have overlooked, such sum as may seem to them or him, under all the circumstances, fitting, suitable, and proper." It then fully appears that there also was in his mind, as of equal prominence, an intention plainly expressed to include certain of his relatives, though they may be indefinitely described. These several purposes were not charitable in a legal sense, and as the fund could be applied to either, as the executors might deem proper, there is no charitable trust created which under our decisions can be supported. *Nichols v. Allen*, *ubi supra*; *Chamberlain v. Stearns*, *ubi supra*; *St. Paul's Church v. Attorney General*, 164 Mass. 188, 195, 41 N. E. 231. See *Bullard v. Chandler*, 149 Mass. 532, 539, 21 N. E. 951, 5 L. R. A. 104.

That he intended to dispose of his entire estate may be presumed, and such an intention should be made effectual if possible; but there are insuperable difficulties in construing this clause in such a way as to create a private trust. There was no provision for the apportionment of the residuary fund between "charitable or worthy objects" and the testator's relatives. In order for a court of equity to administer a private trust, the objects to which it is to be applied or the

persons who are to take under it must be capable of ascertainment. *Olliffe v. Wells*, ubi supra. If the court should attempt to make an arbitrary division between the three classes, it must override the discretion of the executors, and thus disregard the terms of the will. Unless this is done, no trust can be supported in favor of any of the objects specified, or class of persons named. When an attempt is made to define the class of relatives intended, there is nothing disclosed by any extrinsic facts from which it can be determined that any of the testator's relatives whom he may have omitted were unintentionally overlooked. If construed to mean relatives whom he may have forgotten, we are no nearer a definition; for there is no standard provided by him by which to ascertain how far he may have remembered and purposely omitted them, or, without such an intention, failed to recall them when making a testamentary disposition of his property. Before any distribution could be made, the executors or the court would be called upon to decide, and must determine, not who were the testator's relatives at the time of his death, but what members of this class had been forgotten by him. Manifestly, this would be a practical impossibility. He might have said "any relative whom I may have omitted," and it may be that this could be held to mean those for whom he had not provided, but who, in the event of his intestacy, would have shared in the distribution of his estate, under Rev. Laws, c. 133. Of course, under such a construction, those who were to take could be readily determined; but his purpose evidently was not so broad, for he adds a limiting and discriminating phrase, "whom, without apparent reason, I may have overlooked."

While the general intention of the testator that the residue of his estate should be held by the executors in trust is fully apparent, the unfortunate terms he employed to express this permits the fund, as we have said, to be wholly applied for objects which are not charitable in law, or for purposes so uncertain as not to be capable of identification, or for the benefit of relatives not named, and who, by reason of the descriptive limitation imposed by him, cannot otherwise be ascertained. The whole trust, therefore, becomes too indefinite for the court to administer, and a resulting trust must be decreed in favor of his next of kin, who thus become entitled to the residuary fund. *Chamberlain v. Stearns*, ubi supra; *Nichols v. Allen*, ubi supra; *Olliffe v. Wells*, ubi supra; *St. Paul's Church v. Attorney General*, ubi supra; *Wheeler v. Smith*, 9 How. 55, 79, 13 L. Ed. 44.

Decree accordingly.

(133 Mass. 550)

KENDRICK v. KENDRICK.

(Supreme Judicial Court of Massachusetts. Barnstable. Sept. 5, 1905.)

1. DIVORCE—DOMICILE OF WIFE—BURDEN OF PROOF.

Under Rev. Laws, c. 152, § 5, relative to divorce, and providing that if the libellant has lived in the commonwealth for five years preceding the filing of the libel, or if the parties were inhabitants of the commonwealth at the time of their marriage and the libellant has lived in the commonwealth for three years preceding such filing, a divorce may be decreed for any cause allowed by law, it is necessary, where the wife attacks for want of jurisdiction a decree of divorce granted to the husband in another state, for the wife to establish a separate domicile by proof that the husband deserted her, and otherwise her domicile will be regarded as having followed that of her husband.

2. SAME—DESERTION—EVIDENCE.

Evidence that a husband, after going to another state in search of employment and without intention to abandon his family, sent no money for their support and ceased to correspond with them, and that he never requested his wife to come to his new domicile, was not sufficient to show a desertion, giving the wife a separate domicile.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 109, 111, 449.]

On rehearing. Affirmed.

For former opinion, see 74 N. E. 593.

LORING, J. The appellants contend that the decree of divorce obtained by the deceased in Texas in 1884 is void for lack of jurisdiction. The first ground on which they support this contention is stated by their counsel to be that the domicile of the wife at the time of the divorce was in Massachusetts, and she might have obtained a divorce in Massachusetts from her husband at the time when he obtained a divorce from her in Texas. The single justice found that Bethiah and her husband were married in Massachusetts in 1851, and lived in this state as husband and wife until 1872, when they removed to Benton Harbor, in the state of Michigan; that they lived there for 2½ years, and both became domiciled there; that on the expiration of the 2½ years they came back together to Massachusetts, temporarily, in search of work for the husband, but their domicile remained in Benton Harbor; that after a few months the husband returned to Benton Harbor, leaving his family in Massachusetts, and after remaining a short time in Benton Harbor he sold out his business there and went to Texas, where he took up his residence and went into business; that the move to Texas was "a bona fide change, undertaken in the hope of bettering his condition, and without any intention, so far as appeared, of deserting or abandoning his family. Neither, so far as appeared, was there any intention on his part to abandon or desert his family

when he went back to Benton Harbor from Edgartown. After leaving Benton Harbor for Dallas, he did not send his wife any more money; his excuse being that he needed all the money he had to start himself in business. He wrote to her that he was going to Dallas, and wrote to her once or twice after he got there. She replied, and wrote several letters, to which she received no answers, and then let the correspondence drop. She remained in Edgartown until forced, for want of means and by the sale of her household goods on execution, to leave and return to her mother, which she did. After remaining with her mother a short time, she came with her daughter to Boston, where she has since lived. I find, if it is competent, that after Kendrick went to Dallas, with the exception of small sums sent occasionally to the daughters, he did nothing towards the support of his wife and family. They supported themselves, as they were able, by needlework. There was contradictory evidence admitted *de bene* as to whether Kendrick ever requested his wife to come to Michigan after his return to Benton Harbor, or to Dallas after he went there. I find, if competent, that he did not. But according to her deposition, which was read in evidence, Bethiah B. Kendrick testified, and I so find, that she did not want to go back to Michigan, though there was nothing to show that she told her husband so, or that he knew it. It did not appear whether she would have been willing to go to Dallas, if requested by him to come. I find that Kendrick acquired and had a bona fide domicile in Dallas from the time that he went there in 1875 until his removal to Yarmouth, in this state, in 1893. In 1884 he filed a petition for divorce from his wife in the district court for the county of Dallas, in Texas. The petition was under oath, and alleged among other things, that his wife had abandoned him without any cause, and had remained absent from him with the intention of never living with him again, and refused to live with him. There was some testimony, consisting of declarations of Kendrick, tending to show that this was so. What the actual facts were, if competent, I am unable to determine." To prove a right to a separate

domicile, for the purpose of divorce, under Rev. Laws, c. 152, § 5, or otherwise, the burden is on the wife to prove a delictum by the husband. In this case the wife had to prove that her husband deserted her, and not she her husband. This the wife failed to do. For the purposes of this case, therefore, her domicile must be taken to have followed that of her husband, and was in Texas at the date of the divorce granted to her husband. See *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, 16 L. R. A. 497, 34 Am. St. Rep. 252; *Burtis v. Burtis*, 161 Mass. 508, 37 N. E. 740.

The second ground on which the appellants support their contention that the Texas court had no jurisdiction is that the name of the wife was "Bethiah," and in the libel for divorce and notice she is called "Bertha." The judge who heard the petition found "that she was addressed as 'Bertha' by her husband, and that she was known by that name to some extent, though it did not appear that she was so known outside the family. I also find that the court had before it a copy of the marriage certificate, in which the name of the respondent was given as Bethiah, that no fraud or imposition was practiced upon it in respect to the name of the respondent, and that the person from whom the court intended to grant the divorce was the petitioner, Bethiah B. Kendrick. I also find that, if there was any error in the name, it did not appear that any one was misled, or, taking all the circumstances into account, would have been misled, by it." We interpret the qualification with which the first finding ends to mean that the plaintiff did not introduce direct evidence that "Bethiah" was known as "Bertha" outside the family, and not to mean that she was not so known outside the family. The finding, therefore, is a finding that, in the family, at least, she was known by both names. We are of opinion that this is a finding that she was known by both names, within the rule applied in *Commonwealth v. Gale*, 11 Gray, 320; *Gifford v. Rockett*, 121 Mass. 431; *Gillespie v. Rogers*, 146 Mass. 610, 16 N. E. 711; *Commonwealth v. Selley*, 167 Mass. 163, 45 N. E. 91. See, in this connection, *State v. Dresser*, 54 Me. 589.

Decrees of probate court affirmed.

(182 N. Y. 320)

In re HATCH.

(Court of Appeals of New York. Oct. 3, 1905.)

EXECUTORS — EXPENSES OF WILL CONTEST — REIMBURSEMENT FROM SALE OF REALTY.

Under Code Civ. Proc. § 2793, subd. 4, providing that, on distribution of the proceeds of the sale of land belonging to a decedent's estate, the executor or administrator shall be repaid the sum found due him upon a judicial settlement of his account, etc., when construed in connection with other sections of chapter 18, tit. 5, an executrix cannot be reimbursed out of the proceeds of the real estate, to the exclusion of creditors, for the expenses of administration, consisting mainly of the amount paid to attorneys employed by her in a contest over the will.

Appeal from Supreme Court, Appellate Division, Fourth Department.

In the matter of the disposition of real property of Elam A. Hatch, deceased. From a judgment of the Appellate Division (90 N. Y. Supp. 33, 97 App. Div. 496), reversing a decree disallowing a claim of Ray S. Hatch, as executrix, William R. Bancroft and others appeal. Reversed.

Horace McGuire, for appellants. Clarence W. McKay, Fletcher C. Peck, and William A. Sutherland, for respondents.

VANN, J. In this proceeding to sell real estate for the payment of debts the material facts are as follows: Elam A. Hatch, a resident of the county of Monroe, died February 4, 1899, leaving a will, which after a long contest was finally admitted to probate. Matter of Hatch, 57 App. Div. 635, 68 N. Y. Supp. 1139; *Id.*, 75 App. Div. 609, 77 N. Y. Supp. 1128; *Id.*, 176 N. Y. 592, 68 N. E. 1118. In the meantime there was temporary administration of the estate, which was superseded by permanent administration upon the probate of the will. The personal assets were exhausted and the debts and funeral expenses were wholly unpaid, so that it became necessary to sell the real estate. On the 5th of June, 1900, this proceeding was commenced for that purpose, and no question is raised, except as to the disposition of the proceeds. On the 26th of May, 1904, a decree distributing the proceeds of the sale was made by the surrogate. The amount to be distributed was the sum of \$4,140.65; but after deducting \$926.77, the expenses of the proceeding, and \$890.98, the gross sum accepted by the widow in lieu of dower, there remained but \$2,322.94 to be divided. The funeral expenses amounted to \$135.54, the debts duly established to \$2,521.34, and the expenses of administration, including the amount paid by the executor in the litigation over the will, to \$4,756.95. The sum last named was fixed upon a judicial settlement of the accounts of the executor on the 15th of February, 1902, and the decree then made adjudged, among other things, "that there is due the executor on the settlement of this, her account, for expenses of adminis-

tration and will contest actually paid by her, the sum of \$4,756.95." The executrix claimed that the entire proceeds of the real estate, less the expenses, should be applied on this claim, and that neither undertaker nor creditor should have any part thereof. Code Civ. Proc. § 2730. The decree of distribution directed the payment of the funeral expenses in full, and that the remainder of the net proceeds, amounting to \$2,187.40, should be applied pro rata upon the debts. The claim of the executrix "to be reimbursed for expenses of administration and will contest" was "disallowed and denied." Upon appeal by the executrix and others the Appellate Division by a divided vote reversed the decree in so far as it disallowed said claim, and directed that it should be allowed, and that the distribution should be readjusted accordingly. Certain of the creditors now appeal to this court. The question presented is whether the executrix shall be reimbursed out of the proceeds of the real estate, to the exclusion of creditors, for the expenses of administration, consisting mainly of the amount paid to the attorneys employed by her in the contest over the will. The answer to this question depends upon the construction of paragraph 6 of section 2793 of the Code of Civil Procedure as it stood when this proceeding was commenced, which was prior to the dates when certain amendments went into effect. Laws 1900, p. 209, c. 120; Laws 1904, p. 1907, c. 750. In our discussion of the subject we shall allude exclusively to the statute as it was before the passage of the acts last cited.

While real estate of a devisee cannot be sold to pay the expenses incurred by an executor in a contest over the will, it is claimed that, when actually sold to pay debts, such expenses must be paid out of the proceeds before any part can be applied upon the debts, or even on the funeral expenses. This in effect would take the property of one person to pay the debts of another, for the devisee does not need probate of the will by the surrogate in order to establish his right to the land. A devisee can sell, mortgage, and convey without such probate, and can take possession or maintain ejectment. Real estate is a kind of property in which the executor has no interest, and he cannot incur expenses on the credit thereof. Tender-ness for the rights of heirs and devisees for time out of mind has been a marked characteristic of the common law, and the statute before us should be read in the light of that fact in order to ascertain the real intention of the Legislature. Laying aside the question of power, let us see whether the Legislature intended to depart from the common-law rule to such an extent as to sacrifice the rights of devisees, not for the payment of debts, which, of course, would be proper, but to pay the expenses of administration in which the devisees have no

legal concern, except incidentally as a matter of evidence. Code Civ. Proc. § 2627. The proceeding before us is regulated by title 5 of chapter 18 of the Code of Civil Procedure, entitled "Disposition of the Decedent's Real Property, for the Payment of Debts and Funeral Expenses. Distribution of the Proceeds." Code Civ. Proc. §§ 2749, 2801. We cite and quote from the statute before the Code amendments went into effect. The Code provides that the real property of which a decedent died seised may be sold to pay his debts, funeral expenses, and judgment liens existing at his death. Section 2749. At any time within three years after the decease a proceeding to sell may be instituted by the executor or administrator, by a person holding a judgment lien upon the real property of the decedent, or by any other creditor; but it is limited to the three objects above named. Section 2750. The petition must show the unpaid debts of the decedent, the names of the creditors, the amount of each claim, the sum due for funeral expenses, the names of the husband or wife and of all the heirs and devisees, and, if presented by the executor or administrator, the amount of personal property which has come into his hands and the application thereof. Section 2752. Creditors must be cited, and heirs or devisees may contest every fact essential to jurisdiction. Section 2755. If a debt is merged in a judgment against the executor, only the amount recovered, exclusive of costs, can be allowed. Section 2757. "The decree must determine and specify the amount of each debt * * *

* as a valid and subsisting debt against the decedent's estate, or as a just and reasonable charge for funeral expenses." Section 2758. Before a decree to sell can be made it must be established to the satisfaction of the surrogate that "the debts, or liens, or both, for the payment of which the decree is made, are the debts of the decedent, or are just and reasonable charges for his funeral expenses, or are liens by judgment existing at his death upon his real property, or upon some portion thereof; and are justly due." Section 2759. The land, or so much thereof as is necessary "in order to pay the debts, judgment liens thereon, and funeral expenses of the decedent" may be mortgaged, leased, or sold. Sections 2760, 2761. The proceeds are distributed upon notice, and at the time designated "the surrogate must hear the allegations and proofs of the creditors or lienors, and of the persons interested in the estate, or in the application of the proceeds, respecting any demands against the decedent or for his funeral expenses," etc. Section 2788.

These are among the leading steps required in order to create the fund to be distributed, and the rule of distribution appears in section 2793, which prescribes the following order of payment: (1) The expenses of the pro-

ceeding to sell, mortgage, or lease. The second, third, and fourth are not now material. (5) Judgment liens existing at the decedent's death according to their respective priorities. (6) "Out of the remainder of the money, must be paid the sum, if any, which has been found to be due to the executor or administrator, upon a judicial settlement of his account, after applying thereupon the proceeds of the personal property. But this subdivision does not authorize the repayment to an executor or administrator, of any sum paid by him to a creditor of the decedent, exceeding the proportion which that creditor would be entitled to receive from the estate of the decedent, upon the distribution of all the assets of the decedent, and the proceeds of property disposed of as prescribed in this title." (7) The reasonable funeral expenses of the decedent. (8) The other debts of the decedent as established. After payment of these classes of claims in the order named, if any surplus remains, it must be paid over to the heirs and devisees. Thus we have a practice act governing the disposition of real estate for the payment of debts and funeral expenses, and all the provisions thereof should be read together. While paragraph 6 of section 2793 is broad enough to cover payment of the expenses of administration, it would be very remarkable if the Legislature intended that the expense of contesting the will should be paid out of money derived from the sale of land belonging to devisees in preference to the funeral expenses and the debts of the decedent. When paragraph 6 is read as an entirety, it is capable of the construction that the first sentence relates to the same subject as the second, and that the sum found due to the executor is the amount paid by him to creditors of the decedent, for which he would be entitled to reimbursement, subject to the limitation mentioned. *Ball v. Miller*, 17 How. Prac. 300. The statute thus construed would simply codify the rule laid down in the case cited, as it has in other instances, so as to embrace the entire subject. *Laws 1863, p. 691, c. 400*. Not only should paragraph 6 be read as an entirety, but it should be read in connection with all other provisions relating to the sale of real property for the payment of debts. When thus read, we find that when this proceeding was commenced there was no authority for a sale to pay the expenses of administration, but only for the purpose of paying the debts and funeral expenses of the decedent. While the statute specifically names the various classes whose claims are to be paid, and requires a statement of the amount claimed by each person, as is necessary in order to determine the sum to be raised and how much of the land should be sold for the purpose, the expenses of administration are not included, yet why should they be omitted if they are to be paid? How can the court decide whether a sale of all or only a part of

the real estate is necessary, unless proof is given as to the entire amount required to discharge all claims lawfully chargeable upon the land? Moreover, debts are a lien upon the land for three years, yet the paragraph in question, as construed below, requires payment of the expense of administration, which is not a lien, in preference to the general lien of creditors prescribed by law. It is not reasonable to hold that the Legislature intended to authorize payment of a claim for general expenses out of the land, and yet to deny the right to sell land for that purpose. *Matter of Quatlander*, 29 Misc. Rep. 566, 61 N. Y. Supp. 1064; *Matter of Summers*, 37 Misc. Rep. 575, 75 N. Y. Supp. 1050; *Matter of Meakim*, 5 Civ. Proc. Rep. 421; *Matter of Woodard*, 13 N. Y. St. R. 161.

The recent amendments of the statute indicate that the Legislature was of the opinion that executors were not sufficiently protected theretofore, and thus confirm the construction we have adopted. Laws 1900, p. 209, c. 120; Laws 1904, p. 1907, c. 750. While the question is close and difficult, we think that, when all the provisions relating to the sale of real property for the payment of debts are read together, the intention of the Legislature was not to authorize payment of the expenses of administration out of the proceeds of real estate, but to restrict the account mentioned in the first sentence of the paragraph under consideration to the amount paid in anticipation upon the claims of creditors, as indicated by the last sentence thereof. We have not construed the statute in its present form, but have construed it as it was when the question discussed arose.

The order of the Appellate Division should be reversed, and the decree of the surrogate affirmed, with costs against the respondents in all courts.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and WERNER, JJ., concur.

Order reversed, etc.

(132 N. Y. 547)

McGOWN et al. v. BARNUM et al.

(Court of Appeals of New York. Oct. 3, 1905.)
PLEADING—DEMURRER—EFFECT.

If plaintiffs are entitled to any relief on the facts pleaded, a demurrer to the complaint should be overruled, though they are not entitled to some of the relief asked.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 486-488.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by David J. McGown and others against Curtis A. Barnum and others. From a judgment of the Appellate Division, af-

firming a judgment in favor of defendant (90 N. Y. Supp. 1105, 98 App. Div. 622), plaintiffs appeal. Affirmed.

Clarence L. Barber, for appellants. Carlton B. Pierce, for respondents.

PER CURIAM. It is very unfortunate that so simple a matter as is the subject of this controversy should be the occasion of so much and such unnecessary litigation. It cannot be questioned that the interest the defendant Barnum took under his father's will in the house and lot in the town of Middlefield was a vested remainder in fee, and that his interest in the fund produced by the sale of said lot was of the same character. That remainder was at all times alienable and devisable by said Barnum, and his title thereto passed to the receiver appointed in supplementary proceedings. The present action to establish the receiver's title to the remainder in the fund after the death of the judgment debtor's mother was unnecessary. The plaintiff receiver could apply in the supplementary proceedings for leave to sell the judgment debtor's interest in the fund. The judgment creditors could purchase on the sale, and on the termination of the life estate get possession of the fund itself. Whether the present action can be maintained may be doubted, regardless of the effect of the prior judgment between the parties; but it is unnecessary to determine that question, as we deem the plaintiffs concluded by the judgment in that action which was pleaded as a bar to this. The first suit was brought on substantially the same allegations as set forth in the present complaint, and some of the relief demanded was the same as that now sought. The final judgment rendered was that the action was prematurely brought, and the complaint was dismissed on the merits. It matters not that to some of the relief asked in the first action the plaintiffs were plainly not entitled. If they were at that time entitled to any relief on the facts pleaded, the demurrer should have been overruled. The judgment sustaining the demurrer is conclusive between the parties that the plaintiffs were then entitled to no relief, and the situation has not been in any respect changed from the time of the institution of that action to the commencement of this. The Special Term, therefore, properly held that the judgment in the first action was a bar, and dismissed the suit. But the Special Term also found, as a conclusion of law, that the plaintiff receiver had no title or interest in the trust fund or in the interest of the defendant Curtis A. Barnum therein. This conclusion of law, as an original proposition, is plainly erroneous, for the interest of said defendant in the fund vested in the plaintiff receiver. Nor did the judgment in the first suit require such a finding by the trial court. An examination of the record and

opinion in that case shows that all that was decided therein was that the action was prematurely brought, not that the plaintiffs had no title to or lien upon the remainderman's interest in the fund.

Therefore, the judgments below should be affirmed, without costs, and without prejudice to the right of the plaintiffs to demand and receive the trust fund upon the death of the life tenant.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(182 N. Y. 361)

In re MAYOR, ETC., OF CITY OF NEW YORK.

In re RIVERSIDE PARK.

(Court of Appeals of New York. Oct. 3, 1905.)

BOUNDARIES—ROYAL GRANT—CONSTRUCTION—TIDE LANDS—TITLE OF PUBLIC.

Under the royal grant of April 22, 1686, conveying to the city of New York all waste and vacant land within the city and on Manhattan Island to low-water mark, the land between high and low water mark was taken by the city in trust for the public, so that, where a later conveyance by the city to a private person described the land as bounded by the Hudson river, it was presumable that the boundary extended only to high-water mark; the city still holding the strip between high and low water mark as trustee.

Appeal from Supreme Court, Appellate Division, First Department.

Proceedings by the mayor, aldermen, and commonalty of the city of New York to acquire title to certain lands as part of Riverside Park. From a judgment of the Appellate Division (92 N. Y. S. 1144, 102 App. Div. 615), affirming an order confirming the report of commissioners of appraisal, Herman C. Von Post and others appeal. Affirmed.

William C. Beecher and Bache McE. Whitlock, for appellants. John J. Delany, Corp. Counsel (Theodore Connolly and Charles D. Olendorf, of counsel), for respondent.

HAIGHT, J. These proceedings were instituted on behalf of the mayor, aldermen, and commonalty of the city of New York to acquire the title and interest of all persons interested in the lands and premises, including upland and land under water or rights therein, not then owned by or vested in the mayor, aldermen, and commonalty of the city of New York, abutting upon the Riverside Drive between 72d street and 129th street. The lands in question were part of a tract of land which was granted to the mayor, aldermen, and commonalty of the city of New York by Thomas Dongan, then lieutenant governor under his majesty, the King of England, by his charter, bearing date the 22d of April, 1686, which grant included the

tideway of the lands upon the eastern side of the Hudson river to low-water mark. On the 21st of July, 1701, the mayor, aldermen, and commonalty of the city of New York conveyed to one Jacob De Kay a tract of upland abutting upon the land under water, in dispute, and bounded by the Hudson river, which conveyance was subsequently confirmed by Lord Cornbury, the captain general of the province under Queen Anne. In 1839 one William Whitlock became the owner of the lands in question, claiming title through several mesne conveyances to the lands acquired by De Kay from the city in 1701. The claimants derived their title through Whitlock. On November 9, 1847, Whitlock conveyed to the Hudson River Railroad Company a strip of land 66 feet wide across his premises upon the river front for a right of way; a small portion thereof being above high-water mark and the remainder thereof below high-water mark, leaving, however, a narrow strip of the tideway on the lower side thereof unconveyed. Subsequently the city of New York acquired lands between the railroad's right of way and the Riverside Drive for park purposes, and the same is now known as "Riverside Park."

The rights of claimants depend upon the construction that is to be given to the deed of 1701, by which the city conveyed the uplands abutting upon the premises in question to De Kay. It is contended on behalf of the claimants that under the provisions of that deed De Kay acquired the tideway in front of the uplands described in the deed, and that it was the intention on the part of the city to convey to him all the title that it had to the lands under water, while on behalf of the city it is contended that the lands conveyed were, by the terms of the deed, bounded west by the Hudson river, and, that being a navigable river in which the tide ebbs and flows, the presumption arises that high-water mark was intended to be the boundary line. We shall assume for the purposes of this case that, if the conveyance was by an individual who owned the tideway and who had bounded his deed upon the river, the presumption would be that he intended to include in the conveyance the tideway. *Smith v. Bartlett*, 180 N. Y. 366, 73 N. E. 63; *Archibald v. N. Y. C. & H. R. R. Co.*, 157 N. Y. 574, 52 N. E. 567. But the conveyance in this case, as we have seen, was by a municipal government, the city of New York, and the question arises as to whether a different presumption arises with reference to its deed.

The rights of the sovereign, whether crown or state, to land under water in navigable streams and arms of the sea, are doubtless twofold, proprietary and governmental. As proprietor, the sovereign may sell or convey to others, but as to the power to govern the sovereign holds as trustee for the use of the

public, under such laws, rules, and regulations as may from time to time be adopted and which shall be deemed to best serve the interests of commerce and the state. These powers may be transferred by the sovereign to local subordinate governments which have been established, constituting such governments the trustees of the public and the guardians of the rights and privileges of the people. The King of England, therefore, during our colonial period, had the power to grant a charter to the mayor, aldermen, and commonalty of the city of New York, constituting it a body corporate and politic, with powers of local government, and to convey to it the lands under water surrounding Manhattan Island, on which the city is located. This power the king exercised through his colonial governors, who from time to time have enlarged the powers and jurisdiction of the city. While the king had the power to convey the tideway on the shores of the high seas and navigable rivers, he will not be presumed to have done so by merely bounding the conveyance upon the sea or the river. Such conveyance will carry title only to high-water mark. Other words must be employed in the conveyance which would clearly indicate his purpose and intent to convey the lands under water in order to pass the title thereto. *Trustees of Brookhaven v. Strong*, 60 N. Y. 56; *Sage v. Mayor, etc.*, of N. Y., 154 N. Y. 61, 47 N. E. 1096, 38 L. R. A. 606, 61 Am. St. Rep. 592; *Mayor, etc., of N. Y. v. Hart*, 95 N. Y. 443.

The charter issued to the mayor, aldermen, and commonalty of the city of New York in 1686 by Gov. Dongan recites that the city of New York is an ancient city, and that the citizens have anciently been a body politic and corporate, and have held, used, and enjoyed divers and sundry rights, liberties, privileges, franchises, free customs, pre-eminences, advantages, jurisdictions, emoluments, and immunities, as well by prescription as by charter, letters patent, grants, and confirmations, not only of divers governors and commanders in chief in the said province, but also of several governors, directors, generals, and commanders in chief of the Nether Dutch nation, whilst the same was under their power and jurisdiction, and the citizens and inhabitants of said city have erected and built at their own costs several public buildings, including a city hall or stadt house, and have constructed a bridge into the dock or wharves, and established a ferry between the city and Long Island for the convenience of travelers. He then, on behalf of the king, grants, ratifies, and confirms to the mayor, aldermen, and commonalty of the city all and every such and the same liberties, privileges, franchises, rights, royalties, free customs, jurisdictions, and immunities which they have anciently held, used or enjoyed: provided, always, that none of the said liberties, privileges, franchises, rights, free customs, jurisdictions, or immunities be incon-

sistent with or repugnant to the laws of his majesty's kingdom of England, or any of the laws of the general assembly of the province. The public buildings, with the ground thereunto belonging, two market houses, the bridge into the dock, the wharves or dock, and the aforementioned ferry, with their rights and appurtenances, together with all the profits, benefits, and advantages which shall or may accrue and arise at all times hereafter, for dockage or wharfage, within the said dock, with all and singular the rents, issues, profits, gains, and advantages which shall or may arise, grow, or accrue by the said city hall, or stadt house, and ground thereunto belonging, market houses, bridge, dock, burying place, ferry, together with full power, license, and authority to the said mayor, aldermen, and commonalty, and their successors, forever, to establish, appoint, order, and direct the establishing, making, laying out, ordering, amending, and repairing of all streets, lanes, alleys, highways, water courses, ferry, and bridges, in and throughout the said city and Manhattan Island, needful and convenient for the inhabitants and for all travelers and passengers, is likewise granted, ratified, and confirmed unto all the inhabitants of the city and of the island. He then grants to the mayor, aldermen, and commonalty of the city all the waste, vacant, unpatented, and unappropriated lands lying within the city and on Manhattan Island, extending and reaching to low-water mark through all parts of the city and Manhattan Island, together with all rivers, rivulets, coves, creeks, ponds, waters, and water courses; also to the officers of the city and their successors, forever, the right to extend itself, as well in length and in breadth as in circuit, to the farthest extent throughout Manhattan Island, and in and upon all the rivers, rivulets, coves, creeks, waters, and water courses belonging to the island as far as low-water mark, and jurisdiction over the same, "without the let, hinderance, or impediment of me or any of my successors, governors, lieutenants, or other officers whatsoever." He creates the offices of mayor, chamberlain, treasurer, sheriff, coroner, clerk, constable, marshal, etc., with a common council, naming the persons that shall fill such offices until their successors are appointed and qualified, and provides that the aldermen and assistant aldermen shall constitute a common council of the city, and "that they, or the greater part of them, shall or may have full power and authority, by virtue of these presents, from time to time, to call and hold common council within the common council house or city hall of the said city, and there as the occasion shall be, to make laws, orders, ordinances, and constitutions in writing, and to add, alter, diminish, or reform them, from time to time, as to them shall seem necessary and convenient (not repugnant to the prerogative of his most sacred majesty afore-

said, his heirs and successors, or to any of the laws of the kingdom of England, or other of the laws of the general assembly of the province of New York), for the good rule, oversight, correction, and government of the said city and liberties of the same, and of all the officers thereof, and for the several tradesmen, victualers, artificers, and of all other the people and inhabitants of the said city, liberties, and precincts, aforesaid, and for the better preservation of government and disposal of all the lands, tenements, and hereditaments, goods, and chattels of the said corporation, which laws, orders, ordinances, and constitutions shall be binding to all the inhabitants of the said city.

It is quite apparent from a reading of the charter that a local subordinate municipal government was here established, to which the sovereign delegated the powers of local government, not inconsistent with the laws of England or of the province of New York, and to which he conveyed the tideway surrounding the island. While we have no express provision of the charter delegating to the municipality the sovereign power to hold the tideway as trustee for the use of the public and for commerce, and to make laws, rules, and regulations with reference thereto, we think this power was intended to be delegated to the municipality, and that such intent is clearly inferable from the provisions of the charter growing out of the general powers given to its common council to make laws, ordinances, and constitutions, and to amend the same from time to time as may be deemed necessary, and from the fact that he conveyed to the city the land between high and low water mark. The conveyance of the tideway to the city interposed a barrier between the body of the river and the uplands which would prevent the sovereign from erecting docks, piers, or wharves thereon for the accommodation of commerce, and is inconsistent with the purpose of the sovereign to longer retain jurisdiction, control, and management thereof for the interest of the public. We therefore are of the opinion that it was the intention of the sovereign to delegate to the municipality the power to hold and control the tideway in the interest of commerce and of the public, and that this is apparent from the fact that the charter not only conveyed to the city the tideway, but also granted to it the bridge, docks, and piers already constructed, with the right to collect wharfage therefrom. If we are right in this conclusion, it follows that the officers of the city, in conveying to De Kay in 1701, did so as the representatives of the sovereign power delegated to it as a municipal government; and it is deemed, therefore, to have intended only to have included in the conveyance the uplands to high-water mark, retaining the tideway and lands under water as trustee

of the public domain, in the interests of commerce and of the state.

The order should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Order affirmed.

(165 Ind. 365)

TOWN OF WINAMAC v. STOUT.*

(No. 20,631.)

(Supreme Court of Indiana. Oct. 4, 1905.)

1. PLEADING—JOINT DEMURRER.

Where a complaint for negligence in two paragraphs was demurred to by a demurrer which, though styled a separate demurrer to such paragraphs, disclosed no effort separately to question the sufficiency of each paragraph, but charged that the facts set out in both paragraphs did not constitute a cause of action, it was a joint demurrer, and could not be given a distributive effect by separate assignments of error to the overruling thereof.

2. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Instructions that defendant is permitted to prove contributory negligence under a general denial, and that the burden of proof that plaintiff proximately contributed to the injury is on the defendant, are not objectionable as withdrawing from defendant the benefit of plaintiff's evidence on such issue.

3. MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—ASSUMED RISK—INSTRUCTIONS.

Where, in an action against a town for injuries to a pedestrian on a defective sidewalk, plaintiff denied that he had any knowledge of the existence of the defect, and it appeared that, though he boarded at a hotel not far from the place of the accident, he was not in the habit of using the walk, the fact that he also testified that he had passed over it several times, but could not state whether two or three or a dozen times, did not require the court to give an instruction on assumed risk.

Appeal from Circuit Court, Starke County; John C. Nye, Judge.

Action by Frank Stout against the town of Winamac. From a judgment in favor of plaintiff, defendant appeals. Case transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1837u. Affirmed.

W. W. Borders, for appellant. Guthrie & Bushnell, for appellee.

GILLET, J. Action by appellee against appellant to recover damages for negligence in the maintaining of a sidewalk. Error is sought to be predicated upon assignments of error drawing in question alleged rulings of the court below in respect to the first and second paragraphs of the complaint respectively, and also on the overruling of a motion for new trial. The complaint was in two paragraphs, and the objection urged against each of said paragraphs is it does not sufficiently appear that the alleged negligence of appellant was the proximate cause of the injury. Appellee's counsel make the point

*Judgment modified, 75 N. E. 661.

that appellant's demurrer to the complaint was joint, and that it cannot be given a distributive effect by means of separate assignments of error. Although the demurrer is styled a separate demurrer to the first and second paragraphs of plaintiff's complaint, yet there was no effort separately to question the sufficiency of each paragraph; the demurrer being based on the ground the facts set out in the first and second paragraphs of the plaintiff's complaint do not constitute a cause of action. It is clear that the demurrer is joint. *Terre Haute, etc., R. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 17 L. R. A. 339, 32 Am. St. Rep. 239; *Silvers v. Junction R. R. Co.* 43 Ind. 435; *Baker v. Groves*, 1 Ind. App. 522, 27 N. E. 640. The record does not bear out the claim that there was a demurrer to either the first or the second paragraphs of complaint, considered separately, and consequently the assignments of error in respect to the complaint are not well founded.

Objection is made that under the second and twelfth instructions given by the court appellant was prevented from having the benefit of the evidence of the plaintiff on the question of contributory negligence. The instructions mentioned are not open to objection. The mere fact that the court instructs the jury that the defendant is permitted to prove contributory negligence under the general denial, or states that the burden of proving that the plaintiff proximately contributed to the injury is upon the defendant, is nothing more in practical effect than a reaffirmation of the provisions of the statute, and may be given by the court without error. *M. S. Huey Co. v. Johnston* (at last term) 78 N. E. 996. In addition, we may state that the record shows that in response to the request of appellant the court instructed the jury that although upon the question of contributory negligence the burden of proof was upon the defendant, yet that contributory negligence might be inferred from the evidence of plaintiff. It is clear that appellant has not the slightest ground of complaint on this score.

It is urged that the court erred in refusing to give an instruction on the subject of assumed risk; the instruction being based on language used by this court in *Bruker v. Town of Covington*, 69 Ind. 33, 36, 35 Am. Rep. 202. Appellee received his injury in the nighttime, while passing over an alley crossing consisting of four planks laid lengthwise. One of the inside planks had been broken, or had decayed, near the middle, leaving an opening the width of the plank and about 18 inches long. At the time in question there was a mudhole about 2 inches in depth at the opening, and appellee was injured owing to the fact that one of his feet slipped off the edge of a plank and into the hole, throwing him down. The crossing at the center was about the level of the surface of the alley. Appellant received his injury about the 1st of April, 1900. He took up his

residence in Winamac, and began boarding at a hotel not far from said crossing, about the middle of October 1899. He was away about 13 weeks during the meantime. He admitted while upon the stand that he had passed said crossing several times. When pressed for a more definite statement, he said that he could not state whether he had passed over it two or three or a dozen times. It was not his habit, however, to go over that crossing. During much of the time he was in Winamac said walk was covered with mud or snow. He resolutely denied that he had any knowledge of the existence of the defect. Appellant relies upon the single fact that appellee had passed over the crossing, as above stated, in proof of his knowledge of the defect. We have considered with care the evidence as it is set out in the bill of exceptions, and we are wholly unable to find a basis for such a conclusion upon the part of the jury. Whether appellant ever went that way when there was an opportunity to observe the defect does not appear, nor is there proof of any circumstances calculated to attract his attention to the condition of the crossing, if he might have observed it, or to show that he ever gave it the slightest heed. While it was competent for the jury to determine whether it would believe such facts as appellant as a witness asserted to exist, yet we perceive no ground for a conclusion which would involve not alone the refusal to believe him, but which would also require a sheer guess that knowledge existed, when it would be perfectly consistent with all the evidence either that the crossing was covered with mud or snow or obscured by darkness when he had gone that way, or that he had not in fact observed the defect when he passed. The idea that appellant cast himself upon a known danger does not appear to us to have been a relevant hypothesis under the evidence, and for that reason, if for no other, the court was justified in refusing said instruction. We may add, however, that the record does not show that all of the instructions given are in the record, and it might therefore be presumed, if necessary to uphold the result, that the substance of the instruction refused was embodied in an instruction which is not set out. *Board v. Gibson*, 158 Ind. 471, 63 N. E. 982.

We have examined the evidence with a view to its sufficiency to support the verdict, and have concluded that there was adequate evidence to uphold the result.

Judgment affirmed.

(185 Ind. 276)

MAJOR et al. v. MILLER et al.
(No. 20,382.)

(Supreme Court of Indiana. Oct. 4, 1905.)

1. PLEADING—DEFECTS—CURE BY FINDING.

Where, in a suit to enjoin a nuisance, plaintiff's property was described with particularity, and it was charged that the property of the other plaintiffs lay contiguous thereto, and between plaintiff's property and that of defendants, all within P. township, in a certain county,

an alleged defect in the complaint for failure to describe the premises on which the nuisance was created and continued with sufficient certainty was cured by the finding in favor of complainants.

2. NEW TRIAL—SPECIFICATION OF ERRORS—SUFFICIENCY.

Under a statute authorizing a new trial on the ground that the decision of the court is not sustained by sufficient evidence, specifications for a new trial that the "special findings" specified were not sustained by sufficient evidence, were without the issues, and were contrary to law, and that the court erred in not finding certain facts specified, were insufficient, since by the "decision" of the court referred to in the statute is meant "the special finding," when one has been required.

3. TRIAL—FINDINGS BY COURT—SURPLUSAGE.

Where a special finding by the court, taken as a whole and stripped of all extraneous matter, including facts not sustained by the evidence, without the issues, and contrary to law and legal conclusions, still contains facts properly found within the issues on sufficient evidence on which to predicate the court's conclusions of law, such conclusions will be upheld, and the surplus findings disregarded.

4. APPEAL—WAIVER OF ERROR.

Where an alleged error assigned is not presented in any manner in appellant's brief, it will be regarded as waived.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Lizzie L. Miller and others against Ambros J. Major and others. A judgment was rendered in favor of plaintiffs, and defendants appealed. Cause transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

Joseph G. Orr and E. A. Howard, for appellants. George E. Clarke and M. A. Dittenhoefer, for appellees.

MONTGOMERY, J. Appellees brought this action to enjoin appellants from maintaining a nuisance, resulting from the manner in which a slaughterhouse was conducted. Appellants answered by general denial, and a trial by the court resulted in a finding and judgment for appellees. Appellants' motions for a new trial and in arrest of judgment were overruled, and exceptions properly saved. The errors assigned are that the complaint does not state facts sufficient to constitute a cause of action; that the court erred in its conclusions of law stated upon the special finding of facts; and that the courts erred in overruling the motion for a new trial and in overruling appellants' motion in arrest of judgment.

The only objection made to the complaint is that it does not describe the premises upon which it is charged that the nuisance was created and continued with sufficient certainty. The property owned and occupied by appellee Lizzie L. Miller is described with particularity, and it is charged that the property of the other appellees lies contiguous thereto, and between said property and the premises of appellants, and all within Penn township in St. Joseph county. No objection was made to the complaint in the court below, either by motion to make the same more

specific, or by demurrer for want of facts. If it were conceded that the description of appellants' property was indefinite, it is apparent that the defect was such that it could and would have been readily removed by amendment. The averments of the complaint were certainly sufficient to advise appellants of the nature and location of the grievances complained of and to bar another action for the same cause; and, in our opinion the objection urged must be regarded as cured by the finding, and the complaint held sufficient as against an attack made for the first time in this court. *Davis v. Shuah et al.*, 136 Ind. 237, 241, 36 N. E. 122; *Louisville, etc., Ry. Co. v. Goodbar*, 102 Ind. 598, 2 N. E. 337, 3 N. E. 162; *Stockwell et al. v. State ex rel.*, 101 Ind. 1, 17; *Jackson et al. v. Weaver*, 98 Ind. 307; *Jones v. White*, 90 Ind. 255; *Evansville, etc., Ry. Co. v. Willis*, 80 Ind. 225; *Beal et al. v. State ex rel.*, 77 Ind. 231; *Indianapolis, etc., R. R. Co. v. McCaffery et al.*, 72 Ind. 294; *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261.

The conclusions of law provided for a continuation of appellants' business under such restrictions as were designed and reasonably adequate to avoid the offensive odors of which appellees complained. The special finding of facts is neither set out in full nor in substance in appellants' brief, and we would be justified in disregarding the second assignment of error. We have, however, referred to the record and examined the finding of the court, from which it appears that appellants so kept and conducted their said slaughterhouse as to create and maintain a nuisance; that, on account of the manner in which appellants conducted their said business, noisome and offensive smells were created, which, carried by the atmosphere, permeated the houses of appellees with such frequency and offensiveness as to prevent the enjoyment of life and property. These facts, together with others found, were clearly sufficient to sustain the conclusions of law.

Appellants' motion for a new trial is as follows: "First. The special findings numbered 1, 2, 16, 18, 19, 20, 21, 22, 24, 25, 44, 45, 46, and 48 are not sustained by sufficient evidence. Second. The special findings of the court numbered 1, 2, 18, 19, 22, 25, 45, 47, and 48 are without the issues. Third. The special findings of the court numbered 16, 37, 38, and 40 are contrary to law. Fourth. The court erred in not finding that the ditch mentioned in finding 21 was a public ditch; that said ditch was outside of and off defendants' property; that it was the duty of the trustee of Penn township to keep said ditch clean and in good repair; that said trustee had neglected his said duty for a year and more before the filing of this suit; that after the filing of this suit, and before the trial thereof, said trustee had cleaned said ditch, and at the date of the trial there was a full and abundant flow of water in said ditch, and no offensive odor arising therefrom.

Fifth. That the decision of the court is contrary to law."

The first four reasons above set out, if conceded to be well assigned, would not be sufficient to secure a new trial. The statute prescribes the causes for which a new trial may be had, and one of them is that the decision of the court is not sustained by sufficient evidence. By the decision of the court is meant the special finding, when one has been required. If the special finding, taken as a whole, when stripped of all extraneous matters, such as facts not sustained by sufficient evidence, without the issues, and contrary to law and legal conclusions, still contains facts properly found within the issues, upon sufficient evidence upon which to predicate the conclusions of law, such conclusions will be upheld, and the surplus findings disregarded. The trial court is not required by law to paragraph and number a special finding, but in practice courts frequently do so subdivide such findings for the sake of convenience. Appellants' first three grounds for a new trial did not require the court below, and do not require us, to examine the entire finding, but only such parts thereof as are particularly specified. If it be conceded, therefore, that paragraphs 1, 2, 16, 18, 19, 20, 21, 22, 24, 25, 37, 38, 40, 44, 45, 46, 47, and 48 of the special finding are not sustained by sufficient evidence, or are without the issues, or contrary to law, it would by no means follow that the remaining paragraphs of such finding, which we are not required by appellants to review in this connection, do not contain facts within the issues, fully sustained by evidence, legal in form, and abundantly sufficient to sustain the court's conclusions of law. We are required to presume that the court's conclusions of law do rest upon facts properly found until the contrary is made to appear.

The fifth ground upon which a new trial was asked is because the decision of the court is contrary to law. We have examined the evidence, and find that it supports the finding of the court upon every material point, and discover no reason for which it may be claimed that the decision of the court is not in conformity to the law.

The last alleged error assigned is not presented for our consideration in any manner in appellants' brief, and is accordingly waived.

No error appearing in the record, the judgment is affirmed.

(26 Ind. App. 339)

RITCHIEY v. McKAY et al. (No. 5,426.)*

(Appellate Court of Indiana, Division No. 2.
Oct. 5, 1905.)

1. DESCENT AND DISTRIBUTION—ASSIGNMENT OF DISTRIBUTEES' INTEREST—RIGHTS ACQUIRED BY ASSIGNEE.

An assignment by a distributee in the estate of a decedent of his interest therein vests in

the assignee whatever interest the assignor had in the assets of the decedent.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Fraudulent Conveyances, §§ 144, 147.]

2. FRAUDULENT CONVEYANCES—SOLVENCY OF GRANTOR.

A distributee assigned his interest in the estate of his intestate without any valuable consideration. The assignment was made for the purpose of defrauding the distributee's creditors. There was nothing to show that the distributee did not have other property sufficient to satisfy a judgment against him, nor did it appear that any attempt had been made to collect the judgment by ordinary processes of law, nor that the distributee was insolvent. *Held*, that the assignee acquired the distributee's interest in the estate as against the judgment creditor.

Appeal from Circuit Court, Johnson County; W. J. Buckingham, Judge.

Petition by Lawrence E. Ritchey against Louise A. McKay and others for the recovery by the petitioner of a distributive share of the estate of Sallie E. Ritchey, deceased. From a judgment for defendant the Anderson Carriage Company, the petitioner appeals. *Reversed*.

W. A. Johnson and L. E. Ritchey, for appellant. Deupree & Slack, for appellees.

COMSTOCK, J. Appellant petitioned in the court below, under the decedent's estate act, for the recovery of a distributee's share by appellant as the assignee of a distributee of the estate of Sallie E. Ritchey, deceased. The appellee the Anderson Carriage Company was made a party, because it claimed to have an interest in the sum claimed by the petitioner. There were other parties, but the issues were formed by the amended petition, the answer of the Anderson Carriage Company thereto, and the reply of appellant. Such proceedings were had in the premises that a trial was had by the court and special finding of facts made, conclusions of law stated thereon, and judgment rendered in favor of appellee the Anderson Carriage Company.

There are a number of specifications of error. We deem it necessary to consider only one, namely: That the court erred in its conclusions of law, and each of them, on the special findings of facts. The findings are, so far as they concern the appellant and appellee carriage company, as follows: "That on the 8th day of September, 1899, one Sallie E. Ritchey departed this life intestate in Johnson county, Ind., leaving as her only heirs at law the petitioner herein, Lawrence E. Ritchey, Louise N. McKay, and one Georgia E. Eccles, who departed this life since the death of the said Sallie E. Ritchey, leaving as her only heirs at law [naming them], and also her husband the defendant, Lawrence P. Ritchey. (2) That on the 6th day of January, 1901, one William D. Whitesides was duly appointed administrator by this court of the estate of Sallie E.

*Mandate modified. Rehearing denied, 75 N. E. 1000.

Ritchey, deceased, and qualified as such administrator. (3) That all the personal assets of said estate that ever came into the hands of said administrator was one certain promissory note dated November 6, 1897, due one year after date, and for the sum of \$1,000, with 8 per cent. interest from date, and executed by said Lawrence E. Ritchey in favor of said Sallie E. Ritchey. (4) That said administrator on the 26th day of June, 1902, realized on said note for the said trust the sum of \$1,320, the same being the principal and interest of said note. (5) That on the — day of June, 1902, said administrator filed in this court his only and final report of his said trust, in which he charged himself with said sum of \$1,320 realized as aforesaid, and being the only assets reported and received by him belonging to said trust; that after paying all liabilities, expenses, and costs of said trust said administrator reported a balance of \$516.52 for distribution among the lawful heirs of said Sallie E. Ritchey, deceased, which sum of \$516.52, upon the filing of said final report, said administrator paid to the clerk of this court; and that said final report was duly approved by this court on the 24th day of January, 1903, and said administrator discharged. (6) That Lawrence P. Ritchey, as the husband and heir of Sallie E. Ritchey, deceased, would be entitled to one-third of said sum of \$516.52 for distribution, or the sum of \$172.17. (7) That the defendant Lawrence P. Ritchey, in the name and style of L. P. Ritchey, after the death of said Sallie E. Ritchey, and before the appointment of said administrator, executed to said petitioner herein, Lawrence E. Ritchey, the following contract of assignment, to wit: 'Nashville, Ind., Nov. 7, 1900. In consideration of the surrender to me by L. E. Ritchey, of Johnson county, Indiana, of a certain promissory note given by me to said L. E. Ritchey in the sum of \$200, dated Dec. 23, 1876, and drawing interest at the rate of 10 per cent. per annum, and the further consideration of attorney's fees agreed by me to be paid to said Ritchey, I hereby assign all my right, title, and interest in and to a certain promissory note given by said L. E. Ritchey to his mother, Sallie E. Ritchey, now deceased, in the sum of \$1,000.00, and dated about September 11, 1897, and which note was by me placed in possession of Lizzie Ritchey about Oct. 15, 1899, to be held by her until the estate of said Sallie E. Ritchey was settled and note settled, and also the undivided one-third of all other personal property of said Sallie E. Ritchey now belonging to me as her husband. L. P. Ritchey.' (8) That the \$1,000 note mentioned in said assignment is the same note that said administrator took possession of and received thereon the said sum of \$1,320 as the only assets of said estate. (9) That the defendant the Anderson Carriage Company is a corporation duly organ-

ized and doing business in the state of Michigan, and on the 19th day of June, 1900, obtained a judgment in this court against said defendant Lawrence P. Ritchey in the sum of \$464.80, which judgment is wholly unpaid. (10) That there was no valuable consideration passed from the petitioner herein, Lawrence E. Ritchey, to the defendant Lawrence P. Ritchey, for said contract of assignment. (11) That said assignment was a fraudulent agreement, with no valuable consideration therefor, entered into between the petitioner, Lawrence E. Ritchey, and the defendant Lawrence P. Ritchey, to keep the defendant the Anderson Carriage Company from collecting the said judgment held by said Anderson Carriage Company against said defendant Lawrence P. Ritchey, and that said assignment is fraudulent, null, and void, and without any legal force and effect whatever." As conclusions of law the court stated: (1) That the petitioner, Lawrence E. Ritchey, take nothing by his action; (2) that the petitioner, Lawrence E. Ritchey, pay the costs of this action.

It will be observed that appellee Anderson Carriage Company had no lien against decedent's estate. The assignment to appellant vested in him whatever interest the assignor had in the right or asset assigned. *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Smith v. Rogers*, 14 Ind. 224. The debtor may sell or give away his property. Its transfer or conveyance is not fraudulent solely because it is without consideration. Fraud cannot be predicated upon what a debtor has a right to do. *Kolb v. Raisor et al.*, 17 Ind. App. 557, 47 N. E. 177. "No matter how bad the intention of a debtor may in point of fact have been in making a voluntary conveyance, still, if he had sufficient other property remaining subject to execution to pay all his debts, his creditors in legal contemplation are not injured by this bad intention simply, and have no right of action to set aside such conveyance. It is only when an inadequate amount of property remains that creditors have the legal right to complain." *Sherman et al. v. Hogland*, 54 Ind. 584. The finding that the transfer in the case at bar was for a fraudulent purpose is not enough to deprive appellant of his right as assignee. For anything that appears in the finding, Lawrence P. Ritchey may have had other property out of which appellee's judgment could have been made. It does not appear from the findings that any attempt has been made to collect the judgment by the ordinary processes of law, or that the debtor was insolvent at the time of the transfer. It follows, therefore, that the conclusions of law were not justified by the facts found.

The judgment is reversed, with instructions to the trial court to restate the conclusions of law and to render judgment in favor of the appellant.

(216 Ill. 406)

PINKSTAFF v. STEFFY et al.

(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—REVIEW—FINDINGS OF CHANCELLOR.

Where a cause is heard by the chancellor in open court, his findings and decree will not be disturbed, unless it is so contrary to the weight of the evidence that it should not be allowed to stand.

2. WATERS AND WATER COURSES—OBSTRUCTION OF SURFACE WATER.

Where complainants owned the dominant estate as against defendant with reference to drainage, defendant was not entitled to obstruct the flow of surface water from plaintiff's land by constructing a levee or embankment on the ground that the course of natural drainage of ordinary surface water was not necessarily over defendant's land.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 128, 131.]

3. SAME—RIGHTS OF DOMINANT ESTATE.

A dominant estate has the natural easement over the land of the servient estate for the flow of surface waters and also for the overflow of a stream.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 131-134.]

4. SAME—RIGHTS OF SERVIENT ESTATE.

Where complainants owned the dominant estate with reference to the drainage of surface waters over defendant's land, defendant was not entitled to construct a levee to restrain the flow on the ground that good husbandry rendered the same necessary in order to protect his crops.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 128.]

5. SAME—LIMITATIONS.

Where part of a levee constructed to restrain surface water had only existed about 17 years, and prior to 1895 the only levee was about a foot high, very narrow, and made for the purpose of constructing a fence, and defendant, in 1897, submitted his right to maintain a levee there to arbitration, and the levee built under the arbitration agreement was entirely different from that which had previously existed, and was washed out in 1904, defendant was not entitled to maintain a levee 3 feet high and 10 to 12 feet wide by limitations.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 155, 195-198.]

6. EVIDENCE—ARBITRATION AND AWARD—SUBMISSION—EXTENT.

Where an arbitration submission was as to defendant's right to "make and construct" a certain levee, it could not be enlarged by parol proof that the submission and award were to determine defendant's "right to maintain" such levee.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Arbitration and Award, §§ 514-519.]

7. WATERS AND WATER COURSES—SURFACE WATERS—EXECUTION OF AWARD.

Where defendant constructed a levee under an arbitration award giving him the right to make and construct a levee on a certain line, the destruction of the levee terminated the license so that defendant was not entitled to rebuild by virtue of the award.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, §§ 194-198.]

8. APPEAL—REVIEW—HARMLESS ERROR.

A chancery decree will not be reversed for error in the admission of evidence, where there is other competent evidence covering the same point.

Error to Circuit Court, Lawrence County; E. E. Newlin, Judge.

Bill by Richard Steffy and others against C. F. Pinkstaff. From a decree in favor of complainants, defendant brings error. Affirmed.

Rehearing denied October 12, 1905.

Defendants in error exhibited their bill in chancery to the October term, 1904, of the circuit court of Lawrence county, praying for an injunction restraining plaintiff in error from repairing or rebuilding any line of levee or embankment on the north and east sides of plaintiff in error's land. Defendant in error Richard Steffy owns the southwest quarter of the southwest quarter of section 33, in town 5, range 11; defendant in error Malinda A. Steffy owns the south half of the northeast quarter of the southeast quarter of section 32; and plaintiff in error owns the south half of the southeast quarter of said section 32—all in the same town and range; so that the land of Richard Steffy lies directly east of that of Pinkstaff and the land of Malinda Steffy lies directly north of the east half of the Pinkstaff land. Along and near the north line of Richard Steffy's land and across on the south side or end of the land of Malinda Steffy, and extending on east and along and near to the north line of the land of Pinkstaff, is Gladly Fork creek. The bill alleges that the land of the defendants in error is higher in elevation than the land of the plaintiff in error, and that the land of said defendants in error is the dominant heritage and the land of the plaintiff in error is the servient heritage; that the surface water falling and accumulating upon the land of the defendants in error in a state of nature flowed off over the land of the plaintiff in error through a natural water course or depression leading from the land of the defendants in error; that in 1897 the plaintiff in error constructed a levee or embankment along both the north and east lines of his land, and thereby dammed the natural water course, forcing the water back upon the land of the defendants in error, diverting the course of the water; that in 1904 the said levees of the plaintiff in error were broken by the flow of the water, and that plaintiff in error is about to repair and rebuild the same, and make said levees both higher and wider than they formerly were, and intends to maintain the same, to the irreparable injury to the land of the defendants in error.

Plaintiff in error answered the bill, denying that his land was the servient heritage and that the same was the natural outlet for all the surface water falling and accumulating on the land of defendants in error; admits that he repaired the levees mentioned in the bill in 1897 to protect his land from overflow from Gladly Fork creek; denies that the levee was constructed to obstruct the natural flow of the surface water, or

that he changed the natural drainage of the lands; avers that the levees were constructed in 1876, before the defendants in error owned their land, and before the plaintiff in error purchased his land, and that he has since that time maintained the same; avers that in May, 1897, the defendant in error Richard Steffy and the plaintiff in error submitted, in writing, to arbitration, the question of the right of the plaintiff in error to construct and maintain a levee along the east line of his land, and that arbitrators were selected and acted, and returned a written award confirming the right of the plaintiff in error to construct and maintain said line of levee along the east end of his land.

Replication was filed to the answer, and the cause was heard by the chancellor in open court upon the oral testimony of the witnesses and documentary evidence, and a decree was entered finding the allegations of the bill of complaint sustained as to the east levee. It found the issues for the defendants in error as to the north line of the levee, and perpetually enjoined plaintiff in error from maintaining his levee along said east line. From the decree so entered the plaintiff in error prosecutes this writ, and complains that the court erred in admitting certain evidence offered on the part of the defendants in error, and in not holding that the evidence was insufficient; that the action was barred by the statute of limitations and by said arbitration.

W. F. Foster, S. B. Rowland, and O. J. Borden, for plaintiff in error. Gee & Barnes and J. E. McGaughey, for defendants in error.

RICKS, J. (after stating the facts). As this cause was heard by the chancellor in open court, we will not feel authorized to disturb the findings and decree unless from a review of the evidence we are satisfied that the decree is so manifestly against and contrary to the weight of the evidence that it ought not to be allowed to stand. We have read the evidence as abstracted, and considered it with care, and concur in the view of the court that the lands of the defendants in error are the dominant heritage, and that, according to their natural contour and the lay of their surface, the drainage of surface waters from the portion of Malinda Steffy's land lying south of the creek, and substantially the whole of the land of Richard Steffy, is through the land of plaintiff in error. The creek in question is described as being about 35 feet wide, with banks of about 5 feet, and having its main course toward the west. The natural fall of the bed of the creek and lands on both sides, and particularly on the south side, reasonably and substantially conform to each other. East of the land of Richard Steffy are small hills and broken country sloping toward the west, and having their drainage over his

land. The elevation at his east line ranges from 6 to 10 feet higher than the west line of the Pinkstaff land, and from 3 to 5 feet higher than the east line of the Pinkstaff land; and there is a swale or natural depression leading from the Steffy land on and through the land of Pinkstaff, which the overflow water usually followed. The evidence shows that at times of freshet the channel of the creek is not of sufficient dimensions to retain the waters flowing into the same, and that in the vicinity of the lands of these parties said creek frequently overflows; that in 1904, when it did overflow, it crossed the land of Richard Steffy with such force and in such quantities that when the east levee between the Steffy and Pinkstaff land was reached the water to a considerable extent destroyed the levee and swept on through the land of Pinkstaff, and drained and freed the land of Richard Steffy from the accumulated water. There can be no question that when overflows occur the effect of the levees in question, which are so near to the stream, is to narrow what was originally the natural bottom, and might be said to be a natural channel at flood time, and to thereby raise the body of water, and to more extensively and deeply submerge land adjoining the Pinkstaff land.

The evidence discloses that after the levee was constructed Richard Steffy made certain tile drains and ditches on his land, by which he was enabled to carry the waters, contrary to the course of natural drainage, back in a northerly direction to the creek, and that these ditches reasonably protected his land, except at such times as there were freshets or overflows; and it also appears that in the western portion of his land there is a pond, which in a state of nature contains from one to three acres, and in which water stood the greater part of the year, until it was drained out by the ditches above mentioned. Plaintiff in error seems to be of the opinion that because of the existence of this pond, which, even in a state of nature, would not drain out or entirely empty over his land, and because of the ditches above mentioned, Richard Steffy is not entitled to the relief claimed. His theory seems to be that, if Richard Steffy could carry the water, by any means of drainage, off of his land, that naturally falls there, he is not entitled to the benefit of the natural drainage in cases of floods. The view seems to be that unless, by the course of natural drainage, the ordinary surface waters of the Steffy land must seek their outlet over the land of Pinkstaff, the latter may, by levee or embankment, obstruct the flow of any waters; and especially is it contended that plaintiff in error is entitled to levee against the overflow water that may come upon the Steffy land, as it is contended that in the consideration of the rules of natural drainage overflow water has not been taken into account.

In support of his contention plaintiff in error cites *Groff v. Ankenbrandt*, 124 Ill. 51, 15 N. E. 40, 7 Am. St. Rep. 342. That case, when properly considered, does not support the contention. The opinion there was upon the pleadings, and the declaration charged that the levee or embankment wrongfully and unlawfully obstructed the flow of large quantities of water flowing to and against the said levee or embankment on the east side thereof. It was held insufficient, because it did not allege or aver that the flow was a natural flow of water, and it is there pointed out sufficiently for the purposes of that case what constitutes surface water; and, as the case did not require it, it was not said whether water overflowing from the creek onto the land of the adjacent owner would be regarded as surface water or not. So far as the question here involved is concerned, the distinction between surface water and a water course is not important. In this state the rule of the civil law has been adopted. By it the owner of the dominant heritage has a natural easement over the land of the servient heritage for the flow of the surface waters. By it, also, the owner of the servient heritage cannot interfere with or divert the flow of the water courses. *Gillham v. Madison County Railroad Co.*, 49 Ill. 484, 95 Am. Dec. 627; *Gormley v. Sanford*, 52 Ill. 158; *Peck v. Herrington*, 109 Ill. 611, 50 Am. Rep. 627; *Lambert v. Alcorn*, 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611.

In *Gormley v. Sanford*, *supra*, after announcing the adoption of the rule according to the civil law and reviewing the *Gillham Case*, *supra*, it is said (page 161): "Although there was a conflict of authorities among the courts of this country, yet the rule forbidding the owner of the servient heritage to obstruct the natural flow of surface waters was not only the clear and well-settled rule of the civil law, but had been generally adopted in the common-law courts both of this country and of England. * * * In our judgment, the reasoning which leads to the rule forbidding the owner of a field to overflow an adjoining field by obstructing a natural water course fed by remote springs applies with equal force to the obstruction of a natural channel through which the surface waters derived from the rain or snow falling on such field are wont to flow. What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface, or rises in a spring upon the upper field and flows upon the lower? The cases asserting a different rule for surface waters and running streams furnish no satisfactory reason for the distinction." It might with equal force be inquired here what difference it can make, in principle, whether the water that submerges the land of Steffy comes from the hills above the land or comes from the overflow of a stream along

the same. We are unable to see either the distinction or the ground for one. Both are natural consequences. Both are burdens cast upon the adjacent lands by the laws of nature, and as applied to such creeks and streams as the one in question we have no doubt that the correct rule is "that waters which have overflowed the banks of a stream in times of freshet, in consequence of the insufficiency of the natural channel to hold them and carry them off, are surface waters, within the meaning of the rules of law relative to such waters." 24 Am. & Eng. Ency. of Law (1st Ed.) 903. Whether this law would obtain when applied to large rivers is not before us, and we do not decide.

Accepting the law as above stated, the waters in question are surface waters, and the evidence clearly shows that when the stream overflows the waters from the land of Steffy have their natural outlet over the land of Pinkstaff. It also shows that, so long as the levee was able to withstand the pressure of the water, the land of Steffy remained submerged, while the land of Pinkstaff would be quickly freed from water, and his crops not interfered with; and that when the levee was broken down by the pressure of the water the land of Steffy, except as to the pond in question, was relieved from the water as quickly as that of Pinkstaff.

It is urged by the plaintiff in error that in the interest of good husbandry he is entitled to maintain the levee to protect his crops from inundation by overflow from the water course in question; and, if he could so protect his crops and lands without injuring others, the rule invoked would readily be admitted, but the civil-law rule of drainage, being founded upon natural right, carries with it also the rule that one must so use his own as not to injure another, or to deprive another of that right of natural drainage which the law guarantees to him; and if by the construction of the levee in question, although good husbandry may, on the part of Pinkstaff, dictate and justify the same, yet if, by so using his land, he injures Steffy by depriving him of the enjoyment of the right of natural drainage, then Pinkstaff cannot avail himself of the plea of good husbandry that benefits himself alone, and to the injury of his neighbor.

The plea of the statute of limitations was not sustained by the evidence. While there was evidence tending to show some kind of levee had been, at least part of the way, along the east line of the Pinkstaff land as early as 1876, there was evidence showing that it had only existed about 17 years, and still other evidence showing that the only levee prior to 1895 was a small levee about one foot high part of the way, very narrow, and made for the purpose of a line upon which to construct a fence. In addition to this, plaintiff in error submitted his right to have a levee there to arbitration in 1897, which it is not reasonable to suppose he

would have done had the right ripened under the statute then, as is now contended. The evidence also shows that the levee built after the arbitration of 1897 was entirely different from what had at any time previously existed. The levee that washed out in 1904 was 2½ feet high and 10 feet wide, and the plaintiff in error was about to repair the breaks and raise the levee to an average of about 3 feet high and 10 to 12 feet wide when the present writ of injunction was passed.

Nor do we think the arbitration was a bar to the action of the defendant in error Richard Steffy. It was not a statutory arbitration or submission. It was in writing, and each agreed to be bound by it. The article of submission was to submit the dispute "concerning the right of C. F. Pinkstaff to make and construct a levee on a line where he had formerly built a levee, to run north from Waters' schoolhouse to Gladly Fork creek." The object, character, height, or width of the levee was not specified, or the length of time it should be maintained, or whether it could be rebuilt if destroyed. The award was in the same restricted language of the submission. Mrs. Malinda Steffy was not a party to it, and could not be affected by it, however formal it might have been. Plaintiff in error testified that the submission and award were to determine his "right to maintain" the levee, but in this he is contradicted by the written submission and award, which could not be enlarged by parol. *Schmidt v. Glade*, 126 Ill. 485, 18 N. E. 762. The scope and effect of the arbitration must be determined from the language and provisions thereof. There are no latent effects calling for or justifying oral explanation. In the absence of any provisions, conditions, or agreement for maintaining, repairing, or rebuilding the levee when built or constructed according to the terms of the arbitration, we are disposed to the view that the authority was no more than a license to build a levee. While the levee so built remained intact, the arbitration would be a complete defense to its existence, whatever its effect upon Richard Steffy's land; but when the levee was destroyed the extent of the license had been enjoyed by Pinkstaff, and if he desired to build another levee, though along the same line, he must do so subject to the rights of Steffy. Cases involving the question and relating to a levee have not been called to our attention, nor have we found such; but cases involving the erection of dams on the servient heritage, by which the land of the superior or dominant heritage is overflowed by backwater in times of flood or freshets, are numerous, and would seem to involve the same principle, and the holding seems to be uniform that a license to build such a dam does not carry with it the right to rebuild if the dam be destroyed. *Wingard v. Tift*, 24 Ga. 179;

Hall v. Boyd, 14 Ga. 1; *Cowles v. Kidder*, 24 N. H. 364, 57 Am. Dec. 287; *Cook v. Stearns*, 11 Mass. 533.

The assessment roll was admitted in evidence to show that the land of Richard Steffy, though higher than the land of Pinkstaff, was, because of the want of outlet for drainage, assessed lower, and of less value than the Pinkstaff land. Assuming that this evidence was incompetent, the decree should not be reversed, because there is other competent evidence covering the same point, and the chancellor is presumed to have disregarded the incompetent evidence. The decree of the circuit court is affirmed.

Decree affirmed.

(216 Ill. 416)

PROVIDENT SAV. LIFE ASSUR. SOC. v. KING.

(Supreme Court of Illinois. June 23, 1905.)

1. COURTS—APPELLATE COURTS—ASSIGNMENT OF CASES.

By Const. Art. 6, § 11, Appellate Courts consisting of three justices were created. If one of the justices has heard the cause and is disqualified and the remaining two disagree, the judgment is affirmed, and the controverted facts are determined conclusively against the appellant. In 1897, the Branch Appellate Court for the First District was constituted, to which the Appellate Court of that district may assign cases for hearing and decision. *Held*, that appellant's petition to set aside the assignment to the branch court of a case appealed to the Appellate Court, on the ground that one of the branch court justices was the judge before whom the case below was tried below, should have been granted.

2. SAME.

Appellant was not prejudiced by the denial of its petition where appellee's motion to strike the bill of exceptions from the record, made while the justice was on the branch court bench, was finally decided in appellant's favor, but not until the justice ceased to be a member of the court, and the justices then composing the same were all qualified to hear and determine the appeal.

3. COURTS—APPELLATE JURISDICTION—REVIEW OF FACTS.

If the evidence did not justify the conclusion of fact when the principles of law held in the propositions were applied to it, the finding was still one of fact, reviewable only by the appellate court.

4. TRIAL—FINDINGS—INCONSISTENCY—GENERAL VERDICT.

In an action on a life policy the declaration counted on a New York statute, alleging that by such statute, after a policy had been in force for three years, the reserve thereof, in case of default, computed with the surrender value, should be taken as a single premium, and be applied to continue the policy in force or purchase temporary insurance. *Held*, that a finding that a replication to a plea to the count was not sustained by the evidence, was not a finding that there was nothing in the guaranty fund, and hence was not inconsistent with a general finding in plaintiff's favor. The issue raised by the plea and replication being whether there was a reserve on the policy.

5. WITNESS—COMPETENCY—EXPERT.

Where a witness qualified as an expert, the fact that he was entitled to a professional fee, contingent on the result of the suit, and therefore an interested witness, affected only his

credibility and the weight to be given his testimony, and did not render it incompetent.

6. INSURANCE — LIFE POLICY — GUARANTY FUND—EVIDENCE.

A life policy provided for deducting an expense charge limited to \$4 per annum on each \$1,000 of insurance, the residue of each renewal premium to be divided by applying such amount as should be required for the policy's share of the death losses, as the death fund, to be used solely in the settlement of death claims, the balance being retained as a guaranty fund. Defendant failed, after notice, to produce the books showing the actual receipts of renewal premiums and the share of the policy of the death losses for each year while it was in force. To prove the amount belonging to the guaranty fund, plaintiff showed from the sworn reports made by defendant to the states of Wisconsin and Illinois, the cost of insurance, the estimated mortality based on tables in general use in life insurance, and the actual mortality reported. Two standard mortality tables were in evidence. There was proof of admissions by defendant's general officers that the actual had never exceeded the estimated mortality, and plaintiff's expert witness testified that calculations made by him, based on the mortality tables and defendant's reports showed the amount belonging to the guaranty fund. *Held*, that the evidence was competent.

7. SAME.

The evidence tended to prove that there was sufficient in the guaranty fund to carry the policy to the death of insured.

8. SAME.

Defendant having introduced evidence of general conclusions from its books and papers that there was nothing in the guaranty fund applicable to extending the policy, and that it had been necessary to raise the rate of premium, plaintiff was entitled to introduce such evidence available to her as tended to prove the contrary.

9. SAME.

Evidence of plaintiff, the widow of insured, that one of defendant's agents told her when the policy was taken out that it was the best, because nonforfeitable under the New York law after five years, and that another of defendant's agents said that he was sent from New York to take up the policy, and could give her a very much better rate if in lieu thereof she would take a straight ten-year policy, was irrelevant and immaterial to the issue as to whether there was anything in the guaranty fund applicable to extending the policy.

Appeal from Appellate Court, First District.

Action by Susan B. King against the Provident Savings Life Assurance Society of New York. From a judgment of the Branch Appellate Court for the First District affirming a judgment of the superior court in plaintiff's favor, defendant appeals. *Affirmed*.

Rehearing denied October 11, 1905.

Peck, Miller & Starr and L. C. Krauthoff, for appellant. Darrow, Masters & Wilson (Edgar L. Masters and William A. Howett, of counsel), for appellee.

CARTWRIGHT, J. In this suit the appellee, Susan B. King, recovered a judgment in the superior court of Cook county on a policy of insurance for \$5,000 issued by the appellant, the Provident Savings Life Assurance Society of New York, to her husband, Thomas E. E. King, payable to her upon his

death. The Branch Appellate Court for the First District affirmed the judgment.

A jury having been waived, the issues of law and fact were submitted to the judge, Philip Stein, and upon a trial before him such issues were found for the plaintiff, and judgment was entered accordingly. An appeal was taken to the Appellate Court for the First District, and that court assigned the cause for hearing to the Branch Appellate Court, of which said Philip Stein was one of the justices. There was a preliminary motion by appellee to strike the bill of exceptions from the record while he was one of the justices, but the motion was not decided, and was reserved to the final hearing of the cause. Appellant filed its petition to set aside the order assigning the cause to the branch court and to transfer it to the Appellate Court, on the ground that Philip Stein, before whom the cause was tried in the superior court, was one of the justices of the branch court before which the cause was pending for review, and setting forth that only two justices were qualified to hear the appeal, while the Constitution and law contemplated a review by three justices, and in case of division between the two the judgment would be affirmed by operation of law, and the appellant be finally concluded as to the facts upon the decision of but one. The petition was denied, and its denial is assigned as error.

Section 11 of article 6 of the Constitution provides for the creation of Appellate Courts, to be held by judges of the circuit courts, but provides that no judge shall sit in review upon cases decided by him. By virtue of that provision of the Constitution Appellate Courts were created, consisting of three justices, but, if one of them has heard the cause, he is prohibited by the Constitution from taking part in the hearing or decision of the case upon appeal, and, if the remaining justices do not agree, the judgment or decree is affirmed by operation of law, and thereby the controverted facts are conclusively determined against the appellant. In 1897 the Branch Appellate Court for the First District was constituted, to which the Appellate Court of that district may assign cases for hearing and decision. It is manifest that the Constitution and law contemplate a review by a court consisting of three justices wherever it is possible, and in the First District there may be such a review in every case. The discretion committed to the Appellate Court should be exercised in accordance with the intent of the law and in the interest of parties, so that they may have the benefit of the judgment of three justices, and not be concluded as to the facts without a decision upon them. We see no reason, and none is suggested by counsel for appellee, why the petition of appellant should not have been al-

lowed. But it appears that in this case appellant was not prejudiced by the denial. The motion of appellee, made while Philip Stein was one of the justices of the branch court, was finally decided in favor of appellant, and neither the motion nor the cause was decided until after he had ceased to be a member of the court on the first Monday of December, 1904. The motion and cause were decided on January 10, 1905, and the justices then composing the court were all qualified to hear and determine the appeal.

Although both parties have argued at great length the questions of fact in controversy in the superior court which have been finally determined by the Appellate Court in favor of appellee, counsel for appellant say that they rely only on certain propositions of law relating, first, to the construction of certain provisions of the policy; second, to the competency of evidence offered in the trial court; and, third, to the hearing of the cause in the branch court, which has already been passed upon. The policy was dated April 16, 1891, and in consideration of the payment of \$104.40 Thomas E. E. King was insured for one year. This clause followed: "Said society further agrees to renew and extend this insurance upon like conditions, without medical re-examination, during each successive year of the life from date thereof, upon the payment, on or before the sixteenth day of April in each such year, of the renewal premiums in accordance with the scheduled rates, less the dividends awarded hereon." The policy contained a schedule of yearly renewal rates, increasing in amount progressively from year to year on each \$1,000 of the insurance. King's age when the policy was issued was 48, and he was 57 when he died. Following the schedule of rates there was this clause: "Regarding the death fund and guaranty fund.—After deducting the expense charge, which is limited to \$4 per annum on each \$1,000 insured, the society agrees to divide the residue of each renewal premium received by it on this policy as follows: Such amount as shall be required for this policy's share of death losses will be appropriated as a death fund, to be used solely in settlement of death claims. The remainder thereof will be retained as a guaranty fund. The amounts so retained on account of this policy will be used towards offsetting any increase in the premium on this policy from year to year; or, provided this policy, after five full years' premiums have been paid, be terminated solely by nonpayment of any stipulated premium when due, eighty per cent of any amounts so retained but not so used will be applied to extend this insurance, or, if application be made therefor while this policy is in full force and effect, to purchase paid up insurance." Premiums were paid on the quarterly installment plan from the date of policy, on April 16, 1891, up to April 16, 1900, but the premium due

on the latter date by the terms of the policy was not paid, and King died in October, 1900. Although the schedule rate increased yearly, the premium was increased only twice. It was \$28.25 quarterly up to April 16, 1898, when it was increased to \$35.31, and it was paid at that rate until another increase on April 16, 1900, to \$41.25. The plaintiff testified that about April 1, 1900, she went to the office of the company in Chicago to pay the quarterly premium of \$35.31, which had been the rate; that she gave a boy the money, who took it, and brought back a receipt, saying that the premium was \$41.25; that she told the boy she had not money enough with her to pay, and asked why the premium was raised; that he told her she would have to come again, and see the general agent, Mr. McMullen; that she called again in about a week's time, and saw Mr. McMullen, and told him that she had brought the money before, and asked him why the premium had been raised; that he answered it was because the death rate had been so heavy the past year, and on account of the death rate there had been no dividend, or but little; that she told him the company would have to carry the policy on, and he said they could not, because they had no money in the guaranty fund; that she then asked for a paid-up policy, and he said they could not do that, that there was nothing in the guaranty fund, and she would have to lose. Mr. McMullen denied that plaintiff told him the company would have to carry the policy on, or that she asked for a paid-up policy. He testified that he told her the policy was an annual renewable term policy; that the rate had been maintained level for some years by means of the surplus which had been accruing, but that the surplus had been exhausted by the increased cost of insurance, and that it was necessary to charge the rate for the age of the insured, less any small amount that might be left from the preceding year's premium. Aside from that dispute between plaintiff and McMullen the controversy was over the question of fact whether defendant had in its possession in the guaranty fund sufficient money applicable to the extension of the insurance to keep the policy in force up to the death of the insured.

The proposition of counsel with respect to the construction of the provisions of the policy is that it was a yearly renewable term policy, which would terminate by its own force at the end of the period for which premiums were paid upon failure of the insured to renew it by making further premium payments. They insist that it is essential to the proper understanding of the defense made at the trial that the court should hold, as matter of law, that the contract granted insurance for one year, with the right of renewal during each successive year by the payment of the premium. Upon looking into the record, we find that the trial court

adopted the same view now insisted upon, and held propositions of law submitted by defendant in accordance with the construction contended for. One of the propositions thus submitted and held is as follows: "The court holds, as a matter of law, that the policy of insurance set up in the declaration is a contract for an insurance for the term of one year only, with the right of renewal at the expiration of each year of insurance and during each successive year of the life of the insured, upon the payment, on or before the 16th day of April in each year, of the renewal premiums in accordance with the schedule rates, less the dividends awarded thereon, and is a term insurance contract for one year." The defendant had nothing to complain of in the ruling of the trial court on the construction of the policy, since it accorded exactly with the view of its counsel.

It is said, however, by counsel, that the ruling of the trial court and the holding of propositions of law were inconsistent with the finding of fact for the plaintiff. We must presume that the court applied to the evidence rules of law held in propositions submitted. If the evidence did not justify the conclusion of fact when the principles of law held in the propositions were applied to it, the finding was still one of fact, just like the verdict of a jury under instructions as to the law, and the power to review such questions is committed to the Appellate Court.

The court held a proposition submitted by the defendant that the eighth replication was not sustained by the evidence in the case, and counsel say that this was a finding of the fact that there was nothing in the guaranty fund, and therefore inconsistent with the general finding. The eighth replication of the plaintiff was to the eighth plea of the defendant, and the eighth plea was to the fourth count of the declaration, which counted upon a New York statute, and alleged that by such statute, after a policy had been in force three years, if there should be a default the reserve of such policy, computed with the surrender value, should be taken as a single premium, and be applied to continue the policy in force, or purchase temporary insurance. The finding, therefore, was not that there was no guaranty fund applicable to extending the insurance under the provisions of the contract, and in any event we cannot inquire whether the general finding of fact was proper or not.

It is, perhaps, of little or no consequence whether the policy was a renewable term policy or a continuing policy. The premium due by its terms on April 16, 1900, was not paid, but it cannot be disputed that, if there was anything in the guaranty fund which the defendant was bound to apply to extend the insurance, the policy was not terminated. The controversy whether the policy terminated April 16, 1900, depended upon the

question whether the guaranty fund was sufficient to continue it in force. Premiums had been paid for five years, and, if there was anything in the guaranty fund which had not been used to keep the premiums level, 80 per cent. was to be applied to extend the insurance.

The other alleged error is the admission of incompetent evidence on the part of the plaintiff. It is contended that the policy furnished a definite rule for computing the guaranty fund, which was to come from renewal premiums; that the defendant was not bound to apply its general income, savings, and profits to reduce the policy's share of the death fund, and thus increase the amount of the general fund; and that the evidence for the plaintiff was based upon computations of general profit and savings of the company, and was therefore incompetent. The policy did provide how the guaranty fund was to be created. It provided for deducting an expense charge limited to \$4 per annum on each \$1,000 of insurance, and the residue of each renewal premium was to be divided by applying such amount as should be required for the policy's share of the death losses as the death fund to be used solely in the settlement of death claims, and retaining the balance as a guaranty fund. That fund was to be used in offsetting any increase in the premium from year to year, or, after the payment of five full years' premiums, if the policy should be terminated solely by the nonpayment of any stipulated premium when due, 80 per cent. of the fund so retained and not used was to be applied to extend the insurance. All the books showing the actual receipts of renewal premiums and the share of this policy of the death losses for each year while it was in force were in the possession of the defendant in New York City. Upon notice given to produce them at the trial, the defendant offered evidence that they were so great in number and so bulky that they could not well be produced, and that they could not be understood and made useful upon a trial in court, and they were not produced. Plaintiff undertook to make proof of the amount belonging to the guaranty fund by showing from the sworn reports made by the defendant to the state of Wisconsin and the state of Illinois the cost of insurance, the estimated or expected mortality based on tables in general use in life insurance, the actual mortality as reported to said states, and the cost of insurance. Two standard mortality tables were in evidence, and the reports showed the estimated or expected mortality under defendant's policies and the actual mortality. There was also proof of admissions by general officers of the defendant that the actual mortality had never exceeded the estimated or expected mortality. A witness for the plaintiff, who made extensive computations based on the mortality tables, and defend-

ant's reports, testified that the calculations by him did show the amount belonging to the guaranty fund. He qualified as an expert and was competent to testify as such, and the fact that he was entitled to a professional fee contingent on the result of the suit, and was therefore an interested witness, affected only his credibility and the weight to be given to his testimony. His interest did not render the evidence incompetent, and it cannot be said that the evidence introduced by the plaintiff did not tend to prove the amount that should be in the guaranty fund. The reports of the defendant filed in Wisconsin and Illinois were for calendar years, and there was evidence for the defendant that a computation by calendar years would not be accurate as to an individual policy, where, as in this case, the policy was for one year from April 16th and not for one year from January 1st, and that the amount of the death fund chargeable to a particular policy for the year of that policy could not be ascertained in that way. In fact, it appears from the testimony of defendant's witness that it could not be ascertained at all except by a complicated system of cards, papers, and books in its possession. There was evidence on the part of the defendant of general conclusions from these books that there was nothing in the guaranty fund applicable to the extension of this policy, and that it had been necessary to raise the rate of the premium; but the plaintiff had a right to introduce such evidence as was available to her which tended to prove the contrary. It is doubtless true that there might be some slight difference in the mortality between a calendar year from January 1st and a policy year from April 16th to April 16th, but there was no evidence that there was any actual difference, and, taking one year with another, the probabilities are that there would be none. Taking all the years together while the policy was in force, the entire insurance and the entire mortality were necessarily included. The evidence for the plaintiff was competent, and tended to prove the fact that there was sufficient money in the guaranty fund to carry the policy to the death of Mr. King.

Mrs. King testified to two conversations—one with an agent of the defendant, named Browning, at the time the policy was taken out, in which he told her that it was the best policy they could take, because it was non-forfeitable after five years, according to the New York law; and the other with an agent named Ludlow, who was in Chicago engaged in retiring policies like this, and giving in their stead nonparticipating policies, in which Ludlow said that he was sent by the New York people to take up the policy, and could give her a very much better rate if she would take a straight 10 year policy in the place of the one she had. The evidence was irrelevant and immaterial to

the issue, and it was otherwise incompetent, but it is clear that it could not have affected the result in any way.

We think the testimony as to the admissions of general officers of the defendant that the actual mortality had never exceeded the expected mortality, as shown by the mortality tables and the reports of defendants, was competent. There was also other evidence that the actual mortality did not exceed the expected mortality, and there was nothing to contradict it.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(216 Ill. 496)

SAYER et al. v. HUMPHREY.

(Supreme Court of Illinois. June 23, 1905.)

1. ASSIGNMENT—VALIDITY.

An assignment to the "heirs and executors" of a living person is void.

2. CONTRACT—MUTUALITY.

A promise by a married woman during her husband's life to convey to her son on request land owned by her husband is void, though her husband's will gave her an estate in the land on his death.

3. WILLS—CONSTRUCTION—LIFE ESTATE.

Where a will gave testator's widow certain land "to hold for the future benefit of herself and children, and * * * dispose of to our children in such just and proper proportions as necessity and due regard to prudence may dictate, as long as she remains unmarried and my widow," the widow had only a life estate, with power of disposition in strict accordance with the terms of the will, and she had no power to purchase the interest of one of the heirs for the benefit of the husband's heirs and executors by transferring to him a part of the land.

4. SPECIFIC PERFORMANCE—LACHES.

A mother executed an instrument purporting to entitle her son to a conveyance of certain land, which instrument the son made no effort to enforce during his life. He was, however, in possession of a part, at least, of the land. After his death, and after the land had been sold by the mother to third persons, his widow sued for specific performance. *Held* that, even if it were held that the son's possession excused his laches, the delay should not be excused except on clear proof that the son was originally entitled to a conveyance, and that his possession had been such as to constitute notice to third persons.

5. POWERS—EXECUTION.

Where a widow, who was given power by her deceased husband's will to convey certain land to her children during her life, promised one of the children to convey a portion of the land to him on his request, which was never made, there was a complete nonexecution of the power, and not a defective execution, which the sole devisee of the son was entitled to enforce.

6. WILLS—POWER OF DISPOSITION.

Where a will gave testator's realty to his widow as long as she remained such, with power to dispose of it by deed to her children, to whom the fee was given if the widow failed to dispose of it during her widowhood, the widow had no power to convey title to a stranger, and such a conveyance operated only as a release of her life estate.

Appeal from Circuit Court, Moultrie County; W. C. Johns, Judge.

Bill by Clara E. Humphrey against Sallie F. Sayer and others. From a decree for complainant, defendants appeal. Reversed. Rehearing denied October 11, 1905.

This was a bill in chancery, filed by Clara E. Humphrey, the appellee, against Polly A. Trower, Sallie F. Sayer, Jacob Galster, George W. Julian, the Merchants' & Farmers' State Bank of Sullivan, and B. F. Rork, in the circuit court of Moultrie county, to require Polly A. Trower to specifically perform the provisions of the following instruments in writing:

"Charleston, Ill., Aug. 20, '77.

"For and in consideration of moneys to me in hand paid by Thomas B. Trower, my father, I hereby assign all my right, title and interest in his estate to the heirs and executors of said estate, reserving no right to myself or my heirs, waiving all liens that may in future appear or in any way show equity in my favor or my heirs or assigns. In witness whereof I have hereunto set my hand and seal the year hereinabove written.

"X. B. Trower. [Seal.]"

"For and in consideration of my son, X. B. Trower, signing the release dated Charleston, Ill., Aug. 20, 1877, of his interest in his father's estate, and attached hereto, I solemnly promise and agree to deed to him, at any time he may request me to do so, for his own use and benefit, the following property: The business house in Sullivan, Moultrie county, Ill., in which he carried on a bank; the 160 acres of land in Edgar county, Illinois, described as follows: The south half of the north-east quarter and the north half of the south-east quarter, section 22, town 16, range 14, 2; the Shelby county farm, described as follows: The west half of south-east quarter and east half of the south-west quarter, section 21, township 12, range 32. I do this to protect my son from danger or loss to him on account of his signing the foregoing release and that his father intended he should have the property herein described in the division of his estate. I also agree and promise to give my son, X. B. Trower, power of attorney to manage said property as he wishes until it is deeded to him as herein agreed. Whereunto I have set my hand and seal, Charleston, Ill., Aug. 20, 1877.

"P. A. Trower. (L. S.)"

—By conveying to the appellee the real estate described in the instrument purporting to be signed by P. A. Trower. On October 19, 1903, George W. Julian died, and his widow and heirs were substituted as defendants in his stead; and on February 27, 1904, Polly A. Trower died, and Sinia Norfolk and Sallie F. Sayer, her surviving children and sole heirs at law (Amerial Silverthorn having died prior to the death of Polly A. Trower), were substituted as defendants in her stead. The Merchants' & Farmers' State Bank of Sullivan and B. F. Rork were in possession of a portion of the business house in Sullivan

referred to in said instrument, and were only nominal defendants. Answers and replications were filed, and the cause was heard in open court, and a decree was entered in accordance with the prayer of the bill, and Sallie F. Sayer, Jacob Galster, and the widow and heirs of George W. Julian, deceased, were directed to convey to the complainant the portions of said real estate held by them, respectively, and an appeal has been prosecuted to this court by the defendants.

On April 15, 1878, Thomas B. Trower departed this life testate, the owner in fee simple of the real estate in question, leaving, him surviving, Polly A. Trower, his widow, and X. B. Trower, Amerial Silverthorn, Sinia A. Norfolk, and Sallie F. Sayer, his son and daughters and sole heirs at law. The only provision of his will which bears upon the matters now under consideration is the following:

"Clause 2—I give, bequeath and devise to my beloved wife, Polly Ann Trower, all of the rest and residue of my personal and real estate, together with any and all estate, right or interest in the lands which are or may be acquired after the date of this will, to have and to hold for the future benefit of herself and children and which she may dispose of to our children in such just and proper proportions as necessity and due regard to prudence may dictate, as long as she remains unmarried and my widow; but on her decease or marriage I give and devise the remainder of my said estate to my children, viz., Mrs. Lemuel L. Silverthorn, Xavier B. Trower, Sinia A. Norfolk and Sallie F. Sayer, in equitable proportions, as may be deemed right and proper, taking into account what they have had heretofore, which will appear from a book kept by myself for the purpose of showing that to them and their heirs, to have and to hold the same in fee simple forever."

Polly A. Trower was named as executrix in the will of Thomas B. Trower, and qualified and acted as such. X. B. Trower died testate on December 7, 1896, leaving the complainant, his widow, him surviving, she being named in his will as his sole and only devisee. On the 26th of April, 1897, Polly A. Trower and her three daughters and their husbands conveyed by warranty deed, for a valuable consideration, to Jacob Galster, the Shelby county farm, and on November 13, 1897, the same grantees conveyed by warranty deed, for a valuable consideration, to George W. Julian, the Edgar county farm, and on December 1, 1897, Polly A. Trower conveyed the business house in Sullivan to Sallie F. Sayer. On December 5, 1879, Polly A. Trower executed to X. B. Trower a power of attorney authorizing him to rent said farms, collect the rents, make repairs, etc. X. B. Trower was in the banking business in Sullivan prior to 1879, in which year he failed, after which he was insolvent, and in poor health, did no business, earned no

money, and was supported by funds which he received from his mother, which came from the income of his father's estate. The complainant, prior to the filing of her bill, and on the 6th day of June in the year 1899, made a demand upon Polly A. Trower that she convey to her said real estate in accordance with the terms of said instruments in writing bearing date August 20, 1877.

James A. Connolly (A. J. Fryer, of counsel), for appellants. W. M. Provine, E. J. Miller, and J. O. and W. B. McBride, for appellee. John R. Eden and F. M. Harbaugh, for Isaac Horn.

HAND, J. (after stating the facts). The bill in this case was filed, and the decree entered in the court below is sought to be sustained, upon the theory that the instruments, which are in the handwriting of X. B. Trower, and written upon one sheet of paper, bearing date August 20, 1877, one signed by X. B. Trower and the other by P. A. Trower, when taken together constitute such a contract in writing for the conveyance of the real estate described in the instrument signed by P. A. Trower that the complainant, as a devisee of X. B. Trower, may maintain a bill for specific performance of said contract. At the time said instrument bore date—August 20, 1877—Thomas B. Trower, the husband of Polly A. Trower, and father of X. B. Trower, was living, and was the then owner in fee simple of the real estate referred to in the instrument signed by P. A. Trower. Thomas B. Trower then had no "heirs and executors," and there was no person or persons answering to that description in being to accept said estate as assignee of X. B. Trower, and said assignment was for that reason of no effect, but was null and void. *Faloon v. Simshauser*, 130 Ill. 649, 22 N. E. 835. If, however, it were conceded that the assignment was a valid transfer of the interest of X. B. Trower in his father's estate to his father's "heirs and executors," upon no principle of law could the promise made by Polly A. Trower to X. B. Trower in the instrument signed by her to deed to him said real estate upon request, which was then the property of and in the possession of and under the control of her husband, be enforced, as, during the life of Thomas B. Trower, Polly A. Trower had no interest in said real estate other than an inchoate right of dower, and she could make no contract to convey the same to X. B. Trower, upon request or otherwise, which he could enforce against her. Her promise was void for want of mutuality (*Gage v. Cummings*, 209 Ill. 120, 70 N. E. 679), and during the lifetime of Thomas B. Trower his will had no force or effect, and Polly A. Trower, by virtue of the terms of the will, could perform no valid act whereby she could bind herself or Thomas B. Trower, or his estate, by any promise she might make to X. B. Trower

to convey to him said real estate in consideration of the release to the "heirs and executors" of Thomas B. Trower of his interest in his father's estate. It is therefore clear that neither of said instruments in writing had any validity or binding force upon Polly A. Trower during the lifetime of Thomas B. Trower.

It is urged, however, that subsequent to the death of Thomas B. Trower the instrument by which X. B. Trower had released his interest in his father's estate and the instrument by which Polly A. Trower promised, upon request, to convey to him said farms and business house in Sullivan, were so far acted upon and ratified by Polly A. Trower and X. B. Trower as to make the same a valid and binding contract to convey said premises to X. B. Trower, and which might be specifically enforced in a suit in equity by the complainant against Polly A. Trower. The question therefore arises, after the death of Thomas B. Trower did anything take place which made the promise of Polly A. Trower to convey said real estate upon request to X. B. Trower valid? By the will of Thomas B. Trower, Polly A. Trower was given the rest and residue of his estate, "to hold for the future benefit of herself and children, and which she may dispose of to our children in such just and proper proportions as necessity and due regard to prudence may dictate, as long as she remains unmarried and my widow." All the power of Polly A. Trower to deal with said real estate subsequent to her husband's death is to be found in the foregoing clause of his will. By that provision of his will the testator intended his widow should hold the rest and residue of his estate, which included the real estate in question, during her widowhood, for the use of herself and her children, which created in her at most but a life estate, and she was, "so long as she remained unmarried and my widow," given the power to dispose of said real estate "to our children in such just and proper proportions as necessity and due regard to prudence may dictate"; that is, she was given power to dispose of said real estate to said children by deed, but not by will. She was not given the power to sell said real estate generally, or to contract with reference thereto generally, but she was so confined by the terms of the will that she could only dispose of the said real estate to the children of Thomas B. Trower and herself, which disposition she was required to make during the time that she remained the widow of Thomas B. Trower. The testator had the right to impose such conditions upon the exercise of the power of his widow to dispose of said real estate, and no transfer thereof could be made by her without strictly complying with the terms of said will. *Griffin v. Griffin*, 141 Ill. 373, 31 N. E. 131; *Fleming v. Mills*, 182 Ill. 464, 55 N. E. 373.

We find some evidence in this record from

which the inference perhaps—and it is but an inference—may be drawn that the instruments in writing signed by X. B. Trower and P. A. Trower, set out in the statement preceding this opinion, were not executed upon the day they bear date, August 20, 1877, but were executed subsequent to the death of Thomas B. Trower. Whether said instruments were executed prior or subsequent to the death of Thomas B. Trower, we think them clearly invalid as an enforceable contract against Polly A. Trower. If the instrument purporting to be signed by Polly A. Trower was executed by her prior to her husband's death, it was invalid, as at that time she had no interest in the real estate, and could make no valid contract with reference thereto; and, if it was executed by her subsequent to her husband's death, it was invalid and incapable of enforcement against her by reason of the fact that Polly A. Trower had no power, under the terms of Thomas B. Trower's will, to purchase the interest of X. B. Trower in his father's estate for the benefit of his father's "heirs and executors," and in payment thereof transfer or agree to transfer to him said farms and business house. Her power was limited by the will, and was confined to the right to dispose of the estate to the children of Thomas B. Trower and herself in such just and proper proportions as necessity and due regard to prudence might dictate.

The instrument in writing signed by Polly A. Trower appears to have been seen by no one other than Polly A. Trower and X. B. Trower until after the death of X. B. Trower, and no demand was made upon Polly A. Trower by X. B. Trower to execute to him a deed for said real estate, and no effort was made by him to enforce a conveyance to him of said real estate by Polly A. Trower during his lifetime. After his death the instrument appears to have been found by his wife in a pocketbook in his house, where he kept his papers. It is said, however, that Polly A. Trower recognized X. B. Trower to be the owner of said farms, and that he was in possession thereof, and that the complainant should not be barred by his delay from enforcing the specific performance of the promise of Polly A. Trower to convey to him said lands upon request. We are not satisfied from the evidence that X. B. Trower was ever in possession of the farms in question except under the power of attorney made to him by his mother. A number of letters written to X. B. Trower by his mother perhaps indicate that she recognized he had some interest in said farms. There is, however, in said letters no reference to the business house in Sullivan which indicates in any way that she considered that he had an interest therein, and for many years prior to his death we have discovered no declaration of Polly A. Trower which in any way indicates that X. B. Trower had any interest in

said lands. At the time that the letters referring to said farms were written, X. B. Trower held, and presumably was acting under, the power of attorney from his mother, which authorized him to rent said farm, to collect the rents, and to make improvements thereon, etc., and during the subsequent years said X. B. Trower was without funds, and he and his family were being supported by Polly A. Trower. If, however, it were held that the fact that X. B. Trower had been in possession of said premises during the time which had intervened between the execution of the said instruments and his death would relieve him from laches for a failure to request a deed or to take some action against Polly A. Trower to acquire the legal title to said farms and business house in Sullivan, still, after so long a lapse of time had intervened between the date of said instruments and his death, and after the rights of third parties had intervened, and after Polly A. Trower was dead, such delay should not be excused except upon clear proof that X. B. Trower was originally entitled to have conveyed to him the legal title to said real estate by Polly A. Trower, and that his possession of said real estate had been of such an open and exclusive character as to bring notice of such possession and of his rights in said real estate home to all persons who might deal with Polly A. Trower or the other heirs of Thomas B. Trower, deceased, with reference to such real estate.

We think it clear the complainant, in view of the facts appearing in this record, has no contractual rights which she can enforce by bill in equity for specific performance against Polly A. Trower. Nor do we think the bill can be maintained or the decree sustained on the theory that the power conferred upon Polly A. Trower to dispose of said real estate to the children of Thomas B. and Polly A. Trower by the will of Thomas B. Trower has been defectively executed. The rule is well settled that a court of equity will not enforce the nonexecution of a power, but may interpose to supply a defective execution of a power in a proper case. A power is said to be nonexecuted when nothing is done towards carrying the power into execution, and defectively executed when there has been an intention to execute, and that intention sufficiently declared; but the act declaring the intention was not an execution in the form prescribed. We think it clear Polly A. Trower never intended to execute the power; at least she never declared her intention to execute the power. The most that can be said is that she promised X. B. Trower, if he desired her to execute said power by transferring to him said farms and business house in Sullivan, that she would do so upon his request, but said request was never made, and she never attempted to execute the said power, although X. B. Trower lived for many years after she promised to execute the power upon his request.

The execution of said power was discretionary with Polly A. Trower, and, she having promised to execute the same only upon the request of X. B. Trower, and he having failed to make such request, and the power not having been executed at the time of her death, the power, as to her, was nonexecuted, and therefore its execution cannot be enforced in favor of a stranger to the will of Thomas B. Trower after the death of X. B. Trower. The nature of a power is to leave to the free will and election of the donee the question whether it shall or shall not be executed, and a court of equity will not, as a general rule, upon the nonexecution of a power to appoint among a certain class, take upon itself the duty of executing the power in favor of such objects, especially where the property is, upon nonexecution, limited over to other persons; and in no event will it aid a defective execution of a power unless there is a meritorious consideration moving from the person to be benefited by its execution. 22 Am. & Eng. Ency. of Law (2d Ed.) p. 1127.

It is provided in Thomas B. Trower's will that after the marriage or death of Polly A. Trower the remainder of his estate shall go to his four children in fee, provided it had not been disposed of by Polly A. Trower, during her lifetime, to said children. The fee to the real estate in question under this provision vested in the four children of Thomas B. and Polly A. Trower at the death of Thomas B. Trower, subject to be divested by the conveyance thereof by Polly A. Trower to a child, or to one or more of the children, of the said Thomas B. and Polly A. Trower. The two farms described in the bill were conveyed, respectively, to Julian and Galster by Polly A. Trower and her daughters and their husbands. The sole effect of the deeds of Polly A. Trower to said Julian and Galster was to release her life estate in said farms, as she was powerless to convey the fee therein except to a child or the children of Thomas B. and Polly A. Trower. At the time of the death of X. B. Trower he therefore was seised of the one-fourth part of said Shelby and Edgar county farms, which interest was never divested by conveyance by Polly A. Trower to a child or the children of Thomas B. and Polly A. Trower. The business house at Sullivan was, however, conveyed by Polly A. Trower to Sallie F. Sayer in fee. It is said, however, that the deed made by Polly A. Trower to Sallie F. Sayer was made by Polly A. Trower as widow, and that it did not have the effect to pass the fee. A second deed was made, which cured the defect, if any there was, in the first deed, and Polly A. Trower had the power, at any time during her lifetime, to dispose of said business property by conveying it to one or more of the children of Thomas B. and Polly A. Trower, as, in her discretion, she might determine necessity and prudence might dictate. Sallie F. Sayer was therefore seised in fee of the

business house in Sullivan at the time of her mother's death.

The decree of the circuit court will be reversed, and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

RICKS, J., took no part in the decision of this case.

(216 Ill. 437)

EDDY et al. v. MORGAN et al.

(Supreme Court of Illinois. June 23, 1905.)

1. MUNICIPAL CORPORATIONS—POLICE PENSION ACT—RETROSPECTIVE EFFECT.

Laws 1899, p. 101, which amends Laws April 29, 1887 (Laws 1887, p. 122), the police pension act, by incorporating section 3 thereof, declaring that any person who has served on the police force for 20 years and has become 50 years of age may be pensioned on half pay, and adding that "all officers entitled to and having been pensioned under said act to which this is an amendment, after the taking effect of this act" shall be pensioned, "and after the decease of such member his widow or minor child * * *

* under 16 years of age shall be entitled to the pension provided for in this act of such a deceased husband or father," etc., contains no provisions showing a legislative intent to make it operate retrospectively, and must be construed not to so operate, and does not give a pension to the widow of a retired officer drawing a pension under the original act, who died before the adoption of the amendment.

2. STATUTES—RETROSPECTIVE EFFECT.

The fact that an amendment to an act incorporates the original act and then adds new provisions does not show a legislative intent to give the new provisions a retrospective effect, but, on the contrary, shows that the Legislature, in complying with the mandate of the Constitution providing that an amendment must propose an entire section, desired to preserve the rights acquired under the original act.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 363.]

3. MUNICIPAL CORPORATIONS—POLICE PENSION ACT—RETROSPECTIVE EFFECT.

Laws 1899, p. 101 (amending Laws April 29, 1887 [Laws 1887, p. 122], giving a pension to a policeman who has served 20 years and has reached 50 years of age), by providing that the widow or minor children of such pensioned officer shall have a pension, is not a remedial statute within the rule that remedial statutes are generally given retrospective effect.

4. STATUTES—CONSTRUCTION.

The court, in construing a statute, cannot consider the opinions of legislators as individuals, or the actions and purposes of the lobby interested in its passage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 292.]

5. MUNICIPAL CORPORATIONS—POLICE PENSIONS.

The fact that a police pension board shortly after the passage of Laws 1899, p. 101, giving a pension to the widow or minor children of a deceased police officer, erroneously construed the amendment as retrospective, and placed on the pension roll the widow of an officer who died before the adoption of the amendment, and suffered her to remain there for five years, does not estop the board, by the rule of contemporaneous construction, from withdrawing the pension.

6. STATUTES — CONTEMPORANEOUS CONSTRUCTION.

The rule of contemporaneous construction of a statute has no application unless it can be said that the statute is ambiguous, or of doubtful meaning.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 294.]

Appeal from Appellate Court, First District.

Petition by Margaret Morgan and others for a writ of mandamus to compel Arthur J. Eddy and others, as the police pension board of Chicago, to grant a pension to the petitioners. From a judgment of the Appellate Court affirming a judgment awarding the writ, defendants appeal. Reversed.

Rehearing denied October 12, 1903.

An appeal is prosecuted from a judgment of the Appellate Court for the First District affirming a judgment of the circuit court of Cook county awarding a writ of mandamus against appellants. In October, 1904, appellees filed their petition in said circuit court for said writ of mandamus, in which it is alleged, in substance: First. That James Morgan was duly appointed and sworn to serve, and did serve, on the regular police force of Chicago for 20 years or more. Second. That he was retired by the police pension board on November 30, 1891, because he had served 20 years or more, and was entitled to a pension under section 3 of the pension law, and was granted a pension by the board because he was a superannuated officer. Third. That James Morgan died February 21, 1897. Fourth. That appellee Margaret Morgan is his widow, and that she has not remarried since his death. Fifth. That an amendment to section 3 (page 123) of the pension law of 1887 was passed and approved in 1899, which provided that after the decease of the pensioner the pension shall be paid to the widow, or a child or children under 16 years of age, etc. Sixth. That this amendment to section 3 was omitted from the act of 1887 by inadvertence and oversight, and that this amendment, so passed in 1899, was intended to cure this omission, and to give the widows and children under 16 years of age the same rights they would have had if the act had read originally as it now reads. Seventh. That the said amendment was passed after repeated efforts on the part of the appellee Margaret Morgan and others, and that each succeeding Legislature from 1887 up to 1899 was appealed to to remedy the defect and omission in the original act of 1887. Eighth. That the question of the retrospectiveness of the amendment of 1899 was fully discussed and understood by the members of the General Assembly of 1899, and that the appellee Margaret Morgan and others were present, and heard said discussion. Ninth. That the appellees petitioned the Legislature at various times to amend the act of 1887 so as to include the widows and children of pensioned officers

who had died prior to the year 1899, and that some of the members of the Legislature of 1899 were also members of prior Legislatures, and that members of the assembly were familiar with the law, and that this amendment was intended to be retrospective. Tenth. That the pension board decided the act was retrospective, and placed appellee Margaret Morgan's name on the pension roll, in pursuance of said amendment, on July 18, 1899, and that she so received and drew her pension up to September 20, 1904, and the board exacted, and she did sign, a waiver to a claim for back pension. Eleventh. That the appellants, the pension board, without notice took her name from said pension roll, and refused to pay her pension. Twelfth. That the amount she is entitled to is \$47.65 per month. Thirteenth. That a proper demand was made by appellee Margaret Morgan for her pension, and said demand was refused by the appellants. Fourteenth. That there is sufficient money in said pension fund with which to pay appellees the pension claimed by them.

In 1877 the Legislature passed an act providing for the creation of a relief fund for the police and fire departments of cities and villages. Laws 1877, p. 62. That act provides a method for raising the fund, creates a board of trustees, and provides for the application of it to beneficiaries. Section 6 (page 63); is the only section that has any application to the questions raised here, and is as follows: "Sec. 6. When, in the judgment of the board, a sufficient amount shall have accumulated in said fund to justify the application thereof to the use for which the same is hereby created, if any member of the police or fire departments, while in the actual performance of duty, shall become permanently disabled, so as to render proper his retirement from membership, a sum not exceeding six hundred dollars (\$600) per annum, or such less sum as, in the judgment of the board, the fund will justify, shall be paid to such member out of said fund; or if any member, while in the actual discharge of duty, shall be killed, or shall die from the immediate effects of an injury received by him while in such discharge of duty, or shall die after ten years' service in the police or fire departments, and while still in the service of the same, and shall leave a widow, or if no widow, any child or children under the age of sixteen (16) years, a sum not exceeding six hundred dollars (\$600) per annum, or such less sum as, in the judgment of the board, the condition of the fund will justify, shall be paid to such widow so long as she shall remain unmarried; or to such child or children while under the age of sixteen years." That section, as is seen, only authorized a retirement on a pension of a member of either of said forces when permanently disabled, and did not extend the benefit of the pension to the widow of the retired officer or

fireman. In 1879 (Laws 1879, p. 72) the act was so amended that it did extend to widows the benefit of the pension that their husbands enjoyed while under retirement. In 1887 the Legislature saw fit to provide by separate acts for the pensioning of firemen and members of the police force, and to discontinue the further application of the provisions of the previous joint acts. Each of the acts provided for the creation of a relief fund, and a board of commissioners, and other details not here of importance, and the only questions that arise upon this case relate to the beneficiaries. The act relating to the police fund was approved April 29, 1887 (Laws 1887, p. 122), and the act in relation to the firemen's fund was approved May 13, 1887 (Id. p. 117), and both became effective July 1st of that year. 1 Starr & C. Ann. St. 1898, c. 24, pp. 837, 840. Section 3 of the act of 1887 (Laws 1887, p. 123), in relation to the police fund, provided that when a person had served 20 years on the police force and had reached the age of 50 years he might be pensioned on half pay. Section 4 authorized the retirement of disabled officers on half pay. Section 6 provided that where a member should be killed or die from injuries in the line of his duty his widow should be pensioned to equal one-half his salary, and that after 10 years' service if a member of the force died from any cause his widow should be pensioned. But that act did not extend to the widows the benefit of a pension of those dying while in retirement. The provisions of the act concerning the firemen's fund were somewhat different. Section 7 (page 124) authorized the retirement on half pay of the firemen who became permanently, physically or mentally, disabled by reason of service. Under section 8, if a member was killed or died of injuries received in the line of his duty, or from disease contracted by reason of his occupation, or should die from any cause during service or during retirement, there should be paid to his widow \$30 a month and to his children under 16 years of age \$8 each, but the total amount to the family should not exceed one-half the monthly salary of the deceased member at the time of his death or at the date of his retirement. Section 10 provided for the retirement of a fireman becoming 50 years of age and serving 22 years or more on a pension equal to one-half of his salary at the time of retirement, and extended to his widow until her remarriage the benefit of his pension.

It will be seen that the two acts contain different requirements as to the age and conditions of retirement, and that the latter act extended to the fireman's widow the pension of a retired fireman, while the act touching the police fund did not extend the benefit of a retired policeman's pension. In 1899 section 3 (page 123) of the act of 1887, in regard to the police pension fund, was amended so as to read as follows: "Sec. 3.

Whenever any person at time of taking effect of said act to which this is an amendment, or thereafter shall be duly appointed and sworn, and have served for the period of twenty years or more upon the regular constituted police force of said city, village or town of this state subject to the provisions of this act, said board shall order and direct that such person, after becoming fifty years of age and his services upon such police shall have ceased, and all officers entitled to and having been pensioned under said act to which this is an amendment, after the taking effect of this act, shall be paid from such a fund a yearly pension equal to one-half the amount of the salary attached to the rank which he may have held on said police force for one year next preceding the expiration of said term of twenty years. And after the decease of such member, his widow or minor child or children under sixteen years of age, if any surviving him, shall be entitled to the pension provided for in this act of such a deceased husband or father, but nothing in this or any other section of this act shall warrant the payment of any annuity to any widow of a deceased member of such police department after she shall have re-married. That all acts or parts of acts in conflict with the provisions of this act are hereby repealed." Laws 1899, p. 101.

The amendment consisted of adding to the section the portions in italics, and the allegation of the petition and the contention of appellees is that that amendment was intended to, and does by proper reading, extend to the widows of members of the police force who were drawing a retired officer's pension the benefit of that pension, although the officer died before the time of the amendment. The contention is that the amendment is and was intended to be retrospective. Upon a demurrer to the petition the circuit court held according to the contention of appellees, and granted the writ, and the Appellate Court affirmed that judgment.

John W. Beckwith (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellants. Thomas H. Owens (John E. Owens, of counsel), for appellees.

RICKS, J. (after stating the facts). The facts relating to the claims of the appellees other than Margaret Morgan are not set out or mentioned in the abstract or briefs, and in our consideration of the case we will confine ourselves to the facts as disclosed and relating to the case of Mrs. Morgan. James Morgan, her husband, was a police officer of Chicago more than 20 years, and was upwards of 50 years of age on November 30, 1891, and was retired as of that date from active duty on a pension of \$50.50 a month under the act of 1887. He died February 21, 1897. He drew his pension from the date of retirement to the date of his death.

Neither at the time he was placed upon the pension roll nor at any time between that time and his death was there any law conferring upon his widow the right of pension. It is claimed that the act passed in 1890, more than two years after the death of the husband, conferred the right of the pension of her husband upon Mrs. Morgan. The power of the Legislature to enact a law that should have a retrospective effect, so as to confer upon the appellee Mrs. Morgan the pension fund, is not questioned. The contention of appellants is that the Legislature, by an act of 1890, invoked by appellees, did not confer that right in either clear or apt language; but that, taking the construction of the act most favorable to appellees, the court would still remain in doubt, and that in such a case the act should be held operative in futuro. To this position of appellants appellees reply that the act by its terms does clearly confer the right, but that, if it does not, and should be regarded as doubtful from the reading of the act itself, it is a remedial act, and, being such, the doubt should be resolved in favor of appellees, and that to aid in the determination of the proper rule in case of doubt the court may resort to contemporaneous construction, the circumstances surrounding the passage of the act, the object to be attained, or the remedy and the necessity for it.

We are unable to find in the words or provisions of the act that which satisfies our minds that it was the intention of the Legislature that it should have a retrospective effect. Section 3, alone, of the act of 1887, was amended, and the Legislature saw fit to preserve to the policemen then in service the rights that had accrued by virtue of the act of 1887, and to confer upon the widows that should survive such officers the right they had not before that time had to succeed to the pension of their deceased husbands who had died in retirement. We may say the act went further, and preserved the rights not only of the officers in active service, but of the officers drawing pensions under retirement by virtue of the act of 1887. But to say that, where a retired officer had died while drawing a pension, and previous to the amendment, it is the intention of the act to confer the pension her deceased husband had been drawing, or any pension, upon his widow, is more than we are able to do. The provision in the later act is carefully guarded by the reference to things done and events having taken place under the act of 1887 by use of the expression, "said act to which this is an amendment." The first part of the act relates to the qualifications of the officers for retirement on a pension, and specifies those requirements, and is followed by the italicized words found in the body of the section, "and all officers entitled to and having been pensioned under said act to which this is an amendment, after the taking effect of this

act," shall be paid, etc. Are the words "after the taking effect of this act" to be given effect? If so, it would seem that they only have reference to consequences of the act or things that shall follow its passage, and not to things that had already taken place—to rights that had already accrued and been lost for want of a provision covering them. The last clause of the act or section, and the one under which the appellees claim, begins, "and after the decease of such member, his widow," etc. Clearly, those words do not denote an intention on the part of the Legislature to confer rights upon the widows of members dead before or at the time of the passage of the act. If the language had been, "and any member having died," the intention of the Legislature might, from such language, be held to be retrospective. The argument that the relief of appellees was a purpose of the act would strike us with more force if there were not a well-defined purpose expressed in the act itself by the amendment that the widows of retired pensioned officers would succeed to the rights of the pensions drawn by their husbands who should die after the passage of the act. It affected all retired officers living at the time the act went into force.

The argument of counsel that certain words added to the act or placed in the body of it that were not found in the original section, evince the intention of the Legislature to give it retrospective effect, does not seem convincing to us. It is said that the last clause might have been added to the original section if it were intended to benefit only the widows of officers dying after the act. We think the Legislature advisedly inserted the words in italics in the body of the original section, as otherwise confusion might have arisen as to the rights of officers who had been serving under the act of 1887. By our Constitution the amendment must propose an entire section, and not merely an addition to it by reference. The section as amended indicates to us that the Legislature, in complying with that requirement, wanted to preserve the rights of the officers who were serving under the original act.

In the construction of statutes it is the duty of the court to take the words found in the statute, and to give to each its ordinary, usual meaning. We are not permitted to qualify words there found by introducing other words which would change the effect of the act to make it comport more nearly with what we think it ought to be. As was said by Mr. Justice Tindall: "It is the duty of courts to confine themselves to the words of the Legislature, nothing adding thereto, nothing diminishing. We must not import into an act a condition or qualification which we do not find there." *Dwarris on Stat.* 200. Another canon of construction is that statutes are to be so construed as

to be given a prospective effect only, unless the will of the Legislature to give it a retrospective effect is declared in terms so plain and positive as to admit no doubt. *Thompson v. Alexander*, 11 Ill. 54; *Cleary v. Hoobler*, 207 Ill. 97, 69 N. E. 967; *Cooley's Const. Lim.* (7th Ed.) 529; *Bruce v. Schuyler*, 4 Gilman, 221, 46 Am. Dec. 447. Appellees concede that the latter rule, as we have stated it, is sound, and generally applicable; but it is said that the statute in question is a remedial statute, and for that reason should be construed retrospectively. There are various kinds of remedial statutes, and those statutes with relation to matters of procedure, and which affect the remedy alone, are frequently, if not usually, so construed as to affect rights of action existing at the time of their passage, or rights of action accruing upon contracts, or growing out of transactions had before the passage of the act. Such was the case in *Woods v. Soucy*, 166 Ill. 407, 47 N. E. 67, cited by appellees. The act in question is remedial, as being contradistinguished from penal acts, but is not of a class of acts that are ordinarily given retrospective effect. The general rule that a statute shall be given a prospective operation only, unless the contrary intent appears, is as applicable to the statute under consideration as to any other class of statutes. But in some instances in the application of remedial statutes the rule is applied with less strictness. 26 Am. & Eng. Ency. of Law (2d Ed.) 698. But the rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention to do so; as where the imperfection of the language used and literal construction might defeat the intention expressed. *Marsh v. Chesnut*, 14 Ill. 223; *Thompson v. Alexander*, supra. If, however, the intention to give the act a retrospective effect is not so clearly found in the act as to satisfy the court that such was the intention, or if, from the reading of the act, the court is doubtful whether such was the intention, the doubt must be resolved against the retrospective effect of the act, and the act must be given prospective effect only. *Thompson v. Alexander*, supra; *Cleary v. Hoobler*, supra. We think there is nothing in this act to indicate an intention on the part of the Legislature of giving it a retrospective effect. If there is, it is of so slight a character that the court would remain in doubt if such were the intention.

We do not regard as important the allegation of the petition that efforts were made to have an act passed before and at the time of the passage of this act that should have the retrospective effect contended for, and that in the opinion of certain legislators such was the effect of the act. While journals and proceedings of the Legislature are sometimes looked to in an endeavor to ascer-

tain a proper construction of the statute, so that the court may have before it what is authentic that surrounded the enactment of the law, we are aware of no authority, and none has been pointed out, where the action of the lobby or the opinion of the legislators as individuals has been taken into account. In fact, we understand the rule to be otherwise, and that such matters are inadmissible. 6 Am. & Eng. Ency. of Law (2d Ed.) 638.

Appellees, in their argument, remind us that we are to consider the old law, mischiefs and inconveniences introduced by it, and the remedy proposed by the amendatory law. This, doubtless, is a correct statement of the rule in all cases where it is applicable, but we are unable to say that the mischiefs or inconvenience contended for by appellees was such as the Legislature did take into account, or should have taken into account, or that they were trying to remedy. We think the act did supply a deficiency that was quite material; and because it did not extend further, and bring within this provision the case of appellees, it does not necessarily follow that it fell short of its purpose. Appellees argue this case as though it were a matter of contract or vested right, while in fact it is a mere matter of largess or bounty. A pension is a bounty springing from the graciousness and appreciation of sovereignty. It may be given or withheld at the pleasure of a sovereign power. Because one is placed upon a pension roll under a valid law is no reason why that law may not be repealed and the pension cease. *Walton v. Cotton*, 19 How. 355, 15 L. Ed. 658; *Frisbie v. United States*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657; 26 Am. & Eng. Ency. of Law (2d Ed.) 658.

It is also insisted that as the pension board, shortly after the passage of this act, construed it to be retrospective, and placed appellees on the pension roll, and suffered them to remain there for about five years, appellants are estopped or precluded by the rule of contemporaneous construction to deny the right of appellees. The trustees of the police pension fund were municipal officers dealing with municipal funds, and, so far as relates to appellees, we think exceeded their authority in granting them a pension upon the theory that the act was retrospective. There is no principle of estoppel involved. Appellees were simply given a pension to which they were not entitled, and it was paid for a time, when the board that granted it (whether constituted of the same persons or others is not material) became doubtful of its former action, and dropped appellees from the pension roll. In order that the rule of contemporaneous construction can be invoked, it must have continued for a long time, and the construction must have been uniform. So far as appears from this record, the act never received but one construc-

tion, and that was in 1899. Whether any person other than the board passed upon it does not appear. The municipalities have law officers who may be called upon by other officers for instructions in the discharge of their duties, and it is not alleged that any law officers or any court construed this statute according to the contention of appellees. Five years' practice is not a long time, in the case of a statute of slight application, to be insisted upon as bringing it within the theory of contemporaneous construction. Furthermore, the rule has no application unless it can be said that the statute is ambiguous, or of doubtful meaning. 26 Am. & Eng. Ency. of Law (2d Ed.) 633, 634. We are unable to reach the conclusion that this statute is so doubtful, or its language so ambiguous, that the rule contended for should be applied.

Appellees were doubtless worthy objects of the bounty of the state or municipality if the Legislature had seen fit to so provide. We think it has not done so, and that the judgments of the circuit court and Appellate Court are wrong, and should be reversed, which is done. We see no occasion for remanding the cause.

Judgment reversed.

(216 Ill. 451.)

SOUTH CHICAGO CITY RY. CO. v. KINNARE.

(Supreme Court of Illinois. June 23, 1905.)

1. LIMITATION OF ACTIONS—AMENDMENT—NEW CAUSE OF ACTION.

In an action for death, the original declaration alleged that the negligence was that defendant so carelessly operated a car that it ran against deceased, and knocked him off his bicycle, and he was thereby so seriously injured that he died; and thereafter an additional count was presented, stating that defendant so negligently ran the car that, as a direct result, deceased was brought in collision with the car, and knocked off his bicycle, and so seriously injured that he died. *Held*, that the negligence charged in the original count and that charged in the additional count were the same, and hence a plea of limitations to the additional count was properly overruled.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 543-545.]

2. NEGLIGENCE—CARE REQUIRED.

The law does not demand that one in a place of danger shall exercise the highest degree of self-possession, coolness, and skill, but only such as an ordinarily prudent and careful person would exercise in like situation and under like circumstances.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 99.]

3. STREET RAILROADS—COLLISION WITH TRAVELER—CONTRIBUTORY NEGLIGENCE.

In an action for death owing to a collision between defendant's car and the bicycle which deceased was riding, *held*, that the question of contributory negligence was one for the jury.

4. SAME—QUESTION FOR JURY.

Where a pleading charged that defendant's servants negligently placed deceased in a position of great peril, whereby while exercising ordinary care, he received his injuries, it was

for the jury to determine, whether under the influence of sudden fear, he so conducted himself as to incur the imputation of contributory negligence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 251, 255.]

5. SAME—INSTRUCTIONS—CARE REQUIRED OF TRAVELER.

In an action for death owing to the negligence of defendant railroad company, the court instructed that the plaintiff could not recover unless deceased was in the exercise of ordinary care (meaning thereby that he was required to exercise such care for his own safety not only at the time of the injury, but during the time and circumstances preceding the injury), and that, if deceased failed to exercise care for his own safety in going into the position he was in when injured, the jury should find for defendant, the same as if plaintiff had failed to exercise care at the precise instant of the injury. *Held* that, in view of such instruction, another instruction—that ordinary care is that which an ordinarily prudent person, situated as the deceased was before and at the time of the accident, would exercise for his own safety—was not erroneous on the theory that it assumed that plaintiff was not guilty of contributory negligence in being in the position in which he found himself at the time of the injury.

Appeal from Appellate Court, First District.

Action by Frank T. Kinnare, as administrator of Paul Christensen, deceased, against the South Chicago City Railway Company. From a judgment of the Appellate Court (117 Ill. App. 1) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Rehearing denied October 11, 1905.

James W. Duncan and C. Le Roy Brown, for appellant. Wing & Wing and James C. McShane, for appellee.

BOGGS, J. On the ground that servants of the appellant company negligently caused the death of Paul Christensen, the appellee, as administrator of his estate, recovered in the circuit court of Cook county a judgment in the sum of \$5,000. The Appellate Court for the First District affirmed the judgment, and the cause is here on a further appeal.

After the expiration of more than two years from date of the alleged negligence the appellee presented an additional count to his original declaration. The appellant company interposed a plea of the statute of limitations, to which a demurrer was sustained—erroneously, as it insists. The original declaration contained one count. The negligence alleged therein was that "the defendant, through certain of its servants then and there in charge and control of one of its said electric street cars being operated by it upon said street railway as aforesaid, then and there so negligently, carelessly, and improperly ran, managed, and operated said street car that said street car thereby then and there ran against and struck the said Paul Christensen and knocked him off his bicycle upon the ground, and he was thereby then and there so seriously and permanently injured that he died, as a result of his said

injuries, a short time afterwards." The negligence charged in the additional count was that the appellant company "so negligently, carelessly, and improperly ran, managed, and operated said street car that, as a direct result and in consequence thereof, the said Paul Christensen was brought in collision and contact with said street car, and was thereby then and there knocked off his said bicycle on to the ground there, and was thereby then and there so seriously injured that he died as a result of his said injuries." The negligence charged in the original count and that charged in the additional count are the same, namely, the negligent, careless management and operation of the street cars. The mode or manner in which such alleged negligence caused the death of appellee's intestate is somewhat differently stated. The cause of action is the thing done or omitted to be done, from which the right of action arose (*Swift & Co. v. Madden*, 185 Ill. 41, 45 N. E. 979; *Illinois Central Railroad Co. v. Campbell*, 170 Ill. 163, 49 N. E. 314); and as to this the allegations of the original and additional counts are not different. There was no error in sustaining the demurrer to the plea of the statute of limitations.

The refusal of the trial court to instruct the jury, as requested by the appellant company, to return a peremptory verdict in its favor, is urged as ground of reversal. On the 24th day of May, 1896, at about 2 o'clock in the afternoon, the deceased, a man aged about 38 years, and one Peter Brask, a relative, were riding their bicycles northward along the roadway on the east side of Stony Island avenue, in the city of Chicago. This avenue runs north and south, and the appellant company maintained a double line of street car tracks in and along the avenue. A horse drawing a buggy was being driven south on the roadway on the east side of the avenue, and Brask, who was riding slightly in advance of the deceased, turned to the right in order to pass between the buggy and the curb of the roadway. The deceased turned to the left, and while he was on the west side of the buggy, and Brask to the east thereof—the buggy being between them—a train of street cars, consisting of a motor car and a trailer, which was operated and controlled by employes of the appellant company was driven at a high rate of speed northward along the east track in the avenue, and passed them. The bicycle on which the deceased was riding came in contact with the side of one of the cars, and he was thrown from his bicycle to the pavement of the street, and sustained injuries which resulted in his death some days later. The collision occurred between Sixty-Ninth and Seventieth streets, and about 50 feet north of Sixty-Ninth Place, which intersects Stony Island avenue on the western side thereof. The space between the eastern rail of appellant's track and the curb of the street was 17 feet. Two feet of this space next immediately

east of and adjoining the rail on the east was filled with cinders and slag, and was slightly lower than the roadway of the street, from which it was divided by a wooden plank or curb. The roadway of the street between the cinders and the curb was of a width of not exceeding 15 feet, and was paved with wooden blocks. The buggy was moving along the middle of this roadway. The sides of the cars of appellant's train extended, as variously estimated, from 16½ to 18 inches over the cinders and slag. The space between the buggy and the sides of the cars was about 5 feet. The deceased was in this narrow space when the train of appellant's cars dashed along the track at a speed of from 12 to 15 miles per hour. The evidence fully justified the view that neither of the bicyclists knew the train was in their rear. No warning was given of the approach of the train, nor was the speed of the train slackened in any degree. The bicyclists, when within 10 or 15 feet of the buggy, turned to the right and left, respectively, and the appellant's train was then from 150 feet to 200 feet in their rear. The train, if moving at the rate of 12 miles per hour, would run about 17 feet per second. Witnesses, some of whom were passengers on the train, and others who were standing on the sidewalk to the rear of the bicyclists, saw and appreciated the perilous position in which the deceased would be placed by the on-coming train, and the jury were warranted in believing that the motor-car, had he exercised ordinary care, would have realized that unless warning should be given of the approach of the train, or the speed thereof slackened, the deceased would be placed in a position of great danger in the narrow space between the train and the buggy. The court could not declare, as matter of law, that the deceased was guilty of contributory negligence, for the reason the evidence tended to show he did not know that the train was approaching, and did not go or intend to go on the track, nor on the ground that the deceased became excited and frightened, and did not exercise proper skill in endeavoring to extricate himself from the perilous place in which he found himself. There was testimony tending to show that while between the train and the buggy the deceased put his hand on the side of the motor car, and that this caused his wheel to "wobble" and to come in contact with the trailer, which struck him and threw him to the surface of the street. But this act of the deceased could not be deemed contributory negligence as matter of law. What course should have been expected of an ordinarily prudent man under such circumstances was a question of fact. The law does not demand that one in a place of danger shall exercise the highest degree of self-possession, coolness, and skill, but only such as an ordinarily prudent and careful person would exercise in the like situation and under like circumstances. 3 Thompson on Negligence, §§ 3025, 3026.

Thirty instructions, which cover more than 12 pages of the printed abstract, were given as asked by the appellant company. One instruction requested in its behalf was refused. This instruction read as follows: (5) "The court instructs the jury that there can be no recovery against a party for merely frightening or alarming the person injured, and, if you believe, from the evidence that Christensen was injured solely by reason of being frightened or alarmed just before his bicycle came in contact with defendant's car, then you must find the defendant not guilty, even if you believe from the evidence that the defendant, by its servants, produced such fright or alarm on his part." Instructions Nos. 28 and 30 given at the request of the appellant company treated of fright and alarm of the deceased and his consequent conduct as an element of the case, and declared the law on that subject fully and completely. Instruction No. 28 is as follows: "If you believe from the evidence that the plaintiff became frightened or alarmed or confused just before coming into collision with defendant's car on account of getting suddenly into a position of peril, then such sudden peril will not excuse him for a failure, if there was any, to exercise ordinary care, if you believe from the evidence that he brought himself into such position of peril by reason of his own negligence, if he was negligent, or by reason of running the risk of an obvious and serious danger merely to avoid inconvenience." Instruction No. 30 occupies a full printed page of the abstract, and, because of its length, is not here set forth. It declared it to be the duty of the deceased to conduct himself with that coolness and presence of mind that might be expected to be exercised by men of ordinary coolness and prudence under like circumstances. It is urged that neither the original declaration nor the additional count specifies a charge of negligently producing fright and alarm on the part of the deceased, and that for that reason the court committed error in refusing instruction No. 5. The charge in the pleading is that the servants of the appellant company negligently placed the deceased in a position of great peril, and that by reason of such negligence he received his injuries, and that he exercised ordinary care for his safety. His conduct while in a position of danger was a matter of evidence, not of specific allegation of pleading. Whether, under the influence of sudden fear, he so conducted himself as to incur the imputation of contributory negligence, was to be determined by the jury as a question of fact, and did not arise as a matter of pleading.

Instruction No. 1 given at the request of the appellee was as follows: "The court instructs the jury that ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent

person, situated as the deceased was before and at the time of the accident, would exercise for his own safety." As a criticism upon this instruction, it is urged that "It assumes that an ordinarily prudent and cautious person might find himself in the situation that the plaintiff was in at the time of the accident, and assumes that he was not guilty of contributory negligence in being in the position in which he found himself at the time of the injury." We see nothing in the instruction from which any such assumption is indicated. The instruction fairly directed the minds of the jury to the acts of the deceased connected with his going to the left of the buggy and bringing himself into the situation or position in which he found himself at the time he was injured, as well as his conduct while in such position or situation. There is nothing in the instruction which would lead the jury to infer that, if the deceased exercised due care in his endeavors to avoid injury or extricate himself from a position of danger, he might recover, without regard to whether he had by his own negligence brought himself into such position of peril. Instruction No. 11 given at the instance of the appellant company so fully explained the meaning to be given by the jury to the expression found in any of the instructions that the deceased was required to use "ordinary care at the time of the injury" that it would be wholly unjustifiable to suppose that any improper inference could have arisen in the minds of the jury. Instruction No. 11 is as follows: "When the court instructs the jury that the plaintiff can not recover unless Christensen was in the exercise of ordinary care at the time of the injury, the court means that Christensen was required to exercise such care for his own safety not only at the precise time of the injury, but during the time and circumstances preceding the injury as well; and, if you believe from the evidence that he failed to exercise ordinary care for his own safety in getting into the position he was in when injured, it will be your duty to find for the defendant, the same as if he failed to exercise ordinary care at the precise instant of the injury."

We have carefully considered the complaint that counsel for appellee, in the trial court, conducted himself improperly in the course of the examination of the witnesses, and indulged in improper argument in addressing the jury, but we do not find anything which would suffice to justify the view that the cause of the appellant company was thereby unduly prejudiced.

The declaration herein was filed January 7, 1897. The case has been thrice tried before a jury, and nothing is here urged sufficient to show that the litigation should be further prolonged.

The judgment of the Appellate Court is free from error, and is affirmed.

Judgment affirmed.

(216 Ill. 458)

CALKINS et al. v. CALKINS et al.

(Supreme Court of Illinois. June 23, 1905.)

WILLS—ATTESTATION—SUFFICIENCY.

After testator had signed his will in the presence of the attesting witnesses, the latter withdrew to another room outside of the range of his vision, and there signed their names as witnesses. The witnesses then returned to the testator, and one of them read the will to him, including the signatures, and showed the signatures to him, who said it was all right. *Held* not a compliance with the statute requiring wills to be attested in the presence of the testator by two or more witnesses.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 320-328.]

Error to Circuit Court, Kane County; Linus C. Ruth, Judge.

Suit by Gilbert Calkins and others against Charles Calkins and others to set aside the probate of the will of Cyrus Calkins, deceased. From a decree sustaining the will, complainants bring error. Reversed.

Rehearing denied October 11, 1905.

Aldrich & Worcester and Lee Mighell, for plaintiffs in error. Raymond & Newhall (Robert Egan, of counsel), for defendants in error.

CARTWRIGHT, C. J. Appellants filed their bill in the circuit court of Kane county to contest the will of Cyrus Calkins, deceased, alleging, among other things, that the will was not executed in conformity with the requirements of the statute, for the reason that the persons signing the will as witnesses did not attest it in the presence of said Cyrus Calkins, but signed it in another room from the one in which he was lying, and out of the range of his vision, where he did not and could not see the act of attestation. F. M. McNair, the executor, and Charles Calkins and Clara Calkins, three of the appellees, by their answer alleged that the will was signed within the range of vision of the testator, and that after it was signed by the witnesses it was immediately presented to the testator, and by him read over and acknowledged in the presence of said witnesses who had so signed the same. An issue was formed and submitted to a jury for trial, when the alleged will was presented signed by Cyrus Calkins with his mark, and with the usual attestation clause signed by Phoebe Catlin and Edwin M. Harris. The subscribing witnesses testified that the will was prepared by the witness Harris, and was signed by the testator at 9 or 10 o'clock in the evening; that the testator was lying in bed with a broken hip; that, after affixing his mark to it, he, in response to a question by Dr. McNair, the executor, requested said witnesses to witness it; that they took the will and went into an adjoining room, out of the presence of the testator and outside of the range of his vision, where it was a physical impossibility for him to see them or the will, and sat down

by a table and wrote their signatures; that Mr. Harris then took the will and a lamp, and they went back into the room where the testator was; that Mr. Harris then read the will to the testator, including the signatures, and showed them to him, and he said it was all right. The will, being offered in evidence, was objected to by the appellants on the ground that it was not executed in accordance with the statute, and was not attested in the presence of the testator, or within his sight or view, or within the possible range of his vision. The court overruled the objection, and admitted the will in evidence. The same question was afterwards raised by instructions asked by the appellants and refused, and the court gave instructions at the instance of appellees, stating, in effect, that there was a valid attestation of the will if the jury found the facts to be as testified to by said witnesses. The verdict was that the writing introduced in evidence was the last will and testament of Cyrus Calkins, deceased, and, after overruling a motion for a new trial, the court entered a decree in accordance with the verdict. From that decree this appeal was prosecuted.

It must be borne in mind that the question what will constitute a valid will devising property, or a valid attestation of such an instrument, is legislative, and that the only legitimate function of the court is to declare and enforce the law as enacted by the Legislature. The office of the court is to interpret the language used by the Legislature where it requires interpretation, but not to annex new provisions or substitute different ones. The statute requires that all wills, testaments, and codicils shall be attested in the presence of the testator or testatrix by two or more credible witnesses, and if we should attempt to change that provision so as to authorize an attestation out of the presence of the testator or testatrix, either on account of a desire to sustain a particular will, or because we regard a subsequent acknowledgment by the witnesses, or ratification or approval by the testator, just as good and effective as an attestation according to the statute, we should justly be charged with offensive judicial legislation. Our duty is merely to determine whether this will was attested in the presence of the testator, and the evidence was that it was not so attested, but was afterwards read over to the testator, and the signatures of the witnesses were shown to him. Attestation is the act of witnessing the actual execution of an instrument, and subscribing the name of the witness in testimony of the fact. 4 Cyc. 888. In the case of *Drury v. Connell*, 177 Ill. 43, 52 N. E. 368, it was said that the attestation of a will consists in the subscription of the names of the witnesses to the attestation clause as a declaration that the signature of

the testator was affixed or the will acknowledged in their presence, and in the case of *Sloan v. Sloan*, 184 Ill. 579, 58 N. E. 952, the court considered the question whether there is a distinction between the attestation of a will and the subscription of the names of the witnesses. In that case the proponent offered to prove by one who was present that the will was signed by both the witnesses in his presence, and that it was executed and published by the deceased as and for his last will in his presence, but it was said that a different rule had been too long acquiesced in and understood in this state, and that to render a will valid it must be subscribed by the attesting witnesses. The supposed distinction, as applied to our statute, was rejected, and it was held that an attesting witness must be a subscribing witness, and that it is not competent to prove a will by a person who was present and witnessed its execution but did not sign as an attesting witness.

That the attestation mentioned in the statute consists in the witnesses subscribing their names is shown by other provisions of our statute. In case of a deceased, insane, or absent witness, the court may admit proof of the handwriting of such witness, and admit the instrument to probate as though it had been proved by such subscribing witness in his or her proper person. Proof of the handwriting of the subscribing witness in such a case raises the presumption that the witness duly attested the will in the presence of the testator and believed him to possess testamentary capacity. *More v. More*, 211 Ill. 268, 71 N. E. 988. It is not indispensable that the witnesses shall sign a formal clause of attestation. The attestation clause may consist of a simple word, such as "witness," "attest," or "test," or there may be no words of attestation at all, and yet the signature of the witness alone constitutes an attestation of every fact necessary to make the will valid.

The provisions of the statute as to the signing by the testator and the witnesses are different. He may either sign the will in the presence of the witnesses, or acknowledge that the will is his act and deed; but as to the witnesses, the only provision is that they shall attest the will in his presence. All the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will, and to effect that object it is necessary that the testator shall be able to see and know that the witnesses have affixed their names to the paper which he has signed and acknowledged as his will. The Legislature have determined that such object shall be attained by requiring the attestation of the subscribing witnesses to be in the presence of the testator, and, if that is not done, it is no answer to say that some other method would effect the same object. Numerous methods may be devised by which the testa-

tor can be made acquainted with the fact that the witnesses have signed the identical will which he executed and that there is no fraud or imposition upon him, but where the Legislature have determined in what manner the object in view shall be accomplished, no other method can be adopted, although in the opinion of the court it would be just as effective. To adopt any other rule would open a limitless field as to what would be equivalent to a compliance with the provision of the statute.

The authorities have always given to the word "presence" the meaning of conscious presence, so that the act of attestation may be within the actual personal knowledge of the testator, and in *Witt v. Gardiner*, 158 Ill. 176, 41 N. E. 781, 49 Am. St. Rep. 150, it was stated that the test of presence of the testator is contiguity, with an uninterrupted view between the testator and the subscribing witnesses, as the indispensable element to the physical signing in the testator's presence. It is not necessary that the act of attestation be performed in the same room, if it takes place within the testator's range of vision, where he can see the signing, considering his position and the state of his health at the time. It is still in his presence although he may turn and look away or choose not to look at the act. On the other hand, no mere contiguity of the witnesses will constitute presence if the position of the testator is such that he cannot possibly see them sign. An attestation is not in the presence of the testator, although the witnesses are in the same room and close to him, if some material obstacle prevents him from knowing of his own knowledge, or perceiving by his senses, the act of attestation. The rule so stated was reaffirmed in *Drury v. Connell*, supra.

But counsel say that, according to the rule so stated, a blind person would not be able to execute a will. The rule was naturally stated with reference to sight, because nearly all persons can see, and the rule would apply almost universally. In the case of a blind person, his will would be attested in his presence if the act was brought within his personal knowledge through the medium of other senses. But whether a person is blind or can see, an attestation is certainly not in his presence if he has no conscious personal knowledge of the act and is merely told that it has been performed in another room. Neither is there anything in the suggestion that, if a testator were lying on his bed and could only look upward, the witnesses would have to be suspended in the air over his head. Means could be adopted to comply with the law, and the plain meaning of the authorities is that an attestation is in the presence of the testator only when he has personal knowledge that the witnesses are signing their names to his will in accordance with his request.

Counsel say that in this case the attesta-

tion was within the knowledge and understanding of the testator, meaning by that statement that, from the question asked by the doctor concerning witnessing the will, and the testator's answer and the taking of the will into the other room, he would naturally conclude that they went there to attest the will and were attesting it. It is perfectly clear that he could not have been a witness to the attestation, but that his knowledge, as it is called, was merely an inference or conclusion as to what was going on, based on other facts.

The question here involved was decided in *Mendell v. Dunbar*, 169 Mass. 74, 47 N. E. 402, 61 Am. St. Rep. 277, where the testator signed the will in the presence of the subscribing witnesses, and they withdrew to another room in the house and there subscribed it as witnesses. There was a question whether the fact that the witnesses afterwards returned to the testator, and one of them, with the assent of the others, said that they had signed the will, and showed him the signatures, and he assented thereto, was a sufficient compliance with the statute. The question was answered in the negative. The same view of the law was taken in the case of *In re Downie's Will*, 42 Wis. 66. We have been referred to two cases adopting a contrary view—*Cook v. Winchester* (Mich.) 46 N. W. 106, 8 L. R. A. 822, and *Cunningham v. Cunningham* (Minn.) 83 N. W. 58, 51 L. R. A. 642, 81 Am. St. Rep. 256. In each of those cases there was a conscious effort on the part of the court to sustain the will on account of the equity and justice of the case. The subsequent acknowledgment was considered as effective as the actual attestation in the presence of the testator, and was held to be a substantial compliance with the statute. But we do not regard the reasons given as sufficient to justify a departure from the plain language of our statute. If some other method than the attestation in the presence of the testator would be just as effective to prevent fraud, imposition, or the substitution of a surreptitious will, we deem it sufficient to say that the Legislature has prescribed a particular method which must be followed in order to make a will legal and valid.

The court erred in overruling the objection to the will and in giving the instructions. The decree is reversed, and the cause remanded.

Reversed and remanded.

(216 Ill. 466)

JOYCE v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. June 23, 1905.)

1. MUNICIPAL CORPORATIONS—POLICE OFFICERS—REMOVAL FROM OFFICE.

Under Hurd's Rev. St. 1903, p. 381, c. 24, par. 457, § 12, providing for the removal from office of officers in the classified civil service "or cause, on a written charge, after hearing, where written charges against a police officer were filed with the civil service commission of

Chicago, and he was notified of the time and place of hearing, and served with a copy of the charges, and appeared, the commission had jurisdiction to remove him from his office.

2. CERTIORARI—EVIDENCE.

On certiorari to a civil service commission to test the legality of its removal of a police officer, evidence aliunde the record of its proceeding is properly excluded.

3. MUNICIPAL CORPORATIONS—MISCONDUCT OF POLICE OFFICER—DISMISSAL.

Under Civil Service Act, § 12 (Hurd's Rev. St. 1903, p. 381, c. 24, par. 457), providing that an officer in the classified civil service shall not be removed except for cause, misconduct of a police officer in unlawfully obtaining money from the state is cause for his removal, though he was not acting strictly in the discharge of his official duties.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 492, 494.]

4. CERTIORARI—DISMISSAL OF POLICEMAN—REVIEW.

Where the civil service commission had jurisdiction of a proceeding for the removal of a police officer, the circuit court on certiorari was without power to review its order of removal on the ground that the commission wrongfully removed him.

5. MUNICIPAL CORPORATIONS—REMOVAL OF POLICE OFFICER.

Where written charges preferred to the civil service commission for the removal of a police officer clearly present the grounds assigned for his removal, they are sufficient, as it is not necessary that they be technically formulated.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 499.]

6. CERTIORARI—REVIEW—REMOVAL OF POLICE OFFICER.

Where no objections were interposed to written charges preferred to the civil service commission for the removal of a police officer, the sufficiency cannot be questioned on certiorari to review the proceedings.

7. MUNICIPAL CORPORATIONS—REMOVAL OF POLICEMAN—GROUNDS.

Civil Service Act, §§ 4, 5 (Hurd's Rev. St. 1903, p. 380, c. 24, pars. 449, 450) directing that the commission shall make rules for removals in accordance with its provisions, and providing for their publication and when they shall take effect, do not require a statement of the grounds on which removals by the commission may be based, such grounds being prescribed by section 12 (page 381, par. 457), providing for removals for cause.

Error to Appellate Court, First District.

Certiorari by Peter J. Joyce against Robert Lindblom and others. From a judgment of the Appellate Court affirming a judgment of the circuit court quashing the writ, plaintiff brings error. Affirmed.

Rehearing denied October 11, 1905.

The plaintiff in error filed a petition in the circuit court of Cook county against Robert Lindblom, John W. Ela, and Joseph O. Powell, composing the civil service commission of the city of Chicago, for a common-law writ of certiorari to test the legality of his removal by said commission as lieutenant of police upon the police force of the city of Chicago. The writ was issued; and, as a return thereto, the defendants in error filed a certified copy of the record kept by them as such commission, showing the examination, promotion, and appoint-

ment of plaintiff in error to the office of lieutenant of police of said city; that a charge in writing was filed in their office against him as such lieutenant of police by the general superintendent of police of said city, charging him with having made a false official report, and with conduct unbecoming a police officer; that a time and place were fixed by the commission for a hearing upon said charge; that the plaintiff in error was summoned to appear for trial before said commission, and was served with a copy of said charge; that he appeared before said commission, in person and by attorney, at the time and place fixed for his trial; that witnesses were sworn and examined, and upon due consideration the plaintiff in error was found guilty of the said charge, and was removed from the office of lieutenant of police, by said commission. Upon the return being filed, the defendants in error moved the court to quash the writ, which motion was allowed and the writ quashed, and, the judgment of the circuit court in quashing said writ having been affirmed by the Appellate Court for the First District, the record has been brought to this court by writ of error for further review.

A. D. Gash and James H. Hooper, for plaintiff in error. Colin C. H. Fyffe (Edgar Branson Tolman, Corp. Counsel, of counsel), for defendants in error.

HAND, J. (after stating the facts). It is first contended that the commission was without jurisdiction to try plaintiff in error. Section 12 of an act entitled "An act to regulate the civil service of cities" (Hurd's Rev. St. 1903, p. 381, c. 24, par. 457), which is in force in the city of Chicago, provides for the trial and removal from office of officers in the classified civil service for cause, upon a written charge, and after an opportunity to be heard in their defense has been given them. A charge in writing was filed against the plaintiff in error. He was notified of the time and place fixed for his trial, was served with a copy of the charge upon which he was to be tried, and appeared in person and by attorney before the commission, and was fully heard in his own defense, and was convicted and removed from office. The commission was given jurisdiction of the subject-matter by the statute, and had jurisdiction of the plaintiff in error by service of summons, and we fail to see wherein the commission was lacking in jurisdiction to hear and determine his case.

It is next contended that the circuit court erred in rejecting proper evidence offered upon behalf of plaintiff in error. The rule is well settled in this state that the purpose of the common-law writ of certiorari, which writ issues in certain cases from a superior to an inferior court or tribunal when no method of reviewing

the proceedings of such inferior court or tribunal is given by appeal or otherwise, is to bring before the court granting the writ the record of such inferior court or tribunal for inspection and review, and that the only questions which can be determined by that court are, did the inferior court or tribunal have jurisdiction to act, and, in acting, did it exceed its jurisdiction or fail to proceed according to the essential requirements of law? and that, on the return of the writ being made by filing the record in court, the trial is had on the record alone. It being inadmissible to form issues of fact or to hear or consider evidence relative to questions involved upon the trial of the original proceeding or heard upon that trial (*Donahue v. County of Will*, 100 Ill. 94; *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969; *Smith v. Commissioners of Highways*, 150 Ill. 385, 36 N. E. 967; *Drainage Commissioners v. Volke*, 163 Ill. 243, 45 N. E. 415; *Scheiwe v. Holz*, 168 Ill. 482, 48 N. E. 65; *People v. Lindblom*, 182 Ill. 241, 55 N. E. 358), the court did not err in declining to hear evidence aliunde the record, and properly decided the case upon the face of the record filed as a return to the writ.

It is further contended that the offense with which the plaintiff in error was charged pertained to misconduct on his part while acting as a notary public, and not to misconduct on his part while acting as a lieutenant of police, and that, although he may be guilty of the charge, it formed no proper basis for his discharge from office as a lieutenant of police by the commission. The charge is that the plaintiff in error, in connection with Patrolman Tracy and Sergeant Cramer, two other officers upon the police force in the city of Chicago, rendered a false and fraudulent "messenger's expense account" to the Secretary of State for the return of Joseph Larkin, a fugitive from justice, from Cleveland, Ohio, to the city of Chicago, whereby they obtained from the state \$48.80 in excess of the amount allowed by law for such service. Said section 12 of the city civil service act provides that an officer in the classified civil service shall not be removed except for cause. The commission held the obtaining of said fund unlawfully from the state was cause for the removal of the plaintiff in error as a lieutenant of police. We are of the opinion they were right in so holding, and do not agree with the contention that no cause is sufficient for the removal of an officer in the classified civil service unless the offense is committed while the officer is acting strictly within the line of his duty as an officer. It would hardly be urged that a construction of the statute would be justified which would require the commission to retain a murderer or burglar in the classified civil service simply because he was off duty at the time the murder or burglary was committed, and was not acting in the line of his

duty at the time he committed one or both of said crimes.

But if the contention of plaintiff in error were conceded to be correct, still the removal of the plaintiff in error cannot be set aside in this proceeding. If the commission had jurisdiction to hear and determine plaintiff in error's case, the circuit court in this proceeding was powerless to review its order removing the plaintiff in error as a lieutenant of police on the ground that the commission wrongfully removed him from office. In *People v. Lindblom*, supra, it was held the correctness of the ruling of a civil service commission that one person is entitled to a certificate in preference to another cannot be raised on certiorari, even on the ground that the statute on which such ruling is based is unconstitutional, and that the inquiry in such case is limited to determining whether the commission had jurisdiction and proceeded according to law. It is clear, here, the commission had jurisdiction, and that it proceeded according to the forms of law applicable in such case. In that case, on page 244, 182 Ill., and page 360, 55 N. E. the court said: "The petitioner seems to be laboring under another misconception in regard to his rights and the power of the court in a proceeding of this character. The inferior tribunal, where the record is brought before the court by writ of certiorari, may have erred in its rulings on questions of law during the progress of the trial; or it may have erred in the application of the law to the facts in reaching its final judgment, and yet those errors cannot be reviewed and corrected in a proceeding of this character. On a return to a writ bringing the record before the court, the only proper inquiry is whether the inferior tribunal had jurisdiction and proceeded legally—i. e., followed the form of proceedings legally applicable in such cases—and not whether it correctly decided the questions arising upon the admission or exclusion of evidence, the giving and refusing of instructions, and other like questions, during the progress of the trial. The rulings of a court may be erroneous and yet it may have jurisdiction and proceed legally."

It is also urged that the charge filed with the commission by the general superintendent of police is not sufficiently specific. This proceeding is not a common-law or criminal proceeding, but an investigation. While the plaintiff in error had the right to have the charge preferred against him reduced to writing, and in such form that he could clearly understand the ground assigned for his removal, it was not necessary that the charge should be formulated in technical language similar to that of a declaration or indictment. In *State v. Common Council of the City of Superior*, 90 Wis. 612, 64 N. W. 304, charges were filed with the common council against the mayor of the city for extorting sums of money from policemen and

firemen for political purposes. After a hearing upon the charges, the common council removed the mayor from office. Under the Wisconsin statute the mayor could not be so removed "without cause, nor unless charges are preferred against him and an opportunity given him to be heard in his own defense." The court, on page 622, 90 Wis., and pages 306, 307, 64 N. W., said: "This was not a common-law trial, but an investigation. While the mayor had a right to insist that he have a fair hearing, and that the substance of the rules governing trials at law should be preserved, he cannot require that the same precision and formality be observed which are required in criminal trials at law. These principles govern the charges made, as well as the procedure. The charge does not need to be drawn with the accuracy of an indictment. It is sufficient if the accused be furnished with the substance of the charge against him." Upon the trial the plaintiff in error was represented by counsel, and no objections, as appears from the record filed as a return, were made to the written charge for indefiniteness or otherwise, and it is too late now for him to raise the objection that the complaint was not sufficiently specific. In *State v. Kirkwood*, 15 Wash. 298, 46 Pac. 331, the relator was removed from the office of police commissioner of the city of Seattle by the mayor upon charges, and Kirkwood was appointed in his place. The relator brought suit, in the form of an information in the nature of a quo warranto, to oust Kirkwood. The court held that in a quo warranto proceeding it could examine the sufficiency of the charges, and said (page 300, 15 Wash., and page 332, 46 Pac.): "The second contention of appellant, however, viz., that the charges were sufficient to support the removal of relator, we think must be sustained. These charges may have been somewhat indefinite, but no motion was made to make them more definite or certain. No objection was made to them in any way. The appellant went to trial upon the complaint as it was, and the issues were found against him, and we think it is too late for him now to raise the objection that the complaint was indefinite and not specific. * * * The complaint * * * is somewhat discursive and indefinite, but we think sufficient can be gathered from the complaint to place the relator upon trial for acts which were inconsistent with the duties of a public officer."

It is finally contended that the plaintiff in error could not be tried by the commission and removed from office for the offense with which he was charged, as it is said the commission had passed no rule or rules, under sections 4 and 5 of the city civil service act (*Hurd's Rev. St. 1903*, page 380, c. 24, pars. 449, 450), making the offense with which he was charged a ground of removal. Section 4 provides the commission shall make rules to carry out the purposes of said act, and for

examinations, appointments, and removals in accordance with its provisions; and section 5 provides for the publication of such rules, and when they shall take effect. We do not understand the rules in section 4 with reference to removals refer to the grounds upon which removals by the commission may be based. The grounds of removal are found in section 12 of said act, where it is provided that removals "for cause," upon written charges, after an opportunity be given to the accused to be heard, may be made by the commission. It would, we think, in a city like Chicago, where the classified civil service embraces many hundreds of persons, greatly hamper the commission in the administration of the city civil service act to require it, in advance, to specify in written rules every case which should be deemed cause for removal, and the statute should not be held to require it so to do unless such requirement is plain. The charge filed in this case, if true, shows conduct of the plaintiff in error "unbecoming a police officer," and which clearly rendered him unfit to act as a lieutenant of police in the city of Chicago, and was cause for and justified his removal from such office by the commission. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(216 Ill. 474)

KIEBEL et al. v. LEICK et al.

(Supreme Court of Illinois. June 23, 1905.)

1. PARTITION—SETTING ASIDE SALE—INCREASE OF BID.

In the absence of anything in the record to show an abuse of discretion, the order of the court setting aside, on the petition of the infant parties to a partition proceeding, the sale to the adult parties, \$1,000 more than the prevailing bid being offered by one who did not have access to the abstract, which was in the possession of one of the purchasers, and who did not think the order of sale a protection to bidders in case of defective title, will not be set aside.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 367-370.]

2. SAME—EXCEPTIONS.

Under Hurd's Rev. St. 1899, c. 106, § 29, providing that, after a report of sale is made by the master, any persons interested may file exceptions thereto, the petition of infant defendants in partition proceedings, asking that the sale be vacated, is a sufficient basis for an order setting it aside.

3. SAME—ABSOLUTE OFFER.

Though the offer to increase the bid made in a petition to set aside a partition sale is conditioned, it is enough that, before the order vacating the sale, the offer is made absolute.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 369, 370.]

4. SAME—BOND OF BIDDER.

A bond of a person to increase the bid is sufficient security, without a cash deposit, to authorize an order for a new sale in partition proceedings.

Appeal from Superior Court, Cook County;
M. Kavanagh, Judge.

Suit by Anna K. Kiebel and Jacob Kiebel against Edward J. Leick and others for partition sale. From an order setting aside the sale to complainants, they appeal. Affirmed. Rehearing denied October 12, 1905.

On July 11, 1904, a bill was filed in the superior court of Cook county for the partition of certain real estate in the city of Chicago between Jacob Kiebel, Anna K. Kiebel, Edward J. Leick, Casper J. Leick, Alfonso M. Leick, and Isabel May Leick; the last four being minors. The premises, being reported not susceptible of partition, were appraised at \$9,000, and a decree of sale entered. On January 6, 1905, at a sale by the master, they were purchased by appellants for \$11,000. After the report of sale had been filed, but before it was approved, appellee Mathias J. Leick, as guardian ad litem of the infant defendants, moved the court to set the sale aside, and in support of the motion filed a petition, and alleged that it had been made upon the terms that the title should be perfect, or the sale vacated; that one George Manierre was desirous of purchasing said premises, but his attorneys did not consider the order of sale a protection to bidders, and for this reason he had declined to make any bid; that the abstract of title was in the possession of the said Jacob Kiebel, and other parties did not have access to it; that, owing to the absence of the abstract, the sale was not made for the best price obtainable, and said Manierre, if a complete abstract of title were delivered to him, and the same showed a good and merchantable title, would bid for said premises the sum of \$12,100, and would deposit with the master the sum of \$1,000 as earnest money, to be returned if the title was not good. The petition prayed that the sale be vacated, set aside, and a resale ordered. The purchasers answered the petition, asking that the sale be confirmed, and offering to take the title without an abstract, alleging there was no fraud in the sale; that the premises had been sold for their full value; and that the offered bid of Manierre was merely conditional. Upon a hearing of the motion and the answer thereto, the court found that it was for the best interest of the minors that the sale be vacated, and a resale ordered, and the bond of Manierre was ordered to stand in lieu of a cash tender. From this order an appeal has been prosecuted to this court.

Lynden Evans, for appellants. Ernest Saunders, for appellee guardian ad litem.

WILKIN, J. (after stating the facts). The only question for determination is whether or not the superior court properly set the sale aside. It is the policy of the law to give permanency and stability to judicial sales, and to give to the purchaser the benefit of his bid, but there are cases in which such sale will be set aside even in the absence of fraud. The chancellor is vested with a sound

legal discretion in such cases, which, however, must be exercised according to established rules of law. *Ayres v. Baumgarten*, 15 Ill. 444. Where a judicial sale has been conducted in the usual manner, and the purchaser is a stranger to the order of sale, mere inadequacy of price will not justify a court in vacating the sale and depriving the vendee of the benefit of his purchase unless the inadequacy is such as to amount to evidence of fraud. *Barling v. Peters*, 134 Ill. 606, 25 N. E. 765. But if fraud or misconduct in the purchaser, or in the officer conducting the sale, or other persons connected therewith, be shown, or if the owner or party interested has been surprised or misled into a mistake by the conduct of the purchaser or by the officer or any person connected with the sale, such facts will be considered, together with the inadequacy of price, and the sale set aside, if in the sound discretion of the court it should appear to be for the best interest of the parties concerned. *Wilson v. Ford*, 190 Ill. 614, 60 N. E. 876. On an application to vacate a judicial sale the court should also take into consideration the fact, if shown, that the parties interested are under disabilities. Adults are able to bid for themselves or have others do so, and thus protect their rights and obtain the full value of their interests in premises sold; but not so as to infants. They are, by their disability, prevented from protecting themselves against loss. Courts of equity are the guardians of all infants within their jurisdiction, whose rights are under their special protection; hence a sale of real estate should be set aside where the interests of infants are involved, if the court can see that to refuse to do so will result in substantial and irreparable loss to them. In other words, the policy of the law to give permanency to judicial sales should not be enforced contrary to the rights of infants or others under disability. In the case at bar four of the six parties to the suit were infants. The price offered was \$1,000 in excess of the prevailing bid. There was a question raised as to the title to the premises and the possession of the abstract of title. The case was heard by the chancellor in open court. He was familiar with all of the facts, and decided that it was for the best interest of the infants that the sale should be set aside and the premises reoffered to the highest bidder. It was a question within his sound discretion, and we cannot say, from the record before us, that such discretion was abused, or was not exercised in accordance with the rules of law governing such cases.

It is next urged that no exceptions were filed to the sale within the meaning of the statute, and that the offer to increase the bid was merely conditional, and that, as no earnest money was paid into court by the bidder, the order setting aside the sale should be reversed. Section 29 of chapter 106 of

Hurd's Statutes of 1899 provides that, after a report of sale is made by the master, any person interested may file exceptions thereto. No particular form for such exceptions is prescribed. The guardian ad litem for the infant defendants filed his petition asking that the sale be vacated. We are of the opinion that the petition was sufficient, under the statute, as a basis for an order setting aside the sale. The offer to increase the bid according to the petition was conditional, but before the sale was ordered set aside that offer was made absolute, and a bond executed in place of the earnest money being paid into court. We think this was sufficient to protect the rights of the parties, in consideration of the power of the court to punish for contempt in case of a failure to comply with the bid.

We find no sufficient reasons for disturbing the decree of the superior court. It will accordingly be affirmed.

Decree affirmed.

(216 Ill. 478)

EVERETT v. PEOPLE.

(Supreme Court of Illinois. June 23, 1905.)

1. MURDER—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to support a conviction for murder.

2. SAME—INSTRUCTIONS—PRESUMPTIONS.

In a prosecution for murder, a statement that all the presumptions of the law, independent of the evidence, are in favor of innocence, and that every person is presumed to be innocent until he is proven guilty, is a sufficient statement as to the presumption of innocence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1846, 1847.]

3. SAME.

In a prosecution for murder, in which the vital question was whether the fatal shot was fired by defendant, an instruction that, though the jury might find that defendant fired one or more shots, still, before they could find him guilty, they must also find, beyond a reasonable doubt, that one of the shots was the cause of the death of the deceased, rendered unnecessary the giving of a requested instruction that, if the jury had a reasonable doubt as to any one of the facts necessary to make out the case, they should acquit.

4. SAME.

Where, in a prosecution for murder, it appeared that several persons were discharging firearms at the time deceased was killed, but the evidence for the state was sufficient, if believed, to show that defendant fired the shot which caused the death, error in giving an instruction, not supported by the evidence, authorizing a conviction if defendant aided or abetted in the killing, was not cause for reversal.

5. SAME—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for murder, an instruction that where the evidence is circumstantial it must be absolutely incompatible with any reasonable hypothesis except the guilt of accused was sufficient to justify the refusal of requested instructions to the effect that the circumstances must be such that they could not reasonably be true and the defendant be innocent.

Error to Criminal Court, Cook County;
R. S. Tuthill, Judge.

Lonney Everett was convicted of murder, and brings error. Affirmed.

Rehearing denied October 12, 1905.

Richard J. Finn, for plaintiff in error. W. H. Stead, Atty. Gen., John J. Healy, State's Atty., and Fletcher Dobyns, Asst. State's Atty., for the People.

RICKS, J. Plaintiff in error, together with John Gibson, John Gallion, and Albert Johnson, was indicted at the October term of the circuit court of Cook county, charged with the murder of Henry Maskey. At the December term the defendants entered their plea of not guilty, and the trial was entered upon. After it had proceeded for a time, a nolle prosequi was entered as to defendants Gallion and Johnson, and later a like order was entered as to the defendant Gibson. The trial proceeded as to the plaintiff in error, who was found guilty, and his punishment fixed at imprisonment in the penitentiary for 14 years. Motions for new trial and in arrest were made and overruled, and judgment entered. From that judgment this writ is prosecuted.

On August 20, 1904, the employees at the Union Stockyards were on a strike, and the plaintiff in error and many others were employed in the yards in the place of the strikers, and were called "strike breakers." They were taken to and from their work by special train. At about 5:30 o'clock p. m. of that day a train of nine coaches and engine, loaded with these so-called strike breakers, many of whom were women, was passing down Fortieth street, east from the yards, toward the city. A majority of the passengers on the train were colored people. Emerald avenue crosses Fortieth street, and is a street running north and south, and is of the width of about 60 feet. Approaching Emerald avenue from the west, the train passed under a viaduct which carries traffic over Fortieth street at Emerald avenue. At that point Fortieth street is covered by many railroad tracks, and on the day in question Henry Maskey, the deceased, and several other persons, were standing on the south side of the crossing, and others were on the north side of the crossing. A police officer had escorted five women to that crossing to take that train, and placed them in custody of one John E. Kinsella, a switch watchman at that crossing, with directions to stop the train in order that the women might get aboard. When the train reached the crossing the switchman signaled it to stop, and it did stop, with the third car from the front of the train on the crossing. Maskey at that time was standing a little south of the train, leaning against a telegraph pole. The train was heavily loaded—so much so that the platforms were covered with people, and it was difficult to get access to them. One of the women attempted to get on the car, but in doing so lost her balance, or in some manner fell back from the

car, and screamed. A signal was given for the train to move ahead, and the woman fell just as the car started. Her screaming seemed to excite others there, and the evidence tends to show that other women there also screamed. The cars back of this third car were either under or west of the viaduct, so that the view was obstructed. While the evidence does not expressly so show, it is manifest that those on the train that were working in the stockyards anticipated an attack on the train by the strikers, and the hallooing of the women caused a panic to start, which spread through the train. Immediately upon the screaming and the starting of the cars, shooting began from the third car from the front, and as the various cars passed the crossing a number of shots were fired from each car, both on the north and south sides, until the third car from the rear was at the crossing, and as that car pulled onto the crossing the evidence shows that plaintiff in error went to the open window on the south side of the car, and towards the center, and extended his arm through the open window and fired three shots. Just at that time three persons were struck by bullets, namely, Henry Maskey, Dennis Ryan, and Henry Hanson. They were all standing near each other. Ryan and Maskey were killed, and Hanson slightly injured. Maskey was shot in the forehead, and almost directly between the eyes, and died instantly. The bullet that killed him was from a 38-caliber gun. There was no attack made upon the train, nor was there any threat or attempt to make one, so far as shown by the evidence, nor was there a shot fired, other than those from the train. The evidence tends to show that there were from 50 to 100 shots fired altogether, some witnesses placing the number of shots fired from the car alone in which defendant was, as high as fifty. It is manifest from the evidence that there was much excitement and indiscriminate discharging of firearms by those on the train.

A reversal is urged upon the ground that the evidence does not sufficiently point out the plaintiff in error as the person who fired the fatal shot, and that the court erred in giving and refusing instructions. The shooting was without provocation or justification, and, so far as it was directed toward those standing in the street, was so reckless and wanton and in such utter disregard of human life that the law would imply malice.

When the plea was entered as to the co-defendants of the plaintiff in error, they were placed upon the stand by the people. Johnson testified that he was in the third car from the rear, sitting facing a lady on the south side of the train, and that, as the car pulled onto Emerald avenue, Gibson and plaintiff in error passed between them and to the open window and began firing; that the lady got up and ran; that he knelt down between the seats to protect himself, and that three

shots were fired, apparently over his head; that after the firing ceased he saw Everett take cartridges out of his stocking and hide them behind the seat, but did not see the revolver. Gibson testified that when the shooting began he was standing in the third car, talking to other parties, and that the plaintiff in error came into the car, and went to the open window, and was firing his pistol; that just as Everett ceased firing he looked out of the window, and saw the deceased, Maskey, lying down near a telegraph pole. Gallion testified that he was down near the end of the third car from the rear when the shooting took place, and that when it ceased he got up and went toward the middle of the car, and found Everett and Johnson sitting in seats on the south side of the car, facing each other; that he sat down by Johnson, and that about that time some one said: "Hide your guns." They are searching the car;" and that he saw Everett put a gun similar to the one in evidence under his seat; and that Everett then put his left foot on the seat, took some cartridges out of his stocking, and rammed them down between the cushion and the back of the seat, and they fell through on the floor. Kinsella testified that he stood near the train, on the north side, and was trying to get the women on; that, when the women screamed, shooting began at the third car from the front, and continued until after the third car from the rear had come upon the crossing; that in the third car from the rear, and on the south side and toward the center of the car, he saw a black hand extended through the window, holding a blue-steel gun; and that from it three shots were fired rapidly; and stated that the gun he saw out at the window resembled the gun in evidence. Then he heard some one halloo or exclaim, "Oh!" and looked around and saw the deceased, Maskey, on the ground, and that those shots from the blue-steel gun were the last shots that were fired. Henry Hanson testified that he was standing at the crossing, and within three feet of Maskey. He describes the beginning of the shooting and its continuance substantially as does Kinsella. He says Ryan, Maskey, and himself were all shot about the same time, and that, when they were shooting, the third car from the rear was in the middle of the crossing at Emerald avenue. He says he saw a blue-steel gun coming out of the window of the third car from the rear, and saw three shots fired from it; that one of these shots struck him and knocked him down, but he was able to get up immediately; that that ball struck a bar on his watch chain, and its course was deflected by it, cutting the skin slightly, and lodging in the lining of his coat. He swears that the gun he saw resembled the one offered in evidence. When the shooting had ceased, the train was pulled out from the crossing a short distance, and held until the arrival of

police officers, who searched the train for firearms. Officer John Tracy was one of those who searched the car in which plaintiff in error was. He testified that officers entered at each end of the car and worked toward the center, and at about the center of the car he found Everett, Johnson, and Gallion together; that Everett had his head out of the window, and he rapped him with his club and told him to come in; that Everett came in out of the window and looked at him; that he lifted up the seat, and found under it a blue-steel revolver, which was offered in evidence, of 38-caliber, and also found under the seat, by the revolver, eight cartridges of 38-caliber, and that the gun had in it three exploded cartridges and three unexploded cartridges. The evidence shows that the bullets that killed Maskey and Ryan and struck Hanson were of 38-caliber. The officer also stated that in this car but two guns were found. Officer Enstrum helped search the car, and he found an Iver-Johnson revolver of 38-caliber under the seat occupied by a colored woman named Sophia Johnson. It was loaded, and did not appear to have been fired. There were a number of women in this car, but they were not searched. After the passengers got out of the train the cars were searched, and six revolvers and numerous other weapons were found, but it does not appear whether any of them were found in this car.

The evidence, we think, sufficiently shows that other firearms were discharged in this car, and also out of the windows of it, and we do not attribute much probative force to the circumstance that the gun of plaintiff in error was the only one that was found, having discharged cartridges in it. One-half hour had elapsed between the time of the shooting and the time of the searching of the cars, and there was plenty of opportunity to hide and transfer weapons from one car to another, and reload those that had been fired, if sufficient forethought had been exercised to do so. But from what has been narrated above it is quite clear that there was sufficient evidence before the jury to warrant the conclusion reached, if they gave credit to the witnesses. No witness was sought to be impeached. It is claimed that there were some contradictions in the testimony of the witnesses for the people, and an examination of the record supports that contention; but the contradictions were not on material matters, and were not of such character as would authorize us to say that the jury was not warranted in giving credit and adopting the view it did.

Complaint is made of the refusal of the fourth and seventh instructions offered on behalf of the plaintiff in error. They announce the well-known rule that the defendant is presumed to be innocent until his guilt is established by the evidence beyond a reasonable doubt, and that that presumption is not a mere form, to be disregarded by the

jury at pleasure. No objection can be made to the instructions, either in form or in substance, and they might properly have been given. Their refusal is sought to be justified on the ground that in the fourteenth instruction given for plaintiff in error this language is used: "All the presumptions of the law, independent of the evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty." This fourteenth instruction was upon the question of reasonable doubt, and advised the jury that, in making up their minds and solving the doubt, it was their duty to bear in mind these presumptions of innocence. It is argued that there is a well-recognized distinction between a reasonable doubt and presumption of innocence, and in support of this contention are cited *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. 394, 80 L. Ed. 481, and *People v. Macard*, 73 Mich. 15, 40 N. W. 781. With this position no fault can be found, and it is conceded by the people. But the important thing to the plaintiff in error was that the rule of presumed innocence should be clearly stated to the jury, and, if it was, although in connection with some other rule, or as a guide in the application of it, it would not be necessary that the court should repeat and reiterate the rule in separate instructions. We think that the rule is sufficiently and clearly stated in the fourteenth instruction, and it was not prejudicial error to refuse the fourth and seventh instructions.

Refused instruction No. 3 advised the jury that, if they had a "reasonable doubt as to any one of the facts necessary to make out a case of the prosecution," they should acquit, and it is complained that as the jury were instructed, for the people, that the reasonable doubt that would justify an acquittal must be as to the guilt of the accused on the whole evidence, and not as to any particular fact in the case, the plaintiff in error was prejudiced by the refusal; and in this connection it is said that the vital question was whether either of the shots fired by the plaintiff in error caused the death, and that the evidence was so confused and conflicting that the jury should have been clearly instructed upon the question. Instruction No. 13 given in behalf of plaintiff in error told the jury that, though they might find that the plaintiff in error fired one or more shots, still, before they could find him guilty, they must also find, beyond a reasonable doubt, that one of the shots so fired by him was the cause of the death of the deceased, or that the plaintiff in error was aiding, abetting, or assisting the one who caused the death of the deceased. We think that instruction sufficient to direct the attention of the jury to the necessity of the proof showing that the particular shot fired by the plaintiff in error must have been the one that produced the death.

In this connection it is also urged that this instruction No. 13 should have been given without the addition of the expression, "or that said defendant was aiding, abetting, or assisting the one who caused the death of the deceased." It is said there is no evidence that there was any combination or conspiracy or joint action, and we are disposed to the view that upon this contention of fact the plaintiff in error is right. The occupants of these cars seem to have been unnecessarily and unreasonably excited, and to have carelessly begun and kept up the shooting; but we do not think that there is any evidence, circumstantial or otherwise, showing that there was any combination, understanding, conspiracy, or joint action, but that each was doing what he thought the circumstances required, but that there was no reasonable foundation for any such belief or action. We cannot say, however, that the added phrase or expression did affect or could seriously have affected the plaintiff in error, in view of the evidence, which seems sufficiently explicit, if credited, to point him out as responsible for the death.

Defendant's refused instructions Nos. 10 and 11 were upon the rule of circumstantial evidence, and No. 10 told the jury that the circumstances must be of such character that they could not reasonably be true, in the ordinary nature of things, and the defendant be innocent. No. 11, though worded differently, was to the same effect. The court did give instruction No. 21, which was: "The court instructs the jury, as a matter of law, that, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the people must not only show, by a preponderance of the evidence and beyond a reasonable doubt, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused." This instruction, we think, fully covered the question, and we cannot conceive of any declaration of law more pointed or emphatic than the latter part of the given instruction, where the jury are advised that the facts and circumstances must be such as are absolutely incompatible upon any reasonable hypothesis other than that of the guilt of the accused. It would matter little how many times that thought was expressed. Its clearness could hardly be added to, and, with this instruction given, there was no occasion for the refused ones.

The evidence in the record, while in non-essentials somewhat conflicting, we think, as a whole, pretty clearly and distinctly shows that the fatal shot was fired from the car occupied by the plaintiff in error. There is no evidence showing or tending to show that more than one or two revolvers were fired out of that car from the south

side. The question primarily was one of identification, and, if the witnesses for the people were believed by the jury, their evidence was rather direct than circumstantial; and, if doubt might be cast upon the absolute verity of that direct testimony as to the matter of identification, the circumstantial evidence was so strong that we would not feel disposed, upon the whole case, to disturb the verdict for mere technical error.

Finding no error which seems to us to require a reversal, the judgment of the criminal court is affirmed.

Judgment affirmed.

(216 Ill. 487.)

HEINTZ v. DENNIS.

(Supreme Court of Illinois. June 23, 1905.)

1. WITNESSES—COMPETENCY—ACTION AGAINST HEIR.

Under a statute providing that no party to any action shall be allowed to testify on his own motion or in his own behalf, where the adverse party sues or defends as the heir of a deceased person, where plaintiff claimed title to certain property in question as legatee and devisee of her father, and defendant defended the original bill and prosecuted his cross-bill as an heir of his mother, neither was competent to testify against the other.

2. SAME.

Where, in a suit to remove a cloud on title, plaintiff was incompetent to testify against the defendant, both claiming under deceased persons, plaintiff's husband was likewise incompetent to testify in her behalf.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 845.]

3. APPEAL—HARMLESS ERROR.

Where, in a suit to set aside a cloud on title, the evidence was sufficient to sustain a decree in favor of complainant, apart from that given by her and her husband, the decree would not be reversed because the court erroneously permitted them to testify.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4162, 4163.]

4. WILLS—CONSTRUCTION—REMAINDER.

Where complainant's father bequeathed all of his property to his wife for life, remainder in fee to complainant, and during her widowhood complainant's mother purchased certain lots with the proceeds of her husband's estate, and stated during her life that she held the same for her use for life, and after her death it was to go to complainant, complainant was entitled to such property after her mother's death as against an heir of her mother by a former marriage.

5. DEED—CONSIDERATION.

Where complainant's father devised his property to his wife for life, remainder to complainant, and the only consideration for a conveyance of certain land by complainant to her mother after her father's death was funds derived by the mother from her husband's estate, of which complainant was remainderman, the conveyance was without legal consideration as between complainant and her mother, and hence complainant was entitled to recover the property as against an heir of her mother.

Error to Circuit Court, Cook County; R. S. Tutthill, Judge.

Bill by Pauline Geib Dennis against Louis M. Heintz. From a decree in favor of com-

plainant, and dismissing the cross-bill for want of equity, defendant brings error. Affirmed.

Rehearing denied October 11, 1905.

F. L. Salisbury and M. Marso, for plaintiff in error. W. P. Black and A. Hale Vollentine, for defendant in error.

BOGGS, J. This was a bill in chancery, filed in the circuit court of Cook county against the plaintiff in error, in which the defendant in error alleged that she was the equitable owner of lots Nos. 11, 12, 13, and 14, in Maywood, in said county; that the plaintiff in error claimed to be the owner of a portion of said lots as an heir of Magdalena Geib; and that said claim constituted a cloud upon the title of the defendant in error. The prayer of the bill was for a decree finding the defendant in error to be the owner in fee of all of the said lots, and that the plaintiff in error be required to convey to the defendant in error, with a prayer for general relief. The plaintiff in error answered the bill, denying specifically all of the allegations thereof, and also filed a cross-bill praying for a partition of the premises and for an accounting of the rents since the death of the said Magdalena Geib. Issues were joined, and the cause was referred to the master to take and report the proof. The master found the issues for the plaintiff in error, and recommended that the bill of complaint of the defendant in error be dismissed for want of equity. Objections to the master's report were overruled, and were allowed to stand as exceptions upon the hearing before the chancellor. The chancellor sustained the exceptions to the findings and report of the master which were urged by the defendant in error, and entered a decree granting the relief prayed in the original and amended bills of the defendant in error, and dismissed the cross-bill for want of equity. This is a writ of error sued out of this court to bring the record into review.

The plaintiff in error and the defendant in error are the children of one Magdalena Geib; the plaintiff in error being her son by a former marriage with one Louis Heintz, deceased, and the defendant in error her daughter by her second marriage with Henry Geib, also deceased. Henry Geib left a will, wherein he devised and bequeathed to said Magdalena all of his property, real, personal, and mixed, for her "to use and enjoy the same for and during her natural life," with remainder in fee over to the defendant in error. Magdalena died April 28, 1899, seised of the title to the four lots in question. The contention of the defendant in error, complainant in the original bill, was that lots 11 and 12 were purchased by Magdalena with a portion of the funds which she held under the will of Henry Geib for her use during her life and in trust for the defendant in error after her

death, and that lots 13 and 14, originally the property of the defendant in error, were conveyed by her to her mother without consideration, and for the reason that the defendant in error and her husband were about to remove to a Western state, and that all of the four lots were incumbered together in one mortgage for about \$2,200 to a building and loan association, and it was thought it was best to put the title in the mother, in order that she might more conveniently collect the rents, manage and control the property, and pay the monthly dues to the building association. The defendant in error further contended that the indebtedness to the building association was discharged out of moneys received from the sale of some property on Orchard street, in the city of Chicago, of which Henry Gelb died seised, and which belonged to the defendant in error subject to the life estate of said Magdalena. Whether these contentions were proven seems to be the only issue that is presented by this record.

The defendant in error and her husband, W. H. Dennis, were, over the objection of plaintiff in error, heard to testify before the master. They were not competent witnesses. The defendant in error claimed title to the property as the legatee and devisee of Henry Gelb, her father. The plaintiff in error was defending against the original bill and prosecuting his cross-bill as the heir of his mother, Magdalena Gelb (formerly Magdalena Heintz). Section 2 of our statute on evidence, etc. (Rev. St. 1874, c. 51), provides that no party to any action shall be allowed to testify on his own motion or in his own behalf where the adverse party sues or defends as the heir of a deceased person. In *Pigg v. Carroll*, 89 Ill. 205, *Mueller v. Rebhan*, 94 Ill. 142, and in other cases resting on these cases as authority, we held that said section 2 was intended to protect the estates of deceased persons from the assaults of strangers, and related to "proceedings where in the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of heirs or devisees as to the distribution of an estate, in proceedings by which the estate itself is in no event to be reduced or impaired." In the case at bar the effort of the defendant in error was to "impair and reduce" the estate of Magdalena Gelb, mother of the defendant in error, and the effort of the plaintiff in error was to reduce the estate of said Henry Gelb, father of defendant in error. Neither of them was, therefore, competent to testify against the other. The defendant in error being incompetent, her husband was likewise incompetent to testify in her behalf. *Treleaven v. Dixon*, 119 Ill. 548, 9 N. E. 189; *Way v. Harriman*, 126 Ill. 132, 18 N. E. 206; *Shaw v. Schoonover*, 130 Ill. 448, 22 N. E. 589.

We think, however, the evidence (that of the defendant in error and her husband being

excluded) sustained the findings and decree of the court. It is to be presumed, as we have repeatedly held, that the chancellor excludes all incompetent testimony, and acts only on that which is competent, and decrees in equity are, under that rule, to be upheld if sustained by adequate competent proof. Mrs. Shippy testified that Magdalena Gelb told her that lots Nos. 11 and 12 were paid for by her with money which she had received from the sale of the property on Orchard street, which belonged to her husband, Henry Gelb, during his lifetime, and which passed under his will. Albert Hall Vollentine, who was engaged and acted as attorney and counselor for Magdalena Gelb in the matter of the sale of the Orchard street property and in other of her affairs, testified that said Magdalena received from the sale of the Orchard street property, of which Henry Gelb died seised, the sum of \$5,000, which was paid to said Magdalena in two installments, and that a part of the first installment so received was applied and used in the purchase of said lots 11 and 12 in Maywood. A number of witnesses testified that Magdalena Gelb told them that all of the property she had was such as came to her under the will of Henry Gelb; that "she didn't own anything except what she had received from Mr. Gelb"; and that she held it for her use during her lifetime, and that after her death it was to go to the defendant in error. To all of these witnesses she expressed the strong desire that all the property which she had should pass to the defendant in error at her death, stating as the reason for such desire that it all belonged to defendant in error under the will of Henry Gelb. Frank P. Pratt, an attorney at law, testified that Magdalena called on him for legal advice; that she stated to him that all the property which she had was such as came to her possession under the will of Henry Gelb, and asked him if it was necessary she should make a will devising and bequeathing such property to defendant in error; and that he advised her that, as she held the property as trustee for the defendant in error, it would become the property of the cestui que trust at her death, and that a will was unnecessary to accomplish that purpose. Lots 11 and 12 were properly decreed to be the property of the defendant in error.

Lots 13 and 14 in Maywood were purchased from the proprietors of the subdivision by the defendant in error, and with lots 11 and 12 were incumbered to secure the indebtedness to the building and loan association in the sum of \$2,200, as before stated. The deed executed by the defendant in error to her mother, Magdalena Gelb, conveying lots 13 and 14, recited a consideration of \$2,400, of which, as appeared in the deed, \$2,200, the amount of the principal of the building and loan association mortgage, was assumed to be paid by said Magdalena as a

part of the consideration. On April 22, 1896, Magdalena received the second payment of the purchase price of the Orchard street property, being \$2,500 and the accumulated interest, and on the next day she paid the mortgage indebtedness mentioned in the deed from the defendant in error conveying said lots 13 and 14 to said Magdalena. All of the testimony being considered, the chancellor was fully justified in the finding that all of the money paid by Magdalena Geib to the building and loan association was such as she held under the will of Henry Geib, deceased, and that therefore the only consideration paid by Magdalena Geib for lots 13 and 14, conveyed to her by the defendant in error, was trust funds, of which the defendant in error was the cestui que trust. The conveyance was therefore properly regarded as having been made without any legal consideration as between defendant in error, the cestui que trust, and her mother, the trustee. As against the trustee, the cestui que trust may pursue the proceeds of trust property, and charge with the original trust any property in which the trust fund or property may be invested. *Breit v. Yeaton*, 101 Ill. 242; *Sholty v. Sholty*, 140 Ill. 81, 29 N. E. 1041; *White v. Sherman*, 168 Ill. 589, 48 N. E. 128, 61 Am. St. Rep. 132. The plaintiff in error claims as an heir of the trustee, and he can have no higher or better claim to the property here involved than had his mother, the trustee, and the cestui que trust is entitled to the same relief as against him which a court of equity would have granted against his mother, the trustee.

The decree must be and is affirmed.

Decree affirmed.

(216 Ill. 493)

WILDER v. AURORA, DE K. & R. ELECTRIC TRACTION CO.

(Supreme Court of Illinois. June 23, 1905.)

1. DEDICATION—STREETS—DEFECTIVE PLAT.

Rev. St. 1845, c. 25, § 17, provides that whenever any person wishes to lay out a town, or an addition or subdivision of outlots, he shall cause the same to be surveyed and a plat or map thereof made by the county surveyor, and that it shall be acknowledged by the owner. *Held*, that where a plat was certified by a deputy county surveyor instead of the county surveyor, and was not certified to have been laid out by the owner, but merely by his agent, the plat was invalid as a statutory dedication of streets shown thereon.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 60.]

2. SAME—SALES UNDER PLAT—EFFECT.

Where a plat of a city addition was insufficient to create a statutory dedication of the fee in the streets shown thereon, the title remained in the dedicator until he sold lots by reference to the plat, when the title to the soil in front of the lots to the center of the street passed to the grantees.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 34-36.]

3. ADVERSE POSSESSION—EVIDENCE.

Where plaintiff acquired title to a lot in question by warranty deed, and occupied the same as his homestead thereunder as color of title for 17 years, and paid all taxes assessed thereon for 15 years, he had title to the land by limitations.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 65, 188, 512-516.]

4. DEED—DESCRIPTION—SUFFICIENCY.

Where a deed recited that it was made on a certain date between G., of the city of Chicago, county of Cook, and state of Illinois, of the first part, and H., of West Aurora, in the county of Kane and state of Illinois, of the second part, and described a parcel of land lying in sections 21 and 22 of township 38 north, of range 8 east, of the third principal meridian, and known as "Gale's Addition to West Aurora," it was not objectionable for failure of the description to state the state or county in which the premises conveyed lay.

5. SAME—PROPERTY CONVEYED.

Where a deed conveyed the whole of a city addition, except lot 8 in block 10 and lot 12 in block 13, it conveyed lot 9 in block 19 of such addition.

6. SAME—ERASURES.

Where a second deed was executed in the place of a quitclaim, and a warranty deed form was used for the purpose, the mere erasure of such words as were necessary in order to make the deed correspond with the original quitclaim deed was immaterial.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, § 76.]

7. APPEAL—FREEHOLD INVOLVED.

Where an original bill averred that complainant was the owner in fee of a certain city lot, and that such ownership extended to the center of W. street in front of such premises, subject only to the use of the public as a public highway, and defendant denied that complainant was the owner in fee of any part of W. street described in the bill, but averred that the fee in such street was in the city, a freehold was directly involved in the litigation, warranting a direct appeal to the supreme court.

8. SAME—CONSTITUTIONAL QUESTION.

Where a bill to restrain defendant's construction of a railway in a street in front of complainant's premises alleged that complainant was the owner of the fee to the center of the street, and that defendants were about to construct a commercial railroad without affording complainants compensation and in violation of complainant's constitutional rights, the bill presented a constitutional question, warranting a direct appeal to the supreme court.

9. STREET RAILROADS—FRANCHISE TO INDIVIDUALS.

Under Sess. Laws 1899, p. 331, providing that any company which has been or shall be incorporated under the general laws of the state to construct, maintain, or operate any street railroad may enter on and appropriate any property necessary for the construction and operation of its road, and City & Village Act, art. 5, § 63, par. 90 (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 712), providing that the city council shall have no power to grant the use of or right to lay down any railroad tracks in any street of the city to any railroad company, whether incorporated under general or special law of the state, except on petition of property owners, etc., an ordinance granting a street railway franchise to individuals was void.

10. SAME—ORDINANCE—AMENDMENT.

Where, after the passage of a void ordinance granting a street railway franchise to individuals, the city council passed another ordi-

nance amending the former ordinance, but complete in itself, granting to a certain corporation, its successors and assigns, a franchise to use the streets for a certain electric railroad, such latter ordinance was not invalid because passed as an amendment to a void act.

11. SAME—PETITION TO COUNCIL—ASSIGNMENT.

Where a petition by property owners for the passage of an ordinance granting a street railway franchise as required by City & Village Act, art. 5, § 63, par. 90 (1 Starr & C. Ann. St. 1896 [2d Ed.] p. 712), was for the grant to certain individuals, their representatives and assigns, and not to defendant corporation, and an ordinance granting such franchise to such individuals was void, an assignment of their rights thereunder to a subsequent corporation did not operate as an assignment of the petition, so as to entitle the city council to pass another ordinance thereunder granting a new franchise to the corporation.

12. INJUNCTION—CONSTRUCTION OF STREET RAILROAD—PLEADING.

Where, in a suit to restrain the construction of a railroad in a street in front of plaintiff's property, the bill alleged that there was on file in the city clerk's office a petition from abutting owners filed prior to the enactment of the first franchise by the city council to four named persons, a copy of which was attached to the bill, and that no other or different petition of voters had been filed with the council authorizing the enactment of an amending franchise ordinance, the fact that the latter ordinance recited that it had been petitioned for by the owners of the land representing more than one-half of the frontage of each and every mile of streets sought to be used by the traction company, etc., did not justify a conclusion on demurrer to the bill that the amendatory ordinance had been petitioned for.

13. STREET RAILROADS—PETITION—FRANCHISE.

Where a petition of abutting owners for the grant of a street railroad franchise prayed that such grant should be for a term of 40 years from the passage of the ordinance, an ordinance, granting authority to a traction company for a term of 33 years from the passage thereof did not conform to the petition.

14. SAME—COMMERCIAL RAILROAD—USE OF STREETS—EMINENT DOMAIN.

Where an electric street railway company was organized under the railroad law, as distinguished from the street railroad act, and by the terms of its charter was authorized to operate through several counties and transport passengers, their ordinary baggage, United States mail, express, and milk, it was a commercial railroad, and was not entitled to lay its tracks in a street, the fee of which was in the abutting owners, without condemning a right to do so.

Appeal from Circuit Court, Kane County; Chas. A. Bishop, Judge.

Bill by George Wilder and others against the Aurora, De Kalb & Rockford Electric Traction Company. From a decree dismissing the bill, complainant George Wilder appeals. Reversed.

Rehearing denied October 12, 1905.

The original bill in this case was filed on October 11, 1904, by the appellant, George Wilder, and two others, to wit, C. H. Hitchcock and E. W. Dunton, alleging that they were residents of Aurora, in Kane county, and owners of real and personal property in said city, and taxpayers, and that said Wilder was the owner in fee of lot 9 in block 19 in Stephen E. Gale's Addition to West

Aurora; that Hitchcock was the owner in fee of lot 3 in block 18 in said addition, and that E. W. Dunton was the owner in fee of lot 7 in block 20 in said addition; and that their respective fees began in the center of Walnut street in said city, and that they respectively owned the fee of Walnut street in front of their premises, subject only to the use of the same by the public as a public highway, and had valuable improvements on their respective premises. The original bill was filed against V. A. Watkins, William George, R. S. Vivian, William P. Kopf, C. W. Ross, and the Aurora, De Kalb & Rockford Electric Traction Company.

The bill alleges that on May 27, 1902, the city council of Aurora, without authority in law and contrary to the statute, granted a license to the said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, and assigns, to construct a railroad in said Walnut street, in Aurora, which would necessarily pass over the portions of their respective premises, owned in fee by the complainants, falling within Walnut street; that the said license was approved May 29, 1902, by the mayor of Aurora, a copy of said ordinance being attached to the bill; that on November 2, 1903, said city council attempted to amend said void license or ordinance, extending the time within which the grantees therein were to perform the acts therein mentioned 12 additional months, a copy of said amendatory ordinance being attached to the bill; that the electric traction company above named is organized under the general railway laws of Illinois, with such powers as are authorized by the statutes of Illinois, a copy of its articles of incorporation being attached to the original bill; that no compensation has ever been paid to complainants, or either of them, for the use of the fees owned by them respectively in said street; that they have not, or either of them, consented to the occupation or use of their fees in Walnut street for the purpose of said railroad; that said railroad has not attempted to condemn, or purchase from them, the privilege of taking from them their rights in said fees; that said pretended license or franchise was granted without authority of law; that the city did not have the power, under the statutes or Constitution of the state, to grant said license, as attempted in said ordinance and the amendment thereto, and that said Watkins, Vivian, George, and Kopf were not thereby vested under the statutes and Constitution of the state with the power to receive authority from the city of Aurora to exercise the right of eminent domain and construct a railroad in the public highway; that said license is void, and no rights were acquired by the grantees therein under the same; that said proposed railway, as set out in said ordinance, is intended to be a part of a railroad system extending from the intersection of North River and

Walnut streets in Aurora the entire length of Walnut street to the westerly limits of the city, and there connecting with the tracks of the Aurora, De Kalb & Rockford Electric Traction Company, and forming a continuous railroad to the city of Rockford by way of the city of De Kalb; that said grantees propose to lease or sell, assign and transfer, their rights in said franchises to said electric traction company, and that said electric traction company will operate said railway for its entire length; that said traction company is licensed and permitted by said ordinance to carry express and milk, and that it is proposed to conduct a large business by carrying merchandise to and from Rockford and Aurora, and the cities lying between them along said line, whereby it is proposed to subject the fees of complainants to an additional servitude not authorized by law, and without due compensation to them for the confiscation of their property for said purpose; that complainants attach to their bill, and make a part thereof, a true copy of the plat of said Stephen F. Gale's Addition, and of the certificate of acknowledgment of said plat; that said individuals and traction company threaten to enter upon Walnut street, and make excavations and tear up the surface thereof, with a view to constructing thereon and maintaining railroad tracks and operating a railroad, and in so doing will not only discommode public travel, but will interfere with the right of ingress and egress of complainants to and from their respective premises, to their irreparable injury. The bill prays that said Watkins, George, Vivian, Kopf, Ross, and said electric traction company may be required to answer the bill, and that it may be decreed that the said license or franchise is void and a nullity, and that the said defendants and their assigns obtained no rights under it, and that they may be enjoined from exercising any of the pretended rights granted thereby, and from going upon Walnut street for the purpose of excavating or tearing up the same, or building or constructing said railroad, and from going upon the respective fees of the said complainants upon said street for said purpose, etc.

The defendant Ross filed a disclaimer. The defendants Watkins, George, Vivian, and Kopf filed a joint and several answer on November 23, 1904. On the same day the separate answer of the Aurora, DeKalb & Rockford Electric Traction Company was filed to the original bill. Replications were filed to the answers.

On November 27, 1904, the cause came on for hearing upon bill and answers, and evidence was offered by complainants to show that they were owners of lots abutting on Walnut street, and that these lots extended to the center line of the street. Oral evidence was also introduced by the defendants tending to show the character of their road

and railway, and the character of the business proposed to be transacted by the latter.

On December 6, 1904, the bill was dismissed by the complainants as to C. H. Hitchcock and E. W. Dunton, and on the same day the bill was dismissed as to the defendants Watkins, George, Vivian, Kopf, and Ross, leaving the Aurora, De Kalb & Rockford Electric Traction Company the only party defendant. On the same day leave was given to the complainant Wilder, being the only complainant left, to file a supplemental and amended bill, which supplemental bill was filed on December 17, 1904, and on December 19, 1904, a demurrer was filed to the amended and supplemental bill.

On December 22, 1904, the court rendered a final decree, wherein, after reciting that the cause came on to be heard upon said original bill and the answers thereto, and upon the amended and supplemental bill and the demurrer of the traction company thereto, and upon proofs oral and documentary heard in open court upon said original bill and the answers thereto, and after reciting that the court found the equities of the cause to be with the defendant and against the complainant, it was decreed that the demurrer to the amended and supplemental bill be sustained, and that the original and amended and supplemental bills be dismissed for want of equity. To the ruling of the court in sustaining the demurrer and in dismissing the original and amended and supplemental bills, the complainant excepted, and took an appeal to this court. The present appeal is prosecuted for the purpose of reviewing the decree of dismissal so entered on December 22, 1904.

By the terms of the original ordinance passed by the city council of Aurora on May 27, 1902, and approved May 29, 1902, authority was given, by the first section thereof, to said Watkins, George, Vivian, and Kopf, "their heirs, executors, administrators and assigns," to lay down, maintain, and operate a railway, with the necessary curves, side tracks, turn-outs, cross-overs, switches, and Y's, in and upon certain streets in Aurora, to wit, North River street and Walnut street. By section 1 it was provided that no tracks other than the single track of "said grantee" should be permitted upon Walnut street, except that one side track or switch, not to exceed 200 feet in length, might be located on Walnut street at some point between Lake street and May street. By said section 1 a double-track railway was to be constructed upon North River street extending southerly between the north line of Walnut street to Galena street, and a single track railway upon Walnut street extending from the east line of North River street to the westerly limits of the city, together with the right to connect the tracks thereby authorized at such points as might be deemed necessary by said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, assigns, or

lessees, and the further right to connect said tracks with the tracks of any railway company operating tracks in Aurora, but only for the purpose of forming the loop therein referred to, the tracks to be laid and in operation within 30 months after the passage of the ordinance, with the exception of such time as the work might be delayed by injunction or the action of the council; the rights thereby granted only to be forfeited as to the unbuilt portion of the tracks in case of noncompletion within the time specified. Said grantees and their assigns were granted the right to permit any railway company, subject to the approval of the city council, to use their tracks on North River street from Walnut street to Galena street for the purpose of such loop as should be at any time operated through the business portions of the east and west sides of the city.

Section 2 of the ordinance provided that the grant therein should extend for the term of 40 years from the passage of the ordinance, provided the same should be accepted by said parties within 10 days after the passage thereof, and provided further that the local rate of fare which the grantees or their assigns might charge for a continuous ride over its tracks in Aurora should be readjusted in the following manner: For the first 20 years the local rate of fare should not be more than 5 cents. For the following 20 years the local rate of fare should be determined by ascertaining the lowest rate of fare, demanded by street railways, prevailing in 10 different cities having approximately the same population as Aurora, etc.

Section 3 of the ordinance provided that said grantees, their legal representatives or assigns, should use, in the construction of the tracks, improved girder rails on North River street, and T rails (not less than 70 pounds per yard, and subject to the approval of the city council) on Walnut street, which should be so laid that vehicles may freely and safely cross the same.

Section 4 of the ordinance provided that, during November, December, January, February, and March of each year, heating apparatus of a certain kind should be provided, and that the cars upon said tracks should be run at such intervals as might be necessary to accommodate the public, provided that said cars should be run at intervals of not more than one hour apart between 5 o'clock a. m. and 9 o'clock p. m., and that said cars should be run at a speed not to exceed 5 miles an hour on curves, and 10 miles an hour on the balance of the local line of said railway, subject to the police regulations of the city; that, in removing snow from the tracks, said grantees, their legal representatives or assigns, should distribute it so that it would not impede public travel on the streets occupied by their tracks; that, when the city council should so order, they should, within 90 days after notice by the city clerk, place fenders on their cars.

Section 5 provided that said grantees or assigns should have the right to operate their cars by electricity, compressed air, cable, or other motive power except steam, and to construct, lay down, and erect wires, iron poles, underground conduits, and other apparatus necessary for the operation and maintenance of its lines, and to change from one motive power to another as it might elect; that, in case of the use of electric power, they should have the right to string necessary wires, including an overhead contact system, consisting of wires suspended from painted iron poles on River street and Walnut street from River street to the Geneva Branch of the Chicago, Burlington & Quincy Railroad tracks, and painted cedar poles from thence to the westerly city limits, set within the curb line of the street on either side thereof, but that said grantees in locating their poles should not obstruct driveways nor interfere with catch-basins, drains, sewers, gas or water pipes, the wires to be not less than 19 feet above the rails, and the grantees or assigns to have the right to make all necessary connections of said wires with powerhouse, car shed, or other property of grantees. By section 5 it was also provided that, in the event of any new and better method of furnishing electricity or other motive power for the operation of railways being discovered, the grantees or assigns should have the right to adopt the same in place of or in connection with the overhead trolley system. Said section 5 also provides as follows: "The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, United States mail, express, milk, and the cars and carriages for that purpose shall be of the style and class ordinarily used on such railways in other cities. No freight shall be carried by said grantees, their legal representatives or assigns, excepting such as is used in the construction of their road within the limits of the city of Aurora."

Section 6 provides that the grantees or assigns shall keep the space between the rails of its tracks, and two feet on the outside of each rail, on streets occupied by them, in good condition and repair, etc. Section 7 provides the grantees or assigns "shall have the right to do such excavating and grading as they may deem necessary for the proper laying of their tracks, also the right to lay drainage tile or pipe and construct catch-basins and connect said tile or pipe and catch-basins with the sewer system of the city of Aurora, but said work shall be completed within six months from the time it is commenced."

Section 7 also provides that the streets shall be left in as good condition as before the building of the road, etc.

Section 8 provides that the grantees or assigns shall save the city harmless against all damages, etc., by reason of the granting of such privileges, or resulting from the ex-

ercise of the same, and shall within 10 days from the passage of the ordinance execute a bond to the city in the sum of \$10,000 to indemnify the city against such damages, etc.

Section 9 provides that the terms and conditions of the ordinance shall inure to the benefit of the grantees, their legal representatives or assigns, and the city of Aurora, its successor or successors.

Section 10 provides that the permission and authority therein granted are to be used "for the public purpose of a general railway, connected with the tracks when laid of the Aurora, De Kalb & Rockford Electric Traction Company, a corporation organized and existing under the general railway laws of the state of Illinois, their successors, assigns, or lessees, and now projecting a railway from the city of Aurora to the city of Rockford, in said state. The rights and privileges herein granted shall cease and determine and this ordinance and the grants herein contained shall be null and void, unless the grantee herein shall construct and operate its railway from the city of Aurora, Illinois, to the city of De Kalb, Illinois, within thirty months, and unless the said grantee herein shall expend within eighteen months from the passage of this ordinance, upon the purchase of right of way and construction of its railway, the sum of at least \$20,000.00, outside of the city of Aurora, Illinois."

Section 11 provides that in consideration of the privileges granted, etc., said Watkins, George, Vivian, and Kopf, their heirs, executors, administrators, and assigns, shall, in their written acceptance of the ordinance, bind themselves, their heirs, etc., to pay or cause to be paid to the city of Aurora the sum of \$10,000 on or before December 15, 1902, said sum to be paid to the city treasurer on or before December 15, 1902.

Section 12 provides that the ordinance shall take effect when the grantees, their legal representatives or assigns, shall file the bond required, and accept in writing the terms and conditions of the ordinance, etc.

On November 2, 1903, there was passed, and on November 5, 1903, approved, an amendatory ordinance providing that the times within which, under the rights, privileges, and franchises given to said four individuals on May 27, 1902, they had to construct and operate their railway from Aurora to De Kalb, and within which to expend for the purchase of right of way and construction the sum of at least \$20,000, and within which to have their road constructed and in operation along said streets, should be extended 12 additional months. Section 2 of the amendatory act provided that the ordinance should be in full force and effect 10 days after its legal publication, and upon the acceptance of the same in writing within 30 days from the passage thereof by the grantees, their legal representatives or assigns.

It is conceded that no tracks had been actually laid on Walnut street, the street upon which the appellant's lot abuts, at the time of the filing of the original bill in this cause.

On November 7, 1904, the city council of Aurora passed another ordinance, which was approved on the same day, which is substantially the same as the ordinance, attacked as void in the original bill passed on May 27, 1902, and amended on November 2, 1903, except that the authority to construct the railroad in question was, by the ordinance of November 7, 1904, conferred upon the Aurora, De Kalb & Rockford Electric Traction Company, its successors and assigns, instead of being conferred upon Watkins, George, Vivian, and Kopf, the individuals named in the ordinance of May 27, 1902; and except that the grant by the ordinance of November 7, 1904, was to extend, by the terms of section 2 thereof, for the term of 38 years from the passage thereof, instead of the term of 40 years as specified in section 2 of the original ordinance; and except that the said traction company was to construct and operate its railway from Aurora to De Kalb on or before November 27, 1905, and to expend on or before November 27, 1904, upon the purchase of right of way and construction, the sum of at least \$20,000 outside of the city of Aurora. There may be other slight differences between the two ordinances, but those already indicated are the material ones.

The ordinance of May 27, 1902, was made an exhibit to the original bill, and also to the amended and supplemental bill, and the ordinance of November 7, 1904, was made an exhibit to the amended and supplemental bill. There was also made an exhibit to the amended and supplemental bill the petition to the mayor and aldermen of the city of Aurora, and the names of the property owners signed to the same, and the amounts of feet frontage for which they signed, which was not signed by the complainants in the original bill, or the sole complainant in the amended and supplemental bill, being the appellant here. By the terms of this petition the owners, signing the same, owning land abutting and having a frontage on Walnut street lying between the east line of North River street and the westerly limits of Aurora, petitioned the common council of Aurora to grant to Watkins and George of Aurora, and Vivian and Kopf of Chicago, their representatives and assigns, the right to use said portion of Walnut street, or as much thereof as the mayor and aldermen may deem best, for the purpose of constructing, maintaining, and operating thereon a railroad with electricity or other motive power "which will not scatter smoke or fire, with single track with the necessary side tracks and switches and with all necessary poles (said poles to be set within the curb line of said street), wires, and other appliances for the operation of the said railroad, and we

hereby consent to the construction and operation of the said railroad on, over, through and along said portion of said street or any part or portion thereof, by the said V. A. Watkins, William George, R. S. Vivian and William P. Kopf, their representatives and assigns."

There was also made an exhibit to the amended and supplemental bill an assignment, dated September 26, 1904, by Watkins, George, Vivian, and Kopf, of said franchise to the Aurora, De Kalb & Rockford Electric Traction Company, and an acceptance in writing of the assignment by the said traction company on the same day, by the terms of which assignment Watkins, George, Vivian, and Kopf, for the consideration of the sum of \$1.00 to them in hand paid by said electric traction company, sold, assigned, conveyed, set over, and transferred to said traction company, its successors and assigns, "all the title, interest, privileges and immunities granted to us, either jointly or severally, by a certain franchise hereinafter described, it being the purpose of this instrument to convey and assign to said traction company all rights by us owned or claimed, either jointly or severally, in and to said franchise, or permit, to-wit: That certain franchise heretofore granted to the undersigned, their heirs, executors, administrators and assigns, by the city council of the city of Aurora, Kane county, Illinois, known and entitled, 'Ordinance granting to V. A. Watkins, William George, R. S. Vivian and William P. Kopf, their heirs, executors, administrators or assigns, consent and right to use, locate, lay down, construct, maintain and operate a railway in certain streets and avenues in the city of Aurora, Illinois,' which said ordinance was passed May 27, 1902, approved May 29, 1902, and also the amendment to said franchise, passed November 2, 1903, and approved November 5, 1903."

There was also attached to said amended and supplemental bill as an exhibit the articles of incorporation of the Aurora, De Kalb & Rockford Electric Traction Company, in which are set forth: First, the name of the corporation; second, the places from and to which it is intended to construct the said railroad, as follows: In and from the city of Aurora in Kane county, thence in a northwesterly direction, through the counties of Kane, De Kalb, Ogle, and Winnebago, to and terminating in the city of Rockford, in the county of Winnebago, all in the state of Illinois, with branches or auxiliary lines of road necessary or convenient to the operation of said railroad; third, that the principal business office of the corporation should be established and maintained at Aurora; fourth, that the time of the commencement of the said proposed corporation was from the date of the filing said articles for record, as required by law, and to continue for a period of 50 years thereafter; fifth, the

amount of capital stock of the corporation was fixed at \$100,000; sixth, the names and places of residence of several persons forming the corporation (then follow the names of five persons, all residing in Chicago, Ill.); seventh, the names of the first board of directors, which are the same as those last above referred to; eighth, a provision that the government of the corporation shall be vested in a board of directors and the officers, as provided by the by-laws; and, ninth, that the capital stock shall be divided into 1,000 shares of the par value of \$100 a share.

There was also attached as an exhibit to the amended and supplemental bill a written acceptance by the Aurora, De Kalb & Rockford Electric Traction Company of the ordinance passed on November 7, 1904. There was also attached as an exhibit to said amended and supplemental bill a receipt dated December 15, 1902, executed by the city of Aurora through its city treasurer, and approved by the mayor and attested by the city clerk, for the sum of \$10,000 from said electric traction company in satisfaction of the liability to the city against Watkins, George, Vivian, Kopf, and their assigns, under section 11 of said ordinance of May 27, 1902.

Carnes, Dunton & Faissler, and Cheney & Evans, for appellant. Knight & Brown, Theodore Worcester, and George G. King, for appellee.

MAGRUDER, J. (after stating the facts). "Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far, at least, as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages." *Stetson v. Chicago & Evanston Railroad Co.*, 75 Ill. 74; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *Chicago, Burlington & Quincy Railroad Co. v. West Chicago Street Railroad Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485; *Doane v. Lake Street Elevated Railroad Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265. The present proceeding is instituted by the appellant, a property owner owning a lot abutting upon Walnut street in the city of Aurora, for the purpose of enjoining the appellee, the Aurora, De Kalb & Rockford Electric Traction Company, from laying down its railway tracks upon Walnut street in front of appellant's property. The appellant claims that he is the owner in fee of Walnut street in front of his lot to the center of the street, subject to a right of easement over the same in the city and the public. If this is not true, and if the fee of such portion of Walnut street is in the city, and not in appellant, as above stated,

then, of course, the present bill for injunction will not lie.

First. The first question, therefore, to be determined, and which is discussed by counsel, is whether or not the appellant is the owner of the fee of the street in front of his lot to the center thereof. The traction company, the appellee herein, contends that the appellant has not shown himself to be the owner of the fee to the center of the street. Appellant's property is lot 9 in block 19 in Stephen F. Gale's Addition to West Aurora. The plat of the addition was introduced in evidence, and is referred to as an exhibit to the amended and supplemental bill. The certificate attached to the plat is dated April 29, 1851, and is made by "John L. Hanchett, Deputy Surveyor," who certifies that he has surveyed and laid out into blocks, streets, alleys, and lots the following piece or parcel of land, to wit: "A part of the north-east quarter of section 21, and north-west quarter of section 22, township 38, north, range 8 east, third principal meridian." The act of 1845 providing for the acknowledgment of plats was in force when the plat here in controversy was acknowledged, and that act remained in force until the revision of the statutes of 1874. Gould v. Howe, 131 Ill. 490, 23 N. E. 602. Section 17 of chapter 25 of the revision of 1845 of the Statutes of Illinois provides that, whenever any person wishes to lay out a town in this state, or an addition or subdivision of outlots, he shall cause the same to be surveyed, and a plat or map thereof made by the county surveyor, etc. Rev. St. 1845, p. 115. Under the Revised Statutes of 1845, the county surveyor's certificate to the plat of an addition to a town is a requisite part of such plat when it is acknowledged by the proprietor. "The plat is neither entitled to acknowledgment or record until it has first been certified by the surveyor. His certificate must also be recorded and form a part of the record. Then, and not until then, does it become evidence of title. * * * The plat or map operates as a conveyance in fee of streets and alleys to the corporation only by force of the statute, and when it requires that it shall be 'made out, certified, acknowledged and recorded, as required by this division,' to have the effect of a conveyance, it is not within the province of a court to say it shall become a muniment of title, notwithstanding a plain requirement has been ignored." Village of Auburn v. Goodwin, 128 Ill. 57, 21 N. E. 212. A deputy county surveyor acting in his own name, and not that of his principal, in making a survey and plat of a town addition under the statute of 1845, does not bind the principal, or make his act that of the county surveyor. Village of Auburn v. Goodwin, supra. It also appears that the other certificate indorsed upon the plat or map of the addition, certifying that such map or plat was laid out

and subdivided, was not made by the owner, Stephen F. Gale, but was made by one P. A. Hall, agent for Stephen F. Gale. In Thompson v. Maloney, 199 Ill. 270, 65 N. E. 236, 93 Am. St. Rep. 133, we held that a plat executed and acknowledged by an attorney in fact does not constitute a statutory dedication of the streets to the municipality. Inasmuch, therefore, as the plat of Gale's Addition to West Aurora was certified by a deputy county surveyor, and not by the county surveyor, and inasmuch as the map or plat was not certified to have been laid out by the owner, but merely by an agent of the owner, the plat was not executed in accordance with the provisions of the statute, and cannot be considered a statutory plat. Consequently the fee of the street did not vest in the city of Aurora. The title thereto remained in the owner, Gale, so long as none of the lots were sold, but, inasmuch as he sold lots by reference to the plat, title to the soil in front of said lots to the center of the street attached to the lots conveyed.

It follows, therefore, that the dedication of the streets comprised in the subdivision or addition under consideration, one of which streets was Walnut street, was a mere common-law dedication, and not a statutory dedication. If, then, the appellant has connected his title to the lot claimed by him with the title of the original dedicatory of this addition, he owns the fee to Walnut street in front of his lot as far as the center of the street. "A conveyance of property abutting upon a street, shown upon a plat not sufficient to constitute a statutory dedication, carries with it the fee of the soil to the center of the street, although the property is conveyed by lot or block number only, unless the title to the street is expressly reserved to the grantor or excluded from the grant." Brewster v. Cahill, 199 Ill. 309, 65 N. E. 233.

We do not understand, however, that counsel for appellee seriously contend that there was anything more here than a common-law dedication only of the land embraced within the street, or that the title in fee of the abutting lot owners does not extend to the center of the street, but their claim is that the appellant has not properly connected himself with the title of the original dedicatory or maker of the subdivision or addition. The record shows that, by warranty deed dated June 25, 1887, James O. Hanna and his wife, of Aurora, in consideration of \$2,750, conveyed and warranted to George Wilder, of the same place, the present appellant, lot 9 in block 19, Gale's Addition to West Aurora, Kane county, Ill., as per plat of the same on record in the recorder's office of Kane county. The proof further shows that the appellant resided upon the lot in question as his homestead for 17 years, and paid all taxes for 15 years, from 1888 to 1903 inclusive, upon said lot, such possession

and payment of taxes being under the deed of June 25, 1887. Such possession and payment of taxes for more than seven years under the last-named deed, as color of title, make him the owner of said lot 9 under the limitation law in regard to possession and payment of taxes. Whether, however, such title could extend his ownership to the center of the street, it is unnecessary to inquire, and we do not decide. The abstracts of title and deeds introduced in evidence show a connected chain of title from the government down to Hanna, the immediate grantor of appellant. No objection is made by counsel for appellee, as we understand their argument, to any part of this chain of title, except one deed, to wit, a warranty deed, dated January 26, 1853, executed by Stephen F. Gale, the owner of the property when the subdivision was made, to Philip A. Hall. The description contained in this deed is as follows: "All the following described piece or parcel of land lying and being in sections No. 21 and 22 in township No. 38 north of range No. 8 east of the third principal meridian, and known as Gale's Addition to West Aurora, reserving and excepting lot No. 8 in block No. 10 and lot No. 12 in block No. 13."

The first objection made to the last above-named deed is that the description does not state in what state or county the premises conveyed lie. The deed begins as follows: "This indenture, made this 26th day of January, A. D. 1853, between Stephen F. Gale of the city of Chicago, county of Cook and State of Illinois, of the first part, and Philip A. Hall of West Aurora in the county of Kane and State of Illinois of the second part." In thus describing the residence of the grantee, Philip A. Hall, the deed describes him as being "of West Aurora in the county of Kane and State of Illinois." When, therefore, in the description of the property, mention is made of "Gale's Addition to West Aurora," a reference back to the previous part of the deed shows that West Aurora is in Kane county, Ill. This is sufficient to indicate the county and state in which the premises lay. It was so held in *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, and cases there cited. See, also, *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; also *Billings v. Kankakee Coal Co.*, 67 Ill. 489. It is not a correct statement that no evidence was offered tending to show that the parcel of land claimed to be owned by the appellant was identical with any part of the premises described in the original deed. The deed from Gale to Hall conveys the whole of the addition to West Aurora, except lot 8 in block 10, and lot 12 in block 13. It therefore conveyed lot 9 in block 19 in said addition. The record of the plat was an exhibit to the amended and supplemental bill, and the original plat itself was produced, and appellant testified that he owned and lived

and paid taxes on that particular lot of land. This was sufficient evidence to show that the premises conveyed by the deed were the same premises as those included in the recorded plat of Gale's Addition to West Aurora.

It is also insisted by the appellee that there were certain erasures in the deed from Gale to Hall, and that, although the admission of the deed was objected to upon this ground, the erasures appearing on the face of the deed were not explained. Two deeds were introduced in evidence, shown upon the abstract of title, and also introduced as separate instruments outside of the abstract of title. The first deed introduced was a quitclaim deed executed by Gale to Hall, dated January 26, 1853, signed by Gale, and sealed and delivered by him in the presence of one John T. Waite. This deed was recorded on January 29, 1853. On account of certain defects in the first deed, it was redrawn and re-executed by being signed and acknowledged by Gale before a notary public on September 4, 1863, and recorded on September 3, 1864. The erasures objected to are in the second deed, acknowledged in 1863, and were merely erasures of such words as made the deed correspond with the original quitclaim deed. The form used in drawing the second deed was the form of a warranty deed, and such words as operated to make it a warranty deed were erased, so as to make it conform with the original deed, which was a quitclaim deed. The comparison of the two deeds was an explanation of the erasures, so as to relieve the deed of the charge that it contained such erasures or interlineations as amounted to suspicious circumstances. *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; *Merritt v. Boyden & Son*, 191 Ill. 136, 60 N. E. 907, 85 Am. St. Rep. 246.

The deed from Gale to Hall passed the title to the property in question, and was therefore properly admitted by the court. For the reasons above stated, we are of the opinion that the appellant showed himself to be the owner in fee of said lot 9, and of the fee of so much of Walnut street lying in front thereof as extends to the center of the street. In other words, he has shown himself to be the owner in fee of so much of the half of Walnut street as lies in front of his lot.

Second. A motion was heretofore made by the appellee to dismiss the present appeal for want of jurisdiction in this court, and this motion was, by a previous order entered herein, reserved to the hearing of the cause, and will now be disposed of. The original bill averred that George Wilder, the appellant, was the owner in fee of said lot 9, and that such ownership extended to the center of Walnut street in front of said premises, subject only to the use of the public as a public highway. The defendants in their

answers denied that the complainants in the original bill, or any of them, were the owners of the fee of that part of Walnut street described in the bill, but, on the contrary, averred that the fee of said street, as described in the bill, was in the city of Aurora. Hence the issue was directly made as to the ownership in fee of the property by the complainants in the original bill, and, this being so, a freehold is directly involved, and the cause was properly brought to this court. It is said, however, by counsel for the appellee, that such allegation as contained in the amended and supplemental bill was admitted to be true by the demurrer thereto, and that therefore there was no issue upon that subject which authorized the taking of the appeal to this court. The theory of the amended and supplemental bill was, not only that appellant was the owner in fee to the center of the street in front of his lot, but that the railroad to be constructed upon the street by appellee was a commercial railroad—that is to say, a railroad carrying both passengers and freight—and that therefore the construction of it was the imposition of a new or additional servitude in the street, for which the appellant, as the owner of the fee, was entitled to compensation. The bill avers not only that appellant was the owner in fee as above stated, but that no compensation had ever been paid to him for the use of the fee owned by him in said street, and that he had never consented to the occupation and use of said fee for the purposes of said traction company, and that said traction company had never attempted to condemn or purchase from him his rights in the fee in said street, “and that the taking of your orator’s land in said street for said purposes will be in violation of the constitutional rights of your orator.” These and other allegations in the amended and supplemental bill amount substantially to the charge that the appellee was seeking to take the property of appellant without making just compensation therefor, in violation of the Constitution of the state. For these reasons, also, the case has been properly brought to this court, as well upon the issues made by the demurrer to the amended and supplemental bill, as upon the issues made under the answers to the original bill. Accordingly, the motion to dismiss the appeal is overruled.

Third. It is claimed on the part of appellant that the ordinance of May 27, 1902, was absolutely void, as authorizing certain individuals, rather than a corporation, to construct and maintain and operate a railroad in a public street of the city of Aurora. It cannot be denied that the ordinance of May 27, 1902, was and is absolutely void upon this ground, whether the railroad be regarded as a street railroad or as a commercial railroad. The act of March 7, 1899, in regard to street railroads, provides “that

any company, which has been or shall be incorporated under the general laws of this state for the purpose of constructing, maintaining or operating any horse, dummy or street railroad or tramway, may enter upon and appropriate any property necessary for the construction, maintenance and operation of its road,” etc. Sess. Laws 1899, p. 331. The power here granted is to an incorporated company, and not to an individual. Paragraph 90 of section 63 of article 5 of the city and village act provides that “the city council * * * shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city to any steam, dummy, electric, cable, horse or other railroad company, whether the same shall be incorporated under any general or special law of the state now or hereafter in force, except upon the petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes; and when the street or part thereof sought to be used shall be more than one mile in extent no petition of land owners shall be valid, unless the same shall be signed by the owners of the land representing more than one-half of the frontage of each mile, and of the fraction of a mile, if any, in excess of the whole mile measuring from the initial point, named in such petition, of such street or of the part thereof sought to be used for such railroad purposes.” 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 712. Paragraph 90, it will thus be observed, provides for a grant to an incorporated company, and not to an individual or individuals.

In *Goddard v. Chicago & Northwestern Railway Co.*, 202 Ill. 362, 66 N. E. 1066, a construction was given to the act of March 7, 1899, in reference to this question, and it was there held that the act by its terms only authorized the grant of street railroad privileges to companies incorporated under the general laws of Illinois, and not to individuals or partnerships, and that the act should not be extended by construction to apply to individuals, since that would give to individuals the sovereign power of eminent domain, and could not be adopted unless both the letter and the spirit of the act clearly so required. In that case it was said (page 368, 202 Ill. and page 1067, 66 N. E.): “The question is not whether a natural person, if the law so provided, might acquire a right of way, exercise the right of eminent domain, and enjoy the franchise to operate a street railway, but whether the law does so provide, and, if it is clear that it does not, the complainants acquired no right by the action of the county board. The Legislature had power to limit the authority of the county board to grant a license to incorporated companies created under the general laws of the state for the purpose of constructing and operating street railways, and it is not material what reason existed

for prescribing the limit. It was a case for the exercise of the legislative judgment, with which we are not concerned. * * * The right to operate a street railway and collect fares for carrying passengers, and the power to exercise the right of eminent domain, are franchises. No private person can establish a toll bridge, public ferry, or railroad, or enjoy the franchise connected therewith, without authority from the Legislature, either directly granted, or by the exercise of legislative power through delegation to a municipality. 2 Smith's Law of Mun. Corp. § 1702. A franchise is a special privilege, conferred by grant from the sovereign power, not belonging to the citizen of common right. It must be derived from the laws of the state and emanate from the sovereign power, and it cannot be exercised by an individual on his own lands without the consent of the state." The same reasoning applies to paragraph 90 as above quoted. The grant there contemplated can only be to a company, and not to an individual. *McGann v. People*, 194 Ill. 528, 62 N. E. 941; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448.

In line with the Illinois authorities is the case of *Allen v. Clausen*, 114 Wis. 244, 90 N. W. 181, where it is said: "Appellant's counsel needlessly argue at length for the natural right of individuals to receive such a franchise. That is not questioned, but only whether the Legislature has empowered a municipality to grant it to them. As there is no pretense that defendants, or any of them, are within such class of individuals to whom franchise is so authorized to be granted, we may, for the purposes of this case, consider the statute as if it in terms only authorized grants to street railway corporations, except, indeed, as the express mention of certain individuals the more clearly negatives grant to any others. That an authorization to grant such franchises only to corporations excludes any power to confer one on individuals, and renders void any attempt so to do, has been often decided by other courts."

In the case at bar, the ordinance of May 27, 1902, granted the right to lay down, maintain, and operate a railway on Walnut street in front of the appellant's property to V. A. Watkins and William George, of Aurora, and R. S. Vivian and William P. Kopf, of Chicago. The grant was to four individuals, and not to any incorporated company, and hence, under the authorities already cited, the grant was absolutely void.

After the original bill in this case was filed on October 11, 1904, and on November 7, 1904, a new ordinance was passed, amending the ordinance passed on May 27, 1902, and by the terms of the latter ordinance the authority to construct and operate the road was conferred upon the appellee, the Aurora, De Kalb & Rockford Electric Traction Company, its successors and assigns. Subsequently, on December 17, 1904, the amended

and supplemental bill herein was filed, which refers to the passage of the latter ordinance, and makes it an exhibit to said bill. It is claimed by the appellant that the ordinance of November 7, 1904, is merely amendatory of the ordinance of May 27, 1902, and that a void ordinance cannot be amended. And such is the law. *McQuillin on Mun. Ordinances*, § 196; *People v. Onahan*, 170 Ill. 449, 48 N. E. 1003; *Tedrick v. Wells*, 152 Ill. 214, 38 N. E. 625; *Schwartz v. City of Oshkosh*, 55 Wis. 490, 13 N. W. 450. On the other hand, it is claimed by the appellee that the ordinance of November 7, 1904, is an original and independent ordinance conferring an original and independent privilege upon the appellee, and is not in any sense dependent for its validity upon the ordinance of May 27, 1902. This court has held that an act which possesses all the attributes of a complete statute in itself is not invalid because passed as an amendment to an act which had become inoperative. *People v. Onahan*, supra; *School Directors v. School Directors*, 73 Ill. 249; *Timm v. Harrison*, 109 Ill. 593. We are inclined to the opinion that the ordinance of November 7, 1904, may be regarded as an independent ordinance, and as possessing all of the attributes of a complete statute in itself. Its title contains the following words: "Granting the Aurora, De Kalb & Rockford Electric Traction Company, its successors, lessees and assigns, consent and the right to use, locate, lay down, construct, maintain and operate its railway as hereinafter provided, in, upon and along sundry streets and avenues in the city of Aurora, Illinois; also in said streets, the right to erect, use and maintain poles and overhead wires, and to build, construct and maintain underground conduits and tubes, with all necessary appurtenances, for the purpose of propelling its cars thereon by electricity or any other motive power, except steam." The body of the act confers upon the Aurora, De Kalb & Rockford Electric Traction Company the same rights as were conferred upon the four individuals named in the ordinance of May 27, 1902.

Fourth. But it is insisted by the appellant that the ordinance of November 7, 1904, was ineffectual in any event, because it was enacted without any petition from consenting property owners. There was a petition to the mayor and aldermen of the city of Aurora by the owners of land abutting and having a frontage on Walnut street, etc., asking for a grant to Watkins, George, Vivian, and Kopf, their representatives and assigns, of the right to use the street for the purpose of constructing, maintaining, and operating thereon a railroad, etc. This petition was for a grant to the four individuals, and not to the appellee corporation. The property owners signing the consent consented to an ordinance conferring the power to construct and operate the road upon certain individuals, but there is nothing to show

that they ever consented to the grant of power to the appellee company to construct and operate the road. Counsel for appellee say that the consent or petition was to the effect that the grant should be made to the four individuals named, "their representatives and assigns." A written assignment is then produced, and is attached as an exhibit to the amended and supplemental bill, wherein Watkins, George, Vivian, and Kopf assign, set over, and transfer to the appellee corporation "all the title, interest, privileges and immunities granted to us, either jointly or severally, by a certain franchise hereinafter described, it being the purpose of this instrument to convey and assign to said traction company all rights by us owned or claimed, either jointly or severally, in and to said franchise or permit, to-wit: That certain franchise heretofore granted to the undersigned, their heirs, executors, administrators and assigns, by the city council of the city of Aurora, * * * known and entitled, 'Ordinance granting to W. A. Watkins, William George, R. S. Vivian and William P. Kopf, their heirs, executors, administrators or assigns, consent and right to use, locate, lay down, construct, maintain and operate a railway in certain streets and avenues in the city of Aurora, Illinois,' which said ordinance was passed May 27, 1902," etc. This is not an assignment of the consent of abutting property owners. It is an assignment of the rights and privileges and franchises granted by the ordinance of May 27, 1902. As that ordinance was absolutely void because of the grant to individuals instead of a company, there could be no valid assignment of it.

Independently, however, of this consideration, the ordinance of May 27, 1902, being invalid in attempting to confer rights on the four individuals, could not be valid because it authorized such individuals to assign the franchise or privileges conferred upon them. This would amount to a delegation of power by the city council to the four individuals to license a railroad company to construct and operate a railroad in a street of the city. An ordinance attempting to so delegate power is void. Legislative powers conferred upon municipalities cannot be delegated. In *City of Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359, we said (page 433, 136 Ill., and page 360, 26 N. E.): "The powers that were granted by the state, and that are relied upon by the municipality, were delegated to the city council; and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere executive officer." See, also, *People v. Village of Crotty*, 93 Ill. 180. In *City of East St. Louis v. Wehrung*, 50 Ill. 23, it was held that, where the power is conferred upon municipal corporations to regulate any calling or business, it is so done with the intention that such power

shall be exercised by the corporations, and in the mode prescribed, and that they are not warranted in delegating a discretionary authority to others, or to an individual. In *Hickey v. Chicago & Western Indiana Railroad Co.*, 6 Ill. App. 172, where the general railroad law conferred upon a railroad company authority to construct a railroad upon a street in a city with the assent of the corporation, it was held that, as the act contained no provision as to how such consent might be obtained, the action of the city council must be governed by the provisions of the general statute relating to the incorporation of cities and villages; and it was also there held that cities have full power to regulate the location and use of railroad tracks within their corporate limits, but that this is a public power or trust, and can be exercised by the corporation when and in such manner as it shall judge best, but that such power cannot be delegated to others. It may be here observed that, in the case at bar, the act of March 7, 1899, in regard to street railroads, if it has any application here at all, provides that no such company shall have the right to locate or construct its road along any street in any incorporated city "without the consent of the corporate authorities of such city," but it is not specified how such consent may be obtained, and therefore the action of the council must be governed by the provisions of the general statute relating to the incorporation of cities and villages, which includes paragraph 90 of section 63 of article 5 as above quoted. It follows from what is said that the appellee corporation could have obtained no authority to construct and operate its railroad along Walnut street in front of appellant's property by virtue of the power to assign, given by the ordinance of May 27, 1902, to the four individuals there named, and by virtue of the assignment executed by such individuals to the appellee. The consent or petition, signed by the property owners and appearing in the record, could only apply to the action of the city council in passing the ordinance of May 27, 1902. It could not be used as a basis for the action of the city council in passing the ordinance of November 7, 1904. In order to invest the common council of Aurora with power to pass the latter ordinance, there should have been a new petition by the requisite number of property owners. This precise point has been recently decided by this court. In *Vennum v. Village of Milford*, 202 Ill. 423, 66 N. E. 1040, it was held that where an ordinance based upon a petition of property owners was invalid, and the confirmation proceeding was dismissed, the same petition could not be used by the improvement board as a basis for recommending another ordinance. The same principle announced in *Vennum v. Village of Milford*, supra, applies here.

It is true that the title of the ordinance of November 7, 1904, contains these words: "This ordinance having been duly petitioned for by the owners of land representing more than one-half of the frontage of each and every mile and fraction of a mile in excess thereof, or so much thereof as is sought to be used by said traction company, of all that portion of the streets hereinafter described." The ordinance of November 7, 1904, including its title, or the description of what the ordinance is, is an exhibit to the amended and supplemental bill, and is therefore to be regarded as a part of the bill. In *Cummings v. West Chicago Park Com'rs*, 181 Ill. 136, 54 N. E. 941, it was held that a recital in an ordinance providing for an improvement, that the petition of the owners of a majority of the land fronting on the improvement was presented to the municipal authorities, is sufficient prima facie evidence of the existence of such jurisdictional fact. See, also, *McGann v. People*, 194 Ill. 526, 62 N. E. 941. If a recital in the title to the act can be regarded the same as a recital in the body of the act, then the recital above quoted from the title of the ordinance of November 7, 1904, might be regarded as prima facie evidence that the latter ordinance was duly petitioned for by the owners of land, etc., under the issue made by the demurrer to the amended and supplemental bill. But the amended and supplemental bill contains the allegation "that there is on file in the city clerk's office of said city of Aurora a petition from abutting owners of land on said Walnut street, filed prior to the enactment of the first purported license herein mentioned to said four natural persons, a copy of which petition is hereto attached and marked 'Exhibit 3,' and made a part of this amended and supplemental bill, and no other or different petition of abutters on said Walnut street has been filed with said city council authorizing or attempting to authorize in any way the enactment of the last amendment of November 7, 1904." The demurrer to the amended and supplemental bill admits the allegation in question to be true, and it stands the same as though it were established by proof. Inasmuch as the recital in the title of the act as above quoted can only be regarded as prima facie evidence that the ordinance of November 7, 1904, was duly petitioned for, such prima facie case thereby made is overcome by the allegation that no other or different petition of abutters on Walnut street was filed with the city council authorizing the enactment of the ordinance of November 7, 1904, except the petition or consent already referred to, which preceded the ordinance of May 27, 1902, and upon which the latter was based. The allegation that no other or different petition of abutters was filed than the one already referred to is not the statement of a mere conclusion, but is the statement of a

fact. Counsel refer to the case of *Schuchert v. Wabash, Chester & Western Railroad Co.*, 10 Ill. App. 397, as sustaining the contention that the allegation is merely that of a conclusion, but in the case in question the bill averred "that there was no such petition as the statute requires." This was the statement of the conclusion of the pleader that the petition did not conform to the requirement of the statute. But in the case at bar the allegation is of the fact that no other petition was filed with the common council than that set forth as preceding the ordinance of May 27, 1902. It is said that the statute does not require that the petition should be filed with the common council, but merely that the council shall have no power to make the grant in question "except upon the petition of the owners," etc. It is said that the petition might be presented to the common council in some other form than by filing it, and that it need only be exhibited or otherwise brought to the knowledge of the council. The bill alleges, however, and the demurrer admits it to be true, that the petition of abutting property owners, upon which the ordinance of May 27, 1902, was based, was filed in the city clerk's office, and, this being so, the presumption is that, if there had been another petition as a basis for the ordinance of November 7, 1904, it also would have been filed in the city clerk's office. The bill expressly alleges that it was not so filed, and the proper way of bringing such a document to the attention of the common council would be by filing it.

Moreover, the ordinance which the property owners petitioned for not only granted the right to construct and operate the road in Walnut street to the four individuals named, but it provided in section 2 that the grant therein should extend for the term of 40 years from the passage of the ordinance of May 27, 1902; but the subsequent ordinance of November 7, 1904, in addition to granting the authority, referred to, to the traction company, provided in section 2 that the grant therein should extend for the term of 38 years from the passage thereof. Non constat that the property owners who petitioned for a grant to individuals for 40 years would have been satisfied with a grant to a corporation for 38 years.

"Without the statutory consents the street railroad company has no right to commence the construction of its road in the street as to which the consents are withheld; and any abutting property owner in that street owning to the center thereof can maintain an equitable action to restrain such construction, and need not prove special damage." *Nellis on Street Surface Railroads*, § 10.

"Where the abutting owner has title to the fee in the street, or where payment of compensation is by statute made a condition precedent, he may enjoin the construction of the road until compensation has

been paid or tendered." 27 Am. & Eng. Ency. of Law (2d Ed.) p. 184, and cases in note.

Fifth. It has been held that a street railway is not an additional servitude, even where the fee of the street is in the abutting owner. But it is otherwise where a steam railroad, or what is called or known as a "commercial railroad," is constructed in a public street. The latter is regarded as an additional servitude. It has been said that where the public have "only an easement in streets, and the fee is retained by the adjacent owner, the Legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude." *Chicago, Burlington & Quincy Railroad Co. v. West Chicago Street Railroad Co.*, 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485. The term "steam railroad" is used because the ordinary commercial railroad company, which carries both passengers and freight, is generally propelled by steam. But in the present case it is contended by counsel for appellee that the character of the motive power is not controlling in determining the question of whether the railroad to be constructed is a street railway or not, or whether its construction is or is not an additional servitude. Counsel for appellant say, "We assume this position to be in accord with the decisions of courts generally, and it follows from this that the fact that steam is not used as a motive power on this road is not of controlling importance."

The next question that arises, therefore, is as to the character of the road to be constructed by appellee. If the road so to be constructed be regarded as merely a street railroad, it cannot be regarded as an additional servitude, and the appellant is not entitled to an injunction against its construction, even though he is the owner of the abutting property and of the fee of the street in front thereof to the center of the same. Counsel for the appellee thus state the question succinctly in their brief: "The main question in this case is whether the railroad which the appellee company proposes to construct will be a commercial railroad or a street railway." If it is a commercial railroad, appellant is entitled to compensation before it can be built over that part of the street opposite his lot, which he owns in fee subject to the easement of the public.

It is to be noted that the railroad to be constructed by appellee is nowhere spoken of in its articles of incorporation, or in either of the ordinances granting power to construct it, as a "street railroad." A comparison of the provisions of its articles of incorporation with the requirements of the general railroad act will show that it conforms

exactly to the latter act. Indeed, it is conceded that the appellee is a corporation organized under the general railroad law of the state, and not under the street railroad act. Lewis in his work on Eminent Domain (volume 1, § 110a), says: "Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street."

In *Diebold v. Kentucky Traction Co.* (Ky.) 77 S. W. 674, 68 L. R. A. 637, it was said: "It certainly can make no difference whether the cars of a railroad company are propelled by the agency of steam, or of gasoline, or of electricity, compressed air, liquified air, or any other agency which science and the inventive genius of man may in the future bring into use. Rather, the character of a railroad company is determined by the nature and extent and limits put upon its operation by law or otherwise, and by the character and object of its corporate creation as shown by its charter." By the terms of its charter the appellee here is to run, not in one city alone, but from the city of Aurora in Kane county, northwesterly through Kane, De Kalb, Ogle, and Winnebago counties, to the city of Rockford in the latter county, together with branches or auxiliary lines of road necessary or convenient to its operation. The appellee road is evidently not to be constructed for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street, but is to convey them, as commercial railroads do, from one place to another, and from one county to another. The charter of appellee provides that it shall continue for a period of 50 years. The general railroad law provides that no corporation shall be formed to continue more than 50 years in the first instance (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3226, c. 114, par. 5), while the act of March 7, 1899, in regard to street railroads, provides that the consent of the corporate authorities of a city to construct a street rail-

road along any street in the city may be granted "for any period not longer than twenty years." As the corporate existence of the appellee is to continue for some 38 or 40 years, it is certainly not a street railroad so far as the extent of its life as a corporation is concerned. In *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163, we said (page 307, 174 Ill., and page 167, 51 N. E.): "There is a wide and well-understood difference between a railroad organized for general traffic, and a street, horse, or dummy railroad. * * * A street railroad, as is well understood, is a road constructed on a street or highway for the purpose of conveying passengers living upon or having business on such street or highway, its main object being to accommodate street travel." In *Hartshorn v. Illinois Valley Traction Co.*, 210 Ill. 609, 71 N. E. 612, we said that street railways are railways on or upon streets of a city or town, and that a street railway may not, like a steam railway, locate its route in order to reduce time and distance for passengers traveling from town to town across the country, and that, as such location of its route is not for the accommodation of local travel on highways or streets, it therefore "involves a perversion of the character and objects of street railways." A railway authorized to carry freight as well as passengers becomes a commercial railroad, instead of a street railroad, and such railroad, when laid in a street, becomes an additional burden on the fee, and cannot be laid without the consent of, or compensation made to, the adjoining property owners. *Linden Land Co. v. Milwaukee Railway Co.* 107 Wis. 511, 83 N. W. 851.

In *Schaaf v. Cleveland, M. & S. Ry. Co.*, 66 Ohio St. 229, 64 N. E. 148, it is said by the court: "Besides, this company is authorized not only to carry passengers, but also to transfer over the road 'baggage, packages, boxed and barreled freight, farm produce, express matter, and United States mail'; and, although it is required to run cars over its road at least three times each way daily, it is not limited as to the number of cars or trains for freight or passengers, or both combined, or the size or make-up of the trains. All things considered, it is reasonably certain from the facts found that the practical operation of such a road, within its capacity, must necessarily produce annoyance and inconvenience to the plaintiffs, and interfere with their property rights as abutting owners, of the same general character that result from the operation of steam railroads, and become an additional burden on the public highway, and taking of the plaintiff's property in the same sense. * * * But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway, and also making compensation to the owner of private property taken for the use indicated."

In the case at bar, the ordinance of No-

vember 7, 1904, as well as the previous ordinance of May 27, 1902, contains the following provision: "The said tracks and railways shall be used for no other purpose than to transport passengers and their ordinary baggage, United States mail, express, milk; and the cars and carriages for that purpose shall be of the style and class ordinarily used on such railways in other cities. No freight shall be carried by said grantee, its successors or assigns, excepting such as is used in the construction of their road within the limits of the city of Aurora." Thus the road to be constructed by appellee is authorized to carry not only passengers and their ordinary baggage, and United States mail and express matter, but also milk. It cannot be said that a railway which is authorized to carry one kind of freight is not a commercial road within the meaning of the definitions above quoted. The fact that the road is limited to the carriage of one kind of freight does not make it any the less a commercial railroad, which is defined to be one which carries both freight and passengers. Again, the ordinance authorizes the appellee corporation to do such excavating and grading as it may deem necessary for the proper laying of its tracks, thereby failing to confine the laying of its tracks to the surface of the street. It is also authorized by the ordinance to connect its tracks with the tracks of any railway company owning or operating tracks in the city of Aurora for the purpose of forming the loop referred to in the ordinance. The ordinance also provides that the authority granted to appellee is to be used for the public purposes of a railway connecting with the interurban tracks, when laid, of the Aurora, De Kalb & Rockford Electric Traction Company.

In our opinion, the railroad to be constructed under appellee's charter, and under the ordinances authorizing it to lay its tracks in the streets of Aurora, is what is called a "commercial railroad," and is not a street railroad within the definite and fixed meaning of the latter term. Being a commercial railroad, it constitutes a new and additional servitude upon the fee of the property owner to the center of the street. Therefore, inasmuch as appellant, the owner of lot 9 abutting on Walnut street, is an owner of the fee of the street in front of his lot to the center thereof, and inasmuch as the appellee is about to construct a new and additional servitude in the street upon his property without having paid him any compensation or instituted any condemnation proceeding, he was entitled to an injunction in accordance with the prayer of his bill.

For the foregoing reasons, the decree of the circuit court was erroneous, and the same is hereby reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(216 Ill. 532)

GLOS v. DAVIS.

(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—WAIVER OF OBJECTIONS.

The failure to designate or point out a specific objection, or argue it in the brief, is a waiver of such objection, even though it be assigned as error on the record.

2. TAXATION—SUIT TO SET ASIDE TAX DEED—EVIDENCE.

In a suit to set aside tax deeds, evidence that when the bill was filed plaintiff was in possession of the property under a claim of ownership by virtue of a quitclaim deed was prima facie evidence of ownership, and sufficient, in the absence of contrary evidence, to justify a decree finding that when the bill was filed plaintiff was the owner of the premises and in possession thereof.

3. SAME—POSSESSION—EVIDENCE.

The inclosure of the property by a wire fence with posts eight feet apart gave plaintiff possession.

4. SAME.

Though the evidence did not show that plaintiff's husband, who built the fence, was her agent, proof that her agent and attorney, who swore that he took possession by such erection of the fence before the bill was filed, went on the property and assisted her husband in building the fence, sufficiently showed that the inclosure by the fence was done by plaintiff's agent.

5. SAME.

In an action to set aside tax deeds, the rule is that plaintiff's possession of the property must exist at the time of the filing of the bill.

Appeal from Superior Court, Cook County; Theo. Brentano, Judge.

Bill by Minnie Davis against Jacob Glos. Decree for complainant, and defendant appeals. Affirmed.

Rehearing denied October 12, 1905.

This is a bill, filed on March 22, 1904, in the superior court of Cook county by appellee against appellant to set aside two tax deeds, conveying to appellant lot 24, block 8, in McChesney's Hyde Park Homestead Subdivision of the south half of the south half of the northeast quarter of section 22, township 38 north, range 14 east, of the third principal meridian, in Cook county, Ill.; the first deed being dated August 26, 1902, issued in pursuance of a sale on September 21, 1899, of said lot for the delinquent general taxes for the year 1898, and the other deed being dated October 25, 1902, issued in pursuance of a sale on November 9, 1899, to one A. A. Timke for a delinquent special assessment, wherein the certificate of sale issued to Timke was afterwards assigned to appellant. The bill alleged that the tax deeds were invalid for a number of reasons, among which were these: That there was no valid precept or process for the tax sale, and that the delinquent list was filed in the office of the county clerk, instead of being filed with the clerk of the county court. The bill prayed that the deeds be set aside as clouds upon appellee's title. The bill was answered by appellant, who denied that the deeds were invalid, and alleged that thereby appellant acquired a valid legal title to the premises.

Upon the hearing of the cause, after the in-

troduction of documentary and oral testimony, the court rendered a decree on January 17, 1905, finding that appellee was the owner of the premises and in possession thereof at the time of filing the bill; that the tax deeds were void for want of valid process as required by the statute, and were clouds upon appellee's title; and decreed that the same be canceled and set aside upon appellee's paying within five days the sum of \$38.92 to appellant, or to the clerk of the court for his use, etc., which amount was tendered in open court to appellant by appellee, but appellant refused to accept the same, and it was ordered to be paid to the clerk of the court for the use of appellant, which was done. The present appeal is prosecuted from the decree so rendered.

Jacob Glos (John R. O'Connor, of counsel), pro se. Arthur E. Beers, for appellee.

MAGRUDER, J. (after stating the facts).

In this case, although the assignment of errors was broad enough to include the grounds upon which the court declared the tax deeds in question to be void, yet the fact that they are void for the reasons stated is not contested or disputed by counsel for appellant in his argument before this court. The failure to designate or point out a specific objection, or argue it in the brief, is a waiver of such objection, even though it be assigned as error upon the record. *City of Springfield v. Coe*, 160 Ill. 22, 46 N. E. 709.

The only point made by the appellant in favor of the reversal of the decree is that the appellee did not establish by the proof her ownership and possession of the property. Arthur E. Beers, attorney for appellee, testified as follows: "On the day before the bill was filed, the complainant called at my office with the quitclaim deed, which I will introduce in evidence. On the morning of the day that the bill was filed I went on the property described in the bill of complaint, and I found there Mr. Davis, the husband of the complainant, fencing in the property. I called on Mrs. Davis, and she said— As her attorney and agent I went on the property and took possession of it, and fenced in the property, and put up a 'For Sale' sign; that was on the morning that the suit was filed; then I came down town, after taking possession, and filed the bill of complaint in this case. The fence was completed on the morning of the day that the bill was filed. * * * The lot in question is situated on Vernon avenue, being the fourth lot on the west side of the street, north of the first alley north of Sixty-Seventh street. * * * On the morning that the suit was filed I put a sign on it 'For Sale, A. E. Beers, 907-100 Washington St.' Mr. Davis was there then with the wagon and with the posts, putting up the fence. It was a wire fence; the posts were eight feet apart, and three or four of them were up; I assisted. I think he generally dug the post holes; they were about a foot deep; I did not purchase

or pay for any of the materials in the fence; Davis took it from his back yard. I don't know that it came from the back yard of the Davises personally; the same sidewalk on the street in front of the lot that was there before was there on the day the bill was filed; before that it was absolutely vacant. It was about half past eight in the morning of the day that the bill was filed that I was there; Davis was working on the fence when I got there that morning, and then I came to the city and filed the bill, after going to my office." On the trial below, appellee introduced a quit-claim deed, dated March 18, 1904, executed by Jennie C. Gould and husband, conveying said lot to appellee, which said deed was acknowledged on March 18, 1904, the day of its date, and recorded in Cook county on March 22, 1904. The proof above recited shows that, when the bill was filed, appellee was in the possession of the lot under a claim of ownership by virtue of the quitclaim deed executed to her. This proof was prima facie evidence of ownership, and, as no testimony was introduced contradicting it, it was sufficient to justify the decree of the court below.

Where the complainant in a bill to remove a cloud on title to land shows that he is in the actual possession of the property, claiming to own the same in fee at the time of beginning his suit, such possession and claim will be received as a substitute for actual proof of ownership. *Hughes v. Carne*, 135 Ill. 525, 26 N. E. 517. The facts here were sufficient to show possession, and, although it appears that possession of the lot was taken on the same day on which the bill was filed, yet it also appears that the bill was filed after the taking of such possession. The lot was fenced in with a wire fence, strung upon posts eight feet apart. A sign "For Sale," was also put upon the property, stating that it was for sale by the attorney of the appellee, and giving the business address of such attorney. In *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12, 2 L. R. A. 512, a post and four-board fence was put around certain lots, and it was held that the inclosure of the property with such post and four-board fence gave the appellant in that case possession of the property. The same kind of possession was taken of the property in controversy here.

In *Glos v. Gleason*, 209 Ill. 517, 70 N. E. 1045, we said (page 520 of 209 Ill., page 1047 of 70 N. E.): "The proof in this case shows that, at the time the bill was filed, complainant was in the possession of the property, claiming in good faith to be the owner thereof, under a deed conveying the same to him. This is sufficient proof of title where the only cloud which complainant seeks to remove is a tax deed. The evidence here is sufficient to sustain the finding in the decree that the complainant is the owner of the property." In the case at bar the appellee, at the time of taking possession, was claiming the property in good faith as owner under the deed to her, and this was sufficient proof of

75 N.E.—14

her title, inasmuch as the only clouds which she sought to remove were two tax deeds. See, also, *Coombs v. Hertig*, 162 Ill. 171, 44 N. E. 392; *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922; *Glos v. Gerrity*, 190 Ill. 545, 60 N. E. 833; *Glos v. Miller*, 213 Ill. 22, 72 N. E. 714; *Glos v. Archer*, 214 Ill. 74, 73 N. E. 382.

It is said by counsel for the appellant that the proof does not show that the fence around the lot in question was built by the appellee. The reason given for this statement is that the proof does not show that the husband of appellee, who built the fence, was her agent. The proof, however, does disclose that Beers was the agent and attorney of appellee, and that he went upon the property and assisted appellee's husband in building the fence; and Beers swears that he took possession by such erection of the fence before the bill was filed. While the proof is not as clear and full as it might be, we think it establishes the fact that the inclosure of the lot by a fence was done by the agent and representative of the appellee.

It is also said that the possession had not continued a sufficient length of time before the filing of the bill. The rule is that "the possession must exist at the time of the filing of the bill," and here the proof does show that appellee was in possession at the time of the filing of the bill. *Glos v. Archer*, supra, and cases therein cited on page 76 of 214 Ill., page 383 of 73 N. E.

We see no sufficient reason for reversing the decree entered by the trial court in this case. Accordingly, the decree of the Superior Court of Cook county is affirmed.

Decree affirmed.

(216 Ill. 543)

NOWLIN et al. v. PEOPLE ex rel. MOFFETT.

(Supreme Court of Illinois. June 23, 1905.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DELINQUENT LIST—PUBLICATION—COPY OF NEWSPAPER—FILING.

The filing of a copy of a newspaper in which a list of delinquent lots and lands on which a lien for special assessments existed, with the certificate of the publisher, in the office of the county clerk of the county, as a part of the records of his office, did not constitute a compliance with Revenue Act, § 186 (*Hurd's Rev. St. 1903*, c. 120), requiring that a copy of such newspaper, etc., "be filed as a part of the records of the county court."

2. SAME.

Revenue Act, § 186 (*Hurd's Rev. St. 1903*, c. 120), requiring a copy of a newspaper in which the delinquent list of lands subject to special assessment was published to be filed as a part of the records of the county court, is mandatory, and a compliance therewith essential to confer jurisdiction on the court to render a judgment against the property assessed.

Error to Macon County Court; O. W. Smith, Judge.

Proceeding by the people, on relation of E. R. Moffett, county treasurer and ex officio tax collector, against J. A. Nowlin and

others, to recover certain delinquent taxes. From a judgment in favor of relator, defendants brings error. Reversed.

Rehearing denied October 11, 1905.

L. R. Herrick, and Le Forgee & Vail, for plaintiffs in error. W. E. Redmon, State's Atty., for defendant in error.

PER CURIAM. At the June term, 1904, of the county court of Macon county, in the matter of the application of the county treasurer and ex officio collector for judgment against certain lots and lands for alleged delinquent taxes, special assessments, interest, etc., judgment was entered against certain real estate belonging to the plaintiffs in error, and they have prosecuted this writ of error to reverse the same.

It appears from the record that the copy of the Decatur Herald in which the list of delinquent lots and lands had been published, with the certificate of the publisher of the paper, was filed with the county clerk of Macon county as a part of the records of his office. Section 186 of the revenue act (Hurd's Rev. St. 1903, c. 120) requires that the copy of the newspaper, with the certificate, under oath, attached thereto, "shall be filed as a part of the records of said [county] court." As explained in *McChesney v. People*, 174 Ill. 46, 50 N. E. 1110, the county clerk has charge of the records and papers pertaining to matters relating to the government of the county. The records in the office of the county clerk are not the records of the county court. In the case cited we said the direction that the copy of the newspaper, and the certificate thereto, should be filed as a part of the records of the county court, "is mandatory, and an essential part of the necessary foundation for the judgment. It is essential to give the court jurisdiction." In *Glos v. Woodard*, 202 Ill. 480, 67 N. E. 3, we affirmed the ruling in *McChesney v. People*, supra. The application of this doctrine to the record in the case at bar is fatal to the judgments against the property of the plaintiffs in error, and therefore each of said judgments will be reversed, and the causes will be remanded.

Reversed and remanded.

(216 Ill. 559)

HINKLEY v. CHAMPAIGN NAT. BANK.

(Supreme Court of Illinois. June 23, 1905.)

1. JUDGMENTS—ASSIGNMENT—COVENANTS.

An assignor of a judgment rendered by confession on power of attorney is not liable on an implied covenant that the judgment is unassailable, arising from the mere assignment for the damages resulting from the judgment being opened and the action defeated by defendant therein.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1559-1560.]

2. SAME—CONSTRUCTION.

An assignment of a judgment rendered by confession on power of attorney, whereby the

assignor covenants "that there is now due on said judgment" a specified sum, and that it will not collect nor release the same, contains no express warranty that the judgment is unassailable, and does not make the assignor liable for damages resulting from the judgment being opened and the action defeated by defendant therein.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1559-1560.]

Error to Appellate Court, Third District. Action by James O. Hinkley, for the use of J. B. Meneley, against the Champaign National Bank. From a judgment of the Appellate Court affirming a judgment for defendant, plaintiff appeals. Affirmed.

Rehearing denied October 11, 1905.

This is a suit in covenant by J. O. Hinkley, for the use of J. B. Meneley, upon the following instrument:

"This indenture, made the 17th day of December, 1896, between the Champaign National Bank, a corporation, of the first part, and James O. Hinkley, of Chicago, of the second part:

"Witnesseth: Whereas, the said party of the first part on the 15th day of December, 1896, recovered a judgment in the circuit court of Cook county, Illinois, general No. 164,966, against George C. Meneley for \$2633.00 and costs of suit, as will by the record thereof more fully appear.

"Now, this indenture witnesseth, that the said party of the first part, in consideration of \$2633.00 to it duly paid before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged), has sold, assigned, transferred and set over, and, by these presents does sell, assign, transfer and set over unto the said party of the second part, and his assigns, the said judgment and any and all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereon.

"And the said party of the first part does hereby constitute and appoint the said party of the second part, and his executors, administrators and assigns, its true and lawful attorney, irrevocably, with power of substitution and revocation, for it and in its name, and in the name and names of its successors or assigns, but for the sole use and benefit of the said party of the second part, and at his own cost and charges, to ask, demand and receive, and to sue out executions, and other writs, and take all lawful ways for the recovery of the money due, or to become due, on the said judgment; and, on payment, to acknowledge satisfaction or discharge the same; and attorneys, one or more, under him for the purpose aforesaid, to make and substitute, and the same, at pleasure, again to revoke, hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises.

"And the said party of the first part does

covenant that there is now due on the said judgment the sum of \$2633.00, and that it will not collect or receive the same or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings therein, the said party of the second part saving the said party of the first part harmless of and from any cost and charges in the premises.

"Champaign National Bank,

"By Edw. Bailey, Prest. [Seal.]

"[The Champaign National Bank. Seal. Champaign, Illinois.]

"Sealed and delivered in the presence of Thomas J. Smith. J. F. Hessel."

"The declaration sets out the assignment in *hac verba*, and for breach of covenant therein avers, omitting some verbiage, 'that there was not then and there due the sum of \$2,633.00, or any sum whatsoever, on the said judgment'; 'that the said judgment in the said deed or assignment of judgment mentioned was then and there void, and was then and there a pretended judgment entered by confession on a warrant of attorney, and that afterwards, on the 20th day of January, 1900, on motion of said George C. Meneley, the said judgment was opened and said George C. Meneley let in to defend on the merits, the said judgment to stand as security; and that afterwards, at the April term, 1901, of the said circuit court of Cook county, a trial by jury was had of said cause, and a verdict rendered for the defendant therein, said George C. Meneley; and that afterwards, at the May term, 1901, of the said Cook county circuit court, a judgment was entered on said verdict against the said Champaign National Bank for costs of said suit, of all which proceedings said Champaign National Bank had notice, whereby the said judgment in the said deed or assignment became wholly lost to plaintiff.'

"The defendant bank demurred to the declaration; the court overruled its demurrer, whereupon it filed a plea of non est factum, not sworn to, and divers other pleas. Afterwards it was stipulated that the defendant might introduce any evidence which would be a valid defense if well pleaded, and that a jury be waived and the cause tried by the court. The cause was so tried, the finding was for defendant, and judgment entered against plaintiff for costs.

"Upon the trial counsel for plaintiff, Hinkley, introduced in evidence the said assignment of judgment, the original notes signed by George C. Meneley, payable to J. F. Hessel, and indorsed by Hessel to Champaign National Bank; also the declaration and cognovit in the suit of the bank against George C. Meneley, a certified copy of the judgment in that case, which was entered on December 15, 1896, in the Cook county circuit court, Judge Clifford presiding, for \$2,633; also execution thereon issued December 16, 1896, and also execution issued October 22,

1897, which was returned in no part satisfied, the files and record showing the opening of the judgment, plea of defendant, George C. Meneley, trial of that cause, and judgment setting aside the original judgment and adjudging costs against the bank. Plaintiff also made proof showing that the said judgment against Meneley, or the major part of it, if it had not been set aside, could have been collected by certain proceedings in garnishment which had been instituted.

"The circuit court admitted evidence on the part of defendant which appears to show that the bank paid nothing for the notes and received no benefit from the assignment of the judgment; that Meneley, the maker of the notes, was insolvent and execution proof; that he had a suit pending against the Chicago City Railway Company for personal injuries suffered by him through its alleged negligence; that one Starring was an attorney and claim agent for that company; that Hessel, the payee of the notes, negotiated a sale of the notes to Starring for the company, to use as an offset against any judgment that Meneley might get against the company; that the amount to be paid for the assignment was \$450; that before the money would be paid the notes should be transferred to some third party, judgment entered thereon, and assignment of the judgment made for the accommodation of Hessel and the company; that Hessel arranged to have the judgment entered in the name of the bank; the assignment was made to Hinkley at the direction of Starring; the \$450 were paid to Hessel's attorney, and he, the attorney, sent his check for \$400 to the bank or Hessel, payable to the order of the bank, and that Hessel got that amount of money from the bank. The bank profited nothing.

"It seems from the evidence as taken that Hinkley was a mere accommodation holder of the assignments for the railway company, as the bank was of the notes and judgment for Hessel and the railway company. By the assignment, as it turned out, Hessel got \$400, the bank got nothing but this lawsuit, and the railway company appears to be out to the extent of \$450."

After the cause was tried, resulting in a finding for defendant in error, and after judgment was entered by the circuit court against the plaintiff in error for costs, an appeal was taken to the Appellate Court, where the judgment so entered by the circuit court was affirmed. The present writ of error is sued out from this court for the purpose of reviewing the judgment of affirmance so entered by the Appellate Court.

Benson Landon and Spencer M. White, for plaintiff in error. Thomas J. Smith, (Royal Wright, of counsel), for defendant in error.

MAGRUDER, J. (after stating the facts). In their opinion deciding this case, the

Appellate Court, after making a statement of the facts as the same are set forth in the preface hereto, expressed the following views:

"It is claimed by counsel for plaintiff, Hinkley, that all this evidence is incompetent. In the view we take of the case, we deem it unnecessary to take time or space to discuss or determine that question. There is no question of fraud in the case. It is true, the plaintiff avers that the said judgment mentioned in the assignment was a pretended judgment and void, but the proof fails to establish the averment. On the contrary, the plaintiff proved that the judgment was not pretended but real, not void but voidable, in the event Meneley should be let in to plead in the cause and make his defense, as was done. If the averment of the declaration that the judgment was void were proven, a very different case would be presented.

"The determination of the cause depends upon what covenants, implied or express, are contained in the assignment. Appellant contends that appellee, by implication and by express terms, warrants that the judgment thus assigned is a valid judgment, and that the amount named is due thereon. If this contention be right, appellant is entitled to recover, unless the evidence above referred to makes a defense. We do not agree to appellant's contention. We will assume that a valid judgment is one that cannot be successfully assailed by any proceeding at law or in equity. Counsel cite authorities which do sustain their position that the general language of the assignment, the mere words of description and transfer of the judgment, constitute an implied warranty that the judgment is valid. *Arnold v. Hickman*, 6 Munf. 15, *Miller v. Dugan*, 36 Iowa, 433, *Emerson v. Knapp*, 75 Mo. App. 92, and some other authorities support that proposition, but, as we view the question, those authorities do not announce the correct rule, nor the rule as settled in this state. There is no implied warranty in the mere assignment of a judgment that it is impregnable. The implied warranty is that it is a genuine judgment, that in due form of law a judgment was entered, that the court had jurisdiction to enter it, and that it has not been paid, released, or otherwise nullified.

"A judgment is not a negotiable instrument or writing; it is a mere chose in action; the doctrine of caveat emptor applies to the purchaser thereof. If such purchaser desires warranty beyond what is so implied, as above stated, he must see to it that he gets it in express terms. This is not an open question in this state. While the precise question has not been decided in terms, it has been substantially.

"In *First Nat. Bank v. Drew*, 191 Ill. 186, 60 N. E. 856, the subject of implied warranty on sale of mere choses in action is discussed at length, some former decisions of the

court upon the same subject are cited, and the doctrine, as hereinabove stated, is again announced and approved. We deem further discussion of that question unnecessary.

"There being, then, no implied covenant in the assignment that the judgment is proof against all attack, it remains to be considered whether there be any such express covenant. It is urged by counsel for appellant that the words, 'The said party of the first part does covenant that there is now due on the said judgment the sum of \$2633.00,' are a covenant that the judgment is a valid judgment. We do not think that a fair construction of the above-quoted words warrants the conclusion drawn by counsel. The natural and reasonable meaning which would be given to those words by either lawyers or laymen is that the assignor had received no payment thereon. It is as if it read, 'does covenant that nothing has been paid on said judgment; there is now due thereon the sum of \$2633.00.' When the words in the immediate connection are read also, the meaning, if obscure before, becomes perfectly clear. The language is: 'And the said party of the first part does covenant that there is now due on the said judgment the sum of \$2633.00, and that it will not collect or receive the same or any part thereof, nor release or discharge the said judgment.' That is, the assignor covenants that nothing has been or will be paid to it on the judgment. If it had been contemplated by the parties to make assurance that the judgment was a valid judgment, not successfully assailable by any future proceeding at law or in equity, other language than was used would naturally have been used. Naturally it would have been written, 'that the said judgment is a valid judgment,' or some other words of like import.

"When the question is put concerning a note, bond, judgment, or other like writing, how much is due on it? the answer expected is not that it is a valid instrument, but that so much remains unpaid. At the most, it is only by argument and inference, by implication, that it can be said that the language used conveys the idea of validity. The reasoning is: The sum of \$100 is due on this judgment, therefore the judgment is a valid judgment, for, unless it were a valid judgment, there could not be anything due on it. Counsel for appellant cite *Hurd v. Slaten*, 43 Ill. 348. Hurd was administrator of the estate of one Darr. Darr recovered a judgment against one Miller, and assigned it to Slaten. The assignment contained the following: 'Covenanting that the sum of \$478.00, including the interest and cost, is due thereon.' Before the assignment was made an execution had been issued on the judgment, and Darr's attorney had receipted upon it full payment to him. The opinion of the court reads: 'It is clear that Darr by this writing covenanted that this judgment

against Miller in his favor was unsatisfied, and that it amounted to \$478, for which the Slatens paid value.' The language of that covenant is precisely the same in substance as in the covenant under consideration. It is said by the court to be clear that the meaning of the words is that the judgment is 'unsatisfied.' So, here, the clear meaning of the covenant is that the judgment against Meneley is wholly unsatisfied. *Bennett v. Buchan*, 61 N. Y. 222, and *Jansen v. Ball*, 6 Cow. 628, are cited by appellant.

"In the *Bennett* case the covenant in the assignment was that the sum of \$1,034.46 was due on the judgment. The fact was that the only solvent defendant to the judgment had been released before the assignment was made. There was in legal effect no such judgment in existence as described in the assignment. In the *Jansen* Case there was 'warrant that all the above sums remain due and unpaid.' In fact, no such judgment had ever been recovered. There was no judgment in existence; the assignor was liable on the implied covenant of the assignment that a genuine judgment existed.

"In the case at bar no such conditions exist as in the two cases last referred to. Here there was a genuine judgment in existence, and no release thereof, and no payments made thereon. If the purchaser of a genuine unsatisfied judgment desires assurance that it is valid—proof against assault—he must take proper covenant therefor. As is said in *Otis v. Cullum*, 92 U. S. 447, 23 L. Ed. 496: 'If the buyer desires special protection he must take a guaranty. He can dictate its terms and refuse to buy unless it is given. If not taken, he cannot occupy the vantage ground upon which it would have placed him.'

"We find in this record no breach of either implied or express covenant, and the judgment will be affirmed."

We concur in the views above expressed by the Appellate Court, and adopt the same as the opinion of this court. Accordingly, the judgment of the Appellate Court affirming the judgment of the circuit court is affirmed.

Judgment affirmed.

(216 Ill. 527.)

FRANK et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—RECORD—BILL OF EXCEPTIONS.

Objections which do not arise on the face of the record cannot be considered by the Supreme Court unless preserved by bill of exceptions.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2416, 2427.]

2. SAME—BILL OF EXCEPTIONS—INCORPORATION IN RECORD.

The bill of exceptions filed as a part of the record in a cause in the Supreme Court cannot be incorporated into the record on appeal in another cause in that court by reference.

Appeal from Superior Court, Cook County; Theo. Brentano, Judge.

Proceedings by the city of Chicago against Louis and Julius Frank and others. From the judgment, the defendants Frank appeal. Affirmed.

Rehearing denied October 11, 1905.

The city of Chicago commenced a proceeding in the superior court of Cook county for the purpose of widening West Randolph street, in said city, from Halsted street to Sangamon street, and to levy a special assessment on the property benefited to pay for the property taken or damaged. Appellants appeared and filed objections, which were overruled, and a judgment for \$2,253.12 was rendered against their property, and they have appealed.

Guthman & Rothschild, and John S. Stevens, for appellants. Robert Redfield, Frank Johnston, Jr., and Edgar Bronson Tolman, Corp. Counsel, for appellee.

HAND, J. The objections urged by appellants do not arise upon the face of the record, and, unless preserved by a bill of exceptions, cannot be considered by this court. *Kelly v. City of Chicago*, 148 Ill. 90, 35 N. E. 752; *Sargent v. City of Evanston*, 154 Ill. 268, 40 N. E. 440; *Mallory v. Whittier Machine Co.*, 170 Ill. 484, 48 N. E. 992; *Fisher v. City of Chicago*, 218 Ill. 268, 72 N. E. 680. The appellants have attempted to preserve the evidence, the rulings of the court based thereon, and their exceptions to such rulings, by referring the court to the bill of exceptions which it is said forms a part of the record in another case (*Berdel v. City of Chicago* [Ill.] 75 N. E. 386), and an abstract of which bill of exceptions they have incorporated in the abstract filed in this case, although the record filed does not contain a copy of said bill of exceptions. The bill of exceptions filed as a part of the record in the *Berdel* Case cannot thus be incorporated into the record in this case. It has been repeatedly held by this court that a document cannot be made a part of a bill of exceptions by reference, and this is the rule even though the document be found in some other place in the record. *Emerson v. Clark*, 2 Scam. 489; *City of Chicago v. South Park Com'rs*, 169 Ill. 387, 48 N. E. 680; *Melssner v. People*, 169 Ill. 530, 49 N. E. 568; *Call v. People*, 201 Ill. 499, 66 N. E. 243. No reversible error appearing, the judgment of the superior court will be affirmed.

Judgment affirmed.

(189 Mass. 197)

JENNINGS v. MOORE.(Supreme Judicial Court of Massachusetts.
Suffolk. Sept. 26, 1905.)**1. ASSIGNMENT FOR BENEFIT OF CREDITORS—
COLLATERALS—CHANGE OF PLEDGE.**

Where, when an insolvent made an assignment for the benefit of creditors, he was the owner of certain shares of stock, which were pledged as collateral for certain notes, such pledge could not be changed, without the consent of the insolvent's assignee, by an agreement between the insolvent and a purchaser of the notes secured thereby; such assignee being entitled to redeem the shares on paying the amount due on the notes for which they were originally pledged.

2. BILLS AND NOTES—RELATIONSHIP OF PARTIES—EQUITY.

In equity, it may be shown that the maker of a note was in fact surety only for the indorser, and was entitled to be discharged because of dealings between the holder and such indorser.

3. SAME—ACCOMMODATION NOTE—EVIDENCE.

In an action on a note given for the accommodation of the anomalous indorser thereon, evidence held insufficient to show that the note was not delivered as a note to plaintiff, but under an agreement that it should only be used by him in case he found it necessary to raise money to carry out the transaction in which it was given.

4. SUBROGATION—RIGHTS OF SURETY.

Where the maker of a note sued on, secured by certain stock, was surety only for an anomalous indorser of the note, which was made to take up two other notes signed by such indorser as maker, such surety was entitled, on paying the note sued on, to receive the original notes for which it was given, and also, the stock having been negligently sold, to what could have been realized, had the sale been conducted with care.

5. PLEDGE—COLLATERALS—OBLIGATION OF PLEDGEE.

Though a pledgee was not required to sell pledged stock, yet, if he did so, he was bound to the exercise of reasonable care, and was liable for what would have been realized for the stock by the exercise thereof.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Pledges, § 74.]

6. BILLS AND NOTES—DISCHARGE OF MAKER.

Where, after an assignment for the benefit of creditors, the debtor induced plaintiff to purchase certain notes secured by a pledge of stock, and caused defendant to execute a note to plaintiff in the place of those purchased, on which the insolvent was an anomalous indorser, but was in equity the principal debtor, plaintiff's agreement not to prove the debt against the insolvent's estate did not release defendant from the note so executed to plaintiff.

7. SAME—SET-OFF.

Where the holder of a note secured by certain stock agreed not to prove the same against the estate of an anomalous indorser, who was the principal debtor in equity, but he failed to keep such agreement, and also negligently sold the collateral for less than its value, the maker of the note, who was in fact surety for the indorser, in case an amount remained due on the same after crediting the value of the stock for which the holder of the note was bound to account on the day he undertook to sell the same, was entitled to set off against such balance what was lost by breach of the holder's agreement not to prove the notes.

8. CONTRACTS—PLACE OF EXECUTION.

Where an agreement for the taking up of certain notes was made in Massachusetts, to

be completed by the payment in Massachusetts to the Boston correspondent of the holder of the notes, which was a New Hampshire corporation, of a 15-days sight draft drawn by it on plaintiff, in case defendant signed and delivered to plaintiff in Massachusetts the note sued on, which was signed in New Hampshire, but dated "Boston," the contract was a Massachusetts contract, though the note was mailed to plaintiff in Boston by defendant in New Hampshire.

9. BILLS AND NOTES—INTEREST.

In an action on a note, plaintiff was entitled to recover interest, to be computed at the rate specified in the note to the date of the verdict, and not merely to the date of the writ.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, § 1941.]

10. SAME—EVIDENCE—CONVERSATION BETWEEN MAKER AND INDORSER.

Where, in an action on a note, the maker contended that he was in fact but surety for the anomalous indorser, who was in fact the principal debtor, evidence as to what was said between the maker and the indorser was competent to show that defendant, in delivering the note sued on, acted on what was agreed between plaintiff and the indorser.

11. SAME.

Evidence of the trade in pursuance of which the note sued on was given was competent to show that the note was a Massachusetts contract, and that in equity defendant was a surety for the anomalous indorser.

12. SAME.

Though the anomalous indorser of the note sued on was in equity the principal debtor, evidence of the agreement between the payee of the note and the assignee of the indorser's estate with reference to collaterals deposited to secure the note was competent to show how plaintiff had dealt with securities to which defendant was entitled in equity as a surety, on paying the debt for which he was liable to plaintiff.

Report from Supreme Judicial Court, Suffolk County.

Action by Stephen Jennings against Arthur C. Moore. A verdict was rendered in favor of plaintiff, and the case was reported to the Supreme Judicial Court. Verdict set aside.

Benj. B. Dewing, for plaintiff. Alfred Hemenway and J. Weston Allen, for defendant.

LORING, J. This case comes up on a report made after a verdict for the plaintiff had been ordered as matter of law. It appears from the report that on April 9, 1896, one Dr. J. C. Moore, who had "made an assignment for the benefit of his creditors," called upon the plaintiff at his office in Boston, and told him that among his assets were 120 shares of the Laconia & Lakeport Street Railroad (formerly the Laconia & Lake Village Horse Railroad), which he did not wish sold at a forced sale; that he and his friends had control of the road, and that he thought the stock worth more than it was likely to bring if pushed to a sale. These 120 shares were then pledged as security for two notes (60 shares on each note) held by a bank in Manchester, N. H. One of these notes for \$3,000, was signed by Dr. Moore himself. The other note for \$2,500, was signed by

him and by one Fellows. Both were overdue. At Dr. Moore's request, the plaintiff agreed to take up the notes, if Dr. Moore "would arrange for a 15-days sight draft to the Manchester bank's correspondent in Boston"; the money advanced to be repaid, with interest at $1\frac{1}{2}$ per cent. per month. The plaintiff asked Dr. Moore if he "couldn't get some one to make the new note," as he, Dr. Moore, was in insolvency, and suggested his nephew. The plaintiff made out the note here sued on, Dr. Moore took it back to New Hampshire, and it was either handed to the plaintiff by Dr. Moore (as the plaintiff testified) or mailed to him (as Dr. Moore and the defendant testified). Afterwards the 15-days sight draft was drawn, and was paid by the plaintiff in Boston; and thereupon he received the two notes, with the 120 shares of stock. On January 7, 1897, the plaintiff sold the stock at auction in Boston, and bought it in for \$10 a share. The jury were warranted in finding that the stock was a local stock, not known in the Boston market; also that, at the date when sold by the plaintiff, it had a market value in Laconia, N. H., of from \$45 to \$54 a share. They were warranted, also, in finding that the assignee of Dr. Moore's estate objected to the stock being transferred to the plaintiff, on the ground that the sale had not been properly conducted, and that the plaintiff had not realized the full value of it. After protracted negotiations, it was agreed between the assignee and the plaintiff that no proof should be made by the plaintiff against the estate of Dr. Moore, and that the assignee should not redeem the stock. The stock was transferred to the plaintiff on October 8, 1900, under this agreement. In August, 1897 (that is, August succeeding the January in which the plaintiff sold the stock), the defendant wrote to the plaintiff, stating that he understood that he had sold the stock, and asking for the return of his (the defendant's) note. The plaintiff acknowledged receipt of the letter, and promised to bring the matter before his attorney. Nothing more was heard by the defendant from the plaintiff until this writ, dated April 17, 1902, was served upon him.

Before considering the several contentions made by the defendant, it will be convenient to make a statement of the rights of the parties resulting from these transactions. The equity in the 120 shares of stock was in the assignee of Dr. Moore's estate. The shares were collateral for the two notes taken up by the plaintiff and held by him as his property, which notes, together with the shares, he was bound to surrender to Moore or the defendant on payment of the note here sued on. It is stated in that note (the note here sued on) that these shares were collateral security for that note. But that was at most an agreement not operative

until the rights of Dr. Moore's creditors in the stock in the hands of his assignee had been extinguished. The shares were pledged as collateral for the two notes originally held by the Manchester bank and taken up by the plaintiff, and that pledge could not be changed without the consent of the assignee for the benefit of the creditors of Dr. Moore. The assignee could redeem the shares in the hands of the plaintiff on paying the amount due on these two notes. The ruling does not profess to have been made on the pleadings. Under these circumstances, they are of importance only so far as the rights of the parties in equity differ from their rights at law.

In *Guild v. Butler*, 122 Mass. 498, 501, 23 Am. Rep. 378, this court expressly left undecided the question whether the maker of the note there in question could in that action be shown to be a surety. This question, without doubt, was left undecided because of the cases of *Fentum v. Pocock*, 5 Taunt. 192 (cited with approval by this court in *Commercial Bank v. Cunningham*, 24 Pick. 270, 275, 276, 35 Am. Dec. 322, and in *Fall River Union Bank v. Willard*, 5 Metc. 218, 221), on the one hand, and, on the other hand, the cases of *Pooley v. Harradine*, 7 E. & B. 431, *Hollier v. Eyre*, 9 Cl. & F. 1, *Greenough v. McClelland*, 2 E. & E. 428 and *Oriental Corporation v. Overend*, L. R. 7 H. L. 348, 360. *Commercial Bank v. Cunningham*, 24 Pick. 270, on the one hand, and, on the other hand, *Pooley v. Harradine*, 7 E. & B. 431, *Greenough v. McClelland*, 2 E. & E. 428, and *Oriental Corporation v. Overend*, L. R. 7 Ch. 142, were cited on the briefs in that case. See original papers in *Guild v. Butler*, 122 Mass. 498, 501, 23 Am. Rep. 378. It had been held in *Fentum v. Pocock* that the parties to a negotiable instrument could not go behind its terms to show that the parties to it in fact held a relation to each other different from that indicated on the face of the negotiable paper in question. But it was the established law of England before the judicature act that in equity the true relationship of the parties to a negotiable instrument could be inquired into, and that it could be shown in equity (for example) that the maker of a note was in fact a surety and an indorser the principal, and, further, that in such a case if the indorser, who was in fact the principal, was dealt with so as to discharge a surety, the maker was discharged. See *Pooley v. Harradine*, 7 E. & B. 431, and the other cases, *supra*. What is meant by the rule of *Fentum v. Pocock* is that the maker of a negotiable note enters into a written contract with all subsequent holders thereof to pay that note as the one primarily liable thereon. That written contract between the maker and the subsequent holder can no more be contradicted by parol than any other written agreement. But, on

the other hand, the rule of *Pooley v. Harra-dine* is that if, as between the maker and the indorser, the indorser is the one primarily liable on the note, and the maker is the surety, and this is known to the holder, the holder must in equity have regard to the relation between the maker and indorser in enforcing the contract between himself and the maker. If he interferes with the rights of the maker, as between himself and the indorser, the same result ensues as if the maker had contracted with him as surety and the indorser had contracted with him as principal.

We are of opinion that under the allegations of the answer in the case at bar the rights of the defendant in equity should be considered by us. It is alleged that Dr. Moore, who was an anomalous indorser under Pub. St. 1882, c. 77, § 15, was and was known to be the principal obligor. This allegation is made in connection with an allegation that Dr. Moore was released. He was not released, as will be shown later on. But, as we have said, the ruling made does not purport to have been made on the pleadings, and under those circumstances we think that the equitable rights of the parties should be considered. We are of opinion that in equity at any rate the true relation can be shown in this commonwealth. It is not necessary to decide whether the defense is not open at law. The defense of a surety was held to be open at law in this commonwealth when *Baker v. Briggs*, 8 Pick. 122, 19 Am. Dec. 311, was decided; and it was held in *Carpenter v. King*, 9 Metc. 511, 43 Am. Dec. 405, that in a common-law contract one signing as principal is a surety.

Coming, now, to the contentions of the defendant: The first contention made by him is that on the evidence it was a question for the jury whether he signed the note for the plaintiff's accommodation, and to be used only if the plaintiff found it necessary to raise money at a bank. The note was given by the defendant for the accommodation of Dr. Moore, and not for the accommodation (speaking strictly) of the plaintiff, since it was something stipulated for by the plaintiff as part of the trade. But the question remains, which of these two things did the plaintiff stipulate for? Did he stipulate that he should have the note of a third person, or did he stipulate that a note signed by a third person should be handed to him, to be used only if he found it necessary to raise money at a bank to carry the transaction through? The question of what the jury were warranted in finding on this point depends on the testimony of Dr. Moore. His testimony was that the plaintiff, during the negotiations, "wanted to know, as I was in insolvency—previous to that I had made an assignment for the benefit of creditors—if I couldn't get some one to make the new note. He said he didn't care who it was. I told him I didn't

know about that, situated as I was, and he said that Arthur C. Moore, my nephew, would be just as good as anybody. I told him I would try to get him." In answer to the question "for what reason he wanted a new note," he said that "he was very short of money, and he might be obliged to use the stock and note in the bank, and he did not want to use it as it was, neither did he think it would be advisable to present the note with my name as maker on it, I being in insolvency," and that he could not use the old notes, because "they were overdue. * *

* He said all he wanted was to get something that he could use at the bank; that he was obliged to borrow money when the draft came due." Nothing more was stipulated for, and no condition was made when the note was delivered to the plaintiff. In considering the significance of this evidence, it should be added that the defendant then was without means, and was known to the plaintiff to be "a young man who had worked for Dr. Moore a good deal." On the other hand, this note was the only written obligation or statement signed by any one of the terms on which the \$3,200, necessary to take up the two notes in the Manchester bank, was to be repaid to the plaintiff. On the whole, we are of the opinion that it has not been shown that the note was not delivered as a note to the plaintiff, but was handed to him only for use by him if he found it necessary to raise money in carrying out this transaction.

The defendant's next contention is that the plaintiff is bound to account, not only for what he realized from the sale, but for what he would have realized from it if it had been conducted with care. The plaintiff contends that he never realized on the stock, that he offered at the trial to return it to the defendant, and that he is not bound to account for what was, or what with care might have been, realized from a sale of it. It is apparent that there was a change in the value of the stock "after they built the line to the Weirs" in "1897 or 1898," and that the stock is not worth to-day what the jury were warranted in finding it could have been sold for on January 7, 1897, if it has any value now. What the plaintiff relies on, when he makes the contention that he never realized on the stock, is his testimony that he went through this form of sale for the purpose of getting the stock transferred into his own name, because it then stood in the name of Dr. Moore, who had been in insolvency, or was liable to be, and he sold it to have it transferred. But the jury were not bound to accept this testimony as true. More than that, there was evidence that he sought to prove the balance due on the two notes taken up by the plaintiff, for which these 120 shares were collateral, against the estate of Dr. Moore in the hands of his assignee, after deducting the amount realized

from the sale of the shares on January 7, 1897. That is direct evidence that he intended to realize on his security.

The defendant was entitled as surety, on paying the note here sued on, to receive the two notes, and, if the jury found that the plaintiff had undertaken to realize on the stock while the notes were in his hands, to what could have been realized on it, had the sale been conducted with care. A finding that the sale was not conducted with care was abundantly warranted on the evidence. It was sold in Boston, where it was not known, while in Laconia there were four sales of it in the preceding August, and one in the preceding November, at from \$47.50 to \$54.25; and there was testimony from those familiar with its value that there was no change in its value down to the date of the sale on January 7, 1897, and that it was then worth \$45 to \$54. The plaintiff was not bound to sell the stock pledged as collateral for the notes bought by him; but under the notes he bought he had a right to sell it. If he chose to exercise that right, he had to use due care in realizing the value of it, or, if he did not use due care, he must account to the defendant as surety for what would have been realized had he done so. See *Guinzburg v. H. W. Downs Co.*, 165 Mass. 467, 43 N. E. 195, 52 Am. St. Rep. 525, and *Guild v. Butler*, 127 Mass. 386, respectively, for the last two propositions. The plaintiff's agreement not to prove against the estate of Dr. Moore did not release him from the note here sued on. That note was made after Dr. Moore made an assignment for the benefit of his creditors, and could not be proved under the assignment. The agreement not to prove related to the two prior notes held by the Manchester bank and taken up by the plaintiff. But if, after crediting the defendant with the value of the stock, which the plaintiff is bound to account for as of January 7, 1897 (when he undertook to sell it), any balance is due the plaintiff on the note, the defendant can deduct what was lost by this agreement not to prove the two notes, under the familiar rule laid down in this commonwealth in *Guild v. Butler*, 127 Mass. 386.

The defendant next made the contention that the contract was a New Hampshire contract, and that under the statute of New Hampshire, put in evidence by him, no more than 6 per cent. interest is due under it. It is not necessary to consider whether that is the true construction of that statute, since we are of opinion, not only that the contract could have been found to be a Massachusetts contract on the testimony of the plaintiff that Dr. Moore handed to him in Boston the note here sued on, but also that apart from that fact the contract was a Massachusetts contract. We are of opinion that it is a Massachusetts contract, even if the note was mailed to the plaintiff, as the defendant and Dr. Moore testified. The agree-

ment for the taking up of the two notes was made in Massachusetts. The two notes were to be taken up in Massachusetts by the payment in Massachusetts to the Boston correspondent of the Manchester bank of a 15-days sight draft drawn by it on the plaintiff, if the defendant signed and delivered to the plaintiff in Massachusetts this note, signed in New Hampshire, but dated "Boston." It was held in *Hill v. Chase*, 143 Mass. 129, 9 N. E. 30, that a similar contract could be found to be a Massachusetts contract. Under the circumstances in this case, for the reasons given in that decision, we are of opinion that the jury should have been instructed that the contract here in question was as matter of law a Massachusetts contract. See, also, in this connection, *Pine v. Smith*, 11 Gray, 38; *Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683, 32 L. R. A. 283; *Nashua Savings Bank v. Sayles*, 184 Mass. 520, 69 N. E. 309, 100 Am. St. Rep. 573.

The plaintiff has pointed out that the ruling as to the rate of interest was too favorable to the defendant, in that the jury were directed to compute interest at the rate specified in the note to the date of the writ only, in place of to the date of the verdict. See *Kendall v. Equitable Life Assurance Society*, 171 Mass. 568, 51 N. E. 434, where the cases are collected.

A few questions of evidence remain. The testimony of what was said between Dr. Moore and the defendant was competent, not to fix the defendant's rights (those depended upon what was agreed upon between the plaintiff and Dr. Moore), but to show (if it showed) that the defendant, in delivering the note, acted on what was agreed upon between Dr. Moore and the plaintiff. The evidence of the trade in pursuance of which the note was given was competent to show that the note was a Massachusetts note, and to show that in equity the defendant was a surety, and what his rights were as such. The evidence of the agreement between the plaintiff and the assignee of Dr. Moore's estate was competent to show how the plaintiff had dealt with securities to which the defendant was entitled in equity as a surety on paying the debt owed by him to the plaintiff.

The entry must be: Verdict set aside.

(189 Mass. 134)

JAMES v. LEWIS.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

PRINCIPAL AND AGENT—ACTS OF AGENT—OBTAINING AUTHORITY.

Where plaintiff, a widow, gave T. \$1,000 to invest for her, and thereafter assigned certain mortgages and executed a mortgage on her homestead to raise more money, which she placed in the hands of T., and he sold and delivered the mortgages to defendant, who conducted the negotiations through his attorney, and on one occasion in the presence of plaintiff's son, who was a clerk in T.'s office, a finding that defendant was entitled to assume that T. had authority to complete the transaction was not error.

Appeal from Superior Court, Suffolk County.

Bill by Lizzie L. James against J. B. Lewis to enjoin defendant from foreclosing a certain mortgage on plaintiff's homestead, from collecting any part of the principal or interest on certain other mortgages assigned to him, or from instituting any foreclosure proceedings as such assignee to compel defendant to release and discharge plaintiff's homestead from the mortgage thereon, and to reassign to plaintiff the mortgages so assigned. From a final decree in favor of defendant, plaintiff appeals. Affirmed.

Rehearing denied.

G. W. Anderson, for appellant. Alfred Hemenway and Arthur E. Burr, for appellee.

MORTON, J. This is another case growing out of the fraud and wrongdoing of Edwin M. Thayer. It comes here on the plaintiff's appeal from a decree dismissing the bill, with costs. The evidence was taken by a commissioner, and is all before us. There were no rulings of law or special findings of fact, and the question for determination is whether it can be said as matter of law upon the whole case that there is no view of the evidence that properly could have been taken which warranted the decree. *Dickinson v. Todd*, 172 Mass. 183, 51 N. E. 976; *Evans v. Strachan Hanscom*, 171 Mass. 64, 50 N. E. 512. This question resolves itself into two others: First. Is there any evidence warranting a finding that the signatures to the assignments and to the mortgage of the homestead are the plaintiff's genuine signatures, or does the evidence require a finding that they were forgeries? Second. If they are genuine, is there any evidence warranting a finding that what Thayer did was within his actual or apparent authority, and that the defendant and those acting for him were justified in dealing with him as they did on one footing or the other, or does the evidence require a contrary finding as to each alternative?

The plaintiff is a widow living in Melrose. She had known Thayer six or seven years through her stepmother, for whom he had done business, and testified that she had implicit confidence in him. Her first talk with him relative to business matters was in June, 1902, and her first business transaction with him was in the following September, when she let him have \$1,000, which he was to invest for her. He subsequently told her that he had invested it, and had made \$700 on the investment. She believed this, and, so far as appears, allowed the whole amount to remain in his hands without any security therefor. Later, in response to a suggestion made by him that he thought he could invest her money better for her than it was invested, she told him that she had a mortgage of \$3,500 on a house in Melrose which she was willing he should get the money on and invest, and she took the mortgage in to him for that purpose. This was the Lynde mortgage, and she admitted that the signature

to the assignment of it and the indorsement on the note were her genuine signatures; and, although she testified that she did not notice that the mortgage was assigned to J. B. Lewis, Jr. (the defendant), she admitted that she understood that it was to be assigned to a gentleman who was about to make a tour around the world, which was the fact with regard to Mr. Lewis. After the assignment was executed and the note indorsed by her, she left the mortgage and the assignment and the note with Thayer; and there can be no question, we think, that a finding that Thayer had apparent authority to deliver them to the defendant and to deal with them as he did, and that the defendant was justified in relying upon such apparent authority, and had no notice of anything fraudulent on Thayer's part, or of anything sufficient to put him upon inquiry, was well warranted by the evidence. Shortly after the plaintiff had taken the Lynde Mortgage in to Thayer, he sent her word by her son, who was employed in his office, that there was a flaw in the title, which was the fact, and which was subsequently rectified, and asked her to bring in her other mortgages, if she had any, and the deed of her house, and he would look them up and see if they were all right. Thereupon she took in the Gerrish mortgage and the deed of the house, and left them with him. He told her that the Gerrish mortgage was all right, but that there was a slight defect in the title of some land that adjoined her house, which was true, and which was remedied, and said that she had better leave the papers with him, and he would put them in his safe deposit vault, where they would be safer than at her house, and she did so. The circumstances under which her signature to the assignment of the Gerrish mortgage and to the mortgage on her homestead were secured do not very clearly appear. She denied that she executed the mortgage upon the homestead or the assignment of the Gerrish mortgage, though she admitted that the signatures resembled her signature. But, Mr. Bullard, the notary public who took her acknowledgment to the assignment of the Lynde mortgage, testified that she signed both, and that he took her acknowledgment to both. This, without anything more, would warrant a finding that her genuine signatures, though fraudulently obtained by Thayer, were attached to the mortgage of the homestead and to the assignment of the Gerrish mortgage. Thayer had, therefore, in his possession, or could have been found to have, the original Gerrish note and mortgage and an assignment thereof to the defendant duly executed, and also a mortgage from the plaintiff to the defendant on her homestead duly executed, under circumstances of which, so far as the defendant was concerned, the only reasonable explanation was, or at least could have been found to be, that he had the authority which he purported to have to act for the plaintiff. These facts alone, without anything to put

the defendant upon inquiry, which could have been found to be the case, would seem to have warranted a finding that the defendant was justified in believing and in acting on the belief that Thayer had authority to represent the plaintiff in the transaction and to deliver the securities and to receive the sum which the defendant had agreed to lend. *Haines v. Pohlmann*, 25 N. J. Eq. 179; *Williams v. Walker*, 2 Sandf. Ch. 325. But this was not all.

In addition to the trust which the plaintiff admitted she reposed in Thayer, the defendant testified that, in reply to an expression of regret on his part in regard to the case, the plaintiff "said she was sorry, too, but it was only another case of a woman parting with her good mortgages for the sake of trying to get a large amount of income." She denied saying this, but whether she did or not was clearly for the court to determine, as well as the effect of it, if it was found that she did say it. There was also testimony tending to show that the defendant put the matter, after he had decided to make the loan ostensibly applied for by Thayer on behalf of the plaintiff, into the hands of the Massachusetts Title Insurance Company, of which Mr. Eugene O'Brien was counsel, to act for him; that Thayer took the Lynde and Gerrish mortgages in to Mr. O'Brien, and he proceeded to examine the title; that subsequently the defendant and Thayer, and a young man said by Thayer to be a son of the plaintiff, met at Mr. O'Brien's office, and he called attention to a defect in the title of the Lynde mortgage; and that, after some talk between Thayer and the defendant, the former said that the plaintiff would put in the homestead in order to get the money, and the son would get the papers necessary for the examination of the title from his mother and bring them in to Mr. O'Brien, and did so. The son, who was identified at the trial by Mr. O'Brien, though not with absolute certainty, as the young man referred to, denied this. But here also the facts and their materiality were for the determination of the court. Taking the whole case together, we do not see how it can be fairly said that there was no evidence warranting the decree, or that it was clearly erroneous. See *Phelps v. Sullivan*, 140 Mass. 36, 2 N. E. 121, 54 Am. Rep. 442; *Doyle v. Corey*, 170 Mass. 337, 49 N. E. 651; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 30. This case is very different from *Westlake v. Dunn*, 184 Mass. 280, 68 N. E. 121, 100 Am. St. Rep. 557, to which our attention has been called by counsel for the plaintiff since the argument. What Thayer did with the checks that were delivered to him, by the defendant, and whether the plaintiff has any remedy against the defendant or the bank by reason of the forged indorsements, or has a right to redeem, have nothing to do with the case before us and need not, therefore, be consid-

ered. The bill is not a bill to redeem, although so entitled, and there is no offer to redeem contained in it. It seeks to compel a release of the mortgage on the homestead and a reassignment of the other mortgages, because of alleged fraud and forgery on Thayer's part and because the plaintiff has received no part of the consideration. But it appears that a part of the consideration was received by the plaintiff in the form of a check payable to Thayer as her authorized or apparently authorized agent, and she could not be relieved from the mortgages without redemption.

The result is that the decree must be affirmed. So ordered.

(139 Mass. 124)

MAGNOLIA METAL CO. v. GALE.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

1. CONTRACTS—SEPARATE OR CONTINUING CONTRACTS—CONSTRUCTION.

Where parties entered into a contract which expressly canceled a prior contract between them and relieved them from further liability thereunder, the two contracts were independent, and the second contract was not a continuation of the first.

2. SAME—ACTION FOR BREACH—DAMAGES.

One suing for breach of contract is entitled to recover only the net profits he would have made if the contract had been performed, and, in estimating his damages, his expenses in carrying out the contract on his part must be deducted from his gross profits which would have accrued to him under the contract.

3. SAME.

Where one sues for breach of a contract which bound him to pay office rent during the period of the contract, to divide the expense of a stenographer, and to continue a third person in charge of their interests so long as he was connected with him and the contract remained in force, the expense, which he was bound to pay if the contract had been performed by the other party, should be considered in estimating the damages resulting from the other party's breach, though such expense was difficult of estimation.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 301.]

4. SAME—MOTIVE FOR BREACH—EFFECT ON DAMAGES.

The rule of damages for breach of contract is not affected by the motive which the party breaching the contract had for his act, or by the fact that he chose without sufficient excuse to break it.

5. SAME—CONSTRUCTION.

The phrase, "so long as * * * the contract remains in force," used in a contract whereby a party bound himself to continue a third person in charge of the interests of the parties "so long as" he was connected with him "and the contract remains in force," does not refer to a possible breach, but means so long as the contract continues in force if performed according to its terms.

6. APPEAL—EXCEPTIONS—NEW TRIAL.

Where, in an action for breach of contract, the exception sustained relates only to the question of damages, a new trial will be confined to that question only.

Exceptions from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Action by the Magnolia Metal Company against one Gale. There was a verdict for plaintiff, and defendant excepts. Exceptions sustained.

Alexander S. Bacon and I. R. Clark, for plaintiff. George F. Piper and Walter H. Thorpe, for defendant.

MORTON, J. This is an action for the breach of a written contract dated June 26, 1900. The defendant notified the plaintiff on January 22, 1901, that he would no longer act under the contract, and this was the breach relied on. It was admitted that from that date the contract was no longer in force. The only defenses relied on were that the contract was procured by fraud and misrepresentation on the part of the plaintiff, and that the plaintiff had violated certain terms and conditions on its part to be performed. There had been a prior contract between the same parties dated September 22, 1899, which was expressly canceled, and the parties relieved from further liability thereunder by the contract in suit. The fraud and misrepresentation relied on related to the first contract, and the first exception is to the refusal of the court to rule, as requested, that the second contract was a continuation of the first, and that the two should be read together, and that the plaintiff was not entitled to recover on the contract in suit if the defendant was induced to enter into the first one by the fraud or misrepresentation of the defendant or its duly authorized agent. It is too plain for argument that this request was rightly refused. Save as the second had incorporated into it with certain modifications certain covenants and agreements contained in the first, the two were independent and distinct. The second was not a continuation of the first, and the two together did not constitute one contract or agreement. This exception is overruled.

The next and remaining exception is to the refusal of the court to rule, as requested, that in estimating the damages, if any, which the plaintiff was entitled to recover, such expenses as the plaintiff would have been subjected to in carrying out the contract on its part were to be deducted from the profit, meaning thereby, we assume, the gross profit which would have accrued to it under the contract. We think that this instruction should have been given. The plaintiff was not entitled to be put in a better position by reason of the breach than it would have been in if the contract had been carried out by the defendant. The damages are to be assessed on the footing of what the plaintiff's profits would have been if the contract had been carried out by the defendant according to its terms, and the plaintiff is to be made whole for what he has thus lost by the defendant's breach. The jury was properly instructed that the plaintiff was entitled to recover the net profit which it would have made if

the contract had been performed. But, in order to arrive at that, it was necessary to take into account the expense to the plaintiff of completing the contract on its part. It can not have the same benefit of the contract that it would have had if it had been fully performed, and at the same time avoid the expense to which, according to the terms of the contract, it would have been subjected by performance. To allow such expense to be ignored in the estimation of the damages would be putting the plaintiff in a better position than it would have occupied if the contract had been fully performed. In *Noble v. Ames Mfg. Co.*, 112 Mass. 492; *Fox v. Harding*, 7 Cush. 516; *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38; 2 *Sedgwick on Damages* (8th Ed.) § 609.

According to the terms of the contract the plaintiff was to employ two salesmen in the territory covered by the contract, to supply the defendant with advertising matter and to advertise the metal and use every effort to advance its sale, to pay the defendant \$25 a month for office rent during the period covered by the contract, to divide with the defendant the expense of one stenographer at Boston, and to continue Mr. W. H. Lent in charge of their interests at Boston so long as he was connected with the company and the contract remained in force. It would have been subjected to expense in regard to all of these matters if the contract had been performed, and in estimating the damages such expense should be taken into account. The fact that such expense may be difficult of estimation is far from being a sufficient reason for disallowing it altogether. As said by Barker, J., in *Cutter v. Gillette*, 163 Mass. 95, 39 N. E. 1010: "It is not the law that damages which may be larger or smaller because of such uncertainties are not recoverable. The same kind of difficulty is encountered in the assessment of damages for personal injuries. All the elements which are involved in the prognostication are to be considered by the jury, and from the evidence in each case they are to form an opinion upon which all can agree, and to which, unless it is set aside by the court, the parties must submit." See, also, *Daniell v. Boston & Maine Railroad*, 184 Mass. 337, 343, 68 N. E. 337. The rule of damages is not affected by the motive which the defendant had for breaking the contract, or by the fact that he chose, without any sufficient excuse, to break it rather than go on with it.

We understand the phrase, "so long as * * * the contract remains in force" used in connection with the plaintiff's agreement to continue Mr. Lent in charge at Boston, to refer, not to a possible breach, but to mean so long as the contract continues in force if performed according to its terms.

The result is that the exceptions must be sustained. But, inasmuch as the exception that is sustained relates only to the question of damages, the new trial will be

confined to the matter of damages only. *Whipple v. Rich*, 180 Mass. 477, 63 N. E. 5; *De Forge v. N. Y., N. H. & H. R. R.*, 178 Mass. 59, 64, 59 N. E. 669, 86 Am. St. Rep. 464.

New trial granted, but on the matter of damages only. Exceptions sustained.

(189 Mass. 173)

TABER-PRANG ART CO. v. DURANT.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

1. PARTNERSHIP—ASSETS—REAL ESTATE.

Mere use of land and buildings by a firm for partnership purposes, does not of itself convert them into partnership assets, nor conclusively show an intention to treat them as such.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 99, 107.]

2. SAME—EVIDENCE.

Certain land and buildings used by a firm were owned by the partners as tenants in common. There was no conveyance of either the land or buildings to the firm, nor was the property entered as partnership property on the firm's books. No rent was paid therefor, but taxes, insurance, and repairs were paid by the firm. The fixtures, including machinery, etc., were put in and paid for by the firm and constituted partnership property; but these were removed and sold as firm assets by the firm's assignee after its failure. *Held*, that a finding that the land and buildings were separate and not firm assets was proper.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 95-99, 107.]

3. SAME.

Where a brick storehouse was built by a firm apparently for partnership business, and was paid for out of partnership funds, and a candle factory was rebuilt out of the proceeds of an insurance policy taken out by the firm in its name and paid for by it, both were properly regarded as partnership property, available to pay firm debts.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, § 98.]

4. SAME.

Where certain buildings located on land belonging to partners as tenants in common, though not transferred to the firm, were made over by the firm into a dwelling houses, but the firm was reimbursed for the expense out of the rents collected, the houses were individual, and not firm assets.

Appeal from Superior Court, Suffolk County.

Bill by the Taber-Prang Art Company against William B. Durant, assignee of C. L. Jones & Co. and of Frank H. and Henry E. Jones. From a decree in favor of plaintiff for a part only of the relief demanded, it appeals. Affirmed.

Warren & Garfield and Clement R. Lamson, for appellant. Wm. P. Martin, for appellee.

MORTON, J. This is a bill in equity to have the proceeds of certain lands and buildings held by the defendant Durant, as common-law assignee of C. L. Jones & Co., and of Frank H. Jones and Henry E. Jones, composing the firm of C. L. Jones & Co., distributed amongst the creditors of the partnership. The case was heard upon agreed

facts, in addition to facts alleged in the bill and admitted in the answer, with power to the court to draw inferences. There was a decree adjudging that \$1,010, the proceeds of a brick storehouse and of a candle factory, were partnership property, and that all the rest of the real estate was property of Frank H. Jones and Henry E. Jones as individuals, and directing that the proceeds thereof should be paid over to their individual creditors. The plaintiff appealed.

We think that the decree should be affirmed. The land and buildings formerly belonged to Charles L. Jones and Henry E. Jones as tenants in common, and on the premises they carried on the business of manufacturing soap, candles, etc., under the style of C. L. Jones & Co. There is nothing to show that the land and buildings were firm property or were so regarded. Charles L. Jones died in March 1879, and devised his half of the land and buildings to Frank H. Jones, with one-half of the fixtures, machinery, and apparatus used in the business, and thereafter Henry E. Jones and the said Frank H. Jones carried on the business on the premises as equal partners under the same style as that under which it had been carried on formerly. There is nothing to show that there was any conveyance of the land and buildings by them to themselves as a firm, or that it was agreed or understood that the land and buildings should be regarded as partnership property, and they were not so entered on the books. It is plain that the use of them for partnership purposes did not of itself convert them into partnership assets, or conclusively show an intention to treat them as such. *Grubbs' Appeal*, 66 Pa. 117; *Robinson Bank v. Miller*, 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 48 Am. St. Rep. 883; *Frink v. Branch*, 16 Conn. 260; *Ware v. Owens*, 42 Ala. 212, 94 Am. Dec. 672; 1 *Lindley on Partn.* (2d Am. Ed.) 331; 1 *Bates on Partn.* §§ 286, 287. No rent was paid, and the taxes, insurance, and repairs that were paid by the firm, with the new floors that were put in and the small additions that were made to the buildings, well might be regarded as an offset to the use of the premises. The fixtures, including machinery, hangers, belts, pulleys, boilers, and kettles, that were put in and paid for out of the partnership funds, constituted partnership property. But they have been removed and sold by the assignees, and the proceeds distributed amongst the partnership creditors. The brick storehouse was built by the partnership, apparently for the partnership's business, and was paid for out of the partnership funds. It was properly found to be partnership property. The candle factory was rebuilt out of the proceeds of an insurance policy, taken out, so far as appears, by the partnership in its name, and the premiums on which were paid by it. We think, though more doubtfully, that this also might be properly regarded as partnership property. No appeal, however, has been taken by the as-

signee, and the question whether the decree is right in this respect is not before us.

As we understand the case, the buildings out of which the dwelling houses were constructed were on the land at the time when the existing partnership was formed, and constituted a part of the real estate. The firm paid the expense of making over the buildings into dwelling houses; but it has been reimbursed out of the rents which it has collected, and we see no reason why the dwelling houses should be regarded as partnership property. The partners being equal owners of the real estate, and equally interested in the business, the fact that separate accounts were not kept in regard to matters relating to the real estate would seem to be of little moment. It is no doubt largely a matter of intention whether real estate belonging to persons who are partners and used in the partnership business shall be regarded as partnership property or not. We do not think in the present case it sufficiently appears that the owners intended that the property should be regarded as partnership property to warrant a decree to that effect.

Decree affirmed.

(189 Mass. 45)

WHITTREDGE v. SWEETSER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Sept. 11, 1905.)

1. BANKRUPTCY—TRUST PROPERTY—TRANSFER—NOTICE TO TRUSTEES.

Notice to trustees is not necessary to complete the title of trustees in bankruptcy of an interest in the property held in trust for the benefit of the bankrupt.

2. SAME.

Where a cestui que trust became a bankrupt, the complete ownership in the bankrupt's incorporeal interest in the trust property became vested in the trustees in bankruptcy by virtue of the assignment in bankruptcy, and such ownership drew with it possession, so far as it was capable of possession, unaffected by the fact that such trustees were at the time in ignorance of the existence of such property.

3. SAME—LIMITATIONS.

Where the trustees in bankruptcy of a cestui que trust became vested with the bankrupt's interest in the trust property by virtue of the assignment in 1878, and such ownership continued since that date until February 1, 1901, when a bill was filed by them for instructions, all persons were barred from claiming an adverse interest in the property so transferred by Rev. St. U. S. § 5057, declaring that no suit shall be maintained between a trustee in bankruptcy and a person claiming an adverse interest touching any property rights vested in such trustee, unless brought within two years from the time when the cause of action accrued for or against such trustee.

4. SAME—ABANDONMENT.

Where trustees in bankruptcy, having acquired title to the bankrupt's incorporeal interest in trust property under a bankrupt's petition filed in 1878, filed a bill in 1882 to compel the bankrupt to execute conveyances to such trustees of all his interest in the trust property, and to enjoin the trustee under the will under which the bankrupt claims from paying the bankrupt or any person claiming under him any part of the trust fund which might accrue to the bankrupt, the fact that the bankrupt's trustees did

not sell their interest in the remainder of the fund so acquired did not establish an abandonment thereof by them.

Case Reserved from Supreme Judicial Court, Suffolk County; Henry K. Braley, Judge.

Bill by one Whittredge, as trustee under the will of Solon O. Richardson, deceased, against E. L. Sweetser and others for instructions. Case reserved for full court.

Hollis R. Bailey and George W. Mathews, for defendant John C. Hammond. W. B. H. Dowse, Warren O. Kyle, and Fred Joy, for assignees in bankruptcy of Elbridge L. Sweetser.

LORING, J. This is a bill for instructions brought by the plaintiff as the present trustee of certain property held in trust under item 8 of the will of Solon O. Richardson. The case was reserved for the consideration of this court on an agreed statement of facts. From this statement it appears that Solon died in 1873, and by his last will and testament, which was duly allowed, bequeathed \$35,000 on the following trusts: The income to be paid to his three sisters for life, namely, Mary A. Sweetser, Martha Hutchinson, and Louisa Richardson; and "at the decease of my said sisters, or either of them, my will is that the share belonging to the deceased sister shall revert to her children, to be shared by them each and each alike. If either of my said sisters shall die childless, the income belonging to her I direct shall revert to the said sisters surviving, to be shared equally between them. At the decease of all my three said sisters, I direct that the fund from which they have derived an income from my property be divided equally between the children of my said sisters, and I direct my executors to pay to them each their respective part, the same to be the property of the children of my said sisters forever." The three life tenants survived the testator. Louisa never had any child; Martha Hutchinson had one child, now the wife of the plaintiff; and Mary A. Sweetser had one child, a son, Elbridge L. Sweetser. Both of these children, Mrs. Whittredge and Elbridge L. Sweetser, were born in the lifetime of the testator. Mary A. Sweetser survived her sisters, and died December 15, 1900, leaving her son and her niece her surviving. On February 1, 1901, this bill was brought to find out who was entitled now to receive Elbridge L. Sweetser's half of the fund. This half is claimed by assignees in bankruptcy of said Elbridge under a petition filed in 1878. It is also claimed by one John C. Hammond, who now owns a judgment rendered in February, 1896, in favor of a creditor of Elbridge, founded on five notes dated in 1881. Hammond is also the present holder under one of two creditors to whom an assignment was made in October, 1885, to secure two debts incurred after this bankruptcy. No other claimants have appeared before us.

The defendant Hammond admits that when the testator died Elbridge had either a vested remainder in one-half of the trust fund of \$35,000, subject to the life estates created by this item of the will, and subject to the class being opened on the birth of a further child or children of the life tenants, or a vested interest in a contingent remainder, and that his interest vested in his assignees in bankruptcy. His contention, however, is that the assignees are barred by Rev. St. U. S. § 5057. The title of the assignees in bankruptcy became complete on the assignment to them of this interest in remainder. In this commonwealth notice to the trustees is not necessary to complete the title of an assignee of an interest in the property held in trust by them. *Thayer v. Daniels*, 113 Mass. 129, and cases there cited. See, also, *Putnam v. Story*, 132 Mass. 205; *Butterfield v. Reed*, 160 Mass. 362, 35 N. E. 1128. By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession, so far as the interest here in question (an incorporeal interest, because an interest in remainder) is capable of possession. This result is not affected by the fact that the assignees were for a time ignorant of the existence of this property of the bankrupt. This ownership and possession in the assignees, which is not disputed by the defendant Hammond, has continued ever since, and all persons are barred by Rev. St. U. S. § 5057, from controverting it. The claim that one in possession of property is barred from exercising the rights which that ownership confers on the owner by not having brought an action is groundless. Under these circumstances we have not found it necessary to choose between the opinion in *Dushane v. Beall*, 161 U. S. 513, 16 Sup. Ct. 637, 40 L. Ed. 791, and the decision in *Rock v. Dennett*, 155 Mass. 500, 30 N. E. 171.

The only other contention made by the defendant Hammond is equally groundless, to wit, that the assignees abandoned this property. The contention is put on the ground that they did not sell their interest in remainder in this fund. Were that all that appeared, the argument would be without merit. But that is not all. In 1882 the assignees filed a bill in which they "prayed among other things, that the said Elbridge L. Sweetser might be directed to execute and deliver such instruments as would convey to said assignees all his interest as legatee under the said will, and that the said trustee, Solon O. Richardson, might be enjoined from paying to the said Elbridge L. Sweetser, or any person or persons claiming under him, any part of the said trust fund, or the income thereof, which might accrue and become payable to the said Elbridge L. Sweetser." This bill apparently was brought by the assignees as soon as they learned of the

existence of the fund and of the fact that creditors of Elbridge were seeking to reach and apply this interest of Elbridge in satisfaction of the debt due from him to them. The bringing of this bill (which seems to have been a bill in the nature of a bill *quia timet*) disposes of the contention that it was in fact the intention of the assignees to abandon this property.

Under the circumstances the defendant Hammond should pay to the defendants Dowse and Kyle their taxable costs. Decree accordingly.

(139 Mass. 114)

DEXTER v. THAYER.

(Supreme Judicial Court of Massachusetts. Barnstable. Sept. 11, 1905.)

1. APPEAL—FINDINGS OF COURT—CONCLUSIVENESS.

The finding of a judge on a question preliminary to the admission of evidence is conclusive, unless the evidence does not warrant the finding as a matter of law.

2. EVIDENCE—CONVERSATION BETWEEN AGENT AND DECEASED PERSON—FOUNDATION.

Where, in trespass as to a boundary line, plaintiff testified that there was an arrangement for an exchange of land between herself and husband and defendant and her husband, since deceased, with a view to establishing the line in question as defendant and her husband wanted it, that the arrangement never was carried out by defendant, and that in whatever was done with reference to the line plaintiff acted with her husband, and whatever was done with reference to the bound stones and the division line with her husband was with her consent, did not sufficiently show that plaintiff's husband had authority to act as her agent, so as to authorize the admission of conversations between plaintiff's husband and the husband of defendant in defendant's absence.

3. TRIAL—INSTRUCTIONS—IGNORING EVIDENCE.

In trespass with reference to a boundary line between two adjoining estates, a requested instruction that plaintiff was estopped to deny that the line claimed by defendant was the division line, if, supposing or having reason to suppose that it had been established by agreement, plaintiff stood by without objection and saw defendant and her husband make improvements on the land set off to defendant, was properly refused, as omitting any reference to an arrangement alleged to have been made by plaintiff for an exchange of lands in connection with the line as claimed by defendant.

4. SAME—ASSUMPTION OF FACT.

Where, in trespass over a disputed boundary line, there was no evidence warranting a finding that plaintiff's husband had authority from her to agree on the line claimed by defendant and to put down bound stones, a requested instruction, based on the assumption that plaintiff's husband and defendant's husband had agreed on the line, etc., was properly refused.

Exceptions from Superior Court, Barnstable County; Lemuel Le B. Holmes, Judge.

Action for trespass by one Dexter against one Thayer. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

Thos. C. Day, for plaintiff. H. H. Baker and H. P. Harriman, for defendant.

MORTON, J. This is an action of trespass in regard to the boundary line between two adjoining estates belonging to the plaintiff and defendant. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the exclusion of certain evidence, and to the refusal to give certain rulings that were requested, and to instructions that were given.

The evidence that was excluded related to conversations between the husband of the plaintiff, and the husband, since deceased, of the defendant, and her son, in regard to the establishment of the line claimed by the defendant. They occurred in the absence of the defendant, and were excluded evidently on the ground that the court was not satisfied that the husband of the plaintiff had authority to act for her as her agent. This was a preliminary question, on which the finding of the presiding judge was conclusive, unless it appears that the evidence did not warrant the finding as matter of law. *Walker v. Curtis*, 116 Mass. 98, 101; *Stevens v. Miles*, 142 Mass. 571, 8 N. E. 426; *Smith v. Brown*, 151 Mass. 338, 24 N. E. 31. The plaintiff's husband was not a witness, or, so far as appears, present, and she was called by the defendant and examined before the testimony that was excluded was offered. Taking her testimony as a whole, it is plain, it seems to us, that it cannot be said as matter of law that the finding of the presiding judge was wrong. The purport of it is that there was an arrangement for an exchange of lands between herself and her husband and the defendant and her husband, with a view to establishing the line in question as the defendant and her husband wanted to have it established, and that the arrangement never was carried out by the defendant, and that in whatever was done in reference to this line she acted with her husband. It cannot be said that her assent to a question put to her, in the course of her examination by defendant's

counsel, that whatever was done with reference to the bound stones and the division line with her husband was with her consent, necessarily so far controls her testimony as a whole as to make the preliminary findings of the presiding judge wrong as matter of law.

The remaining question relates to the instructions that were requested and to those that were given. The first two instructions requested by the defendant asked the court to instruct the jury in effect that the plaintiff was estopped to deny that the line claimed by the defendant was the division line, if, supposing or having reason to suppose that it had been established by agreement as the division line, she stood by without objection and saw the defendant and her husband make improvements on the land thus set off to the defendant. The instructions thus requested omitted any reference to the arrangement alleged by the plaintiff to have been made for an exchange of lands in connection with the line as claimed by the defendant, and for this reason alone were rightly refused. The instructions requested were also incorrect on other grounds. See *Tolman v. Sparhawk*, 5 Metc. 469; *Proprietors Liverpool Wharf v. Prescott et al.*, 7 Allen, 494; *Proctor v. Putnam Machine Co.*, 137 Mass. 159. The third instruction requested was based upon the assumption that the plaintiff's husband and the defendant's husband had agreed upon the line claimed by the defendant as the division line, and had put down bound stones in accordance therewith. There was no evidence warranting an assumption or a finding that the plaintiff's husband had any authority from her to agree upon such a line and to put down bound stones accordingly, and therefore this instruction also was rightly refused. We discover no error in the instructions, so far as recited in the bill of exceptions. They were well adapted to the case before the jury.

Exceptions overruled.

(182 N. Y. 369)

TOWN OF ULYSSES et al. v. INGERSOLL
et al.(Court of Appeals of New York. Oct. 3, 1905.)
OFFICERS—ACTION ON BOND—RIGHT OF ACTION.

Under Code Civ. Proc. § 1888, declaring that where a public officer is required to give an official bond to the people, and special provision is not made by law for the prosecution of the bond by or for the benefit of a person who has sustained injury for which the sureties are liable, such person may apply for leave to prosecute, a town is entitled to leave to prosecute an action on the official bond of the county treasurer, running to the county, to recover money which had been appropriated to the town as school funds, but had never been paid over by the treasurer.

Appeal from Supreme Court, Appellate Division, Third Department.

Action by the town of Ulysses and others against Charles Ingersoll and others. From a judgment of the Appellate Division (80 N. Y. Supp. 924, 81 App. Div. 804), affirming a judgment for defendants, plaintiffs appeal. Reversed.

David M. Dean and Randolph Horton, for appellants. E. A. Denton, for respondents.

O'BRIEN, J. The defendants are the sureties upon the official bond of the treasurer of the county of Tompkins, and the plaintiffs seek to recover certain moneys that the treasurer failed to pay over to the plaintiffs, as was his duty, prescribed by statute. On the trial the plaintiffs' complaint was dismissed on the ground that they had no right to bring or maintain the action.

The obligations of the bond, which it is claimed were violated by the treasurer, and for which his sureties are liable to the plaintiffs, are as follows: "The conditions of this obligation are such, that whereas, the above bounden Charles Ingersoll has been duly elected treasurer of Tompkins county for the term of three years from the 1st day of January, 1897: Now, therefore, if the said Charles Ingersoll shall faithfully execute the duties of his office and shall pay over according to law and account for all moneys, property, and securities which shall come into his hands as treasurer, and render a just and true account thereof to the board of supervisors when thereunto required, and obey all orders and directions of a competent court relating thereto, then this obligation shall be void; otherwise, to remain in full force and virtue." It was recited in the body of the instrument that the sureties are held and firmly bound unto the county of Tompkins in the penal sum of \$200,000, to be paid to the county of Tompkins, its successors, and assigns.

The decision of the trial court has been unanimously affirmed at the Appellate Division (80 N. Y. Supp. 924); and the only question necessary to be considered upon this

appeal is whether the plaintiff the town of Ulysses, joined with the supervisors, can maintain the action upon the facts stated in the complaint. The defendants gave no proof at the trial and the facts are undisputed. It appears that in the year 1899 there was apportioned to the town of Ulysses by the proper authorities the sum of \$2,608.08 of the public moneys, which the state distributed to the various towns in the county for the support of schools. The supervisor of the town gave his bond to the treasurer for the school moneys so apportioned to his town, and thereby qualified himself and became entitled to receive the school moneys apportioned to his town. Of the amount so apportioned, the county treasurer from time to time paid over to the supervisor \$2,131.25, leaving a balance of \$476.78, which he did not and never has paid to the supervisor or any other officer for the benefit of the town. It appears that the county treasurer made default, and at the time of the default the balance above mentioned remained in his hands, and that amount has been frequently demanded of him by the supervisor of the town.

The principal, and, indeed, the only, question raised by the defendants, and the only one upon which the decision turned in the court below, was that the action should have been brought in the name of the county of Tompkins, instead of the names of the present plaintiffs. It is provided by section 1888 of the Code of Civil Procedure, relating to actions upon official bonds, that "where a public officer is required to give an official bond to the people, and special provision is not made by law, for the prosecution of the bond, by or for the benefit of a person, who has sustained, by his default, delinquency, or misconduct, an injury, for which the sureties upon the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond." The plaintiffs in this case did apply to the court for leave to bring this action, and it was granted. This case, we think, turns upon the interpretation that is to be given to this statute. The defendants claim that it has no application, inasmuch as the bond does not, in terms, run to the people, but to the county of Tompkins. It may be that this case is not within the letter of the statute, but it would seem to be within its real spirit and policy. It is a remedial statute, and as such should be liberally construed, in order to give effect to the general policy and purview of the law. There is no reason why an official bond of a county treasurer running to the county should not be prosecuted in the same way as if it ran to the people. There is no person entitled to receive the money which the treasurer failed to pay, except the town of Ulysses or its supervisor. That town alone has suffered from the delinquency of the treasurer. At the moment that the treasurer made de-

fault, the town was entitled to receive the money from him, and no one else was.

But it is said that the case of *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550, holds a different doctrine. When that case is carefully examined, it will be found to contain nothing contrary to the right of the plaintiff to maintain this action. It is true that it was said in that case that, "while an instrument is under seal, no person can sue or be sued to enforce the covenants therein contained, except those that are named as parties and who have signed and sealed the same." That, no doubt, was the general rule of the common law; but these rules, with respect to the right of private parties to maintain actions upon official bonds, have been very much modified by statute, and the statute to which we have referred was plainly intended for that purpose. Moreover, the case has no application to the one at bar. The bond in suit in that case was not an official bond, but a bond given to secure the performance of a contract by a private individual. In disposing of the case there was no occasion to refer to the statute in question, and no reference to it was made. There is nothing, there seems to us, in that case that could justify the dismissal of the plaintiffs' complaint. We think that this case is fairly within the scope and general policy of that statute. Giving to it, as we ought, a liberal construction, the defendants' objections, which were upheld on the trial, will disappear. The equities of the case are manifestly in favor of the plaintiffs, and they ought not to be defeated by a construction of the statute which is obviously contrary to its general spirit and purview.

We think that the complaint was improperly dismissed, and so the judgment should be reversed, and a new trial granted; costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(182 N. Y. 373)

JACKSON et al. v. SWART et al.

(Court of Appeals of New York. Oct. 3, 1905.)

GUARANTY—COLLECTION OF NOTE—CONSTRUCTION.

On assignment of a note executed in another state and secured by a mortgage on land in that state, the assignors delivered an instrument reciting that in consideration of the assignment assignors guaranteed the collection of the note, with interest, provided that, in case of default, the assignees should on request forward the note and mortgage for collection, that the mortgage should be foreclosed and the premises sold, and that, in case there was no bid sufficient to pay the debt, the land should, at the option of the assignors, be bid in by the holder of the note. It was further provided that if the land was so purchased the assignors should take charge of it and sell it within two years, making up any

deficiency that might result from the land not selling for enough to pay the debt. *Held*, that the instrument was not a mere guaranty of collection, but a special contract, by which the assignors assumed certain powers and obligations touching the collection of the note.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John P. Jackson and others, as administrators of the estate of Maurice J. Smith, deceased, against Howard D. Swart and others, as executors of George D. Decker, deceased. From a judgment of the Appellate Division modifying a judgment in favor of defendants (48 N. Y. S. 957, 14 App. Div. 415), plaintiffs appeal. Reversed.

Nelson Smith, for appellants. J. K. P. Jackson, for respondents.

O'BRIEN, J. The plaintiffs, as the personal representatives of Maurice J. Smith, deceased, sought to recover against the defendants upon three negotiable promissory notes amounting in the aggregate to \$2,000, executed at various times between the 24th of May, 1887, and the 27th of April, 1888. These notes were all made by parties living in Kansas, the identity of whom the record does not disclose, further than the name. They were all made payable to the same payee, who indorsed them without recourse to the defendants, or some of them. They were payable five years after date at the Girard National Bank of Philadelphia, and attached to them were interest coupons, at the rate of 7 per cent., payable semiannually. It appears that the defendants themselves, or some of them, paid the interest, or most of it, upon these notes up to the time that they became due. But, so far as appears, the makers never paid anything on any of them. They were not known at the bank where the notes were payable, and no funds were ever deposited to meet either principal or interest. At the time of the delivery of these notes to the plaintiffs' testator, the defendants delivered with them an instrument in writing which it is claimed was a guaranty of the collection of the several notes. This action is based upon this instrument, as well as the notes themselves. The courts below have held that the paper was simply a guaranty of collection, and the plaintiffs have been defeated on that ground. If the instrument is to be interpreted as a guaranty of collection, and nothing else, then beyond all doubt the case has been correctly decided. But we think that, while the paper does contain words of guaranty of the collection of the notes on the part of the defendants, it does in legal effect contain much more. It is, we think, not a mere guaranty of collection, but a special contract, in which the parties have bound themselves to do certain things, and in which the defendants had assumed certain powers and obligations touching the collection of the notes which will be hereafter pointed out. This paper also contained a transfer of a

grant or mortgage by the makers of the notes of certain lands in Kansas as a security for their payment when they became due.

As this written instrument is the fundamental basis of the present action, it is proper to state that the instrument accompanying each note is identical with the others, or substantially so, and in order to get a clear view of the legal scope and effect of the paper it should be set out in full. "May 24th, 1887. This contract witnesseth: That the undersigned have this day sold to M. J. Smith the following described loan, viz.: One certain note signed by Thomas D. Henderson for \$1,000, dated May 1st, 1887, payable to the order of A. O. Wilcox five years after date, with 7 per cent. interest from date, and secured by trust deed of same date with said note to E. Heliker, trustee, upon lots 1, 2, 3, and 4, section 6, township 21, range 10, in Rice county, Kansas, executed by Thomas D. Henderson. That in consideration of said sale the undersigned guaranty the collection in full of said note, with 7 per cent. interest on same, upon the following conditions: In case of a default in the payment of said note or interest due on same, or a failure to comply with the requirements named in the trust deed securing said note, the holder of said note shall, at the request of the undersigned, at once forward said note and trust deed for collection. Said trust deed shall be foreclosed in the usual course provided by law and the land sold. In case there is no bid sufficient to cover the debt and costs, the land described in the trust deed may, at the option of the undersigned, be bid in in the name of the holder of this note. In case the land is so purchased, the undersigned hereby bind themselves to take full charge of said land and sell same within two years after the above-described note matures, and, in case said land does not sell for a sufficient amount to pay the debt in full, to make good and pay any deficiency."

If this instrument contains any ambiguous words or expressions, it is to be construed against the surety and not against the plaintiffs. *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. 669. If the paper is carefully examined, it will, we think, be found to contain much more than a mere guaranty of collection. All the provisions and conditions contained in it are equally binding upon the defendants as upon the plaintiffs.

First. "In case of a default in the payment of said note or interest due on same, or a failure to comply with the requirements named in the trust deed securing said note, the holder of said note shall at the request of the undersigned, at once forward said note and trust deed for collection." The undersigned, or, in other words, the defendant, retained upon the transfer of the notes the right and the power to collect them and to enforce the security given for their payment. To what place was the holder of the note to send the notes for collection? Obviously to

such place as the undersigned should designate in the request, and the holder could not know where to send them until the request was made. The time within which the undersigned might make the request was not limited. They could make it at any time, and until the request was made, or the right of the defendants to collect in some way waived or relinquished, the holder of the note could not know what to do in the premises. It is obvious from this provision of the instrument that the defendants retained the right to control the collection of the notes and the enforcement of the security. They could do that in their own way and at such time as suited their convenience or pleasure.

Second. The next provision of the instrument is equally significant. It provides that "said trust deed shall be foreclosed in the usual course provided by law and the land sold. In case there is no bid sufficient to cover the debt and costs, the land described in the trust deed may, at the option of the undersigned, be bid in, in the name of the holder of this note." It is clear from this language that the defendants retained the right to bid in the property when sold at foreclosure. They could bid it in in the name of the holder of the note, although he might not have been a party to the proceeding. The defendants' object in retaining this right over the collection of the debt and the securities is obvious. It was not intended that the holder of the note himself should foreclose the mortgage and bid in the land, since he might then make a nominal bid and hold the defendants for any deficiency, and to avoid this the defendants retained the right to bid in the land themselves.

Third. Then it is further provided: "In case the land is so purchased, the undersigned hereby bind themselves to take full charge of said land and sell same within two years after the above-described note matures, and, in case said land does not sell for sufficient amount to pay the debt in full, to make good and pay any deficiency." It will be seen by the last clause of this paragraph that the defendants bound themselves to pay the notes unless a sufficient amount for that purpose was realized from a sale of the land. It was not necessary for the holder of the note to pursue the makers or to procure a personal judgment against them. The defendants became liable for the payment of the debt, unless it was collected from the property pledged as security. Whether the security should prove sufficient would depend upon a sale made after the foreclosure and within two years after the note matured. The defendants, by this provision, secured to themselves, not only the right to collect the notes and enforce the security, but to bid in the property themselves and then retain the title for two years, in order to determine whether or not it should ultimately prove sufficient to pay the debt.

The several provisions of this instrument

must be read together, and must be construed as binding upon the defendants, as well as the plaintiffs. It is apparent, when the paper is carefully examined, that the defendants upon the transfer of the notes retained the power and right, not only to collect them in their own way, but to bid in the property and hold it for two years thereafter. Under these circumstances, it is obvious that the holder of the notes could never know when to proceed to collect them until the defendants had in some way waived or renounced the right, which they retained in themselves; and it is obvious, also, that it was impossible for him to tell whether, upon the foreclosure of the securities, he could become the owner of the land or not. It is proper here to state that after the notes matured the holder requested the defendants to proceed to collect them, which request was refused. We think that under the terms of the written instrument, which was delivered with the notes, the defendants assumed such relations to them and to the security for their payment that it was their duty to move in the premises or to relinquish the rights secured to them by the conditions of the agreement referred to. Knowing all the facts and circumstances under which they had transferred the notes, and knowing the character and location of the property embraced in the trust deed, they had no right to look on and allow the property to be swept away by taxes imposed by the state. It seems that the tax sales which were made of the land gave no right of redemption. The sale of the property and the purchase of it by the state transferred the title in fee, and, if the land was ever of any value, its loss as security for the debt is attributable to the defendants, rather than to the plaintiffs. The judgment should be reversed, and a new trial granted; costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(182 N. Y. 380)

LOOMIS v. LAKE SHORE & M. S. RY. CO.
(Court of Appeals of New York. Oct. 3, 1905.)

1. RAILROADS—INJURY TO PERSON WALKING ON TRACK—QUESTION FOR JURY—NEGLIGENCE.

In an action against a railway company for the death of a brakeman, who was struck by an engine while walking between the tracks, evidence held to require submission to the jury of the question of defendant's negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

In an action against a railway company for the death of a brakeman, who was struck by an engine while walking between the tracks, evidence held to require submission to the jury of the question of deceased's contributory negligence.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Elsie Loomis, as administratrix of the estate of John Loomis, deceased, against the Lake Shore & Michigan Southern Railway Company. From a judgment of the Appellate Division (82 N. Y. Supp. 1105, 84 App. Div. 633) affirming a judgment for defendant, plaintiff appeals. Reversed.

Edward R. O'Malley, for appellant. William B. Hoyt, for respondent.

BARTLETT, J. The plaintiff, as the administratrix of John Loomis, deceased, brought this action against the Lake Shore & Michigan Southern Railway Company under the following circumstances: The intestate was, on the 12th day of July, 1902, the day he was killed, in the employ of the New York, Chicago & St. Louis Railway Company, commonly known as the "Nickel Plate," as a brakeman on one of its freight trains. The accident happened in the yard of the Lake Shore road at Buffalo. It is a conceded fact, alleged in the complaint and admitted by the answer, that the Nickel Plate road had a lease and contract with the Lake Shore giving it the right to operate its trains in and upon certain portions of the tracks and yard belonging to the defendant within the city of Buffalo, and particularly at the point where the accident occurred. The direction of the defendant's tracks is substantially east and west through its yard. The main east-bound track and the main west-bound track lie alongside of each other. The west-bound track is north of the east-bound track. There are two or more parallel tracks south of the east-bound track, and a like number north of the west-bound track, used for storing cars and other local purposes. The main tracks near the point of the accident cross Scott street on the west, and proceed east over Perry and Fulton streets. All these crossings are at grade. The accident occurred between Perry and Fulton streets, which are about 800 feet apart, at a quarter to 7 o'clock in the morning of a pleasant July day; the atmosphere perfectly clear, it being broad daylight. At this time the freight train of the Nickel Plate, on which the intestate was the rear-brakeman, was standing on the east-bound main track of the defendant, ready to pull out. The freight train was lying between Perry and Fulton streets; the rear end being near or upon the latter street. The intestate was proceeding to the rear of his train from a point a little east of Perry street, walking between the east and west bound tracks, part of the time on the south end of the ties of the west-bound track, and before he succeeded in reaching his destination he was struck by the rear end of the tender of a passenger engine, without cars, backing on the west-bound track and running in the same direction in which he was walking, and instantly killed. It was

proved that the defendant had been in the employ of the Nickel Plate for some 13 years, and had been familiar for at least 9 years with the yard of the defendant, where the Nickel Plate was authorized to use certain of the tracks and facilities.

The two principal questions in this case are: Was the defendant negligent? Was the intestate guilty of contributory negligence? The trial judge, at the close of plaintiff's case, in granting the defendant's motion to dismiss the complaint, said, among other things: "I am not able to see how the plaintiff can recover in this case upon either branch, either that the evidence establishes the negligence of the defendant or freedom from contributory negligence on the part of the deceased."

As to the first question presented, involving the negligence of the defendant: The hostler in charge of this backing engine was placed upon the stand by the plaintiff, and he admits he was operating this engine alone, and that when backing it, and sitting in the seat of the engineer, where it was necessary for him to be, the track for the first 60 feet beyond the rear end of the tender was entirely shut out from his view by the height of the upper portion of the tender. It thus appears that the hostler was on the north side of the backing engine, and the intestate was walking along the south side between the east and west bound tracks. The hostler could neither see the immediate track ahead of him nor the spot where intestate was killed. It was proved that the duty of the employé, known as the "hostler," was to take engines that had just arrived with passenger trains from the custody of the engineer and fireman and run them out to the roundhouse, some four miles distant. There was also evidence justifying a finding by the jury that no bell was rung, which omission was in violation of rules 69 and 79 of the defendant, read in evidence, and are as follows: "(69) The engine bell must in all cases be rung before the engine is put in motion, and when running through tunnels and the streets of towns and cities; also while switching at stations and yards. * * * (79) Whenever the word 'train' is used, it must be understood to include an engine in service, with or without cars, equipped with signals as provided in rules 33 and 34." There was also evidence from which the jury might have found that the backing engine was run in violation of rule 104a of the defendant, read in evidence. It is as follows: "(104a) In no case must a train be backed over a public crossing or highway, unless there is a man on the rear car, or on the ground ahead of the car, to see that the crossing is clear." Taking the most favorable view of the evidence for the defendant, the question of its negligence should have been submitted to the jury.

As to the question of intestate's contributory negligence, we are of the opinion that there was sufficient evidence to carry the

case to the jury. In order to determine this question, it is necessary to scrutinize intestate's conduct in connection with all the other facts in the case, especially those growing out of the alleged negligence of the defendant. When the intestate was walking between the two main tracks toward the rear of his train, he had a right to assume that every rule of the company would be observed, if an engine was backing in the same direction as he was going, as to speed, as to lookout on the rear of the tender or on the track, and as to the ringing of the bell, etc. It is quite impossible to determine that intestate was guilty of contributory negligence until all these facts are duly considered. The claim of the defendant is that it was negligence per se for the intestate to pass from the head of his train to the rear in the space between the two main tracks; that he could have walked on the top of the cars, although some of them were gondola cars, or on the other side of his train, between the east-bound track and the storage track, to the south, where it is asserted he would have been perfectly safe. The answer of appellant is that his position was not only at the rear of his train, which was about to start, but he was required to locate himself on the right-hand side of his train, which was the position he assumed when passing to the rear as stated. It further appears by a witness named Lynch, a letter carrier, who was also walking toward the rear of the freight train to secure a ride to the outskirts of the city of Buffalo, where he distributed his mail, that as he was walking between the two main tracks, the intestate being ahead of him, he saw him turn completely around and look toward the point where any train or engine might be approaching from behind him. The defendant's complaint is that there is no evidence that he looked more than once, and that he was walking slowly. It was proved that the entire time occupied in passing from the head to the rear of the train was only two minutes, or possibly less. It was also proved that between the main tracks, where trains pass each other in opposite directions, there was a clear space of about three feet, lacking an inch or two. We are of opinion that the question of intestate's contributory negligence was one of fact for the jury. He was not guilty of contributory negligence as matter of law.

Two legal questions were discussed on the argument which seem to require no special consideration at this time. The appellant argues that the plaintiff's intestate was lawfully on the defendant's tracks and in its yard; that he was there by permission, and not as a mere licensee. The situation can be put much stronger. The intestate was there under the provisions of a written lease and contract between the defendant and the Nickel Plate. He was lawfully there, engaged in the business of his employer, and

the defendant under this contract owed him at least the exercise of ordinary care in the management of its own trains and engines. It was also correctly argued, and does not seem to have been controverted, that the doctrine of co-employé has no application. In view of the rule that, in case of a nonsuit, all inferences are to be drawn in favor of the plaintiff and the evidence be regarded in a light most favorable to her, the case should have been submitted to the jury, both as to defendant's negligence and intestate's contributory negligence.

The judgment appealed from and that of the Trial Term should be reversed, with costs to abide event, and a new trial ordered.

CULLEN, C. J., and GRAY, O'BRIEN, VANN, and WERNER, JJ., concur. HAIGHT, J., not voting.

Judgment reversed, etc.

(182 N. Y. 393)

ALFSON v. BUSH CO., Limited.

(Court of Appeals of New York. Oct. 3, 1905.)

DEATH—ACTION FOR NEGLIGENCE—RIGHT TO SUE—ALIEN BENEFICIARIES.

Under Code Civ. Proc. § 1902, providing that an executor or administrator of decedent, who has left surviving a husband, wife, or next of kin, may maintain an action to recover damages for the wrongful act by which the decedent's death was caused, etc., the administrator of a decedent whose next of kin are aliens may bring such an action.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 87.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Anon Alfson, as administrator of the estate of Anders Tobiasen, deceased, against the Bush Company, Limited. From a judgment of the Appellate Division (89 N. Y. Supp. 1100, 97 App. Div. 632), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Ernest F. Eidlitz and Frederick Hulse, for appellant. Carlisle J. Gleason, Abram I. Elkus, and Adolph Ruger, for respondent.

BARTLETT, J. The plaintiff, as administrator of the deceased, brings this action under section 1902 of the Code of Civil Procedure to recover damages of the defendant corporation for negligently causing the death of the intestate. This section reads as follows: "The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death

had not ensued. Such an action must be commenced within two years after the decedent's death." On the 13th day of November, 1902, the intestate, a ship carpenter in the employ of the defendant corporation, was engaged in repairing a float, moored alongside one of its piers, and by reason of the alleged negligent acts of the defendant was instantly killed, being crushed between the float and the pier. The jury rendered a verdict in favor of the plaintiff for \$2,000, and, the Appellate Division having unanimously affirmed the judgment entered thereon, the facts are conclusively settled in favor of plaintiff to the effect that the defendant was negligent and the intestate free from contributory negligence.

The counsel for the appellant calls our attention to several alleged legal errors founded on the refusal of the trial judge to charge certain requests as to the negligence of the intestate and as to his assumption of obvious risks. The answer to these questions depended upon the conclusion reached by the jury on conflicting evidence, and the trial judge, in a charge that was eminently fair to both parties, properly submitted the points in controversy to the triors of fact.

The appellant's counsel, however, raises an interesting question of law as to the proper construction to be given section 1902 of the Code of Civil Procedure, already quoted in full, and other sections to which reference will be presently made. It is a conceded fact that the intestate's widow and next of kin are nonresident aliens, domiciled in Norway, and the appellant insists that this action cannot be maintained for their benefit. This court, so far as we are advised, has never passed upon the question, although it has been considered in the lower courts. *Tanas v. Municipal Gas Co.*, 88 App. Div. 251, 84 N. Y. Supp. 1053, and cases cited. The courts of other states are at variance; *Indiana*, *Pennsylvania*, and *Wisconsin* holding the action cannot be maintained, while *Massachusetts*, *Illinois*, *Alabama*, and *Arizona* take the contrary view. It is to be observed that section 1902 of the Code of Civil Procedure is general in its terms, providing, in case of death by negligent act, the legal representative may maintain an action for the benefit of husband, wife, or next of kin. There are no words of limitation—no expression of the legislative will that the recovery authorized shall be distributed to residents only.

It is argued that this statute has no extraterritorial effect, and that public policy requires it should be construed as limited to beneficiaries residing within the jurisdiction. It is well to bear in mind at the outset of this inquiry the precise character of our statute, which differs in some respects from Lord Campbell's act (St. 9 & 10 Vict. c. 93), which is one of the earliest departures from the rule of the common law that

purely personal wrongs died with the person who suffered them. This act has been copied to a greater or less extent in many of our sister states. The first section creates the cause of action, and the second section authorizes the executor or administrator of the deceased to bring the action, and the damages, "after deducting the cost not recovered from the defendant, shall be divided between the beforementioned parties (wife, husband, parent, and child of deceased), in such shares as the jury, by their verdict, shall find and direct." In *Adam v. British, etc., Steamship Co.*, L. R. 2 Q. B. Div. 430 [1898], it was held that this act and its amendments (St. 27 & 28 Vict. c. 95) did not apply for the benefit of aliens abroad. The learned court said: "The intention of the Legislature is to be collected from the statute; and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British subjects had not until the passing of St. 9 & 10 Vict. c. 93. Moreover, the statute provides in section 2 for the division of the damages recovered amongst the various persons to be benefited in proportion to be assessed by the jury. It appears to me impossible to hold that it was intended, there being no expression to that effect, to cast upon juries such a duty as this in regard to the distant family of a deceased, and possibly polygamous, alien." The foregoing case was dissented from in *Davidsson v. Hill*, L. R. 2 K. B. 606 [1901].

Our Code of Civil Procedure contains a somewhat different legislative scheme. Section 1902, which creates the cause of action, has already been discussed. Section 1903 provides as follows: "The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper." By this section the damages recovered, while not subject to payment of the debts of deceased and the general expenses of administration, are charged with the expenses of the action, the reasonable funeral expenses of deceased, and the commissions of plaintiff on the residue. Section 1904 defines the precise nature of the recovery as "a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought." Section 1905 reads: "The term, 'next of kin,' as used in the foregoing sec-

tions, has the meaning specified in section 1870 of this act." Section 1870 reads: "The term, 'next of kin,' as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife." It thus appears that if the alien husband, or wife, or next of kin, residing abroad, are permitted to share in the distribution of damages, the jury are not required, as under Lord Campbell's act, to find and direct how the fund shall be distributed; the statute of distributions having been made applicable.

It is desirable to ascertain the conditions that doubtless induced the Legislature more than half a century ago to abrogate the principle of the common law which declared that the cause of action for purely personal wrongs died with the person, and to create a new cause of action in favor of those who had suffered pecuniary injuries, resulting from death by negligence. Laws 1847, p. 575, c. 450; Laws 1849, p. 388, c. 256. This rule of the common law, judged by the standards of to-day, rested on a foundation that was neither just nor enlightened. It had its origin in an age when the many phases of our modern civilization, which must have impelled the Legislature to act, did not exist. During the nineteenth century the world witnessed many and important changes. National isolation passed away. International communication became universal. All civilized mankind were brought together in commercial, social, and intellectual intercourse. Foreign travel became general. The result of these conditions was that the old prejudice against the foreigner practically disappeared. Out of this complete revolution in the character of international relations there arose a condition in the world of labor having a direct bearing on the question we are considering. Throughout the last century the emigrants from many lands came to us in constantly increasing numbers, swelling the ranks of labor, and a majority of them ultimately attaining the dignity of citizenship. Many of these toilers in mines, on public works, railroads, and the numberless fields of manual labor, receive a moderate wage, and are compelled to leave in foreign lands those who are dependent upon them and for whose support they patiently work on, indulging the hope that ultimately they may bring to these shores a mother or wife and children.

The principle underlying the legislation we are considering is manifestly the protection of those who suffer pecuniary loss when a laborer or servant is killed by the negligent act of the individual or corporation employing him. The clear intention of the Legislature is that the negligent employer shall

no longer escape the consequences of his act by the death of his servant, but shall respond in damages to those who have suffered pecuniary loss. It is difficult to conceive of any argument springing from public policy, sound reason, or a proper discrimination between the rights of the citizen and the alien, that should prevent the alien husband, wife, or next of kin of a laborer, killed by reason of his employer's negligence, from receiving those damages that a jury has awarded a local legal representative, who derives his authority from and acts under the control of the Surrogate's Court. The damages are imposed upon a negligent employer as compensation to those who suffer by his act, and there is no valid reason, as it seems to us, why they should not be paid to the survivors, whether residing here or in some foreign jurisdiction. The statute not only benefits the survivors, but protects the laboring man, as it tends to enforce observance by the employer of the rule requiring him to furnish his servant a safe place in which to work. The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into the contract of employment, fully relying upon the statute. The conflict of authority in England and our sister states leads us to deal with this question on principle and to base our answer to it on reasons that are weighty and controlling. In *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, Holmes, C. J., said, in discussing this question (page 268 of 176 Mass., page 387 of 57 N. E. [54 L. R. A. 934, 79 Am. St. Rep. 309]): "It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." Again, at page 269 of 176 Mass., page 388 of 57 N. E. (54 L. R. A. 934, 79 Am. St. Rep. 309), the learned judge, referring to the argument that words of limitation must be read into the statute, said: "We cannot think that workmen were intended to be less protected if their mothers happen to live abroad, or less protected against sudden than against lingering death. In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in." This reasoning of the learned judge meets our approval.

The judgment and order appealed from should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment and order affirmed.

(182 N. Y. 387)

SYRACUSE SAV. BANK v. MERRICK et al.
(Court of Appeals of New York. Oct. 3, 1905.)

1. MORTGAGES — ASSIGNMENT — NOTICE OF FORMER ASSIGNMENT.

On assignment of a bond and mortgage, the delivery of the mortgage without the bond was sufficient to put the assignee upon inquiry and charge him with notice of a former assignment, in which the bond had been delivered without the mortgage.

2. SAME—DILIGENCE.

A bond and mortgage were assigned as collateral, only the bond being delivered. Before record of the assignment, the same bond and mortgage were again assigned; the mortgage only being delivered. No inquiry was made by the second assignee, except that its attorney mentioned the fact that some of the bonds supposed to have been assigned were missing, whereupon the assignor said that they were doubtless in his office, and the assignee's attorney took the assignor's affidavit to the effect that he owned the securities. Held to show that the assignee failed to exercise reasonable diligence in not attempting to learn of the prior assignment.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the Syracuse Savings Bank against Charles H. Merrick and others, as executors of James Tolman, deceased, and others. From a judgment of the Appellate Division (89 N. Y. Supp. 238, 96 App. Div. 581) affirming a judgment for plaintiff, certain defendants appeal. Reversed.

George D. Chapman, for appellants. Will B. Crowley and Ceylon H. Lewis, for respondent.

CULLEN, C. J. The action was brought to foreclose a mortgage held by the plaintiff on certain real estate situate in the city of Syracuse. No defense was interposed to the plaintiff's claim; but two of the defendants, each claiming to be the holder of a mortgage on the land subsequent to that of the plaintiff, sought to have their respective titles adjudicated in the action. No question has been made as to their right to inject such an issue into the suit, and we shall raise none, though it may be doubted whether the plaintiff should have been delayed in the enforcement of its claim to await the settlement of a dispute in which it had no interest. The facts out of which the controversy arose are as follows: The owners of the property, subject to the plaintiff's mortgage, executed on August 2, 1895, a bond and mortgage to one Warner to secure the sum of \$3,398.92 borrowed from him, which last mortgage covered the premises in suit and others. On the same day Warner, to secure payment of a loan of \$3,500, executed and delivered to the appellants' testator, Tolman, an assignment of said bond and mortgage. At the same time Warner delivered the bond to Tolman, but retained possession of the mortgage. The assignment to Tolman was not recorded until November 12, 1902. On May

16, 1900, Warner assigned for value said bond and mortgage, with others, to the respondent the Salt Springs Bank, which assignment was recorded on May 20, 1901. Warner delivered to the respondent the mortgage, but not the bond, which was in the possession of Tolman. The trial court found that the respondent had no actual notice of the assignment to Tolman and took its assignment in good faith and for value; that, while the respondent did not receive the bond, it made due and diligent inquiry as to the rights of other persons to the bond and mortgage, and did not discover that the defendant Warner had not full right to assign the same. On these facts the trial court awarded the bond and mortgage to the bank. That judgment has been affirmed by the Appellate Division by a divided court. From that judgment this appeal was taken.

The appellants contend that the recording act, on the strength of whose provisions title to the bond and mortgage has been awarded to the respondents, does not apply to the present case or affect the rights of the prior assignee of a bond and mortgage whose assignment is not recorded as against a subsequent assignee who records his assignment. It has been decided that an assignment of a mortgage is a conveyance of real estate, within the meaning of the recording act. *Westbrook v. Gleason*, 79 N. Y. 23; *Decker v. Bolce*, 83 N. Y. 215; *Bacon v. Van Schoonhoven*, 67 N. Y. 446; *Gibson v. Thomas*, 180 N. Y. 483, 73 N. E. 484. But in nearly all the cases the question arose, not with reference to the rights of rival claimants to the security, but in regard to the rights of subsequent purchasers or lienors on the land itself. The only case in which the question now before us was presented to this court is that of *Kellogg v. Smith*, 26 N. Y. 18, in which the question was not determined; the decision proceeding on another ground. The difficulty in disposing of the question is inherent in the nature of the security. On the one hand, it is contended that as the mortgage is merely collateral or incident to the debt, and as there is no provision for the recording of any assignment of the bond, which is the principal obligation, an assignee's title to the debt or obligation cannot be impaired by the failure to record the assignment, nor can the mortgagor be subjected to a double obligation, to wit, to have his land foreclosed under the mortgage and to be held personally responsible on the bond. This view is strongly presented in the dissenting opinion below. On the other hand, it is contended that by the recording act it was intended to confer a quasi or limited negotiability on bonds and mortgages, and that to accomplish this result it must be held that the title to a bond or evidence of debt, to secure which a mortgage is given, will be defeated by failure to comply with the provisions of the recording act as to assignments of mortgages, what-

ever may be the rule as to the assignment of other obligations. The question is a broad one. In our view, however, its decision is not necessary to a determination of this case, and therefore we leave it open.

As already stated, the learned trial court found as a fact that the respondent made due and diligent inquiry; that it had no notice of the rights of Tolman to the bond and mortgage, nor was it able to discover the same. As the decision of the Appellate Division was not unanimous, the finding is open to examination by this court, and we are of opinion that there is no evidence to sustain it. The failure of Warner to produce the bond at the time of the assignment was sufficient to put the respondent on inquiry, and, if unexplained, to operate as notice of the defect in Warner's title. *Brown v. Blydenburgh*, 7 N. Y. 141, 57 Am. Dec. 506; *Kellogg v. Smith*, supra; *Merritt v. Bartholick*, 36 N. Y. 44; *Bergen v. Urbahn*, 83 N. Y. 49. The only evidence of inquiry or diligence on the part of the respondent is that given by the lawyer who acted for it in procuring the assignment. He testified that, upon his discovery that several of the bonds were not delivered to him with the mortgages, he called the attention of the officers of the bank to that fact and spoke to Warner about it, to which Warner responded: "Well, if any of them are missing, they are doubtless in my office, and I will have them looked up and furnish them to the bank—hand them in." He also took an affidavit from Warner that he owned the securities. With this the subject was dropped, and nothing further was done. Now, so far from this showing due diligence on the part of the assignee, we think it discloses an entire failure to exercise diligence. The learned counsel for the respondent relies on the case of *Munoz v. Wilson* 111 N. Y. 295, 18 N. E. 855, as an authority for the proposition that, where the mortgage itself contains a covenant to pay the debt, the production of a bond is not necessary. In that case, however, it was proved that, while the mortgage referred to a bond, in fact no bond had ever been given. In the present case, however, the respondent was expressly told that the missing bonds were in the assignor's office. After that statement common prudence would have dictated that the assignor be required to produce and deliver the bonds. If on such demand he failed to deliver them, that failure itself would create suspicion.

It is argued that, if the demand had been made, the assignor would have made some other excuse for his failure to produce the missing security. This does not follow, even if we assume the assignor to have acted dishonestly in the transaction. The assignor, however, testified on the stand that at the time of the assignment to the bank, which was one of great excitement on his part, he turned over all his securities to satisfy the bank's claim against him as an indorser, and

that he forgot that he had previously transferred the mortgage to Tolman. If this statement is to be credited, it may very well be that Warner, on discovering that the bond was not in his possession, would have recalled the transfer to Tolman and have refused to assign it to the bank. However this may be, it is no answer to the failure of the bank to make proper inquiry and to obtain the bond to assert that, if it had, the assignor would have told plausible falsehoods to account for his failure to deliver the bond. This might or might not have proved the case. We cannot speculate on it. The same argument was made before the Supreme Court of Massachusetts in *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 82, 1 Am. Rep. 115, where a security was registered in the name of A., trustee, and transferred to the defendant for the trustee's personal benefit. It was urged that the defendant was relieved from making inquiry of the trustee as to the nature of his interest, because the trustee would doubtless have told a falsehood on the subject. It was held that there was no such presumption, and that, even if such conduct on the part of the trustee was probable, it did not relieve the assignee from the duty of making inquiry. The case before us is stronger for the appellant than that of *Kellogg v. Smith*, supra. In that case the assignor stated to the assignee that the bond and mortgage which he failed to produce were locked up in the safe of his agent, who, at the time, was away. It was held that despite this excuse the nonproduction of the bond and mortgage was sufficient notice to deprive the assignee of the benefit of the recording act. In the present case, if the story told by Warner to the bank's lawyer had been true, the bond was immediately accessible.

The judgment of the Appellate Division, and that part of the judgment of the Special Term appealed from, should be reversed, and a new trial granted; costs to abide the event.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(182 N. Y. 400)

SANDER v. STATE.

(Court of Appeals of New York. Oct. 3, 1905.)

EMINENT DOMAIN—STATUTORY PROVISIONS—DAMAGES RECOVERABLE.

Under Laws 1901, p. 1787, c. 729, authorizing the presentation to and allowance by the Court of Claims of claims for damages suffered by the improvement of Park avenue, but providing that the award should include no damages for which any railroad company might be liable, it is error for the Court of Claims, on the trial of such a claim, to admit evidence showing a decrease in the value of the property after the date on which railroad companies began to run their trains.

Appeal from Supreme Court, Appellate Division, Third Department.

Claim by Frederick W. Sander against the state of New York. From a judgment of the Appellate Division (85 N. Y. Supp. 1146, 90 App. Div. 618), affirming a judgment for claimant, the state appeals. Reversed.

Julius M. Mayer, Atty. Gen., for the State. Frank S. Black, James C. Busby, and Henderson Peck, for respondent.

CULLEN, C. J. This is a claim made against the state by an abutting owner for damages caused to his property by the elevation of the tracks of the New York & Harlem Railroad Company on Park or Fourth avenue in New York City. This improvement has been the occasion of so much litigation, which has reached not only this court but the Supreme Court of the United States, full details of which are found in the Reports, that it is now necessary to refer only to the particular questions presented by this appeal. In the case of *Lewis v. New York & Harlem R. R. Co.*, 162 N. Y. 202, 56 N. E. 540, this court, while holding the railroad company liable for damage to abutting property caused by the maintenance of the viaduct and the operation of the trains thereon, decided that such liability on the part of the railroad company commenced only when it entered upon and used the structure. That decision was made in February, 1900. The next year the Legislature enacted chapter 729, p. 1787, of the Laws of 1901, which authorized the presentation to and allowance by the Court of Claims to property owners of claims for damages suffered by the improvement made on Park avenue. This authority was subject to two qualifications: First, that the award should not include any damages for which any railroad corporation was or might be liable; second, that the facts proved should be such as to make out a case of liability were the state a corporation or private individual. Under this statute the Court of Claims, by a divided court, has awarded the respondent a judgment for the diminution of the rental value of his premises occasioned by the improvement, and that judgment has been affirmed by the Appellate Division.

While we feel constrained to reverse the judgments below on account of an error committed by the trial court in the award of damages, which we will point out later, we think it proper to first dispose of several objections interposed by the learned Attorney General to the right of the respondent to recover at all. In the first instance it is contended that the case proved established no liability on the part of the state; that therefore it did not fall within the terms of the statute; that its allowance would be a mere gratuity, and forbidden by sections 9 and 10 of article 8 of the Constitution. In support of this claim it is urged that the state, in improving the street, trespassed on no prop-

erty rights of abutting owners, and that the erection of the viaduct gave such owners no right to compensation. It is true that such was the doctrine held by this court in the cases of *Fries v. New York & Harlem R. R. Co.*, 160 N. Y. 270, 62 N. E. 358, *Muhlker v. New York & Harlem R. R. Co.*, 173 N. Y. 549, 66 N. E. 558, and *Keirns v. New York & Harlem R. R. Co.*, 173 N. Y. 642, 66 N. E. 1110. But on appeal to the Supreme Court of the United States the *Muhlker Case*, with several others which followed that decision, was reversed; the Supreme Court holding that under the decisions of this court in the elevated railroad cases abutting owners had special easements in a street, an invasion of which by the erection of a viaduct, without compensation for such invasion, was taking property without due process of law, in contravention of the federal Constitution. Of course, with the decision of the Supreme Court in the *Muhlker Case*, our own decisions in the cases cited have ceased to be authorities. Were further answer necessary, it may also be said that in the recent case of *Matter of Borup*, 182 N. Y. 222, 74 N. E. 838, we have upheld the constitutionality of a law directing a town to make compensation for a previous change of grade in a highway, although at the time the change was made there was no liability on the part of the town for the damage occasioned thereby.

It is next contended that, whatever liability there may have existed for the trespass on the respondent's property rights, that liability was on the part of the city, not on the part of the state. This position, also, is not well taken. In the *Lewis Case* Judge Vann said on this subject: "The state created a board of experts, and required them to make the improvement for the benefit of the public, giving them absolute control, with no right on the part of the defendants to let or hinder. * * * The change of grade in front of the plaintiff's premises was not only for a public purpose, but was wholly in the interest of the public, and not for the benefit of the defendants, who had no power to prevent it. They simply paid one-half of the expense by command of the statute, and hence under compulsion of law. They are not liable for the acts of the Park avenue board, which was not their agent, but a governmental agency of the state." It is true that in the case then before the court the question of liability between the state and city did not arise. But the statement of Judge Vann that the Park avenue board was a governmental agency of the state was well justified, both on principle and on authority. The liability on the part of a municipality, even for the acts of municipal officers, occurs only when the acts are done in the discharge of a duty or a function imposed upon the municipality itself as such. Thus a municipality is not liable for the negligent acts of the employes of the city department of charities; for the support and care

of the poor is not a municipal, but a governmental, function. *Maxmillian v. Mayor, etc.*, of New York, 62 N. Y. 160, 20 Am. Rep. 468. In *New York & Brooklyn Sawmill Co. v. City of Brooklyn*, 71 N. Y. 580, commissioners appointed under an act of the Legislature to improve the Gowanus Canal, and to cause the sides thereof to be docked and the expense to be assessed on adjacent property owners, had so negligently done the work that the docks sank and became unfit for use. Thereafter by another act of the Legislature the common council of the city were required to cause the docks to be rebuilt at the expense of the city. An action was brought against the city for the failure of the common council to comply with this legislative mandate. It was held that the duty to rebuild the docks was imposed, not on the city, but upon the common council as agents of the state, and that the city was not liable for the default of the common council. So in the case before us, while it is doubtless true that the Legislature might have imposed upon the city the duty of making the Park avenue improvement, as a matter of fact it did not, but imposed the duty upon a specially created board of officers or commissioners, who were not agents of the city, and for whose acts the city was not liable.

Finally, it is contended that the railroad companies were responsible for all the damage caused to the abutters from the time the work was commenced. To this claim the decision in the *Lewis Case* is a conclusive answer. It was there held, as appears by the quotation from Judge Vann's opinion already given, that the railroad companies became liable for the trespass on the property rights of the abutters only from the time they entered upon and used the viaduct which caused that trespass. Till that time the trespass was solely caused by the action of the state commissioners or agents. It is urged that the state under its reserved power to amend the charter of the railroad company might have compelled the company to have done the work. Possibly this may be so, but it is unnecessary to discuss the question. It is sufficient to say the state did not require the railroad company to do the work, but did it itself.

We are now brought to the error made by the Court of Claims in its award of damages. Under our view of the law and our construction of the statute, the state was liable for any damages inflicted on claimants' property up to the time the railroad companies began to run their trains over the viaduct. This date is fixed, not only in this record, but in other litigations, as being February 16, 1897. Testimony was admitted, some of it against the objection and exception of the state, showing diminution in rental value subsequent to the date mentioned. This was plain error. The learned counsel for the appellant contends that the error was rendered

harmless and cured by the withdrawal by the respondent of any claim for damages subsequent to February 16, 1897. If such withdrawal had been made, we agree with the counsel that it would cure the error. But the difficulty is the withdrawal was not as broad as claimed. The respondent had sold and conveyed the property, the injury to which is the subject of the suit, on April 29, 1898, and his claim was necessarily limited to damages accruing prior to that time. At the close of the evidence the following colloquy between the court and counsel occurred: "Mr. Busby: If the court please, the claimant desires to have it appear on the record that no claim is made in this case for any injury to his property caused by the operation of trains on the completed viaduct, in so far as those trains were operated by the railroad company. Judge Saxton: Now, what do you mean by the completed viaduct, the operation of the trains after April 30th? Of course it will be claimed here probably that the viaduct was completed in 1897, as we take it. Mr. Busby: We will make that a little different, if your honor please, so as to make it perfectly clear, and will strike out the last. The claimant states that in this case he makes no claim for injury to his property by the operation of trains on the metallic viaduct subsequent to February 16, 1897. Mr. Stevens: That is to meet the enabling act, is it not? Mr. Busby: Yes, sir. Judge Saxton: Then what do you claim? Mr. Busby: We claim damages from the existence of the viaduct. We say that the viaduct depreciated the rental value of the property up to 1896, and that depreciation continued down to 1898; but it was further accentuated by the operation of the trains. Now, that further decline from 1896 to 1898 we could not recover for under this stipulation. Judge Saxton: We understand that there is no claim at all for the continuing of this viaduct after April 29, 1898? Mr. Busby: That is correct."

From this colloquy it seems to us very clear that the respondent did not withdraw all claim for damages occurring subsequent to February 16, 1897, but only his claim for increased damages caused by the operation of the trains on the viaduct, as distinguished from the damage caused by the presence of the viaduct itself, and that he claimed compensation for such last-mentioned damage up to the time he parted with the property on April 29, 1898. Now, it may be that, if the person who erected the unlawful structure (unlawful as against abutters) had been any one else than the state, he would have remained liable for the damages caused by the structure until the structure was removed or compensation made for the property rights affected thereby. It may also possibly be that in a certain sense the state continued liable, the same as a private corporation would have been. But, whatever may have been its liability, the state, being sovereign,

can be sued only by its own consent. By the statute of 1901 it has consented to suit against it for the damage inflicted on property abutting on Fourth or Park avenue only to a limited extent; that is to say, only till the time at which the railroad company, either alone, or as well as the state, became liable for the trespass. Now, as appears by the Lewis Case, from February 16, 1897, when the railroad companies took possession of the viaduct and ran trains thereon, they became liable, not only for the damage caused by the mere operation of the trains, but for the whole damage occasioned subsequent to that time by the maintenance of the structure, as well as by the operation thereon of the cars and engines. The award of damages made to the plaintiff covers a period of only five years. Hence the allowance of damage from February 16, 1897, to April 29, 1898, fully a fifth of that period, constitutes a substantial error that cannot be disregarded. For this error we feel constrained to reverse the judgments below and direct a new trial.

The judgment of the Appellate Division and of the Court of Claims should be reversed, and a new trial granted; costs to abide the event.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(182 N. Y. 408)

WILSON v. HINMAN.

(Court of Appeals of New York. Oct. 3, 1905.)

DIVORCE—ALIMONY—SECURITY—TERMINATION OF LIEN.

Under Code Civ. Proc. § 1772, providing that, where a judgment requires a husband to provide for the maintenance of his wife, the court may in its discretion direct him to give reasonable security for the payment of the sums required, the lien of a mortgage given to secure performance of a decree awarding a wife alimony annually during life terminates on the death of the husband.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 689, 699.]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Mary H. Wilson against Charles N. Hinman. From a judgment of the Appellate Division (90 N. Y. Supp. 748, 99 App. Div. 41), affirming interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

Harvey D. Hinman and Lewis Seymour, for appellant. Henry A. Yetter, for respondent.

CULLEN, C. J. This action is brought for the foreclosure of a mortgage. The complaint states that the plaintiff recovered a judgment of absolute divorce against one Balis L. Hinman, by which judgment, as

amended, the plaintiff was awarded as alimony the sum of \$300 annually "so long as she shall live, to be paid by the said defendant in equal monthly payments"; that said judgment further provided that the defendant in the action should give security for the payment of such alimony by the execution and delivery of a mortgage on certain specified real estate; that in pursuance thereof that defendant and the defendant in this action, to whom it is alleged said real estate had been fraudulently conveyed, executed a mortgage to the plaintiff, conditioned for the payment of said alimony to her as long as she should live. The complaint further alleged the death of Balis L. Hinman, the defendant in the divorce action, and that default had been made in the payment of the installments accruing subsequently to such death. The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action. At the Special Term the demurrer was overruled, and that decision was affirmed by the Appellate Division, from the judgment of which an appeal is taken by certification to this court.

The objection to the maintenance of the action raised by the demurrer is that the obligation to pay alimony ceased with the death of the defendant in the divorce suit, and that is the question we are now called upon to determine. Clearly, at common law, the obligation ceased with the expiration of the life of the husband; but the common law granted no divorce which dissolved the marital tie between the parties, the divorces awarded by the ecclesiastical courts being merely what are known in this country as "separations." Moreover, it is settled law with us that the jurisdiction of courts over divorces is statutory, not inherent, and that the powers of the court are to be determined by the provisions of the statutes. Nevertheless, the principles on which alimony was awarded in the ecclesiastical courts have been generally adopted by the English courts in actions for absolute divorce which have been authorized by recent legislation, and to a certain extent have been followed by the courts of this country. It cannot be denied, however, that on the question whether the obligation to pay alimony survives the death of a husband there is great conflict between the decisions of the courts in the various states, though the preponderance of authority is to the effect that it does not survive. *Knapp v. Knapp*, 184 Mass. 353; *Smith v. Smith*, 1 Root (Conn.) 340. This conflict in authority is, as shown by a recent text-writer (*Nelson on Divorce*, §§ 980, 982), principally occasioned by the differing views entertained by the courts as to the nature of alimony awarded in a decree for absolute divorce under the statutory provisions of the various states. Of course, alimony awarded on the dissolution of a marriage differs in one element from that on a

separation. In the latter case the decree merely defines the continuous duty still existing on the part of the husband to support the wife, while in the former the marital obligation is terminated, and the sole liability of the husband towards the wife springs from the decree. In some states, therefore, a judgment of absolute divorce has been considered as a decree settling the property rights of the parties and as a distribution of the assets of the quasi partnership hitherto existing between them (a view in cases justified by the statutory law of the state), while in others alimony awarded by a final decree has been considered as essentially of the same character as the right of support which the wife loses by the dissolution of the marriage. It is the latter view which has been adopted by all the recent decisions of this court. Thus in *Matter of Ensign*, 103 N. Y. 284, 8 N. E. 544, 57 Am. Rep. 717, Judge Finch, while holding that a divorced wife could not share in the estate of an intestate, said: "The court is authorized to give by its decree, in the form of an allowance, a just and adequate substitute for the right of the innocent wife (the right of support to which he had previously alluded) which the divorce cuts off and forbids in the future." In *Romaine v. Chauncey*, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, it was held that the alimony awarded to an innocent wife by a decree of divorce in her favor is an allowance for her support and maintenance, the award of which is not the enforcement of a simple debt from the husband, but of his marital obligation of support, from which he would be relieved by the dissolution of the marriage, were it not for the decree. In *Wetmore v. Wetmore*, 149 N. Y. 520, 44 N. E. 169, 33 L. R. A. 708, 52 Am. St. Rep. 752, the doctrine of the *Romaine* Case, that alimony is founded upon the marital obligation of support, was reaffirmed, and it was held that a divorced wife was entitled to have the income of a trust fund created for the benefit of her husband applied upon that alimony.

It is true that in two cases (*Walker v. Walker*, 155 N. Y. 77, 49 N. E. 663, and *Livingston v. Livingston*, 173 N. Y. 377, 66 N. E. 123, 61 L. R. A. 800, 93 Am. St. Rep. 600) we have held that, where a decree of divorce contained no reservation of the right to modify the award of alimony, the court was without power to make such modification, and that the Legislature could not confer that power in the case of decrees entered prior to the enactment of the statute. We there held that the right of the plaintiff was a property right of which she could not be deprived. Those decisions, however, did not proceed on any theory that alimony was merely a debt. They recognized that the foundation for an award of alimony rested in the marital obligation of the husband's support, but held that, the obligation theretofore indefinite having been liquidated

by the divorce decree at a specific sum, the adjudication was final. If this view of the nature of alimony be correct, then it seems clear on principle that the obligation to pay it ceases at the death of the husband. A wife's right of support does not survive her husband's life as a claim against his estate. On the death of the husband the wife has her dower in his real estate, if he was possessed of any, and her share in the personality if he died intestate. The husband, if he choose, may dispose of all his property by will to the exclusion of the wife. It is difficult to see why the rights of the divorced wife should be greater than those she would have enjoyed had she not been divorced. Moreover, there is this practical objection to considering the decree for alimony as surviving the demise of the husband. In this country, at least till very recent times, the class of persons whose income is derived solely from accumulated wealth is comparatively small. The income of most men is derived from their professional or business exertions, and the award of alimony is usually based on such an income, not on one accruing from accumulated property. An allowance of an amount which it would be entirely just that a man should pay during his life to the wife whom his misconduct has compelled to seek a divorce might be grossly extravagant if imposed as a charge upon his estate after his death, and very unjust to other claimants on his property.

The respondent relies upon the case of *Burr v. Burr*, 10 Paige, 37, as a controlling authority upon the question before us. The opinion of the chancellor in that case certainly does decide the question in his favor, but we are of opinion that it is not controlling. The case was carried to the Court of Errors and is reported in 7 Hill, 207. The report of the case shows that in the Court of Errors the substantial contest was as to the amount of the alimony, there being in none of the opinions any discussion as to the period during which the alimony should be paid. Moreover, the case arose under a statute different in its terms from the present law. It provided that the court might make decree for the suitable support and maintenance of the wife by the husband, "or out of his property, as may appear just and proper." 2 Rev. St. (1st Ed.) pt. 2, c. 8, tit. 1, p. 147, § 54. Now the provision is that the court may require the defendant to provide for the support of the plaintiff as justice requires. Code Civ. Proc. § 1759. Thus the court is now empowered only to impose a personal obligation upon the defendant. It cannot deprive him of his property, though it may compel him to give security for the discharge of his obligation, to which I shall allude hereafter. Moreover, the authority of *Burr v. Burr* has been much shaken, if not entirely overthrown, by the recent decision of this court in *Johns v. Johns*, 166 N. Y.

613, 59 N. E. 1124; affirmed on opinion below 44 App. Div. 533, 60 N. Y. Supp. 865. In that case a divorced wife brought an action against the executor of a deceased husband to enforce the payment of alimony awarded her by a decree of divorce. It was held that the obligation to pay alimony ceased at the death of the husband and did not survive against his estate. That case can be differentiated from the one before us only in one respect. In the present case the husband was directed to give security for the performance of his obligation, out of which direction sprang the mortgage in suit, while in the *Johns* Case there was no such direction. On this difference in circumstance there has been founded a doctrine suggested in *Galusha v. Galusha*, 43 Hun, 181, and apparently adopted by the learned Appellate Division in this case, that a general award of alimony against the husband terminates at his death; but, if he be directed to give security for its payment, it survives. Such a doctrine can rest on no solid foundation. Section 1772 of the Code provides that "where a judgment rendered, or an order made * * * requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose." This section does not purport or assume to grant to the wife alimony for any longer period, nor impose upon the husband or his estate any greater obligation than that awarded by the previous provisions of the decree. It is merely security for the performance of the obligation already imposed that the court is authorized to require. It would be an unnatural construction to give it any other effect. The security required might not be in the shape of a lien on any specific property, but merely the personal obligation of sureties. In that case it would hardly be contended that the obligation of the sureties would extend beyond that of their principal. There is nothing in the opinion rendered by Judge Hatch in the *Johns* Case that supports such a doctrine. On the contrary, the court expressly declined to pass upon the question, as it was not involved in the case. It may very well be that by the agreement of the parties alimony might be awarded in a different form from that provided for in the statute; that is to say, the parties might agree that a gross sum should be paid as alimony, or that an allowance should be made to the wife which would bind the husband's estate after his death. An agreement of that character would in no way contravene public policy, and the performance of it would, doubtless, be enforceable by the courts. It is on this

ground that the decision in *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417, proceeded. The present case is barren of any such feature.

The judgments appealed from should be reversed, and the complaint dismissed, but without costs in any court. The question certified should be answered in the negative.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgments reversed, etc.

(216 Ill. 537)

PEOPLE ex rel. HANBERG, County Treasurer, v. CITY OF CHICAGO.

(Supreme Court of Illinois. June 28, 1905.)

TAXATION—SCHOOL PROPERTY — PROCEEDS — RENTS.

Property received in exchange for property granted for the use of schools, and likewise rents of the property so received, is "proceeds," within Const. 1870, art. 8, § 2, providing that property granted for school purposes and the proceeds thereof shall be applied to the object for which such grant was made; and therefore such property and the rents are not subject to taxation.

Appeal from Cook County Court; L. C. Ruth, Judge.

Application by the people, on the relation of John J. Hanberg, county treasurer and ex officio county collector of Cook County, for judgment against lands for delinquent taxes. The city of Chicago, in trust for the use of schools, entered objections, which were sustained, and relator appeals. Affirmed.

Rehearing denied October 24, 1905; Cartwright, C. J., and Ricks and Scott, JJ., dissenting.

James H. Wilkerson, Co. Atty., William F. Struckmann, Asst. Co. Atty., and John C. Richberg, for appellant. John P. Wilson and Orville Peckham (Isham, Lincoln & Beale, of counsel), for appellee.

BOGGS, J. The fee of lot No. 17 in county clerk's subdivision of block 119, in the School Section Addition to Chicago, and the east one-half of the private alley west of and adjoining this lot, except the improvements thereon and leasehold interest therein, was returned by the county treasurer of Cook county as delinquent for the taxes for the year 1903, and the county treasurer and ex officio collector of Cook county filed his application in the county court of Cook county for a judgment against, and for an order of sale of the fee in, the said premises. Taxes against the leasehold interest and the improvements thereon were assessed and extended in the sum of \$6,040.41, and were paid by the lessees.

By the first clause of the sixth section of the act of Congress approved April 18, 1818, c. 67, 3 Stat. 430, which authorized the people of Illinois to organize a state government,

it was enacted that "the section numbered 16 in every township * * * shall be granted to the state, for the use of the inhabitants of such township, for the use of schools." Said lot 17 is a part of section 16 of the town in which it is located. This lot was thereafter sold by the proper authorities for a valuable consideration, and through various meane conveyances the title to the same, in the year 1860, again became vested in the United States, and was used by the national government for a post-office site until after the great fire in Chicago, which occurred in 1871. In the year 1873 the United States made an even exchange of this property for a certain other lot, also located in said original section 16, and which had never been sold or conveyed since it was originally granted by the United States, and, upon said exchange being consummated, the title of the property in question vested in the city of Chicago for the use of schools. On July 16, 1900, the board of education of the city of Chicago demised the premises to the National Safe Deposit Company for a term of 99 years from the 1st day of July, 1900, the rent reserved being \$50,148 per annum to July 1, 1908, and \$54,000 per annum during the remainder of the term, which rent was made payable quarterly in advance. In addition thereto the lessees covenanted to pay all water rates and all taxes, duties, and assessments, general and special, levied or assessed upon the premises during the continuance of the lease. A building not owned by the school authorities, which is used for various business purposes, stands on the premises. The city of Chicago, in trust for the use of schools, filed objections to the application of the county treasurer and ex officio collector for judgment and order of sale of the fee. The court entered a judgment sustaining the objections and denying the application, and an appeal to this court has been prosecuted.

It is objected that the taxation of the fee of this property is forbidden by section 2 of article 8 of the Constitution of 1870, which reads: "All lands, moneys, or other property, donated, granted or received for schools, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made." These premises, having been received in exchange for another portion of school section No. 16, are to be regarded as "proceeds" of lands granted by the general government for schools purposes. "Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such proceeds as one thinks best will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with, and the lands received would be the proceeds." *Phelps v. Harris*, 101 U. S. 380, 25 L. Ed. 855. In *City of Chicago v. People*, 80 Ill. 384, an attempt had been made to tax lands which had been purchased by the city,

in its capacity of trustee for the schools, at a sale made under a decree foreclosing a mortgage which had been given to secure the loan of funds arising from the sale of school lands in section 16, and this court there held that under the constitutional provision above quoted the Legislature was without power to appropriate any portion of this fund to defray the expenses of municipal bodies other than those created for public school purposes, and as the lawmaking body could not so appropriate it directly, it could not so appropriate it by the indirect means of taxation, "because so much as would be taken from the fund by taxation would be an unconstitutional perversion of the fund to that extent." This holding was on the theory the lands procured through the foreclosure proceedings were "proceeds" of lands in the school section. But it is argued that the income realized from the premises by way of rents is not to be regarded as "proceeds," and therefore not within the prohibition of said section 2 of article 8 of the Constitution of 1870; that the property proposed to be taxed in *City of Chicago v. People*, supra, was nonproductive, and the right to tax it was denied because to tax it would be to take the amount of the tax from the corpus of the fund; that the property here involved produces an annual income by way of rents, and that taxes may be imposed on the fee of the premises to an amount not exceeding the income thereof without a depletion or reduction of the fund; and that, though the income be so applied to the payment of taxes, the fund itself—the premises—may still "be faithfully applied to the objects for which such gifts or grants were made," and that this is all that is required by the organic law of the state. We think that the annual sums received as rental for the property here sought to be taxed are to be regarded as the "proceeds" of lands granted for schools purposes, and that to seize it in discharge of taxes would be an unconstitutional perversion of the "proceeds" of lands which had been so granted. What is the meaning to be given the word "proceeds" when lands are the subject-matter to which it is to be applied? If the title of land is disposed of, that which is received therefor, whether money or other lands, is, as we have seen, properly called the "proceeds" of the land. If the land be retained, and not disposed of, that which it produces by way of rents or issues constitutes the "proceeds" thereof. In *Hunt v. Williams*, 126 Ind. 495, 26 N. E. 177, it was said: "A devise of the proceeds of real estate is not materially different from a devise of the income." It was at one time seriously questioned whether school lands in section 16 could be lawfully sold. If such power was lacking, it is clear the word "proceeds" could only relate to the rents or issues of the land. In *Bradley v. Case*, 3 Scam. 585, the court, by a bare majority, determined that the General Assembly might authorize the sale of the land in school sections numbered 16

While then considering whether the Legislature might lawfully authorize the sale of school lands in section 16, we said: "Whether they shall be leased for a term of years, rented annually, or sold, and the proceeds in either case applied, according to the compact, to the use of schools, appears to be a proper subject of state legislation." The view thus expressed that the word "proceeds" embraced that which should be received, whether from the sale of the lands or from the rental thereof, we still think to be correct. This expression was that of a majority, only, of the court, but the dissenting member held that the lands could not be sold, but must be retained by the school authorities. If so retained, the schools could only be benefited by some use to which the land might be applied, and the proceeds of such use, namely, rents, would constitute the only beneficial interest of the school therein. The right of the proper school authorities to lease school lands in school section 16 is not now questioned, and as to such land the word "proceeds" is to be given the sense or meaning of "income." Being "proceeds of lands granted for school purposes," it cannot be appropriated by indirect means of taxation to other and different purposes. If school lands be sold, and money received therefor, it becomes the duty of the proper school authorities to loan the money, and the interest received thereon is properly embraced within the meaning of the word "proceeds" of such moneys. It must be applied to school purposes, and cannot be diverted, by way of taxation, to other and different uses. And the same rule logically applies to and controls moneys received by the school authorities from rentals of the school lands.

The judgment of the county court must be and is affirmed.

Judgment affirmed.

(216 Ill. 545)

BURKE et al. v. HULLETT.

(Supreme Court of Illinois. June 23, 1905.)

1. LANDLORD AND TENANT—DEFECTIVE PREMISES—FAILURE TO REPAIR.

Where a landlord retains control over the passageways of a building, which are used in common by the tenants he is liable for injury occasioned by his negligence in failing to keep them in repair, after notice of their dangerous condition, or after the defect has continued a sufficient time to charge him with constructive notice.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 633.]

2. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The Supreme Court, on the question whether there was any evidence of notice to defendant, cannot weigh the evidence, nor ignore the testimony of an unimpeached witness, and hold there was no evidence tending to establish actual notice.

3. LANDLORD AND TENANT—DEFECTIVE PREMISES—ACTION FOR INJURIES—INSTRUCTIONS.

In action against a landlord for injuries resulting from the defective condition of the premises, a peremptory instruction for de

endant should have been given, where the only evidence that the injury was caused by the defective condition of the premises was that plaintiff was seen to enter the building the evening before her death, without any testimony as to when she was injured, and that her injuries were a punctured wound several inches deep, and it was not shown that such an injury could have been produced by breaking through a rotten floor.

Appeal from Appellate Court, First District.

Action by Maffett Hullett, as administrator of the estate of Sadie Harrison, deceased, against John L. Burke and others. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendants appeal. Reversed.

Rehearing denied October 24, 1905.

Foster & Bradley (Thomas E. D. Bradley, Wm. Elmore Foster, John C. Stetson, and Wm. J. Weldon, of counsel), for appellants. Robert M. Mitchell and Josiah Burnham (John Stuart Roberts, of counsel), for appellee.

WILKIN, J. This is an action brought by appellee, administrator of the estate of Sadie Harrison, deceased, against appellants, as owners of a certain building, to recover damages for the death of his intestate. The first count of the declaration alleges that appellants were on March 30, 1901, the owners and lessors of a certain tenement house containing numerous apartments or rooms, with common passageways, landings, and stairways leading through said house to the various apartments or rooms of the same, and which passageways, stairways, etc., were used in common by the various tenants of said building, and that the defendants exercised control over said stairways, passageways, and landings; that it was their duty to keep said passageways, landings, and stairways in reasonably good and safe repair for the purpose of ingress and egress to and from said apartments; that they neglected to keep the same in good and reasonable repair for the uses and purposes aforesaid, and on account of defects in said premises the said Sadie Harrison, while then and there walking along and upon said passageways, landings, and stairways for the purpose of ingress to and egress from one of the rooms or suite of rooms in the said tenement house to the street, alley, or court, as by law she had a right to do, using all due care and caution for her own safety, stepped in and upon a certain decayed and rotten board in said passageway and landing, and tripped, stumbled, and fell through, upon, and against one of the said decayed, rotten, and insecure boards in said passageway, landing, and stairway, and was then and there violently thrown forward and fell in and upon the landing there with great force and violence, by reason whereof she was then and there hurt, cut, and wounded, becoming sick, sore, and disordered, and as a result of

the said injury so received she died on the 31st day of March, 1901. The second count is substantially the same as the first, with the additional allegation that a portion of said premises was leased to Mary MacMiens; that one Hanratty was at the time of the accident a lodger and roomer in her apartment; that the deceased, at the time of the accident, was upon the said premises by the invitation and request of said Hanratty, and, while she was taking articles of laundry into said apartment, she stepped upon a rotten and insecure board on the porch, landing, or stairway in the said premises and was then and there injured, as a result of which she died. To the declaration the defendants filed a plea of not guilty, and upon a trial before the court and a jury, at the close of all the evidence, they requested the court, in writing, to instruct the jury to find them not guilty, which was denied. The case was then submitted upon the arguments of counsel and instructions of the court, and a verdict was returned in favor of the plaintiff for \$1,000. A motion for a new trial being overruled, judgment was entered upon the verdict. An appeal was prosecuted to the Appellate Court for the First District, where the judgment below was affirmed, and from the latter judgment this appeal has been taken. The only ground of reversal insisted upon here is that the trial court erred in refusing to give the instruction to find for the defendants. The following facts appeared from the evidence: On the evening of March 30, 1901, about 9 o'clock, the deceased, an unmarried colored woman some 40 years of age, engaged with her mother in carrying on a hand laundry in the city of Chicago, was seen to enter the premises described in the declaration, owned by the defendants, for the purpose of delivering laundry to one of the tenants in said building. So far as the evidence shows, she was neither seen nor heard of again until the next morning, when a physician was summoned, and found her lying upon a couch in a room occupied by one Hanratty, the tenant to whom she delivered the laundry. Upon examination the physician found a wound below the knee of one of her limbs, from which she was bleeding, and had already lost a large quantity of blood. This physician did not attempt to give a description of the wound. She was soon after taken to her home, and another physician summoned by her mother, who testified that he found a ragged wound some four or five inches below the knee, to the right and on the inner side, in the fleshy part of the leg; that he probed the wound, and found it two or three inches in depth. The witness says: "I found the probe entered something like 1½ to 3 inches. I am of the opinion that the wound was made by some ragged instrument, something blunt, some kind of an instrument that was not keen or sharp. She was in a dying condi-

tion." He also testified that he had treated her for varicose veins in both legs, but not for six or eight months. Several witnesses testified that on the porch outside of the door to the room where she was found there was a broken board, around which there was blood, indicating that some one had broken through the floor and been injured, and the theory of plaintiff's case is that the deceased was injured in that manner. A police officer, who was called to the room that morning, testified, among other things: "I entered the premises in the rear, through the court. There is a driveway a little to the rear of Burke's meat market. Between the meat market and this house there is a little porch two or three steps high from the ground in the rear. I saw a hole in the porch just as you go in the door. I saw some blood, which had been swept away. Some one had swept over it. The boards in the walk were lengthwise toward the building. It looked as if one board had broken through, six inches wide, but the boards on each side of it were not broken. Only one place was broken." On cross-examination he said: "I was called there about half-past seven in the morning. I found this man Hanratty, and I believe the doctor was there. It was Dr. Simpson, the first witness. I know nothing about how she got hurt, or what occurred, except what I was told. The hole was deep enough to let a man's foot in down to the knee. The break in the porch had been swept over, and I could not tell whether it was a fresh or old one." Another witness, who testified that he examined the premises with a view of making a diagram, some time after the accident, testified: "I found a hole at the rear on entering the back door of the premises occupied by MacMiens and Hanratty. This hole was covered over with a piece of soap box. I took off the piece of soap box and took a piece of wood off of there that was all covered with blood. The hole was made between two stringers in the plank. The plank was rotten, and there was a piece of light wood in the plank that had been broken through. There are stairs that go up to the east flat and stairs that go up to the west flat immediately off of the landing. The paper I showed you is the best I could do by way of making an accurate drawing of the rear of these premises. The piece of board was taken from there. It has been in my possession since that day. I got it after the accident. The boards in the landing were rotten, dirty, and decayed. They were common, ordinary pine boards; I should say from four to six inches wide, lying in a direction from the entrance to the door. There were two or three steps from the ground up to the landing."

The building at which it is claimed the injury occurred contains six flats; the one in which the deceased was found being rented by Mrs. MacMiens, and one of the rooms

sublet to Hanratty. There were stairways, hallways, and passageways in the building, which were used in common by the tenants to go to and from their several apartments; and the evidence tends to show that the place at which the broken board was found was in one of these passageways used in common by the tenants. One ground upon which appellants claim the court erred in refusing to take the case from the jury is that there was no proof offered tending to establish their duty to keep the place in question in repair. The law is that where a landlord rents all of the premises to a tenant or tenants, retaining no control over any portion of the same, he is not liable to keep the property in repair in the absence of a contract or covenant to do so; and there is no duty imposed upon him to make repairs, nor is he liable to a tenant or other person for injuries resulting from a defective condition of the leased premises. *West Chicago Masonic Ass'n v. Cohn*, 192 Ill. 210, 61 N. E. 439, 55 L. R. A. 235, 85 Am. St. Rep. 327. But where only a portion of the premises are rented, and the landlord retains control over other parts of the same, such as stairways, passageways, and halls, or where he rents the premises to several tenants, retaining control over a part of the same for the common use of the several tenants, a different rule applies. As stated in the *American and English Encyclopedia of Law*, vol. 18, (2d Ed.) p. 220: "The rule laid down by the weight of authority is that, where the landlord leases separate portions of the same building to different tenants and reserves under his control those parts of the building and premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control. Thus it is held by the weight of authority that an implied duty is imposed upon the landlord to keep in repair common passageways and approaches retained under his control and used by the several tenants as the means of access to the portions of the premises demised to them, and that the landlord is liable for injuries received by a tenant because of the landlord's negligence in performing this duty." The same principle is announced in *Payne v. Irvin*, 144 Ill. 482, 33 N. E. 756. In such case the landlord is liable for injury occasioned by his negligence in failing to keep the premises in repair, and, of course, he can only be charged with negligence for such failure after notice of the existence of the dangerous condition of the same, or after the defect has continued for a sufficient length of time to charge him with constructive notice thereof. On this question the testimony on behalf of the plaintiff is very unsatisfactory. A witness named Leddy testified that one of the defendants (Daniel Burke) told him about the woman getting hurt, and that "he said that was the place

where Mr. Hanratty showed him where she went through. He had given orders before he went to Europe [which was before the accident] to have it fixed, but it was fixed too late." This evidence, if entitled to credit, of course tends to prove that the owners knew of the defect. The witness was positively contradicted by Daniel Burke as to the conversation, and all of the testimony in the case is to the effect that the break in the floor was not there previous to the day of the alleged accident. In fact, both counts of the declaration aver that deceased stepped in and upon a certain decayed, rotten, and insecure board, etc., and broke through the same, thus clearly indicating that the theory of plaintiff's case was not that there was a hole in the floor previous to the accident, but that the injury was occasioned by reason of plaintiff breaking through the same. Neither is there any evidence tending to prove that the boards were so rotten and decayed as to produce a patent defect, charging defendants with notice that the place was dangerous. The jury would undoubtedly have been justified in finding in favor of the defendants on the question of notice, disregarding entirely the testimony of Liddy, and we think the Appellate Court, having the right to weigh the conflicting testimony, might properly have reversed the judgment below on that point. In this court the question is whether there is any evidence fairly tending to support the material fact of notice. On this question we are not at liberty to weigh the evidence of the different witnesses, nor can we wholly disregard the testimony of an unimpeached witness. We cannot therefore say there is no evidence fairly tending to establish the fact of actual notice of the defective condition of the floor.

There is another ground, however, upon which we think the peremptory instruction should have been given, and that is the absence of proof that the injury complained of was caused by the defective condition of the floor. Plaintiff was seen to enter the building the evening before her death by three disinterested witnesses, and they each swore positively that she did not at that time fall or meet with any accident. They said, "She entered safely—she did not fall down;" and one of them, speaking of her and Hanratty said, "They went in safely." In view of this uncontradicted testimony the only theory upon which plaintiff's case could rest would be that after entering the room safely she attempted to leave it, and thereby received her injury, and of that fact there is no evidence whatever. Her injury, as described by the physician, was a punctured wound some two or three inches deep, and there is not a particle of testimony in this record from which it can be inferred that such an injury could have been produced by simply breaking through a rotten and decayed floor. The physician also said that the wound appeared to have been caused

by some blunt, dull instrument. Neither he nor any other witness testified that the injury might have been produced by the foot of the deceased breaking through a decayed plank. Common experience and observation teach that an injury caused by the foot and limb passing through an opening of the kind here described would produce an abrasion of the skin, rather than a punctured wound of the depth described.

It is to be remarked that both MacMiens and Hanratty, who were the only witnesses present at the time, died soon after the alleged accident, and this fact doubtless accounts for much of the uncertainty in the evidence as to how the injury was occasioned. But that fact cannot relieve the plaintiff of the responsibility of proving the substantial, material facts of his case. There is a cloud of mystery surrounding the case, leaving it wholly to conjecture as to when, how, and in what manner deceased received the injury which caused her death. While we are not disposed to relax the rule which makes the landlord liable for the failure to keep leased premises in repair in cases of this kind, yet the proof ought to satisfactorily show that he has been guilty of negligence in that regard, and with reasonable certainty establish the fact that the injury complained of was the result of his failure to do so. The latter fact was not proved, nor, in our opinion, did the evidence produced before the jury fairly tend to establish it.

The judgments of the circuit and appellate courts will be reversed, and the cause remanded to the circuit court for another trial.

Reversed and remanded.

(216 Ill. 553)

DOWIE v. PRIDDLE.

(Supreme Court of Illinois. June 23, 1905.)

1. LIBEL—WORDS LIBELOUS PER SE—JUSTIFICATION.

Where a declaration for libel charged that defendant published an article charging plaintiff with being a "vile person," "the very opposite of pious," "a poor, ungrammatical ignoramus," "a heathen man and publican of the worst kind," "a scoundrel," an "insane fanatic," a "poor, insane lunatic," a "low, mean coward," and a "paranoiac" and that he harbored the "intent to kill" defendant; that he was also a "low, degraded person, lewd and depraved," and a "teacher of lewd, adulterous, and polygamous practices"—pleas of justification that plaintiff had, "without cause, abandoned his wife and children," had made "murderous and diabolical prophecies," had "committed adultery," and claimed to have "visions and revelations direct from God," and that he had also stated defendant "would be killed," and that he was "the one to do it," etc., did not justify the charges alleged, and were therefore demurrable.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 219-224.]

2. PLEADING—DEMURRER TO REPLICATION.

Where in an action for libel, a demurrer was filed to certain replications, which was

sustained, the court, on subsequently becoming satisfied that pleas of justification were insufficient, and that an erroneous ruling had been made, in refusing to carry back to such pleas the demurrer to the replication, should have withdrawn the case temporarily from the jury, and set aside the order sustaining the demurrer to the replication, and carried back and sustained the demurrer to the pleas, and then permitted defendant to stand by his pleas or plead over.

3. LIBEL — PLEA OF GENERAL ISSUE — EVIDENCE.

Under a plea of the general issue in an action for libel, defendant was not entitled to prove specific acts of misconduct on the part of plaintiff, but was confined to proof of his general bad character.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 249-253.]

4. SAME—INSTRUCTIONS.

Where, in an action for libel, the words published were clearly defamatory on their face, unambiguous, and incapable of an innocent meaning, it was not error for the court to charge that they were libelous, leaving to the jury only to say whether the publication was made, defendant's intent, and whether the published words were true or false.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, §§ 356-359.]

Appeal from Appellate Court, First District.

Action by Samuel G. Priddle against John Alexander Dowle. From a judgment for plaintiff, affirmed by the Appellate Court (116 Ill. App. 184), defendant appeals. Affirmed.

Rehearing denied October 23, 1905; Cartwright, C. J., and Boggs, J., dissenting.

This was an action on the case commenced in the circuit court of Cook county by the appellee against the appellant to recover damages by reason of an alleged libel which it is averred the appellant had published of and concerning the appellee in a certain publication, called "Leaves of Healing," of which the appellant was the editor. The declaration contained three counts. The libelous matter set out in the first count was published on June 1, 1901, and charged appellee with being a "vile person," "the very opposite of pious," "a poor, ungrammatical ignoramus," and a "heathen man and publican of the worst kind." That set out in the second count was published on June 22, 1901, and referred to the appellee as "a scoundrel," an "insane fanatic," a "poor, insane lunatic," a "low, mean coward," and a "paranoliac," and charged that the appellee harbored the "intent to kill" the appellant. And that set out in the third count was published on July 13, 1901, and stated the appellee was a "low, degraded person, lewd and depraved," and a "teacher of lewd, adulterous, and polygamous practices." The appellant filed the general issue and two special pleas of justification, in which last-mentioned pleas he averred that appellee had, "without cause, abandoned his wife and children"; that he had made "murderous and diabolical prophecies"; that he had "committed adultery";

that he claimed to have "visions and revelations direct from God"; that he stated appellant "would be killed," and that he was "the one to do it," etc. To the special pleas filed by appellant the appellee filed a general replication and three special replications, denying the averments contained in said pleas. The appellant interposed a demurrer to said special replications, which was sustained; but the court declined, upon request, to carry the demurrer back to the special pleas of justification, but held said special pleas to be good. The case was tried before a judge other than the one who settled the issues upon the pleadings, and upon the trial the presiding judge held that the special pleas were bad, and that the demurrer to the special replications should have been carried back and sustained to the special pleas of justification, and refused to permit the appellant to introduce any proofs under said special pleas of justification. The jury returned a verdict for \$2,000 in favor of the appellee, upon which, after overruling a motion for a new trial, the court rendered judgment, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

V. V. Barnes, Charles E. Lauder, and P. R. Barnes, for appellant. Frederick Maina, for appellee.

HAND, J. (after stating the facts). It is first assigned as error that the trial court erred in sustaining the objection of appellee to the testimony offered by appellant to prove the various acts of misconduct of appellee set up in the special pleas of justification filed by appellant. In actions for slander or libel the defendant may deny that he spoke or published the words set out by plaintiff in his declaration, or he may rely upon the truth of the words spoken or published as a defense to the action. If he deny that he spoke or published the words declared upon by the plaintiff, he may mitigate damages in two ways: First, by showing the general bad character of the plaintiff; and, second, by proving any facts which tend to disprove malice. But under a denial that he spoke or published the words he cannot prove the words declared upon to be true, as their truth can only be established under a plea of justification. A plea of justification requires great certainty and particularity of averment. The justification must be of the very charge it is attempted to justify, and it is not permissible to set up a charge of the same general nature, but distinct as to the particular subject. When the charge is specific, then the plea need only allege that the charge is true. Where, however, the charge is general, the plea must state the facts which show the charge to be true. When the trial judge became satisfied that the special pleas of justifica-

tion were not a bar to the action, and that an erroneous ruling had been made in refusing to carry back to the special pleas the demurrer to the special replications, he should have withdrawn the case temporarily from the jury, and set aside the order sustaining the demurrer to the special replications, and carried the demurrer back to the special pleas of justification, and entered an order sustaining the demurrer to said pleas, and then permitted the defendant to stand by his pleas or plead over. *Ft. Dearborn Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133. While the method pointed out is the correct practice, as announced in the *Klein Case*, the defendant did not ask the court to take such action, nor that the case be continued, but proceeded with the trial, and put in proofs of the general bad character of the plaintiff under the general issue. If the ruling of the court in refusing to admit proof under the special pleas of justification worked no injury to the defendant, then the error of the court in not setting aside the former order sustaining the demurrer to the special replications, and afterwards carrying the same back to, and sustaining it to, the special pleas of justification, was harmless, and should not work a reversal of the case.

We think it clear that the specific charges of misconduct set up in said special pleas of justification against the appellee, such as that he had, "without cause, abandoned his wife and children"; that he had "made murderous and diabolical prophecies"; that he had "committed adultery"; that he had claimed to have "visions and revelations direct from God"; that he stated the appellant "would be killed," and that he was "the one to do it," etc.—were not answers to the charges set out in the declaration, but, at most, were averments of fact, which, if sustained by proof, would have tended only to break down and destroy the character of the plaintiff, and did not establish the truth of the charges made against the plaintiff by the defendant. The appellant availed himself of his right to prove the general bad character of the appellee. He did not have the right, under the general issue, to prove specific acts of misconduct on the part of the appellee, but was confined to proof of his general bad character. *Sheahan v. Collins*, 20 Ill. 326, 71 Am. Dec. 271; *Strader v. Snyder*, 67 Ill. 404. It is not sufficient, in a plea of justification, to attack the character of the plaintiff generally, or to aver his general misconduct, but the plea must justify the very words contained in the declaration—at least, those that are actionable. Where it was averred that the defendant had said of the plaintiff that he had stolen "a pot and waiter," a plea in justification that plaintiff stole "a waistcoat pattern" was held not sufficient. *Eastland v. Caldwell*, 2 Bibb, 21, 4 Am. Dec. 668. And in an action charging plaintiff with adultery with one man, an answer alleging that she had

committed adultery with another man is bad. *Buckner v. Spaulding*, 127 Ind. 229, 28 N. E. 792. A plea justifying the words as true must aver the truth of the very charge. It is not sufficient to plead and prove the plaintiff guilty of a similar offense, or even of one more flagrant. *Torrey v. Field*, 10 Vt. 408.

We are of the opinion that the special pleas of justification filed by the defendant amounted to no more than the general issue, and that the specific facts averred in said pleas were not admissible in evidence in bar of the action, and that, as the defendant gave in evidence proof of the general bad character of the plaintiff under the general issue, he went as far with his proof as under the law he was entitled to, and that the trial court did not err in declining to permit him to prove said specific facts averred in said special pleas of justification.

It is next assigned as error that the court misdirected the jury as to the law on behalf of the appellee. The first instruction contained the statement, "If the jury believe from the evidence that the defendant published the libel, as charged in the declaration, then the plaintiff is entitled to recover in this suit;" and it is said that the instruction assumed the matters alleged in the declaration to be libelous, and withdrew that question from the jury. The rule seems to be well settled that where the words published are clearly defamatory on their face, and are unambiguous and incapable of an innocent meaning, the court may, as a matter of law, declare to the jury that they are libelous; leaving it to the jury to say whether the publication was made, with what intent it was made, and whether the published words were true or false. *Hunt v. Bennett*, 19 N. Y. 173; *Pitcock v. O'Niell*, 63 Pa. 253, 3 Am. Rep. 544; *Gregory v. Atkins*, 42 Vt. 237; *Gabe v. McGinnis*, 68 Ind. 538; *Pugh v. McCarty*, 44 Ga. 383; *Gottbehuert v. Hubachek*, 36 Wis. 515; *Smith v. Stewart*, 41 Minn. 7, 42 N. W. 595. In the latter case it is said: "Where the words are unambiguous and clearly libelous on their face, incapable of an innocent meaning, and the case free from any evidence tending to change their natural meaning, it is both the right and duty of the court in civil actions to instruct the jury, as a matter of law, that they are defamatory." The questions in this case as to whether the publication was made, its truth or falsity, and the intent with which it was made, were left to the jury. We think the instruction was substantially correct.

Instructions 4 and 5 are criticised on the ground that malice is assumed therein as proven from the mere publication of the alleged libelous matter, notwithstanding the pleas of justification. Those pleas were eliminated from the case by the trial court, as amounting to nothing more than the gen-

eral issue. We do not think the instructions subject to the criticism made thereon.

We think the jury were instructed correctly as to the law of the case.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(216 Ill. 567.)

PENN PLATE GLASS CO. v. JAMES H. RICE CO.

(Supreme Court of Illinois. June 23, 1905.)

1. SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Whether the contract was for the sale of glass, or for the manufacture and sale, the purchaser having broken it by refusing to receive further shipments, and having requested the seller to sell the glass for the best price obtainable, and, he having done so, the seller's measure of damages was the difference between the price obtained and the contract price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 1107.]

2. APPEAL—JUDGMENT OF APPELLATE COURT—CONCLUSIVENESS.

While the measure of damages which is to be applied in a case is a question of law, the determination of the Appellate Court as to the amount of damages due a party is a question of fact, binding on the Supreme Court.

3. SAME—LAW OF THE CASE.

Where a case is reversed by an appellate tribunal and remanded for new trial, the principles announced in the opinion, on a retrial in the court to which the case is remanded, and on an appeal from a judgment rendered upon such remandment, must control, if the case presented on the second trial and appeal is the same case; but, if a different case is made on the second trial, the principle is not applicable.

4. SAME—ASSIGNMENT OF ERRORS.

Error cannot be assigned on the opinion of the Appellate Court.

5. SAME—REVIEW.

Where, on appeal to the Supreme Court, it appears that the Appellate Court has refused to follow its former opinion filed on a first appeal, the Supreme Court may look into the opinions of the Appellate Court, in connection with the record, to see whether the case presented to the Appellate Court was the same as the one presented on the first appeal.

6. SAME—CROSS-ERRORS—ASSIGNMENT.

Where defendant appealed to the Appellate Court, if plaintiff was not satisfied with the trial court's holding on a certain question, it should have assigned cross-errors in the Appellate Court, and, having failed to do so, could not raise the question for the first time on appeal to the Supreme Court.

Appeal from Appellate Court, First District.

Action by the Penn Plate Glass Company against the James H. Rice Company. From a judgment of the Appellate Court (117 Ill. App. 356), reversing a judgment in favor of plaintiff, but rendering one in plaintiff's favor, plaintiff appeals. Affirmed.

Rehearing denied October 24, 1905.

This was an action of assumpsit commenced by plaintiff against the defendant in the circuit court of Cook county. The case was tried before a jury, and resulted in a verdict and judgment against the defendant for the

sum of \$15,000. An appeal was prosecuted to the Appellate Court for the First District, where the judgment was reversed, and the cause was remanded for a new trial. 88 Ill. App. 407. On the case being reinstated in the circuit court, a jury was waived, and a trial was had before the court, which resulted in a finding and judgment in favor of the plaintiff for \$16,595.20. The defendant prosecuted a second appeal to the Appellate Court for the First District, where the judgment of the circuit court was again reversed, and judgment was rendered in the Appellate Court in favor of the plaintiff for the sum of \$9,121.30, and the plaintiff has prosecuted an appeal to this court.

It appears from the evidence that on the 26th day of June, 1896, the plaintiff sold to the defendant, at an agreed price per square foot, 120,000 square feet of polished plate glass stock sheets, which it was to deliver to the defendant in lots of 10,000 feet per month, beginning November 1, 1896, at its factory at Irwin, Pa. Plaintiff delivered prior to February 25, 1897, to defendant 35,345 square feet of glass, and the defendant paid the plaintiff therefor the sum of \$18,072.15. On that date the defendant wrote the plaintiff that it was unable to accept or pay for any further shipments of glass, and notified the plaintiff not to manufacture for it or ship to it any more glass after that date. On March 1st the plaintiff, replying thereto, said it had a contract with the defendant under which it had been shipping it glass, and upon which contract there was still due it about 85,000 feet of glass; that it was ready to perform on its part, and, unless there was some arrangement to the contrary, it should expect to continue shipments. On March 3d the defendant replied it meant what it said in its letter of February 25th, and again notified the plaintiff not to manufacture for it or ship to it any more glass. On the 11th of March the plaintiff replied it understood the defendant had repudiated the contract of June 26th, and it should hold defendant responsible for all loss or damage incurred in consequence of its action. On April 10, 1897, the plaintiff commenced suit. Upon the trial the defendant did not deny that there had been a breach of the contract, or that it was liable for damages by reason of such breach; the only controversy between the parties being as to the amount for which defendant should be held liable to the plaintiff by reason of its failure to receive and pay for said glass.

The Appellate Court incorporated in its judgment the following findings of fact: "The court finds that there was no market price at the time of the breach for the undelivered glass contracted for, and no evidence of sales or other evidence reasonably tending to prove market value at the time of the breach, and that the damages assessed by the trial court, and for which judgment was rendered, are \$7,473.90 in excess of the

damages warranted by the evidence; also that the appellant requested appellee to sell, and appellee sold, the undelivered glass for the best obtainable prices. And the court doth further find that the said appellee, the Penn Plate Glass Company, a corporation, ought to have and recover of and from the said appellant, the James H. Rice Company, a corporation, its damages by it in this behalf sustained herein by reason of the premises; and the court, upon the allegations and proofs in the record in this cause, and being fully advised in the premises, doth assess the damages of said appellee against said appellant to the sum of nine thousand one hundred and twenty-one dollars and thirty cents (\$9,121.30)."

Winston, Payne & Strawn (John Barton Payne, of counsel), for appellant. Smoot & Eyer, for appellee.

HAND, J. (after stating the facts). The only controversy between the parties to this suit is over the amount for which the plaintiff is entitled to recover judgment against the defendant for the breach of the contract entered into by them June 26, 1896; the liability of the defendant being admitted. The question of the amount for which judgment shall be rendered in a case like this is a question of fact, and the Appellate Court having fixed the amount of the defendant's liability by its findings of fact, and having rendered judgment against the defendant for the amount thus found, its findings of fact upon the question of the amount of defendant's liability are binding upon this court, unless, in arriving at the amount for which it rendered judgment against the defendant, it misapplied the law; that is, adopted a wrong measure of damages in fixing the amount of the defendant's liability.

It appears from the undisputed evidence that at the time of the breach of the contract there remained undelivered of the glass which the defendant had purchased, 84,655 feet; and the Appellate Court found that the defendant requested the plaintiff to sell, and that the plaintiff sold, the undelivered glass for the best obtainable prices, and that the plaintiff is entitled to judgment for \$9,121.30. There has been a great deal of discussion in the briefs filed as to whether the contract between the parties constitutes a contract of sale, or one for the manufacture and sale, of said glass. In view of the findings of fact by the Appellate Court, we think those questions immaterial. If the plaintiff had the glass on hand, ready to be delivered, at the time the defendant repudiated the contract, or, if the glass was not in existence at the time the defendant broke the contract, we are unable to see that either of those conditions affects in any way the amount the defendant should pay the plaintiff as damages if the plaintiff, after the breach of the contract, at the request of the defendant, sold the glass it had on hand, or continued to man-

ufacture glass, and afterwards sold the glass so manufactured. The plaintiff would have received from the defendant for the undelivered glass, had the defendant accepted and paid for the same, the contract price therefor. The defendant, however, refused to accept the glass, and requested the plaintiff to sell the undelivered glass, and the plaintiff did sell the same, at the best obtainable prices. If the plaintiff, after the glass was sold, deducted the amount it received from said sales from the amount it would have received from defendant, had it accepted and paid for the glass under the terms of the contract, the difference between those amounts would represent the amount which the plaintiff was damaged by reason of the failure of the defendant to accept and pay for the glass according to the contract. The Appellate Court, by its findings of fact, has fixed the difference between the amount which the defendant would have paid the plaintiff, had it accepted the glass and paid for it under the contract, and the amount which the plaintiff actually did receive from the sale of the glass to other parties, at \$9,121.30. The payment of this amount, if the findings of fact by the Appellate Court are correct—and we are bound in this suit to assume they are—to the plaintiff, when added to the amount which it received from the parties to whom it sold the glass, will fully indemnify it from damages by reason of the breach of said contract; that is, the receipt of said amount will give the plaintiff the same amount it would have received had the defendant performed its contract. The judgment of the Appellate Court works out justice between the parties, and we see no reason why its conclusion is not correct from a legal as well as a moral standpoint. The law is well settled that, where the vendee refuses to receive personal property purchased, the vendor may resell the same, and recover the difference between the contract price and the amount received upon the resale; and, in case the vendee refuses to receive the property purchased, it is the duty of the vendor to mitigate his damages so far as he reasonably can. *Wrigley v. Cornelius*, 162 Ill. 92, 44 N. E. 406; *Brant v. Gallup*, 111 Ill. 487, 53 Am. Rep. 638. The parties both seem to have recognized and to have acted upon these rules, and there is no recognized principle upon which the seller, either in law or equity, can be placed in a better position than he would have occupied if the purchaser had performed the contract. *Tiernan v. Granger*, 65 Ill. 351.

It appears from an examination of the opinions of the Appellate Court filed in this case that the opinion filed on the second appeal departed from the rule announced in the opinion filed by that court when the case was before it the first time, as to the measure of damages which should be applied in determining the amount of the liability of the defendant for a breach of said contract; and it is contended the first opinion settled the

rule as to the measure of damages to be applied in this case; that is, that question became *res judicata* after the rendition of the first opinion by the Appellate Court. The law is clear that, when a case is reversed by an appellate tribunal and remanded for a new trial, the principles announced by the appellate tribunal in its opinion, on a retrial of the case in the court to which the case is remanded, and upon an appeal from a judgment rendered upon such remandment, must control, if the case presented upon the second trial and appeal is the same case as the case in which the opinion was filed, reversing and remanding the case. If, however, the case is remanded for a new trial, and a different case is made upon the second trial from that made upon the first trial, by the introduction of further and material testimony, the case becomes upon the second trial, and in case of an appeal upon the second appeal, a new case, and the trial and appellate tribunals are required to consider the entire case as made upon the second trial, and apply such principles of law to its decision as are applicable to the new case. *Spring Valley Coal Co. v. Patting*, 210 Ill. 842, 71 N. E. 371; *West v. Douglas*, 145 Ill. 164, 34 N. E. 141. The opinion filed upon the first appeal shows the judgment was reversed, and the cause remanded for a new trial. It also appears from the last opinion, and from the testimony of certain witnesses found in the record filed on this appeal, that the evidence upon which the Appellate Court made its finding of fact that the defendant requested the plaintiff to sell, and plaintiff sold, the undelivered glass for the best obtainable prices, and upon which said court held on the last appeal that the measure of damages was the difference between the contract price and the price at which the glass was resold, was not in the record when the case was before the Appellate Court the first time. While it is true that error cannot be assigned upon the opinion of the Appellate Court (*Traeger v. Mutual Building & Loan Ass'n*, 189 Ill. 314, 59 N. E. 544), in *Illinois Central Railroad Co. v. Smith*, 203 Ill. 608, 70 N. E. 628, it was held that this court may rightfully look into the opinions of the Appellate Court for the purpose of advising itself as to the questions considered by that court, and how they were disposed of; and we think, when the Appellate Court has refused to follow its former opinion filed upon the first appeal, as appears to be the case here, this court may look into the opinions of that court, in connection with the record then before it, for the purpose of satisfying itself whether the case presented to the Appellate Court upon the second appeal is the same case as that which was presented to it on the first appeal. From an examination of the opinions of the Appellate Court and the record on file in this case on this appeal, we are convinced that the case made on the last trial so far differed from the case pre-

sented to the Appellate Court upon the first appeal that the court was not bound, as a matter of law, to follow the rule as to the measure of damages announced in its first decision, but might apply the law, as it then viewed it, to the new state of facts as they appeared in the last record.

It is next contended that the Appellate Court erred in neglecting to allow the plaintiff interest upon the amount which it found due the plaintiff from the date of the breach of the contract to the date of judgment in that court. The trial court, upon propositions of law duly submitted, held that the plaintiff was not entitled to interest upon its demand against the defendant. The defendant appealed from the judgment rendered upon that trial to the Appellate Court. The holding of the trial court was, however, upon the question of interest, in its favor. If the plaintiff was not satisfied with the holding of the trial court upon that question, it should have assigned cross-errors in the Appellate Court challenging the correctness of the holding of the trial court in declining to allow it interest, and, having failed so to do, it is bound by such holding, and cannot raise the question for the first time in this court. *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Thompson Co. v. Whitehead*, 185 Ill. 454, 56 N. E. 1106, 78 Am. St. Rep. 51; *Columbia Theatre Amusement Co. v. Adsit*, 211 Ill. 122, 71 N. E. 868; *Kantzler v. Bensinger*, 214 Ill. 589, 73 N. E. 874.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(216 Ill. 576)

SANITARY DIST. OF CHICAGO v. PITTSBURGH, FT. W. & C. RY. CO. et al.

(Supreme Court of Illinois. Oct. 14, 1905.)

1. PLEADING—ALLEGATIONS AS TO TITLE—CONCLUSIVENESS ON PARTY PLEADING.

In a proceeding to condemn land, the allegations of the petition as to the title of defendants are conclusive on petitioner, and defendants need not prove their title.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 524; vol. 39, Cent. Dig. Pleading, § 81.]

2. EMINENT DOMAIN—PETITION—REQUISITES.

In a proceeding to condemn land, it is the duty of the petitioner to ascertain the title to the premises before commencing the proceeding, and to name the owner in the petition; and, if the title is less than a fee simple, it should be so stated.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 517.]

3. SAME—ISSUES.

While only a petition and cross-petition are contemplated by the statute authorizing condemnation proceedings, the record must show some sort of objection, issue, or traverse to justify a decision of the court as to title.

4. SAME—EVIDENCE AS TO COMPENSATION.

Where land sought to be condemned for public use is a portion of a freight terminal of a

railway system, it has no market value, and the market value of other property is not the criterion for ascertaining the compensation which should be made.

5. SAME.

In a proceeding to condemn land used as a freight terminal, evidence of the extent of the business transacted at the terminal station, as well as the capacity of the property for extension to meet the increasing demands of the business, is properly admitted.

6. EVIDENCE—EXPERTS—QUALIFICATION.

In a proceeding to condemn land occupied as a railway freight terminal, witnesses who knew the value of property used as a freight terminal were qualified to testify as experts as to the value of property sought to be condemned, although they did not know the market value of property generally in the city in which the property in question was situated.

7. EMINENT DOMAIN—VALUE OF PROPERTY—EVIDENCE—RETURN FOR TAXATION.

In condemnation proceedings, returns of the property for taxation, made by the lessee of the owner, were not conclusive on the question of value.

8. SAME—IMMEDIATE POSSESSION—INSTRUCTION.

In a proceeding to condemn land for public use, in which there is no stipulation as to when possession of the land shall be taken, it is not error to instruct the jury that, if the time taken to remove a portion of the land which it was proposed to remove would affect the amount of damages to the remainder, they should estimate the same on the basis of what should be the ordinary and natural consequences to the strip, and the damages resulting therefrom.

Appeal from Circuit Court, Cook County;
B. W. Clifford, Judge.

Condemnation proceedings by the Sanitary District of Chicago against the Pittsburgh, Ft. Wayne & Chicago Railway Company and others. From the judgment, petitioner appeals. Affirmed.

James Todd and Eddy, Haley & Wetten (P. C. Haley and Charles H. Pegler, of counsel), for appellant. Wilson, Moore & McIlvaine, Herrick, Allen, Boyeson & Martin, and Loesch Bros. & Howell, for appellees.

CARTWRIGHT, C. J. Appellant filed in the circuit court of Cook county its petition for the ascertainment of just compensation to be paid to appellees for that part of blocks 69, 70, 71, and 72, and that part of Monroe street vacated, all in school section 18, township 39, range 14, in the city of Chicago, lying easterly of a certain line beginning at a fixed point in the south line of Madison street and running thence southerly, by the way of other fixed points, to a point in the north line of Van Buren street, as described in the petition, for the purpose of deepening, widening, and improving the Chicago river between the south line of Madison street and the north line of Van Buren street; the eastern boundary of the tract being the center thread of the Chicago river. The Pittsburgh, Ft. Wayne & Chicago Railway Company and its lessees, the Pennsylvania Railroad Company and the Pennsylvania Company, filed their cross-petition, setting forth that the strip of land sought to be taken was

a part of a tract of land constituting the passenger and freight station of the Pittsburgh, Ft. Wayne & Chicago Railway Company and its lessees; that said tract was improved with a station, baggage rooms, power houses, freight houses, offices, freight tracks, team tracks, and other like improvements; that it constituted the principal terminal station of the railway systems of the cross-petitioners in the city of Chicago; and that by reason of the taking of the strip to be appropriated by the petitioner the remainder of the property would be greatly damaged. It was agreed that the compensation to be paid for the lands taken and any consequent damage to the remainder should be assessed in one sum. Preliminary to the trial by jury of the amount of compensation and damage, the petitioner moved the court to ascertain and determine that the west bank of the Chicago river was upon a certain line alleged to have been established by an ordinance of the city of Chicago passed on March 16, 1857. The position of petitioner on that motion was that the legal dock line was established by that ordinance, which at some places was west of the actual dock line in the possession of the defendants and as it had existed for many years, and that the defendants should be limited to compensation to that line, except where conveyances to the railroad company limited the easterly boundary to lines west of the dock line and where the railroad company had deeded lands away. Petitioner contended that, so far as the actual dock line in the possession of the defendants was located east of the line described in the ordinance, the defendants had intruded on the bed of the river; that if the defendants caused land to be made in the river outside of the legal line they committed a wrong, and were not entitled to the possession of such made land or compensation therefor. The petitioner also contended that it should not be required to pay for the vacated end of Monroe street described in its petition, on account of certain reservations by the city, in the vacation, of a right to lay and maintain gas and water pipes and sewers therein, and because the vacated premises were to be used for the purposes of a passenger station, and were not so used, but were used for freight and team tracks. The court, after hearing the evidence of the respective parties, found and adjudged that the west boundary line of the river was the line of the existing dock in front of the property; that the defendants had certain rights in Adams and Jackson streets under ordinances and contracts, and had title to the vacated part of Monroe street, subject to the rights of the city of Chicago therein. To the decision of the court on these questions the petitioner excepted. A jury trial followed, resulting in a verdict finding the just compensation for the land taken and damages to the remainder to be \$1,889,940. The court over-

ruled petitioner's motion for a new trial, and petitioner excepted and prayed an appeal, which was allowed.

The proceeding before the court as to title was not based upon any issue in the pleadings. The petitioner described the property which it desired to appropriate, lying easterly of the line described in the petition, between Madison street on the north and Van Buren street on the south, and having its east boundary line in the center thread of the Chicago river. As a matter of fact, the easterly part from the dock line to the center of the river was submerged by the waters of a navigable stream and was already subject to the easement of navigation. The statute requires a petition setting forth a description of the property sought to be taken, with the names of the persons interested as owners or otherwise, and if the estate sought to be condemned is a limited one or subject to conditions or restrictions, either in the title or mode of use, or if it is incumbered by some public easement or right, it should be set out in the petition. The averments of the petition as to the nature or extent of the estate or title of the defendants are not binding on the defendants, and upon a proper issue the court may determine such questions; but such averments are binding on the petitioner, and the defendants are not required to establish their title. *Peoria & Rock Island Railway Co. v. Bryant*, 57 Ill. 473. If a corporation entitled to exercise the right of eminent domain claims that it already has a right to take land, a petition for condemnation is not the proper proceeding to try that question. It was the duty of the petitioner to ascertain the title to the premises before commencing the proceeding, and to name in the petition the owner of the premises, and, if the title was less than a fee simple or subject to an easement, it should have been stated in the petition. *Peoria, Pekin & Jacksonville Railroad Co. v. Laurie*, 63 Ill. 264. There was no averment on the subject in the petition, and, so far as it was concerned, the defendants were to be regarded as the owners of an unincumbered title. They were in the actual possession of the land to the existing dock line, and had been for many years, and under the petition they were not required to prove title. While only a petition and cross-petition are contemplated by the statute, the record must show some sort of objection, issue, or traverse to justify a decision by the court as to title, and in this case there was nothing of the kind. But although the proceeding was irregular, and not authorized by any rule of practice, the parties joined in it without objection, and offered evidence as to what part of the land was already subject to the easement of navigation and to what line the defendants were legally entitled to occupy. If it may be considered that the defendants waived their right to have the question submitted

on proper pleadings, we think the conclusions of the court were correct.

The charter of the city of Chicago in force in 1857 gave the city power to widen and improve the Chicago river, and, inferentially at least, to establish dock lines, and required the council to give notice to the owner of an intention to appropriate land for widening the river. After such notice, commissioners were to be appointed to ascertain and assess the damages and compensation due the owners of land taken and to assess such damages on property benefited by the improvement. On March 16, 1857, an ordinance was passed, which was approved on March 18, 1857, establishing dock lines on each side of the Chicago river from Madison street to Van Buren street. On March 23, 1857, the city clerk was directed to advertise in the corporation newspapers that the common council intended to take and appropriate so much land as was necessary to straighten and widen said river from Madison street to Van Buren street, in accordance with a survey on file in the clerk's office. On April 3, 1857, commissioners were appointed to assess the damages for widening the river from Madison street to Van Buren street, and on April 20th two commissioners were appointed in place of two of the original commissioners. On April 27, 1857, there was a report to the council by a committee, recommending that the east line of the survey for the purposes of widening the river should be on a certain line east of said first survey, and this was concurred in by the council. On May 11th a commissioner was appointed in place of another, and on May 14th another commissioner was substituted. The ordinance establishing the dock lines could not be changed, except by another ordinance; but all the evidence showed that the ordinance was preliminary to a condemnation proceeding for the purpose of widening the river and establishing the dock lines, that while the proceeding was still incomplete the council concluded to change the west line from the survey, and that the plan was never carried into effect. So far as the record shows, nothing further was ever done in the matter, and in 1881 an ordinance was passed for widening the river between Adams street and Van Buren street and condemning therefor certain premises, and a petition was filed in court for the condemnation of the same, but was never brought to trial. The evidence showed that the dock between Madison and Adams streets was originally constructed on the present line in 1856 and has been reconstructed several times on the same line. There was evidence that in making excavations between Adams street and Van Buren street it was found that the shore line was at some time west of the dock line and that there were remains of an old dock west of said line; but the present dock had existed for a great many years, and had been in the possession of the defendants, and so far as

the evidence shows the dock was placed where the owners of the abutting land had the legal right to place it, not beyond the line of navigability of the stream, and not obstructing navigation or impairing the rights of others. *City of Chicago v. Laflin*, 49 Ill. 172. The greater part of the line was not in dispute, and there has never been any controversy between the city of Chicago and the defendants in regard to the location of the dock.

The station grounds are about 15 feet below the level of the adjacent streets, and Adams and Jackson streets are carried over the grounds by means of viaducts constructed by the railroad company under contracts and ordinances, and the defendants have the right to lay tracks on the grounds under the viaducts. Monroe street, from Canal street to the dock line, was vacated by the city of Chicago so long as it should be used for railroad passenger and depot purposes, and no longer. The lots abutting on the street had been sold and conveyed, and the plat, not being made, certified, and acknowledged in accordance with the statute, amounted to a common-law dedication, so that the abutting owners took title to the center of the street subject to the easement. On the vacation the title to the street was in the defendants as abutting owners, subject to the condition upon which the vacation was made. The passenger station does not extend from Canal street to the river. The passenger building extends across Monroe street next east of Canal street, and the train shed and passenger tracks are east of that building, but do not extend to the river. The defendants had been in possession of the premises since 1861. If there was a breach of the condition subsequent as to that part next the river, which the city could take advantage of, there had been no election by the city to do so by a re-entry or any equivalent act. The city never declared a forfeiture or took possession for a breach of the condition. The finding of the court was that the defendants were owners subject to the rights of the city of Chicago in the vacated streets, and the finding was not incorrect. On the trial before the jury the petitioner produced a number of witnesses, who had had experience in dealing in real estate in the city of Chicago, who testified that the strip to be appropriated to the uses of the petitioner had a market value by the square foot, and they gave their opinion as to such value, varying from \$8 to \$9.22 per square foot. An average of their testimony showed the value of the land taken to be \$503,012.06. The cost of building docks and improvements, including buildings, tracks, etc., was estimated by them at \$300,945.68, making a total of \$803,957.74. Adding to this the cost of handling freight at other points for one year during reconstruction of the terminal, which was estimated at \$82,887, the total compensation and damages would be \$886,844.74. On the part of defendants a number of witnesses, who were familiar with the nature of such

property and the use to which it was devoted as a freight terminal and an essential part of the railway system, gave their opinions that the entire terminal property was worth about \$15,000,000, and that the value of the part taken, with the damage to the remainder, would be about \$5,000,000. The jury, as before stated, fixed the compensation and damages at \$1,389,940, which was above the estimates of the petitioner's witnesses and very far below the amount testified to by the witnesses for the defendants.

It is urged that the court permitted witnesses for the defendants to testify to the value of the property without qualifying themselves to give an opinion on the subject; and, on the other hand, it is insisted that the testimony of the witnesses for the petitioner was based on the value per square foot of real estate in the city of Chicago, disconnected from the use to which the property was put as a railway terminal, divested of its character as such a terminal, and separated from the railway system of which it was an integral part. The property taken constituted part of the freight and passenger terminal of the railways of the defendants in the city of Chicago, and amounted to about one-sixth of such terminal, and it is conceded that it would be necessary to entirely reconstruct the freight department of the terminal station on a new plan, with new freight houses and new conveniences for doing business. The terminal was in the center of the largest manufacturing and commercial district in the city of Chicago, and had great practical advantages in being close to the center of traffic and therefore easily accessible. The witnesses for the petitioner stated that they took into account the use to which the property was put and its adaptability to such purpose, and that it had a market value, which they stated. But it is perfectly clear from their testimony that none of them had any definite idea of the value of the property to the owner in connection with the use to which it was put. Their estimates of value per square foot were on the basis of ordinary real estate sold in the market in that way. The witnesses for the defendants did not know the market value, by the square foot or otherwise, of property in the city of Chicago, and had not dealt in real estate in that way; but they knew the value of the property as a freight terminal, and were fully qualified to give their opinions on that subject. The jury were called upon to determine the value of an integral portion of a freight terminal which was a part of extensive railway systems, and the damage to the residue, and it was property which had no market value. Where lands proposed to be taken have a market value, such value is the standard of just compensation because it will give to the owner all he is entitled to under the law. But that method of valuation cannot be applied to property which has no market value. The Constitution and the

law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that it is necessary to determine what the property is worth to the owner, and unless he receives what it is worth to him he does not receive just compensation. It is matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use, the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value.

One of the important considerations in ascertaining the value of property which has no market value is its productiveness and capabilities for yielding profits to the owner. The court admitted evidence of the extent of the business done at the terminal station, and witnesses for the defendant based their estimates of the value of the whole property, the part taken and the damage to the residue, upon the business handled at the station and the profits of such business. It is insisted that the court erred in admitting such evidence, which enabled the witnesses for the defendants to arrive at an intelligent estimate of the value of the property. We think there was no error in admitting the evidence. Although the profits of a business do not determine the value of land, it is proper to show, in arriving at the market value, that it is valuable for certain purposes and productive to the owner. *De Buol v. Freeport & Mississippi River Railway Co.*, 111 Ill. 499. The extent of the business done upon the property necessarily affected its value, and the profits of the business were neither made a test of value nor allowed as compensation. There was no ruling of the court or any instruction under which profits could be or were allowed, but the productiveness, capabilities, location, and amount of business done was a proper matter to be before the jury. It is conceded that the defendants had a right to show the use to which the property was devoted and how it was used at the time of filing the petition, and we think it was proper to prove, as bearing on its value, the amount of business transacted, the capacity of the property for such business, and its capacity for expansion to meet the increasing demands of business. Where property, by reason of being applied to a particular use, has a particular value to the owner, that value is to be ascertained and allowed as compensation. *Lake Shore & Michigan Southern Railway Co. v. Chicago & Western Indiana Railroad Co.*, 100 Ill. 21; *Chicago & Northwestern Railway Co. v. Chicago & Evanston Railroad Co.*, 112 Ill. 589; *Chicago & Western Indiana Railroad Co. v. Englewood Connecting Railway Co.*, 115 Ill.

375, 4 N. E. 246, 56 Am. Rep. 173; *Chicago, Burlington & Quincy Railroad Co. v. City of Naperville*, 166 Ill. 87, 47 N. E. 734.

Complaint is made of the eighth instruction given at the request of defendants. The court had admitted in evidence returns for taxation made by the Pennsylvania Company, lessee of the owner, on which the value of the whole property was given at less than half the value as shown by the evidence for the petitioner. The instruction stated that the returns did not purport to be made by the Pittsburgh, Ft. Wayne & Chicago Railway Company, but by the Pennsylvania Company, the lessee; that said returns were not admitted as proving the value of the property on the market for sale or to the owner; but as having a bearing on the question of value; that it was the duty of the jury to determine the real value of the property, and unless the returns for taxation represented the real value the jury should award to the owner such real value. The defendants protested, and now protest, that the returns were not admissible in evidence. But that question is not before us on this appeal. On the question whether a return for taxation is admissible in evidence as tending to show the value of property there is a conflict of authority, and we do not express any opinion upon the subject; but they are not held, in any case, to be a criterion of value or conclusive. The returns did not purport to be made by the owner of the property, and therefore had no force as admissions of value, and, whether admissible in evidence or not, there was no error in giving the instruction to the effect that they were not conclusive.

In the statement of facts preceding the brief and argument of counsel in support of the errors assigned, there is a statement that the court gave an instruction informing the jury that under the law petitioner had a right to stipulate and agree on the trial of the case as to the time after the entry of judgment when it would cut away the strip condemned, and that, no such stipulation or agreement having been made, if the jury found, from the evidence, that the time taken to remove the strip would enter into and affect the amount of damages to the remainder, they should estimate the same on the basis of what would be the ordinary and usual consequences of cutting away and removing the strip and the damages resulting therefrom. The instruction is not mentioned in the brief or in the argument in support of the brief, and therefore it is perhaps not necessary to notice it. It seems, from the statement of facts, to be regarded by counsel as objectionable, but there was no error in giving it. If the petitioner desired the damages assessed on the basis that it would do the work of removal in any particular manner or give any particular time for reconstruction and adjustment of the property to the uses to which it was

devoted, or would do anything which would limit or restrict the damages resulting from the exercise of its legal right to remove the strip on payment of compensation, it should have presented some plan, stipulation, or agreement to that effect. If that had been done, the damages would have been assessed on the basis of the plan or stipulation; but in the absence of anything of the kind it was proper for the jury to assess damages in view of the legal right of the petitioner to enter upon the premises upon payment of the compensation ascertained.

We find no error in the record, and the verdict was not against the preponderance of the evidence. The judgment is affirmed.

Judgment affirmed.

(189 Mass. 347)

CORSIGLIA v. BURNHAM.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 19, 1905.)

1. APPEAL—EFFECT.

An appeal to the Supreme Judicial Court from the superior court does not transfer the entire case, but only such questions of law as are apparent on the record.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2867.]

2. SAME—DISMISSAL OF APPEAL—TIME FOR MOTION.

While, in an action by trustee process, it was open to the trustee to have moved the Supreme Judicial Court to dismiss plaintiff's appeal from an order discharging the trustee because the appeal was prematurely entered, such question of jurisdiction could not be raised for the first time at the argument of the appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1878; vol. 3, Cent. Dig. Appeal and Error, §§ 3149, 3150.]

3. GARNISHMENT—LIABILITY OF GARNISHEE.

Before the owner of a building was summoned as trustee on a debt against the contractor, the contractor had admitted a failure to complete the contract, and had elected to stand thereon and promised to complete the same, and had acceded to the owner's contention that the balance of the price was not payable until the house had been fully completed according to specifications. Held that, in the absence of a fraudulent intent to defeat creditors of the contractor, the trustee's statements showing these facts, made under oath in answer to interrogatories, being conclusive on the plaintiff, as provided by Rev. Laws, c. 189, § 15, the trustee was not chargeable as a debtor of the contractor.

Appeal from Superior Court, Franklin County.

Action under trustee process by George V. Corsiglia against George G. Burnham, as trustee. From a judgment discharging the trustee, plaintiff appeals. Affirmed.

Fredk. L. Greene and Wm. A. Davenport, for appellant. Henry J. Field, for appellee.

BRALEY, J. An appeal to this court from the superior court does not transfer the entire case, but only such questions of law as are apparent upon the record. Fay v.

Upton, 153 Mass. 6, 26 N. E. 997. It was open to the trustee, if he had desired, to have asked that court to dismiss the plaintiff's appeal, because it was prematurely entered. But, this course not having been taken, the question of jurisdiction cannot be raised for the first time at the argument before us. Callendar, McAuslan & Troup Co. v. Flint, 187 Mass. 104, 72 N. E. 345; Com. v. Bond (Mass.) 74 N. E. 293.

The only question presented for our decision is whether the order discharging the trustee should be reversed. It may be considered as practically conceded by the trustee, in his answers to the interrogatories, that at the date of the service of the writ upon him the defendant, who was the contractor, in good faith had substantially finished the house. If nothing further appeared, while in a suit upon the contract a failure to comply with the trifling details of putting in a few shelves and replacing some broken window glass would be sufficient to prevent a recovery, yet the contractor would be entitled to maintain an action under a count upon an account annexed for labor and materials furnished, by which the value of the real estate had been enhanced. The amount to be recovered in such an action would be limited to the contract price, after deducting previous payments and any expenditure that might be required to supply the omitted details. It would follow that the trustee similarly could be charged in the present suit with a corresponding sum. Allen v. Mayers, 184 Mass. 488, 69 N. E. 220; Carpenter v. Gay, 12 R. I. 307.

A further examination, however, discloses a different legal situation. No claim of substantial performance was made by the defendant. But the contrary appears. Before the trustee was summoned, the defendant not only expressly admitted a failure to put in the shelves and replace the glass, but, electing to stand upon the contract, promised to supply both. Moreover, he acceded to the contention of the owner, and agreed with him that until the house had been fully completed according to the specifications the balance of the contract price was not payable. In the absence of a fraudulent purpose to defeat creditors, which does not appear, these statements, being under oath and responsive to the interrogatories, are made conclusive upon the plaintiff by Rev. Laws, c. 189, § 15. Phillips v. Meagher, 166 Mass. 152, 44 N. E. 186; Neally v. Ambrose, 21 Pick. 185, 187. Accordingly, the money which it is sought to hold not being due until the entire contract had been performed, the trustee is not chargeable as a debtor of the defendant. Robinson v. Hall, 3 Metc. 301; Gleason v. Gage, 2 Allen, 410; Wood v. Buxton, 108 Mass. 102; Peterson v. Loring, 135 Mass. 397; Allen v. Mayers, *ubi supra*.

Order discharging trustee affirmed.

(189 Mass. 231)

MANNING v. EXCELSIOR LAUNDRY CO.
(two cases).(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 18, 1905.)**1. MASTER AND SERVANT—INJURIES TO SERVANT — ASSUMED RISK — APPRECIATION OF DANGER.**

Plaintiff, a young girl, while at work on a laundry mangle, was injured by having her hand drawn between a roller and a hot cylinder as she was removing from the roller one of the pieces which had caught thereon. There was nothing to show that she understood or appreciated how fast the machine was revolving. She had seen others remove pieces from the roller in a similar manner while the mangle was in operation, and had received no instruction or warning as to the danger. *Held*, that she did not assume the risk of such injury as a matter of law.

2. SAME—DUTY OF MASTER—WARNING.

Plaintiff was injured while removing a piece of material that had become stuck on a laundry mangle at which she was employed, which she did in the same manner she saw others do, without stopping the machine. Defendant's president testified that he had frequently knocked pieces off the rollers with his hand in the presence of the girls, and there was evidence that the foreman had pointed to pieces caught on the mangle in such a way that the head folder of the laundry had interpreted the gesture that she should remove the pieces from the machine without stopping it, which she did. *Held* that, if defendant permitted the employés to so free the machine without stopping it, it was its duty to warn them of the danger.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 297.]

3. SAME—EVIDENCE.

Where plaintiff was injured while taking a piece of material from a laundry mangle without stopping the machine, evidence of a witness employed in the same laundry that she had taken pieces from the rollers was admissible to show a course of business.

Exceptions from Superior Court, Suffolk County; Elisha B. Maynard, Judge.

Actions by Julia Manning and by John J. Manning against the Excelsior Laundry Company. Verdicts were rendered in favor of plaintiffs, and defendant brings exceptions. Overruled.

Jas. A. McGeough and John A. Collins, for plaintiffs. John and Jas. A. Lowell, for defendant.

MORTON, J. The plaintiff was in the employ of the defendant, and was at work upon a mangle, so called, used for ironing napkins, towels, table cloths, etc., and was injured by having her hand drawn in between a roller and the cylinder and burned while she was in the act of removing from the roller one of the pieces which had caught on it. This action was brought to recover for the injuries thus received. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the court to rule that upon all the evidence the plaintiff was not entitled to recover.

There is nothing to show that the machine was defective, and the questions are whether the risk was an obvious one which

the plaintiff assumed, and, if not, whether the defendant negligently failed to warn and instruct her regarding the danger; and that depends on whether it was a part of her duty, or whether she was warranted in understanding that it was a part of her duty, to remove pieces which caught on the rollers. She must, of course, be held to have understood and appreciated those facts of common experience, which a girl of her age would be naturally expected to have become familiar with. She must be held to have known, for instance, that if her hand came in contact with the cylinder, which she knew was hot, it would be liable to be burned. But it is a different question whether she should be held to have understood and appreciated the risk that there was that her hand might be drawn in between the roller and the cylinder if she attempted to remove a piece from one of the rollers. The rate at which the machine was revolving, and which one of the witnesses testified was very rapid, would naturally have a great deal to do with the liability of getting her hand drawn in; and there is nothing to show that she understood or appreciated how fast the machine was revolving. She had seen others remove pieces from the rollers when the machine was in operation, and had received no instructions or warning as to the danger, and might naturally have supposed that the act was attended with no particular risk or it would not have been allowed. Taking her youth and inexperience into account, we do not see how it could have been ruled, as matter of law, that the risk was an obvious one which she must be held to have assumed.

Neither do we see how, on the other branch of the case, it could have been ruled as matter of law that the jury were not warranted in finding that the plaintiff was justified in assuming that it was a part of her duty to remove pieces from the rollers. It is true that she was not told to do it. Neither was she told not to do it. She testified that she had seen other girls do it, and it was undisputed that Miss McCormick, the head folder, had done it in her presence. If, as there was testimony on behalf of the defendant tending to show, the proper way was to stop the machine or call the foreman, there was nothing to show that she knew it. The president of the company testified that he had frequently knocked pieces off the rollers with his hand in the presence of the girls, and there was testimony tending to show that the foreman had pointed to pieces caught on the mangle in such a way that the head folder had evidently interpreted the gesture as indicating a wish on his part that the pieces should be removed, and she had thereupon got up on the machine and taken them off without stopping it. It seems to us that the evidence fairly warranted the jury in saying that, if the girls working on the machine were not expected to remove pieces from the rollers, they were al-

lowed to do so under such circumstances as imposed upon the defendant the duty of warning them of the danger. An employer cannot stand by, we think, and see persons in his employ doing things in the course of their employment for his benefit which may result in injury to them if they are not properly warned or instructed, and escape liability on the ground that they had not been told to do what they were doing. By allowing the things to be done without objection, he must be held to have assented to the construction thus given in effect by his employes to the scope of their duties. The evidence of the witness Gilbert in behalf of the plaintiff that she had taken pieces from the rollers was properly admitted in support of the plaintiff's contention as to the course of the business.

The result is that, in the opinion of a majority of the court, the exceptions must be overruled. So ordered.

(189 Mass. 254)

LAROE v. NORTHAMPTON ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampshire. Oct. 17, 1905.)

1. MUNICIPAL CORPORATIONS — STREETS — CHANGE OF GRADE—DAMAGES TO ABUTTING OWNERS.

Where the grade of a street is altered by the grant of a location of a street railway, it is not altered "for the purpose of repairing such way," within Rev. Laws, c. 51, § 15, providing that an abutter shall be entitled to compensation for damages sustained by the raising or lowering of a public way, or for the purpose of repairing such way.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 270.]

2. STREET RAILROADS—LOCATION—CHANGE OF GRADE—INJURIES TO ABUTTING OWNERS.

Rev. Laws, c. 112, § 44, making a street railway liable for injuries sustained during construction resulting from the carelessness of defendant's servants, if notice is given and an action begun as provided by chapter 51, § 20, has no application to injuries suffered by an abutting owner by a slight raising of the grade of the surface of a street by the railroad company in the process of construction.

3. SAME.

Where a street railway company was granted a location along a street, it was not liable for a slight raising of the grade from 6 to 15 inches, reasonably necessary as a matter of proper construction.

Case Reported from Superior Court, Hampshire County; Lemuel Le B. Holmes, Judge.

Action by one Laroe against the Northampton Street Railway Company to recover damages for a change of the grade of a street on which plaintiff was an abutting owner by defendant railway company in the construction of its line thereon. A verdict was directed for defendant, and the case was reported to the Supreme Judicial Court. Judgment on verdict.

Edwd. L. Shaw and John L. Lyman, for plaintiff. John C. Hammond and Henry P. Field, for defendant.

LORING, J. This is an action of tort, brought by an abutter on a public way against a street railway for building an embankment on the way, some 6 to 15 inches in height, in the construction of their tracks. The damage was caused by turning surface water onto the plaintiff's land, and otherwise. The plaintiff offered to show "that no grade was fixed in the location granted to the street railway company; that no grade was defined by the selectmen in the order of location or subsequent thereto; that such changing of grade in the process of construction was not made by an order or direction of the selectmen or superintendent of streets; that no authority for raising the embankment and raising the grade above the natural surface of the street had been given the street railway company, the location not having been given any grade lines, and the same not having been furnished before construction." The plaintiff conceded "that the defendant had a location to construct a street railway under the statutes," and "that in the building of the embankment and the construction of the road the work was properly done as street railway construction." The plaintiff owned the fee in that part of the way on which the embankment in question was constructed. Upon these facts a verdict was directed for the defendant, and the case is here on report.

In *Callender v. Marsh*, 1 Pick. 418, it was decided that no action can be maintained by an abutter for raising or lowering the grade of a highway by one authorized so to do. In the Revised Statutes it was provided that an abutter should have compensation when he sustained damage by the raising or lowering of a public way, or other act done "for the purpose of repairing such way." Rev. St. c. 25, § 6, now Rev. Laws, c. 51, § 15. Where the grade of a public way is altered by the grant of a location of a street railway, it is not altered "for the purpose of repairing such way" (Rev. St. c. 25, § 2, now Rev. Laws, c. 51, § 15), and for that reason no compensation is due under that act. That was decided in *Underwood v. Worcester*, 177 Mass. 173, 58 N. E. 589. See, also, *Vigeant v. Marlborough*, 175 Mass. 459, 56 N. E. 708. In such a case, however, the grade of the public way is rightly altered under the authority given to grant locations to street railways. That was decided in *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461. The result is that where the grade of a public way is altered in the location of a street railway, the abutter is without remedy. The statute passed to cover the injustice of *Callender v. Marsh*, 1 Pick. 418, does not cover this case, and it remains subject to that decision.

As to what was said in *Hewett v. Canton*, 182 Mass. 220, 224, 65 N. E. 42, that, if the abutter in such a case has a remedy against the street railway, it is under St. 1898, c. 578,

§ 11, now Rev. Laws, c. 112, § 44, referring to the clause in effect making a street railway liable (*inter alia*) for loss or injury sustained during construction which results from the carelessness of its servants, if notice is given and an action begun, as provided in Rev. Laws, c. 51, § 20; that is to say, as provided for actions brought to recover for defects in public ways. That section manifestly was enacted to relieve towns from liability for injuries to travelers in fact caused by the railway, and has no application in cases like that now before us. These propositions are not seriously questioned, if questioned at all, by the plaintiff. His contention is that under this location the grade of the way here in question was not rightly altered, and for that reason he, as owner of the fee on which the embankment was constructed, can sue in tort for the wrongful construction of it on his land. He argues that, under a location which is silent as to the grade, the railway must be built at the grade in fact existing or lawfully established. We are of opinion, however, that this contention is not correct, but that, on the contrary, as matter of construction of the location here in question, the grade of the way might be changed within the limits here in question, if that was reasonably necessary as matter of street railway construction, and further, the plaintiff's concession, that "in the building of the embankment and the construction of the road the work was properly done as street railway construction," must be taken to mean that. The case, therefore, falls within *Purinton v. Somerset*, 174 Mass. 556, 55 N. E. 461, and *Callender v. Marsh*, 1 Pick. 418; and the entry must be:

Judgment on the verdict.

(189 Mass. 104)

BRADFORD, Treasurer, v. STOREY.

(Supreme Judicial Court of Massachusetts. Middlesex. Sept. 11, 1905.)

1. INHERITANCE TAX—RECOVERY—LIMITATIONS.

Rev. Laws, c. 202, § 2, provides that actions of contract, founded on contracts or liabilities express or implied, except actions limited by the preceding section, or actions on judgments or decrees of courts of record, shall be commenced only within six years after the cause of action accrues; and section 17 declares that the limitations of the preceding sections of the chapter shall apply to actions brought by the commonwealth or for its benefit. *Held*, that such provisions related to actions to which the preceding sections of the chapter applied, and not to all actions brought by the commonwealth or for its benefit, and that, a tax on inheritance not being a debt, an action to recover the same was not barred either by the general or special statute of limitations.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1709, 1730.]

2. PROBATE COURT—JURISDICTION—INHERITANCE TAX.

Under a statute declaring that the probate court having jurisdiction of the settlement of a decedent's estate shall, subject to appeal, as in

other cases, hear all questions as to the collateral inheritance tax, where there was a controversy as to the liability of an administrator to pay a collateral inheritance tax, and as to its effect on the devise and legacies payable under the will, the probate court having jurisdiction of the estate had jurisdiction to hear and determine whether the tax was payable and the amount to be paid.

3. INHERITANCE TAX—INTEREST.

Under Rev. Laws, c. 15, § 4, providing that collateral inheritance taxes shall be payable at the expiration of two years after the day of giving bond by the executors, administrators, and trustees, and that, if not paid when due, interest shall be charged from the time when the same became payable, interest was properly computed on a tax not paid when due, though part of the estate was given in remainder, and the dispositions of the will were subsequently modified by agreement between the beneficiaries.

Case Reserved from Supreme Judicial Court, Middlesex County; William C. Loring, Judge.

Petitions by Edward S. Bradford, as Treasurer of the commonwealth, against Moorfield Storey, administrator with the will annexed of the estate of Sarah A. Tileston, deceased, and by said Bradford against said Storey as administrator *de bonis non* of said estate to determine the liability of the legacies, etc., to a collateral inheritance tax. From an order denying the administrator's motion to dismiss the petition for want of jurisdiction, and from a decree declaring him liable for a tax on the net value of the estate with interest and determining the amount of the tax, the administrator appeals. At the request of the parties the appeals were consolidated, and the case reserved for hearing by the full court. Affirmed.

Roger F. Sturgis, for appellant. Frederic B. Greenhalge, for appellee.

MORTON, J. These are two appeals relating to the same estate, and at the request of the parties were consolidated and heard together. They were reserved for the full court, and such disposition is to be made of them as shall seem meet. The question at issue relates to the collection of a collateral inheritance tax from the estate of one Sarah Ann Tileston, who died testate in March, 1894, leaving an estate appraised at upwards of \$49,000. By her will the testatrix gave her property to nephews and nieces. The estate was, therefore, subject to a collateral inheritance tax, under St. 1891, p. 1028, c. 425, § 1, now Rev. Laws, c. 15, § 1. It is not contended that it was not, or that the tax has ever been paid. The administrator, seeks to avoid the payment on the ground that the probate court had no jurisdiction of the petition by the Treasurer and Receiver General to have the amount of the tax determined and its payment ordered by the administrator, or if it had, that the tax is barred by the general statute of limitations or by the special statute affecting actions against executors or administrators. There is also a further question relating to interest.

Two executors were named in the will, but only one survived the testatrix. He was duly appointed April 24, 1894, and subsequently filed an inventory and paid certain legacies and annuities. In December, 1896, he resigned without having filed any account. In January, 1897, the respondent was appointed, and subsequently filed an inventory and two accounts, one of which was a final account. Neither of the accounts has been allowed. In November, 1902, the judge of the probate court, acting under Rev. Laws, c. 15, § 20, and upon the application of trustees who had been appointed under the will, certified to the petitioner that the final account of the respondent had been filed and that the settlement of the estate was delayed by reason of the nonpayment of the collateral inheritance taxes. Thereupon the petition in this case was filed. The respondent made a motion to dismiss on the ground that the petition was in effect an action at law to collect the tax and the probate court had not jurisdiction. The motion was denied, and the respondent appealed. Subsequently he filed an answer, not waiving this appeal, and setting up in bar the general statute of limitations and the special statute applicable to executors and administrators. A hearing was had, and a decree was entered that the respondent was liable for a tax upon the net value of the estate, with interest from April 24, 1896, being two years after the date of the appointment of the executor, and the amount of the tax was determined, but no order was made for its payment. From this decree, also, the respondent appealed. This appeal and the appeal from the order overruling the motion to dismiss constitute the two appeals referred to earlier in this opinion.

The question whether the general statute of limitations applied was left open in *Howe v. Howe*, 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626, and the question whether the special statute applied was not raised. Rev. Laws, C. 202, § 2, provides that "the following actions shall, except as otherwise provided be commenced only within six years next after the cause of action accrues: First, action of contract founded upon contracts or liabilities express or implied, except actions limited by the provisions of the preceding section or actions upon judgments or decrees of courts of record of the United States, or of this or of any other state of the United States." The "actions limited by the provisions of the preceding section" have nothing to do with the question now before us. Section 17 of the same chapter provides that "the limitations of the preceding sections of this chapter shall apply to actions brought by the commonwealth or for its benefit." But it is manifest that these provisions relate to actions to which the preceding sections apply, and are not intended to apply to all actions that may be brought by the commonwealth or for its benefit, of whatever

nature. A tax is not a debt in the ordinary sense of the word, and is not founded upon a contract, express or implied (*Palmer v. Boston*, 3 Metc. 520), and a collector cannot maintain an action to recover it, except as authorized by statute (*Crapo v. Stetson*, 8 Metc. 398). The word "liability" is, it is true, of large significance, but, as used in the statute, refers plainly to liabilities of a contractual nature. Very likely, in view of the provision in regard to the collection of taxes levied generally for the public benefit, authorizing a collector, if a tax remains unpaid for three months, to maintain an action therefor in his own name as for his own debt (Rev. Laws, c. 18, § 82), the general statute of limitations would be held to apply to actions so brought. See *Rich v. Tuckerman*, 121 Mass. 222. But for reasons stated in *Howe v. Howe*, supra, in considering the question whether the action was barred by failure to bring suit within two years and six months, and which need not be repeated here, we think that neither the general nor the special statute of limitations operates as a bar to the recovery of the tax in the present case.

The respondent contends in the next place that the petition was in effect an action at law for the recovery of the tax, and that the probate court had not jurisdiction. But all that the probate court did was to hear and determine whether a succession tax was payable, and what the amount was, and this was clearly within its jurisdiction. It is expressly provided that "the probate court having jurisdiction of the settlement of the estate of the decedent shall, subject to appeal as in other cases, hear and determine all questions relative to said tax affecting any devise, legacy, or inheritance." In this case there was a question as to the liability of the administrator to pay a tax, and it affected devises and legacies payable under the will. The proceeding was therefore directly within the terms of the statute. *Callahan v. Woodbridge*, 171 Mass. 595, 51 N. E. 176. There are also other provisions which contemplate that the probate court shall have power to determine the amount of the tax, such, for instance, as the provision relating to the sale of real estate for the payment of the tax (Rev. Laws, c. 15, § 8), and the general scheme of the statute vests the probate court with large powers in all matters relating to the tax. The motion to dismiss for want of jurisdiction was rightly overruled.

Lastly, as to the matter of interest. The statute expressly provides that the tax shall be payable at the expiration of two years after the date of giving bond by executors, administrators, and trustees, and that, if the taxes are not paid when due, interest shall be charged from the time when the same became payable. Rev. Laws, c. 15, § 4. Interest was rightly computed by the probate

court according to the rule thus established. It is immaterial that a part of the estate was given in remainder, or that the dispositions of the will were modified by the agreement that was entered into. The whole estate was liable to the tax, and there was nothing to affect the time when it was payable.

Decree affirmed.

(189 Mass. 82)

PHENIX NERVE BEVERAGE CO. v. DENNIS & LOVEJOY WHARF & WAREHOUSE CO.

(Supreme Judicial Court of Massachusetts. Norfolk. Sept. 9, 1905.)

1. CONTRACTS — CONFLICTING EVIDENCE — QUESTION FOR JURY.

Where, in an action on a contract alleged to have been made by parol, defendant did not admit that the terms of the contract were as testified to by plaintiff's agent, the case was properly submitted to the jury.

2. SAME—TERMS OF CONTRACT—INSTRUCTIONS.

In an action for injuries to goods stored by plaintiff in defendant's warehouse under a parol contract, which plaintiff claimed, and defendant denied, required the goods to be stored where they would not freeze, an instruction that the jury were entitled to consider, not only what was said or written when the contract was made, but what was done by the parties in pursuance of the talk and letters, in determining whether the contract was as claimed by plaintiff or not, was sufficiently favorable to defendant.

3. WAREHOUSEMEN — CONTRACT — CONSTRUCTION.

In an action for injury to goods stored by plaintiff in defendant's warehouse, there was evidence that plaintiff's manager asked defendant's treasurer by telephone what the storage on the goods would be, and at the same time notified him that they would have to be stored where they would not freeze, and that defendant's treasurer said that they would not freeze in their basement or third floor. Plaintiff's manager requested defendant to acknowledge the arrangement by mail, which defendant did by a letter merely confirming the charge to be made for storing. *Held*, that a request to rule that the language used in making the contract did not amount to an agreement to store the goods so that they would not freeze was properly refused.

4. EVIDENCE — ADMISSIONS BY EMPLOYÉ — SCOPE OF EMPLOYMENT.

In an action for damages to goods stored by plaintiff in defendant's warehouse under an alleged oral contract providing that the goods should be so stored that they would not freeze, there was evidence that plaintiff's bookkeeper had, at various times after the goods were stored, given orders for removal of part of the goods, and had personal charge of the receipts and delivery of the goods, and had been at the defendant's office a number of times, and that he had authority in behalf of the plaintiff to sign certain transfer orders. The manager of plaintiff testified that the bookkeeper had no authority with relation to the contract, except with respect to the performance of clerical duties. *Held*, that evidence as to the acts and declarations of the bookkeeper, expressing satisfaction with the place where the goods were stored, were properly excluded.

Exceptions from Superior Court, Norfolk County; Chas. W. Bell, Judge.

Action by the Phenix Nerve Beverage Company against the Dennis & Lovejoy Wharf & Warehouse Company. There was

verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

The action was in contract to recover damages for injuries by freezing to certain goods stored by plaintiff in defendant's warehouse. The plaintiff claimed that defendant had made a special contract that the goods should not be allowed to freeze. The contract was made in the course of a telephone conversation between the manager of the plaintiff company and the treasurer of the defendant company, the former of whom testified that he asked defendant's treasurer what he would charge to store the goods, and that the latter quoted a certain price. The witness stated that he then said, "You understand that these goods will have to be stored where they will not freeze?" and that defendant's treasurer said they would not freeze in their basement or third floor. Witness stated that he then asked that the arrangement be acknowledged by mail. The letter sent in compliance to this request merely confirmed the charge to be made for storing the goods. The defendant asked the court to rule that the language used by plaintiff's manager and defendant's treasurer was not sufficient to establish an agreement or guaranty to so store and keep the goods that they should not freeze. This ruling was refused. The defendant offered to prove that one Mitchell, an employé of plaintiff, had inspected the goods from time to time, had expressed approval of the place where they were stored, and had on one occasion expressly approved the storing of a portion of the same goods in a room adjoining the one where the goods were stored and of exactly similar character. Plaintiff objected on the ground that Mitchell, who was a bookkeeper, had no authority to act for plaintiff in connection with these matters. It appeared from the evidence that plaintiff's manager had no communication of any kind with the defendant, other than the original telephone conversation, and defendant's treasurer testified that from that time until the discovery of the freezing Mitchell did everything that was done in connection with the goods. The original receipts given by defendant were made out in the name of a bank, in compliance with so-called transfer orders, and all these orders were signed by Mitchell in behalf of plaintiff, and his authority to do this was admitted. The orders for the removal of goods were given by Mitchell, and he had personal charge of all receipts and delivery orders. Mitchell had been to the warehouse of defendant from 20 to 30 times in connection with the business. Plaintiff's manager testified that he was in charge of plaintiff's business, and that he had never delegated his authority to any person, and that Mitchell had no connection with the contract, excepting clerical duties.

H. T. Richardson, for plaintiff. Roland Gray and Robt. A. Jackson, for defendant.

LATHROP, J. The defendant in this case did not admit that the oral contract was as testified to by the agent of the plaintiff. The case was therefore properly submitted to the jury. *Thruston v. Thornton*, 1 Cush. 89; *Camerlin v. Palmer Co.*, 10 Allen, 539; *Winchester v. Howard*, 97 Mass. 301, 93 Am. Dec. 93; *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193.

The charge of the judge was sufficiently favorable to the defendant in instructing the jury that they were entitled to consider, not only what was said or written, but what was done by the parties in pursuance of the talk and letters, and to determine whether the agents of the plaintiff and defendant understood the terms of the bailment as claimed by the plaintiff, and that, unless they so found, their answer to the first question should be, "No." *Saunders v. Clark*, 106 Mass. 331; *Proctor v. Old Colony Railroad*, 154 Mass. 251, 28 N. E. 13.

The bill of exceptions states that the defendant knew the character of the goods received; that it knew that, if the weather was unusually cold, they would be likely to freeze in that portion of the defendant's building where they were stored; and that no agent or servant notified the plaintiff of this probability, and never said anything to the plaintiff in regard to the temperature or freezing until in March, 1904. Stewart, the manager of the plaintiff company, testified that upon discovering the damage he called Brown's attention to the fact that, in the original conversation over the telephone, the defendant accepted the goods after being notified that they must be kept in a suitable temperature, and that Brown, the defendant's treasurer, did not admit or deny such an arrangement. Brown, in his testimony as to the telephone conversation, said that he did not recollect Stewart's saying anything about temperature or freezing, but he would not deny absolutely that anything of the kind was said. The plaintiff's witnesses also testified that the defendant did not give any notification of the freezing, and that it was discovered by the plaintiff some time after it occurred. The first request for instructions was properly refused.

The remaining exception relates to the exclusion of evidence relating to the alleged acts and declarations of one Mitchell. The defendant offered to show that Mitchell had inspected the goods from time to time, had expressed approval of the place where they were stored, and had on one occasion expressly approved of the storing of a portion of the same goods in a room adjoining the one where the goods were stored and of exactly similar character. On the question of the admissibility of the evidence there was testimony that Mitchell was the bookkeeper of the defendant, and, under authority of the manager of the defendant, had attended to the transfers of the goods from the ware-

house, where they previously had been, to the defendant's warehouse. If the contract was as the plaintiff claimed, we find no evidence in the offer of proof to show any authority on the part of Mitchell to change the contract or to waive it. The evidence, therefore, was rightly excluded. *Baker v. Gerrish*, 14 Allen, 201; *Stollenwerck v. Thacher*, 115 Mass. 224; *Rowe v. Canney*, 139 Mass. 41, 29 N. E. 219; *Gilmore v. Mitlineague Paper Co.*, 169 Mass. 471, 476, 48 N. E. 623.

Exceptions overruled.

(189 Mass. 206)

HARLOW et al. v. BAILEY et al.

WOOD et al. v. HARLOW et al.

(Supreme Judicial Court of Massachusetts.
Middlesex. Sept. 26, 1905.)

1. WILLS—CONSTRUCTION—ESTATE DEVISED.

Testatrix devised her real estate to her sister, and authorized her to sell the same at public or private sale, and to invest and reinvest the proceeds and appropriate to her own use the income thereof, "so long as she shall remain unmarried." *Held*, that the sister did not acquire an estate in fee, but only an estate so long as she remained unmarried.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1356.]

2. SAME—LEGALITY OF PROVISIONS—RESTRAINT OF MARRIAGE.

A devise to one "so long as she shall remain unmarried" is not invalid as in restraint of marriage, though the devisee may be induced to remain single to enjoy the benefits of the devise.

3. SAME—CONSTRUCTION.

Testatrix gave to her sister the income of \$2,000 for life, and also gave her \$2,000 in addition. In a codicil she provided that the \$2,000 "given for the benefit of my sister * * * I give * * * to" persons named, "in trust for" the sister, "the principal and income to be used, if necessary, to provide for" her support. *Held*, the words "given for the benefit of my sister" described the gift of the sum whose income was given to the sister for life, and not to the absolute gift of the similar sum.

4. SAME—ESTATES IN TRUST—DEATH OF BENEFICIARY—EFFECT.

Where the beneficiary, in a provision in a will creating a trust out of the residuary estate, died before the will was proved, and only a month after the death of the testatrix, the trust provision was inoperative, and the trustees could not take the residue and establish the trust, for the purpose of paying the beneficiary the income thereof for one month.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1645.]

5. SAME—DISPOSITION OF RESIDUARY ESTATE.

Testatrix gave the residue of her estate to three persons equally. By a codicil she revoked the gift in favor of two of them, and provided that a specified sum should be equally divided between them, and gave the residue of her estate to three other persons named. *Held*, that one-third of the residuary estate passed to the person named in the will whose gift was not revoked, and two-ninths passed to each of the three persons named in the codicil.

Report from Supreme Judicial Court, Middlesex County.

Bill by George Harlow and another executors of the will of Sarah R. Harlow, de-

ceased, against Dudley P. Bailey, administrator of Abby R. Fletcher, deceased, and others, for the construction of the will and codicil of Sarah R. Harlow, deceased. Petition by Rebecca D. Wood and another against John B. Harlow and others to quiet title to land. The causes were reported to the Supreme Judicial Court. Decree construing the will and dismissing the petition.

The parts of the will of Sarah R. Harlow necessary for a determination of the case are as follows: "I give and devise to my sister, Abby R. Fletcher, my real estate now occupied by me as my residence, situated on Linden street, in said Everett, being lot numbered six (6) on a 'plan of building lots in Everett, belonging to Anthony Waterman, A. F. & N. N. Sargent, surveyors; April 25, 1871,' recorded at Middlesex South District Registry of Deeds of Plans No. 20, Plan 47, so long as she shall remain unmarried; and I hereby authorize my said sister to sell said real estate, either at public or private sale, and to make, execute, and deliver good and sufficient deeds to convey the same, the purchaser not to be answerable for the application of the purchase money, also to invest and reinvest safely the proceeds of such sale, and to receive and appropriate to her own use the income of such investments, so long as she shall remain unmarried. I also give and bequeath to my said sister my household furniture not herein otherwise specifically bequeathed, any and all provisions and wearing apparel remaining, on my decease, without appraisal; also the income of my other property and estate until my estate shall be settled, and after that shall be closed I give and bequeath to her the income of two thousand dollars for and during the term of her natural life. I also give and bequeath to my said sister the sum of two thousand dollars (\$2,000) in addition to the income hereinbefore given; also the picture 'Good Morning' and the two small pictures hanging in my room; also all other personal property in my house not herein otherwise disposed of. All the rest, residue, and remainder of my estate, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and bequeath to Edward O. Harlow and George H. Harlow, and their heirs and assigns, forever, but in trust, nevertheless, to invest and reinvest any investable funds in any securities in which the Savings Bank of Massachusetts is by law authorized to invest, or to deposit the same in any Massachusetts saving bank or banks, to collect the income of said property, and, after the payment of taxes and other necessary charges, to pay to said Abby R. Fletcher the income of the two thousand dollars mentioned in the second clause of this will during her life. All the rest, residue, and remainder of my estate, real, per-

sonal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and bequeath to John B. Harlow of Harvard, in the county of Worcester and commonwealth aforesaid, and Anne E. Harlow and Adaline S. Harlow, both of said Ayer, in equal shares, and their heirs and assigns forever. "I hereby constitute and appoint Edward O. Harlow, of said Ayer, and George H. Harlow, of Billerica, in said county of Middlesex, to be the executors of this my last will and testament, and trustees under the same, and request that they be exempt from furnishing surety or sureties on their official bond or bonds, either as executors or trustees, and I hereby authorize them, on the request of my sister, Abby R. Fletcher, to sell any portion or all of my real estate at public or private sale, and to make, execute, and deliver good and sufficient deeds to convey the same, the purchaser not to be answerable for the application of the purchase money."

The provisions in the codicil are as follows: "First. I hereby revoke any residuary clause of said will in favor of Anna E. Harlow and her sister, Addie S. Harlow, and instead thereof I give to said Anna E. Harlow and Addie S. Harlow the sum of five hundred dollars, to be equally divided between them. Second. The two thousand dollars given for the benefit of my sister, Abby R. Fletcher, I give and bequeath to Samuel A. Bacon of Hartford, in the state of Connecticut, and George H. Harlow, of Billerica, in the commonwealth of Massachusetts, in trust for said Abby R. Fletcher, the principal and income to be used, if necessary, to provide for her comfortable support and maintenance during her life. * * * Eleventh. All the rest, residue, and remainder of my estate, real, personal, and mixed, of which I shall die seised and possessed, or to which I shall be entitled at my decease, I give, devise, and bequeath to said Samuel A. Bacon and George H. Harlow and Edward O. Harlow, and their heirs and assigns, forever."

Adams & Blinn, for Anna E. Harlow and others. H. H. Newton and Cornelius A. Parker, for Rebecca D. Wood and Kate B. Bragg. Dudley P. Bailey, pro se.

KNOWLTON, C. J. The first of these cases is a bill for instructions, on which the single justice reported to this court five questions in regard to the construction of the will of Sarah R. Harlow, deceased. The second is a petition to quiet or establish the title to land, brought by some of the heirs at law of Sarah R. Harlow against the other heirs and the residuary legatees of said deceased. The question of law raised on the second petition is the same as the first question reported by the single justice on the first petition. Digitized by Google

1. The second clause of the will vested in Abby R. Fletcher a life estate, with a power of sale in the real estate therein described, terminable on her marriage. In the first place, the words fixing the duration of the estate, "so long as she shall remain unmarried," do not indicate an intention to create an estate in fee. The authority to the devisee to sell at public or private sale, which immediately follows them, requires her "to invest and reinvest safely the proceeds, and appropriate to her own use the income of such reinvestments so long as she shall remain unmarried." This provision is inconsistent with the creation of an estate in fee, and shows that the estate was for life only. A power to sell may well be given to a devisee in connection with a devise of an estate for life. *Woodbridge v. Jones*, 183 Mass. 549, 67 N. E. 878; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; *Hatfield v. Schier*, 114 Mass. 48. The authority in the fourteenth clause to the trustees to sell this real estate on the request of Abby R. Fletcher, so far as it indicates any purpose in regard to the nature of her estate, implies very plainly that she was not to have the absolute control of an owner in fee. The provision in regard to her possible marriage has no tendency to enlarge the estate. *Fuller v. Wilbur*, 170 Mass. 506, 49 N. E. 916; *Knight v. Mahoney*, 152 Mass. 523, 25 N. E. 971, 9 L. R. A. 578. If we apply the rule of the early cases in regard to provisions in restraint of marriage, the object of the devise in this case plainly is to provide for the devisee while single, and not to restrain marriage. The provision is therefore valid, even though the devisee might be induced to remain single to enjoy the benefits of the property. The devisee was a sister of the testatrix, more than 70 years of age. *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886, 16 L. R. A. 707, 30 Am. St. Rep. 358; *Cornell v. Lovett's Ex'r*, 35 Pa. 100; *Jones v. Jones*, 1 Q. B. D. 279; *Heath v. Lewis*, 3 De G. M. & G. 954; *McKrow v. Painter*, 89 N. C. 487; 2 *Jarman on Wills* (6th Ed.) § 886, and note, and cases cited.

2. The second clause of the codicil refers to the \$2,000 of which the income is given to Abby R. Fletcher in the second clause of the will, and not to the \$2,000 given to her absolutely. The words "given for the benefit of my sister" aptly describe a gift of a sum whose income is given during life, rather than an absolute gift of the same sum.

3. The eleventh clause of the will is inoperative. The beneficiary having died before the will was proved, only a month after the death of the testatrix, the trustees could not take the residue of the estate, and establish a trust, and invest this residue for the purpose of paying to a beneficiary the income of \$2,000 for one month. The cost of doing this would far exceed the income. Besides, the time for the termination of the

trust arrived long before the trust could come into existence.

4. The residue of the estate is to be distributed among the persons named in the thirteenth clause of the will, as modified by the first and eleventh clauses of the codicil, as follows: One-third to John B. Harlow, two-ninths to Samuel A. Bacon, and the same share to George H. Harlow and Edward O. Harlow.

5. For reasons stated in our answer to the third question, it is not necessary for Samuel A. Bacon and George H. Harlow to qualify as trustees under the second clause of the codicil. Besides, the gift was only to be used if necessary to provide for the support and maintenance of Abby R. Fletcher during her life. There is no necessity for the use of it.

In the first case answers are to be decreed accordingly. In the second case the petition is dismissed. So ordered.

(189 Mass. 267)

COMMONWEALTH v. TIROINSKI.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 17, 1905.)

HOMICIDE—CHARACTER OF DECEASED.

Where, in a prosecution for manslaughter, there was evidence of an assault by deceased on defendant immediately before the striking of the fatal blow, evidence that deceased's general character and habits were those of a violent and passionate person and that he was of a quarrelsome, fighting disposition, which character and habits were known to defendant, was admissible on the issue of provocation.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 814, 891, 892.]

Exceptions from Superior Court, Worcester County; Lemuel Le B. Holmes, Judge.

One Tircinski was convicted of manslaughter, and he brings exceptions. Sustained.

Geo. S. Taft, Dist. Atty., and W. P. Hall, Asst. Dist. Atty., for the Commonwealth. Thos. L. Brown, for defendant.

KNOWLTON, C. J. The trial was upon an indictment for manslaughter, and there was testimony tending to prove an assault by the deceased upon the defendant immediately before the striking of the fatal blow. "The defendant offered evidence to show that the general character and habits of the deceased were those of a violent and passionate person, a quarrelsome, fighting man, which character and habits were known to the defendant, as a circumstance tending to show the nature of the provocation under which the defendant acted, and the influence it had on the mind of the defendant, as showing reasonable apprehension that, if he did not act promptly and effectually, his own death or great bodily harm would be the result." The question before us is on the defendant's exception to the exclusion of this evidence.

The principle on which our decision must rest was stated and discussed by Chief Justice Morton in *Com. v. Barnacle*, 134 Mass. 215, 45 Am. Rep. 319. Of a case like the present he said: "In such cases, therefore, the questions whether there was reasonable cause to apprehend great bodily harm, and whether the defendant acted under such apprehension, are material issues. * * * The jury could not intelligently pass upon this issue without being informed as to the character and circumstances of the attack. It seems to us clear that the fact that the assailant was a larger and more powerful man than the defendant has a bearing upon the issue." The habits and temper and spirit of a man, and his fondness for quarrel, if he is naturally combative, are not less important to be considered, in judging of the danger to be apprehended from him, than his size and the strength of his muscles. One man might be of such disposition and habits that, if exceedingly angry, a murderous assault by him might reasonably be apprehended, while another of equal size under similar conditions would not be dangerous. In the case from which we have quoted, the court expressly overruled *Com. v. Mead*, 12 Gray, 167, 71 Am. Dec. 741; and, if the decision in *Com. v. Hilliard*, 2 Gray, 294, was intended to rest upon the same ground, it overruled that also. In *Com. v. Hilliard*, in holding that evidence of the general character of the deceased as a quarrelsome, fighting, and brutal man of great strength was too remote, the court said that "the provocation under which the defendant acted must be judged of by the *res gestæ*, and the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant." It does not appear from the report in that case that the defendant, at the time of the homicide, had any knowledge of the character of his adversary which he offered to prove at the trial. His want of knowledge might have been a sufficient ground for the ruling. If he knew it at the time, the known dangerous character of his assailant would have been a part of the *res gestæ*, to be considered in determining whether he had reasonable ground for apprehending grievous bodily harm from the attack. *Com. v. York*, 7 Law Rep. 497-507, was similar to *Com. v. Hilliard*. If the decisions in these cases were applicable to evidence of the general character of an assailant as a quarrelsome, brutal, dangerous man, which character was known to the defendant at the time of the homicide, they were virtually overruled by *Com. v. Barnacle*, *ubi supra*.

Our conclusion is in accordance with the doctrine of the text-books, and with the great weight of authority in other jurisdictions. *Wigmore on Ev.* § 246; *Wharton on Homicide* (2d Ed.) 605-628; 5 Am. & Eng. Enc. of Law (2d Ed.) 872, and notes; *Smith v. United*

States, 161 U. S. 85; 16 Sup. Ct. 483, 40 L. Ed. 626; *Abbott v. People*, 88 N. Y. 461; *Tiffany v. Com.*, 121 Pa. 165, 15 Atl. 462, 6 Am. St. Rep. 775; *Com. v. Straesser* 153 Pa. 451, 26 Atl. 17; *State v. Lull*, 48 Vt. 581-587; *State v. Nett*, 50 Wis. 524, 7 N. W. 344; *Marts v. State*, 28 Ohio St. 162; *Horsbach v. State*, 43 Tex. 250; *Brownell v. People*, 38 Mich. 732. The reasons for the rule have been so often and so fully considered in these cases that further discussion is unnecessary. We are of opinion that the evidence was competent.

Exceptions sustained.

(186 Ind. 317)

ÆTNA LIFE INS. CO. v. FITZGERALD.
(No. 20,630.)

(Supreme Court of Indiana: Oct. 11, 1905.)

1. INSURANCE—ACCIDENT POLICY—CONSTRUCTION.

An accident policy, insuring "against loss of business time * * * resulting from bodily injuries * * * through external, violent, and accidental means," covered loss of business time by disease proximately caused by a bodily injury occurring through external, violent, and accidental means.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1178, 1186.]

2. SAME—PROXIMATE CAUSE.

Plaintiff placed his hand on edge, with the thumb next to his head, in order to rest easier at night, and while asleep in such position moved so that his hand, with his head thereon as before, rested on the edge of the bed rail, in which posture he continued for several hours, when he awoke, finding his hand wholly numb, with a black mark thereon where it rested on the rail. Inflammation of the periosteum of the metacarpal bones resulted, necessitating a surgical operation and causing a protracted illness. Held that, in the absence of evidence that the inflammation was due to any other cause than the long-continued force exerted by the weight of plaintiff's head on his hand, such cause was an efficient proximate cause of the injury, within an accident policy insuring against loss of business time from bodily injuries effected through external, violent, and accidental means.

3. SAME—NOTICE OF LOSS—POLICY PROVISIONS—INSTRUCTION.

An accident policy requiring immediate notice of injury is complied with by the giving of notice within a reasonable time.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1331.]

4. SAME—ACTIONS—INSTRUCTIONS.

Where notice of injury under an accident policy was not given within a reasonable time, but after it was given a claim was made on the insurance company under the policy for the injury, the fact that the company in response denied all liability solely on the ground that the policy did not recover the injury was not a waiver of the provision requiring immediate notice.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1391.]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Philander Fitzgerald against the Ætna Life Insurance Company. From a judgment in favor of plaintiff, defendant ap-

peals. Reversed. Case transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u.

Miller, Elam, Fesler & Miller, for appellant.
R. W. McBride and Denny & Denny, for appellee.

GILLETT, J. Action by appellee against appellant on an accident policy. By the contract the company insured appellee "against loss of business time . . . resulting from bodily injuries effected during the term of this insurance through external, violent and accidental means." The motion for a new trial presents the question as to whether the disability involved was due to an injury within the terms of the policy. It appears from the testimony that on July 31, 1902, appellee, being much fatigued from an extended business trip, retired about 8 p. m. As he was somewhat restless, he placed his left hand between the pillow and his head, in order to raise it higher. The hand was placed on edge, with the thumb next to the head, and he fell asleep in that position. Some time during the night, while asleep, he moved so that his hand, with his head continuing upon it as before, rested upon the edge of the bed rail, and he continued to sleep in that posture until 4 a. m., when he awoke. He found that his hand was wholly numb, and it continued in that condition for the space of half an hour. There was a black mark upon it, where it had rested upon the rail, and this mark existed for some time thereafter. The hand pained him a great deal during the following day, and during the next night he was compelled to call a physician. The testimony of the latter, as well as that of the family physician, who took charge of the case upon returning from a vacation, shows that the pressure on the hand while upon the bed rail resulted in an inflammation of the periosteum of the metacarpal bones lying back of the third and fourth fingers, a condition which made an operation necessary and caused a protracted illness. The expert evidence shows that cases of inflammation of the periosteum, or, as the difficulty is technically termed, periostitis, are traumatic, at least for the most part, and that it is the opinion of the medical profession that all of such cases are due to some injury, perhaps forgotten.

The principal contention of counsel for appellant on the question of the sufficiency of the evidence is that appellee's loss of time was due to disease, and not to an injury within the terms of the contract. We hold that the policy in suit was an insurance against loss of business time by disease, provided that the disability was proximately caused by a bodily injury occasioned through external, violent, and accidental means. It is the general understanding that this class of policies insure against diseases so occasioned, and where medical science reveals the fact that back of the disease stands a proximate cause

answering in all respects to the terms of the policy, it will not suffice to discharge the company that the consequence is accounted a disease. The insured cannot know what may befall him as the result of possible injuries, and it must be taken to have been the understanding of the parties that loss of time occasioned by disease was insured against, where the disability was proximately occasioned by an injury within the provisions of the contract. It will be time enough to deal with the difficult cases suggested by appellant's counsel, involving subtle, external causes of disease, when they arise. There was no evidence tending to show that the inflammation from which appellee suffered was due to any cause other than that of the long-continuing force exerted by the weight of the head. It was said in *McCarthy v. Travelers' Ins. Co.*, 8 Biss. 362, Fed. Cas. No. 8,682, that "an efficient and adequate cause, being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." See, also, *Continental Casualty Co. v. Lloyd* (at last term), 73 N. E. 824; *National Benefit Ass'n v. Grauman*, 107 Ind. 288, 7 N. E. 233. It was declared by this court, in *Supreme Council, etc., v. Garrius*, 104 Ind. 133, 8 N. E. 818, 54 Am. Rep. 298, that the word "accident," as used in an accident policy, "should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation." We are not here called on to consider a case where the result is one which follows from ordinary means voluntarily employed, and in which the only element of unexpectedness lies in the fact that the pursuit of the means unexpectedly brings about a physical condition which makes disease possible. Here the element of volition was wholly absent, and the fact that during a period of unconsciousness there was a distinct and long-continued force applied, which compressed the tissues and blood vessels surrounding the bones, and thereby caused the inflammation, marks the case as one of accident.

We are also of opinion that the injury was a violent one within the terms of the policy. The degree of violence is not always a controlling consideration. *Southard v. Railway, etc., Co.*, 34 Conn. 574, Fed. Cas. No. 13,182. We are not to be understood as holding that violence will be wholly implied to bring an accident within the terms of the policy. Our holding is that, where an injury proximately proceeds from a cause which falls within the limitations of the policy interpreted according to the ordinary understanding of the force of words, that interpretation is to be preferred, rather than one which would defeat the protection of the assured in a large class of cases. *Trew v. Insurance Co.*, 6 Hurl. & N. 844; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; *Healey v. Mutual*

Accident Ass'n, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637. There were present in this instance, in a substantial sense, all of the elements necessary to bring the proximate cause of the disability within the requirement that the loss of time must result from a bodily injury effected through external, violent, and accidental means. The only thing that was extraordinary about the case was the result; but this will not relieve, for the company was paid for its undertaking to provide a conventional measure of indemnity against the fortuitous, provided that it proximately proceeded from such an injury as the policy describes. We hold that the evidence was sufficient to support the verdict.

Appellant has assigned as an error that the court below erred in overruling a demurrer to the complaint. As the only objection which is urged to that pleading has, in effect, been determined by us to be untenable in passing on the question as to the sufficiency of the evidence, it is enough to announce that appellant is not entitled to a reversal based on the overruling of said demurrer.

The policy in suit provided that an immediate notice of the injury should be given the company. Appellee did not give notice until about 50 days after the injury. October 23, 1902, the company, by its general agents at Indianapolis, sent appellee a letter, stating that the company declined to approve the claim on the ground that it did not "come within the classification of an accident." The trial court, by instructions which are not complained of, submitted to the jury trying the cause the question, as one of fact, whether, in view of appellant's condition, notice was given within a reasonable time; but the court also gave to the jury the following instruction, for which a reversal is sought: "On the question of waiver and the provision of the policy requiring immediate notice, I instruct you that if you should find, from the evidence, that the notice required by the policy was not given within a reasonable time after the happening of the alleged accident and injury, but was given some time later, and that after it was given a claim was made upon the defendant on said policy for the injury in controversy, and that in response to said claim the defendant denied all liability, and placed its denial of liability solely on the ground that the policy sued on did not cover such an injury as this was, without saying anything about the failure to have given this notice required in the policy, such fact would amount to a waiver of the provisions requiring immediate notice." Under the provisions of the Indiana statutes concerning foreign insurance companies the provision of the policy above referred to amounted to a requirement of notice within a reasonable time. Section 4923, Burns' Ann. St. 1901; Insurance Co. of North America v. Brim, 111 Ind. 281, 12 N. E. 315; Pickel v. Phenix Ins. Co., 119

Ind. 291, 21 N. E. 898; Peele v. Provident Society, 147 Ind. 543, 44 N. E. 661, 46 N. E. 990. It will be observed, however, that by the instruction above set forth the court instructed upon the hypothesis that notice was not given within a reasonable time, and informed the jury that a subsequent denial of liability on another ground, without mentioning the failure to give notice, would amount to a waiver. If this was a correct exposition of the law as applied to the facts, there was no question, under the uncontradicted evidence, to submit to the jury.

We considered the doctrine of waiver of proofs of loss at some length in *Germania Fire Ins. Co. v. Pitcher*, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003, and in view of what was there said this case can be disposed of without much further discussion. It is true that we held in the *Pitcher* Case that there might be a waiver after the time for making proofs of loss had expired, but it will be observed that there the disagreement was as to the amount of the loss. A protracted negotiation over such a question after the expiration of the time for the making of proofs might warrant a jury in concluding that the company was recognizing a subsisting obligation to the extent of what it conceived to be the amount of the loss; but we cannot sanction the view that, after the assured has sinned away all right of recovery under the policy, he may yet recover by proof that the company refused to pay on the ground that the policy did not cover the claim asserted in the notice. The refusal to pay on a wholly different ground, made within the time that the policy holder may take steps to make good his right under the contract, is treated in this state as a waiver per se; but we perceive no reason, after the right is gone, for permitting the policy holder to go to the jury on the question of waiver under proof of the solitary fact that the company had afterwards declined for another reason to recognize the validity of the policy. The authorities support us in this view of the law. *Fidelity, etc., Co. v. Sanders*, 32 Ind. App. 448, 70 N. E. 167, and cases cited; *Patrick v. Farmers', etc., Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Beatty v. Lycoming, etc., Ins. Co.*, 66 Pa. 9, 5 Am. Rep. 318; *Hart v. Trustees, etc.*, 108 Wis. 490, 84 N. W. 451; *State Ins. Co. v. School Dist.*, 66 Kan. 77, 71 Pac. 272; *Employers', etc., Corp. v. Roschelle*, 13 Tex. Civ. App. 232, 35 S. W. 869; *May on Insurance*, § 464. In fact, we have not been able to find a case which seems to support appellee upon this point, unless it be *Brink v. Hanover Fire Ins. Co.*, 80 N. Y. 108, which is cited in the brief filed on his behalf. The value of that case as a precedent in appellee's favor was destroyed by *Devens v. Mechanics', etc., Ins. Co.*, 83 N. Y. 168, where the court, referring to the *Brink* Case, said: "The doctrine of waiver was, we think, properly applied in that case; but it should not be extended, so as to deprive a party of his

defense, merely because he negligently or incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that, with full knowledge of the facts, there was an intention to abandon, or not to insist upon, the particular defense afterwards relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury."

Appellee's counsel contend that under the evidence it appears that notice was given within a reasonable time. We have read the evidence as set out in the bill of exceptions, and while we are of opinion that the question of reasonable time was for the jury, in view of the evidence as to appellee's condition, yet the case which he seeks to make out was not so convincing upon that point as to render harmless the giving of the above instruction.

Judgment reversed, and a new trial ordered.

(165 Ind. 279)

CHICAGO & S. E. RY. CO. et al. v. GRANTHAM. (No. 20,550.)

(Supreme Court of Indiana. Oct. 6, 1905.)

1. APPEAL—PARTIES—TRANSFER OF INTEREST—DISMISSAL.

When a party to an appeal transfers or otherwise loses his interest in the subject-matter in controversy, the appeal will be dismissed as to him on the fact being brought to the attention of the Appellate Court.

2. JUDGMENT—CONCLUSIVENESS—TITLE TO REALTY.

In an action to quiet title, which, under Burns' Ann. St. 1901, § 1082 (Rev. St. 1881, § 1070; Horner's Ann. St. 1901, § 1070), may be brought against any one "who claims title to or interest in real property," a defendant must set forth all the interest he then claims, and if he fails to do so his claim, whatever its character, is barred, and a decree for plaintiff is conclusive against him and his privies as to every claim he might have asserted, whether of an easement or other interest.

3. SAME.

In an action for possession of land, in which the question of title is directly in issue, a judgment for plaintiff is conclusive against any claim or interest of defendant.

4. EVIDENCE—TRANSCRIPT OF JUDGMENT—AUTHENTICATION.

A transcript of a judgment, bearing the certificate of the clerk that it contains "a full and complete copy of the complaint, answer, reply, and judgment" in the cause, is sufficiently authenticated to be admissible in evidence.

5. COURTS—JURISDICTION—PRESUMPTIONS.

Where the record of a court of general jurisdiction in a cause is silent on the subject of jurisdiction over the parties and does not affirmatively show want of such jurisdiction, it will be presumed in support of the judgment rendered, and cannot be collaterally attacked; and hence the transcript of a judgment of a circuit court is not inadmissible in evidence, because it shows that the pleadings were filed in the circuit court of another county, the presumption being after judgment that the venue was properly changed.

6. ABATEMENT AND REVIVAL—PLEA IN ABATEMENT AND IN BAR.

It is not reversible error to sustain a demurrer to an answer in abatement filed by a defendant after he has filed an answer in bar.

Appeal from Circuit Court, Clinton County; Samuel R. Artman, Special Judge.

Action by Charles W. Grantham, administrator, against the Chicago & Southeastern Railway Company and others. Judgment for plaintiff, and defendant railway company and defendant Davis, trustee, appeal. Transferred from Appellate Court under Burns' Ann. St. 1901, § 1337u (Acts 1901, p. 590). Appeal dismissed as to Davis, and judgment affirmed.

A. C. Harris and U. C. Stover, for appellants. Clodfelter & Fine and T. E. Ballard, for appellee.

MONKS, C. J. This action was brought on July 28, 1901, by Wesley Grantham against appellant railroad company for the assessment of damages for land appropriated for railroad purposes. The Metropolitan Trust Company, Theodore P. Davis, trustee, and the Central Trust Company, were made parties defendant; it being alleged in the application that "they each claim some right, title, and interest in the strip of land described, the exact nature of which is unknown to this plaintiff, and that said claim of each of said defendants is unfounded and without right. Elizabeth A. Messick is also made a party defendant to answer as to any interest she may have in the matter alleged." Elizabeth A. Messick filed a disclaimer of any interest in the cause of action set forth in the complaint. Final judgment for damages was rendered in favor of the plaintiff, Wesley Grantham. The only errors assigned are by the railroad company and Theodore P. Davis, trustee.

Appellee, by verified motion to dismiss this appeal, shows as to appellant Davis, trustee, that he and the Metropolitan Trust Company were made parties defendant in the court below to answer as to their interest in the real estate in controversy; that the only interest they claimed in said real estate was under and by virtue of a deed of trust for all of the property rights and franchises of said appellant railway company, executed to them as trustees to secure certain bonds described therein; that since the rendition of final judgment by the court below in this cause said trust deed and all the bonds secured thereby have been fully paid and satisfied by the sale of all of said railroad property under a decree of foreclosure of said trust deed, and said trust company and Davis, trustee, no longer have any interest in the matters in controversy in this action. It is well settled that, when a party to an appeal transfers or otherwise loses his interest in the subject-matter in controversy, the appeal will be dismissed as to him, when the fact is brought to the at-

tention of the appellate tribunal. *Stauffer v. Salimone, etc., Co.*, 147 Ind. 71, 72, 73, 46 N. E. 342; *Faucher v. Grass*, 60 Iowa, 505, 15 N. W. 302; 2 Cyc. 781. The appeal as to Davis, trustee, must therefore be dismissed.

The only questions left for determination are those presented by appellant railroad company. It appears from the record that on and prior to November 21, 1887, one Elizabeth A. Messick was the owner in fee simple and in the possession of a farm of 182 acres, described in the complaint in this action, in Montgomery county, Ind., and that prior to said day, and while said Elizabeth A. Messick was the owner and in the possession of said real estate, the Midland Railway Company, a corporation organized under the laws of this state, entered upon said real estate and proceeded to construct a railroad across the same, and on November 21, 1887, said Elizabeth A. Messick brought suit against said Midland Railway Company to quiet her title in and to that part of said real estate so entered upon and occupied by said railway company; the same being a strip 80 feet wide across said 182 acres of land. On May 16, 1892, she obtained judgment in said action against said railway company quieting the title to said real estate in her. On October 30, 1890, while said suit to quiet title was pending, said Midland Railway Company by deed conveyed all its property and franchises to appellant, the Chicago & Southeastern Railway Company, a corporation organized under the laws of this state. On February 1, 1893, the said Elizabeth A. Messick sold, and by warranty deed, in which her husband joined, conveyed, said 182 acres of land to Wesley Grantham. At the time the deed was so executed to said Wesley Grantham the appellant railway company was operating a railroad over and upon the part of said real estate in controversy as a common carrier. In March, 1893, said Grantham, after the conveyance of said land to him, commenced an action in the Montgomery circuit court against the appellant railway company to recover possession of the part of said real estate over and upon which said railroad was being operated; and on December 10, 1894, he recovered judgment for possession of said real estate. On January 1, 1901, the sheriff of Montgomery county, under writ issued on said judgment, put said Grantham in possession of said real estate and made his return on said writ accordingly. Afterwards, on January 19, 1901, while said Grantham was in possession of said real estate, the appellant railway company entered upon said real estate, tore down and removed his fences, and constructed a railroad track over and upon said real estate, and ran its cars and operated a railroad over the same, and when this action was commenced claimed and used the real estate in controversy as a part of its

right of way. Said entry was made upon said real estate without the consent of said Grantham, and without making or tendering him any compensation or damages.

In one of its exceptions to the award, appellant railway company alleged in effect that in 1873, the Anderson, Lebanon & St. Louis Railroad Company, a corporation organized under the laws of this state, located and graded a continuous roadbed from the city of Anderson, Ind., to the town of Waveland, Ind.; that a part of said continuous roadbed was constructed upon the strip of real estate in controversy, the same being then owned in fee simple by and in the possession of Thomas H. Messick as a part of said farm of 182 acres; that in 1874 said Anderson, Lebanon & St. Louis Railroad Company paid said Thomas H. Messick the amount of damages for said right of way as fixed by arbitrators selected by said parties, which amount said Messick received in full payment and satisfaction thereof; that afterwards, in 1885, said railroad and its franchises and property were sold and conveyed under a decree of foreclosure, to which Thomas H. Messick was a party, to the said Midland Railway Company, a corporation organized under the laws of this state; and that afterwards, on October 30, 1890, said Midland Railway Company sold and conveyed its said railroad and all of its property and franchises to appellant railway company, and it owns and operates the same as the successor of the Anderson, Lebanon & St. Louis Railroad Company and the Midland Railway Company. The trial court sustained a demurrer for want of facts to said exception, and sustained objections to all evidence tending to show that appellant railway company, or those under whom it claims, had any interest or right in or to the real estate in controversy prior to the rendition of said judgments quieting title and for possession, upon the theory that the rights of Wesley Grantham, plaintiff in the court below, were conclusively established by said judgments, and appellant railway company was estopped thereby from asserting any right, title, or interest in the real estate in controversy prior to the rendition of said judgments. This theory was correct. It was alleged in the complaint of Elizabeth A. Messick against said Midland Railway Company, filed November 21, 1887, that she was the owner in fee simple of the tract of land in controversy, and that said railway company claimed some title to or interest therein adverse to her, which claim she averred was groundless and unfounded, and a cloud upon her title, and prayed for a judgment quieting her title to the same. Said railway company appeared and filed an answer in two paragraphs. One paragraph was a general denial, and the other alleged new matter by way of confession and avoidance; it being substantially the same in effect as the matter alleged in the said appellant rail-

way company's sixth exception to the award above set out. A reply was filed, and upon the issues so formed the cause was tried by the court and a decree rendered, on May 16, 1892, that said railroad company had no right, title, or interest in said real estate, that its claim therein was unjust and unfounded, that Elizabeth A. Messick was the owner thereof in fee simple, and that the title in fee simple thereto be forever quieted in her. It was alleged in the complaint of Grantham against appellant railway company, filed in March, 1893, for possession of the real estate in controversy, that he was the owner in fee simple and entitled to the immediate possession of the real estate in controversy, and that appellant railway company wrongfully and unlawfully kept him out of possession thereof; and it prayed judgment that he recover possession thereof. Appellant railway company appeared to said action and filed two paragraphs of answer. One of said paragraphs of answer was a general denial, and the other alleged new matter by way of confession and avoidance, being substantially the same in effect as the matter alleged in the railway company's sixth exception to the award as above set out. The cause was tried by the court, and a decree rendered on December 10, 1894, against appellant railway company, by which it was adjudged that said Grantham, the plaintiff below in this action, was the owner in fee simple of the real estate in controversy, and that he have and recover of and from said appellant railway company the possession thereof.

It will be observed that substantially the same facts were alleged as a defense in each of said actions to quiet title and for possession as were alleged in appellant railway company's sixth exception to the award in this action. Moreover, the general denial was also filed in each of said actions, under which all defenses, legal and equitable, could be given in evidence. Sections 1067, 1082, 1083, Burns' Ann. St. 1901 (sections 1055, 1070, 1077, Rev. St. 1881; sections 1055, 1070, 1077, Horner's Ann. St. 1901); Watson v. Lecklider, 147 Ind. 395, 397, 45 N. E. 72; Brown v. Fodder, 81 Ind. 491; Jackson v. Neal, 136 Ind. 173, 35 N. E. 1021. Section 1082, Burns' Ann. St. 1901 (section 1070, Rev. St. 1881; section 1055, Horner's Ann. St. 1901), in regard to actions to quiet title, does not confine the question to one of ownership, but embraces all claims affecting the owner's right to enjoy his land; for it provides that the action may be brought against any one "who claims title to or interest in real property." It necessarily follows from this that one who is brought into court to answer as to his interest must set forth all the interest he then claims, or if he fails to do so his claim, whatever its character, is barred. The decree quieting the title to said land, therefore, adjudged that the whole interest was absolutely in Elizabeth A. Messick, and

that the claim of the Midland Railway Company was groundless. Such a decree cuts off every claim, whatever its form or character, whether an easement or other interest in the land. *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650; *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 581, 586-590, 15 N. E. 446, and cases cited; *Farrar v. Clark*, 97 Ind. 447. An easement is an interest in land (*Burk v. Hill*, 48 Ind. 52, 17 Am. Rep. 731; *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562), and an action will lie to quiet title to it (*Davidson v. Nicholson*, 59 Ind. 411; *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 581, 591, 15 N. E. 446; *Indiana, etc., Ry. Co. v. Allen*, 113 Ind. 308, 15 N. E. 451, 3 Am. St. Rep. 650). In *Green v. Glynn*, 71 Ind. 336, it was said: "The very object of the action to quiet title is to determine all conflicting claims and to remove all clouds from the title of the claimant. If one having a claim is brought into court by a complainant to quiet title, and fails to assert his claim, he is concluded by the judgment, even though he omitted to assert his real claim. The statute was intended to secure repose and settle in one comprehensive action all conflicting claims." It was said in *Indianapolis, etc., Ry. Co. v. Allen*, 113 Ind. 581, 587, 15 N. E. 446, 449, "In many cases it has been asserted that a decree in an action to quiet title, as well as in kindred actions where title is directly in issue, cuts off all claims of the successful party, except such as are expressly saved by the decree. *Ulrich v. Drischell*, 88 Ind. 354; *Cooter v. Baston*, 89 Ind. 185, 186, and authorities cited; *Stumph v. Reger*, 92 Ind. 286; *Ragsdale v. Mitchell*, 97 Ind. 458; *Faught v. Faught*, 98 Ind. 470; *Watkins v. Winings*, 102 Ind. 330, 1 N. E. 638."

The question of title was directly in issue in the action for possession of said real estate, and the judgment therein in favor of Grantham cut off all claims of appellant railway company. *Branson v. Studabaker*, 133 Ind. 147, 159, 160, 33 N. E. 98, and cases cited; *Vance v. Schroyer*, 82 Ind. 115, 117; *Pierce v. Banta*, 9 Ind. App. 376, 384, 31 N. E. 812; *Jarboe v. Severin*, 112 Ind. 572, 574, 575, 14 N. E. 490; 1 *Van Fleet's Former Adjudication*, p. 469; 1 *Woolen's Trial Proc.* § 2314; 24 *Am. & Eng. Enc. Law* (2d Ed.) p. 826. It is clear under the authorities that it was conclusively adjudged, in said action to quiet title and in said action for possession, that appellant railway company and the Midland Railway Company, under which it claims title, had no title or interest in or to the real estate in controversy prior to the rendition of said judgments, and that whatever claims, if any, they or those under whom they claim had in or to said real estate, were cut off by said decrees.

A certified transcript of the judgment in the action of Elizabeth A. Messick against the Midland Railway Company was read in evidence over the objection of appellant rail-

way company. The first objection was that said transcript was not competent evidence, because not a full and complete copy of the record as required by statute. It is true that the certificate of the clerk does not show that it contains a full and complete copy of all the papers and entries in the cause; but it does show that the transcript contains "a full and complete copy of the complaint, answer, reply, and judgment" in said cause. This was sufficient authentication of the pleadings named and final judgment. This objection was properly overruled. *Gale v. Parks*, 58 Ind. 117, 119, 120; *Anderson v. Ackerman*, 88 Ind. 481, 490.

Said appellant made the further objection to the admission of said transcript that the same was not competent evidence, because there was no showing how the Montgomery circuit court, in which said action to quiet title was commenced, lost, and the Putnam circuit court acquired, jurisdiction of said cause. It appears from said certified transcript that the complaint of Elizabeth A. Messick against the Midland Railway Company to quiet title to the real estate in controversy, the answer of the Midland Railway Company thereto, and the reply to said answer were filed in a suit in the Montgomery circuit court, and that final judgment was entered in said cause by the Putnam circuit court. It is true there is no showing in the transcript that any change of venue was taken from the Montgomery circuit court, or how the cause came into the Putnam circuit court, where final judgment was rendered; but it is settled law in this state that where the record of a court of general jurisdiction is silent on the subject of jurisdiction over the parties, or is lost, or the record is incomplete on the subject, unless the want of jurisdiction is affirmatively shown by the record, it will be presumed. When a court of general jurisdiction has assumed to pronounce judgment, every presumption will be indulged in favor of its jurisdiction in that case, and the same is invulnerable to collateral attack, as attempted in this case, unless the record affirmatively shows that it is void. *Ewbank's Indiana Trial Evidence*, § 598; *Sims v. Gay*, 109 Ind. 501, 502-504, 9 N. E. 120, and cases cited; *Horner v. Doe*, 1 Ind. 180, 48 Am. Dec. 355; *Walker v. Hill*, 111 Ind. 223, 231, 232, 12 N. E. 887, and cases cited; *Langsdale v. Woollen*, 120 Ind. 16, 19, 21 N. E. 659, and cases cited; *Davis v. Clements*, 148 Ind. 605, 607, 608, 47 N. E. 1056, 62 Am. St. Rep. 539; *Young v. Wells*, 97 Ind. 410, 412, and cases cited; *Cassady v. Miller*, 106 Ind. 69, 71, 5 N. E. 713, and cases cited; *Bailey v. Rinker*, 146 Ind. 129, 135, 45 N. E. 38; *Pierce v. Banta*, 9 Ind. App. 876, 384, 31 N. E. 812. It follows that it will be presumed, if necessary to sustain the judgment of the Putnam circuit court, that the venue in said cause was properly changed from the Montgomery circuit court to the Putnam circuit court. Besides, in the action of

Grantham, the plaintiff in this action, against appellant railway company, for possession of the real estate in controversy, the validity of the judgment of Messick against the Midland Railway Company to quiet the title to the land in controversy was challenged by appellant railway company, and said judgment quieting the title in the land in controversy in said Messick was adjudged a valid judgment. Appellant railway company cannot, therefore, again call said judgment in question. All of said defenses asserted, whether by pleading or evidence, as to any right or interest prior to the rendition of said judgments, were a collateral attack on said judgments, which, under the authorities cited, could not be made by appellant railway company. If any error was committed in either of said causes, the same did not render said judgments void, as claimed by appellant railway company; but the remedy, if any, was by appeal or bill of review.

Appellant railway company filed an answer of another action pending which was commenced before the commencement of this action. There are a number of substantial objections to the pleading; but it is sufficient to say that it was an answer in abatement, and, as the same was filed after said company had filed an answer in bar, no reversible error was committed in sustaining a demurrer thereto. *Carmien v. Cornell*, 148 Ind. 84, 89, 47 N. E. 216, and cases cited; *Watts v. Sweeney*, 127 Ind. 116, 126, 26 N. E. 680, 22 Am. St. Rep. 615.

The appeal of Davis, trustee, is dismissed, and the judgment is affirmed.

(106 Ind. 272)

SOUTHERN INDIANA RY. CO. v. CITY OF BEDFORD. (No. 20,558.)

(Supreme Court of Indiana. Oct. 3, 1905.)

1. RAILROADS — MUNICIPAL REGULATION — REASONABLENESS OF ORDINANCE.

A city ordinance, passed in the exercise of the power conferred on the council of cities by Burns' Ann. St. 1901, § 3541, cl. 42, to "provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same," to be valid, must be reasonable, fair, and impartial, and not arbitrary or oppressive.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1378; vol. 41, Cent. Dig. Railroads, §§ 725, 726, 754.]

2. SAME—FLAGMAN AT CROSSINGS.

Where a railroad crossing in a city was over switch tracks only, used in moving cars between the main track and certain local industries, and such tracks were not in use after 6 o'clock p. m., nor on Sundays or legal holidays, an ordinance requiring the railroad company to maintain a flagman at the crossing "between the hours of 7 o'clock a. m. and 9 o'clock p. m. of each and every day in the year" is unreasonable and oppressive, at least as applied to the hours and days when the tracks are not in use, and, being indivisible in that respect, is wholly void.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Railroads, §§ 745-747.]

Appeal from Circuit Court, Lawrence County; James B. Wilson, Judge.

Action by the Southern Indiana Railway Company against the city of Bedford. Judgment for defendant, and plaintiff appeals. Reversed.

F. M. Trissal and Brooks & Brooks, for appellant.

MONKS, C. J. The city of Bedford on November 20, 1900, passed an ordinance which provided that "the Southern Indiana Railway Company be and the said company is required to employ and station an adult male guard or flagman at the intersection of Fifth street in said city with the track or tracks of said company. It shall be the duty of said guard or flagman to warn all persons on foot or in vehicles of all trains, engines or detached cars at said crossing, and to so guard said crossing between the hours of 7 o'clock a. m. and 9 o'clock p. m. of each and every day of the year, and it shall be the duty of said company to furnish said guard or flagman a suitable flag for use in daytime, and a suitable lantern for use at night." It is provided in another section of said ordinance that the company shall be fined not less than \$10 nor more than \$50 for "each and every day it shall fail to comply with the provisions of said ordinance." Appellant insists here, as it did in the court below, that said ordinance is an unreasonable exercise of the power granted by the Legislature, and therefore void. The court below held that said ordinance was valid, and rendered judgment against appellant.

Clause 42, § 3541, Burns' Ann. St. 1901, provides that the common council of cities shall have the power to "provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same." As the power granted is to legislate upon the subject named, and the mode of its exercise and the details thereof are not prescribed, the ordinance will be declared invalid, unless it be reasonable, fair, and impartial, and not arbitrary or oppressive. *Pittsburg, etc., Ry. Co. v. Town of Crown Point*, 146 Ind. 421-423, 45 N. E. 587, 35 L. R. A. 684, and authorities cited; *City of Shelbyville v. Cleveland, etc., Ry. Co.*, 146 Ind. 66, 69-73, 44 N. E. 929; 1 *Smith on Municipal Corp.* §§ 95, 527; 1 *Dillon, Municipal Corp.* (4th Ed.) §§ 319, 323, 330; *Tiedeman on Municipal Corp.* § 110; 21 *Am. & Eng. Ency. of Law* (2d Ed.) pp. 985, 989. It appears from the record, as stated in appellant's brief, that said tracks which cross Fifth street were used for switching cars to and from the main track for the benefit of the several industries located thereon, and that they were not used on Sundays, nor on legal holidays nor after 6 o'clock p. m. on any day. It will be observed that by the provisions of the ordinance appellant was required to employ and station a flagman

at the crossing mentioned "between the hours of 7 o'clock a. m. and 9 o'clock p. m. of each and every day in the year." It is evident that on Sundays, legal holidays, and after 6 o'clock p. m. each day said ordinance was not necessary to the security of the persons mentioned in said act from the running of trains, for at such times there were no such trains on said track or at said crossing. It is clear that said ordinance, at least as to such days and hours, was void, because not a reasonable exercise of the power granted. *Cleveland, etc., Ry. Co. v. City of Connersville*, 147 Ind. 277, 46 N. E. 579, 87 L. R. A. 175, 62 Am. St. Rep. 418; *City of Shelbyville v. Cleveland, etc., Ry. Co.*, 146 Ind. 66, 71-74, 44 N. E. 929; *Evison v. Chicago, etc., Ry. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, 436, 437; *Meyers v. Chicago, etc., Ry. Co.*, 57 Iowa, 555, 10 N. W. 896, 42 Am. Rep. 50; *Burg v. Chicago, etc., Ry. Co.*, 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419, 421-424; *Wygant v. McLaughlan*, 39 Or. 429, 64 Pac. 867, 54 L. R. A. 636, 639, and cases cited. There being no distinct and separate provisions in said ordinance as to the time after 6 o'clock each day, and on Sundays and legal holidays, the entire ordinance is void. 21 *Am. & Eng. Ency. of Law* (2d Ed.) 993, 994.

Other objections to the validity of said ordinance are urged, but, as it is invalid for the reason stated, their consideration is not necessary.

Judgment reversed, with instruction to sustain appellant's motion for a new trial.

(165 Ind. 666)

HENDERSON v. HENDERSON.

(No. 20,587;)*

(Supreme Court of Indiana. Oct. 3, 1905.)

1. APPEAL—REVIEW—DISCRETION OF TRIAL COURT—CROSS-EXAMINATION.

The court, on appeal, will not interfere with the discretion of the trial court in controlling the extent of the cross-examination of witnesses, unless there has been obvious abuse of discretion.

2. WITNESSES—CROSS-EXAMINATION—DISCRETION OF COURT.

Where, in proceedings to establish a claim against the estate of decedent, based on a certificate of deposit issued by decedent as a private banker, the claimant called a witness to testify concerning the execution of the certificate reciting on its face that the witness had deposited the money with decedent for the use of the claimant, it was within the court's discretion to permit the witness to be asked on cross-examination as to how she had procured the money, as to how long it had taken her to get it, as to where she had kept it in the meantime, as to whether she did not have other children less fortunately situated than claimant, and as to whether she had not permitted a mortgage on her property to remain unpaid and taxes thereon to remain delinquent during the years she claimed to have had the amount of the deposit.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 931-938, 940.]

* Rehearing denied.

2. EXECUTORS AND ADMINISTRATORS—CLAIMS—EVIDENCE—ADMISSIBILITY.

Where a suit to establish a claim against a decedent's estate, based on a certificate of deposit issued by decedent as a private banker, payable to claimant, was tried on the theory that the estate was entitled to all defenses, except set-off, questions whether any one was associated with decedent in the banking business were immaterial.

4. SAME.

Where, in a suit to establish a claim against the estate of a decedent, based on a certificate of deposit signed by him as private banker, which recited that a third person had deposited a certain sum in decedent's bank payable to claimant, the estate was entitled under the statute to all defenses, except set-off, it was competent to show by tax duplicates that the third person had suffered her taxes to become delinquent, and by certified copies of deeds and mortgages that she suffered a mortgage to remain unpaid during the time she claimed that she possessed the amount of the deposit, as showing that no deposit was made.

5. APPEAL—APPELLANT'S BRIEF—STATEMENT OF RECORD—RULES OF COURT.

Under Sup. Ct. rule 22 (55 N. E. iv), which provides that appellant's brief shall contain a concise statement of so much of the record as presents the exceptions relied on, a brief of an appellant, which states that the court erred in giving instruction No. 3, and in refusing to give instructions Nos. 1, 2, 3, 4, 5, 6, and 8 requested by appellant, and which contains a brief statement of appellant's opinion of their legal effect, is insufficient to raise any question with reference to instructions.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Proceedings by Loutitia Henderson for the allowance of a claim against the estate of Alexander H. Henderson, deceased. From a judgment disallowing the claim, claimant appeals. Transferred from Appellate Court, under section 1337u, Burns' Ann. St. 1901. Affirmed.

Martindale & Stevens and Talbot & Talbot, for appellant. H. W. Jones, Meyer & Drummond, and A. L. Courtwright, for appellee.

HADLEY, J. Appellant, being the administratrix of her husband's estate, filed a claim against said estate, founded on what purported to be a certificate of deposit executed to her by her husband, a private banker, which instrument is as follows: "\$1,300. Knox, Indiana, January 13, 1892. The Knox Bank of Alexander H. Henderson. Mrs. Elizabeth Bickel has deposited in this bank thirteen hundred dollars, payable to the order of Mrs. Lou M. Henderson in current funds, on demand, on the return of this certificate properly indorsed. Alex H. Henderson." The court, not being satisfied with the correctness of the claim, under the provisions of section 2476, Burns' Ann. St. 1901, appointed Mr. Courtwright, appellee, a practicing attorney of the bar, to represent the estate. The only questions sought to be presented by the appeal arise on appellant's motion for a new trial, and are (1) the action of the court in permitting and in refusing certain

testimony to go to the jury, and (2) in the giving and in refusing to give certain instructions to the jury.

Elizabeth Bickel, mother of the claimant, testified in chief that she was present when the certificate of deposit was executed and signed by the decedent, identified the payee of the certificate as being her daughter, and that, when the certificate was prepared and signed, it was handed by the deceased to the claimant, who was then his wife. She also explained that she deposited the money for her daughter as a gift. Further on in cross-examination the court permitted appellee, over appellant's objection and exception, in a palpable effort to discredit the recital in the certificate and oral statement that witness had deposited \$1,300 with the decedent, to ask the witness where and how she got the money, and, witness having answered that she earned it weaving carpet, appellee was further permitted to ask her how long she was in acquiring it, where she had kept it in the meantime, if she did not have other children less fortunately situated in life, if she had not during the time permitted a mortgage on her real estate to remain unpaid for a considerable time, and if she had not permitted her taxes to go delinquent for a number of years in which she claimed to have the \$1,300, or the most of it. The objections urged to the various questions were (1) because it was not cross-examination and no part of the transactions testified about in chief, and (2) the evidence elicited would in no way prove or disprove any issue in the case.

The purpose of a cross-examination is to sift the testimony of a witness, and separate that which is true from that which is false or misleading; and trial courts have a wide discretion in allowing questions reasonably addressed to these ends, and more especially along lines incapable or impracticable of proof by other evidence. We think it is everywhere acknowledged that within proper bounds, to be controlled by the court, a witness on cross-examination may be questioned concerning his antecedents as affecting his credibility, and for the same purpose, as a general rule, questions which tend to develop the motive, bias, or interest of the witness should be allowed. It is therefore only where there has been an obvious abuse of discretion in the trial court that this court will interfere. *Shields v. State*, 149 Ind. 395, 402, 49 N. E. 351; *Bessette v. State*, 101 Ind. 85; *Wachstetter v. State*, 99 Ind. 290, 295, 50 Am. Rep. 94; *Railroad Co. v. Barnes*, 10 Ind. App. 460, 38 N. E. 428; 2 *Elliott on Ev.* § 908; *Wharton Ev.* §§ 544, 545. Furthermore, the witness had been called by the claimant to testify concerning the execution of a certificate that recited upon its face that the witness had deposited the money in controversy with the decedent for the use

of the claimant. Thus the claimant had brought the general subject of a deposit of the money before the court, and in such cases "it is well settled that, where the direct examination opens on a general subject, the cross-examination may go into any and all phases of that subject." *Railway Co. v. Wood*, 113 Ind. 544, 557, 14 N. E. 572, 16 N. E. 197; *Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385. The record discloses unusual caution on the part of appellant's counsel in limiting the direct examination of his best-informed and most important witness, and his caution in this regard may have furnished the court the justification, under the circumstances of the case, for an enlarged license in cross-examination. At all events, in a careful review of the evidence we are convinced that no reversible error was committed in allowing the questions.

Complaint is also made of the court's ruling in sustaining appellee's objections to the following questions propounded by appellant to her witness Rogers: "Was anybody associated with him [meaning decedent] in the banking business? Please state, if you know, who, if any one, was interested in or in any way engaged in conducting the Knox Bank of Alexander H. Henderson [the decedent]. You may state to the jury whether the Knox Bank at any time ceased to do business in the town of Knox." The questions were not material to any issue in the case, and were properly excluded.

Over appellant's objection the court admitted in evidence tax duplicates for 1891, 1892, and 1893, and certified copies of certain deeds and mortgages, which showed that the witness Bickel, who claims to have given the money in controversy to her daughter, the claimant, suffered her taxes for the years named, in all not exceeding \$10 in any one year, to become delinquent, and for some time before that, and during the period Mrs. Bickel claimed she had in possession the \$1,300, or the most of it, that she suffered a mortgage, which she had assumed to pay, to remain unpaid for a considerable time. There was no answer filed by the court's committee, and the case was tried upon the evident theory that he was, as an administrator, under the statute entitled to all defenses without plea, except counterclaim and set-off. Under these broad issues it was competent for the defendant to show, if he could by legitimate evidence, that Mrs. Bickel did not give the claimant and did not deposit \$1,300 for her use with the decedent. The evidence complained of tended in that direction and was competent.

No question is presented on instructions for noncompliance with the fifth subdivision of rule 22 (55 N. E. iv), which reads thus: "A

concise statement of so much of the record as fully presents every error and exception relied on, referring to the pages and lines of the transcript. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely. The statement will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party in his brief shall make necessary corrections or additions." Under the statute but one copy of the record, in an appeal, is filed in this court; and, it being impracticable in the reasonable dispatch of business for each judge of the court to take such record for personal examination before a final disposition of the cause, it was deemed necessary to adopt some plan whereby the judges may reach an accurate knowledge of the record without an examination of the original. The plan adopted, as outlined in rule 22, requires that in the preparation of his brief the appellant, among other things, shall make a concise statement of so much of the record as fully presents every error and exception relied on; that is to say, his brief must present a concise—not a full—statement of every part of the record that is essential to a full presentation of every question relied upon for reversal. A brief so constructed enables each member of this court, in reading the brief and considering the case in his chambers, to act as intelligently upon the questions involved as if he personally had the original record before him. The question of the rule, however, is no longer one of expediency. *Magnuson v. Billings*, 152 Ind. 177, 52 N. E. 808; *Railroad Co. v. Stewart*, 161 Ind. 242, 248, 68 N. E. 170; *State v. Lankford*, 158 Ind. 34, 62 N. E. 624; *Boseker v. Chamberlain*, 160 Ind. 114, 66 N. E. 448; *Harrold v. Fuenfstueck*, 31 Ind. App. 275, 67 N. E. 699; *McElwaine, etc., Co. v. Wall*, 159 Ind. 557, 65 N. E. 753.

Appellant has made no effort to comply with the rule beyond stating that the court erred in giving No. 3 of its own motion, and for refusing to give Nos. 1, 2, 3, 4, 5, 6, and 8 tendered by appellant, and in addition a brief statement, not of the contents or substance of the instructions, but his opinion of their legal effect. In testing instructions, the legal effect is to be determined by the court from the language used, and not by the opinion of counsel. For failure to comply with the fifth subdivision of rule 22, we must hold that no question arises upon instructions.

There is by no means such a failure of evidence to sustain the verdict as will warrant us in disturbing it.

Judgment affirmed.

(188 Ind. 612)

SOUTHERN RY. CO. v. STATE.*

(No. 20,714.)

(Supreme Court of Indiana. Oct. 4, 1905.)

1. REMOVAL OF CAUSES — CITIZENSHIP — STATES.

A state not being a citizen of any state, an action in which a state is the real party in interest cannot be removed from a state to a federal court solely on the ground of diverse citizenship.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 84.]

2. SAME—REAL PARTY IN INTEREST — STATUTES.

In an action in the name of the state, by the prosecuting attorney of a judicial circuit, against a railroad company, to recover penalties for the railroad's violation of Burns' Ann. St. 1901, §§ 5186, 5187, requiring the posting of trains in passenger depots in which there is a telegraph office, the state is the real party in interest, though one-half of the penalties recovered are payable to the prosecuting attorney.

3. RAILROADS — REGULATION — TRAIN BULLETINS — FAILURE TO POST — PENALTIES — COMPLAINT.

Where a complaint alleged that defendant railroad company maintained a certain telegraph passenger station, that a passenger train operated by defendant was scheduled to arrive and stop at such station on a day specified, and that defendant unlawfully failed and neglected to cause to be written on a blackboard placed in a conspicuous place in the station, at least 30 minutes before the schedule time for the arrival of the train, the fact whether it was on time or not, and, if late, how late, and that at the time defendant regularly employed a telegraph operator at the station, and did not then have any device, indicator, etc., for use instead of a blackboard for the posting of trains, and that such train was not a freight train carrying passengers, it stated a cause of action for violation of Burns' Ann. St. 1901, §§ 5186, 5187, requiring such posting of trains, and was not objectionable as admitting that "some" report was made; there being no attempt to charge the making of a false report.

4. TRIAL — CREDIBILITY OF WITNESSES — INSTRUCTIONS.

Where, in an action by the state to recover penalties against a railroad for failure to post trains, as required by Burns' Ann. St. 1901, §§ 5186, 5187, two witnesses had testified that they had procured evidence introduced under an arrangement with the prosecuting attorney that they should receive pay for their services in case the cases were made to "stick," it was error for the court to modify requested instructions that if any witness was employed to procure evidence for plaintiff, and his compensation was contingent upon plaintiff's success, then the jury should consider such facts in determining the weight of the witness' testimony, by changing the word "should" to "may"; defendant being entitled to an instruction that such was the jury's duty, and not their mere privilege.

5. SAME.

It was proper for the court to modify such instruction by declaring that the jury should consider such facts for no other purpose than that of determining the witnesses' credibility.

6. SAME.

Where, in an action against a railroad company, there was evidence that defendant subpoenaed some of its witnesses and furnished them with transportation to the place of trial, it was not error for the court to refuse to charge that defendant had a right so to do, though such charge would have been proper.

7. WITNESSES — TESTIMONY FROM MEMORANDUM—REFRESHING MEMORY.

While it is proper for a witness to refresh or stimulate his memory by reference to original memoranda made by him, he is not, in general, entitled to testify wholly or entirely therefrom, without possessing some knowledge or recollection independent of the memoranda.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 893.]

8. EVIDENCE—RES GESTÆ.

Memoranda made by a detective while watching a railroad depot for violation of Burns' Ann. St. 1901, §§ 1586, 1587, requiring the posting of trains, was neither a part of the res gestæ, nor made in the ordinary course of business, nor in pursuance of some duty owing by the person making it, and was therefore incompetent.

9. WITNESSES—REFRESHING MEMORY — COMPETENCY OF MEMORANDA.

A witness cannot be permitted to resort to a copy of original memoranda for the purpose of refreshing his memory, without proving that the original has been lost or destroyed.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 878.]

10. TRIAL—MOTION TO STRIKE OUT EVIDENCE — EVIDENCE ADMISSIBLE IN PART.

A motion to strike all of the evidence of a witness was properly denied, where some of the evidence was admissible.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, § 223.]

11. SAME—GROUNDS OF OBJECTION.

Where a motion was made to strike out the testimony of a witness, but no grounds were assigned, except that the witness had refreshed his memory partly from his original memorandum and partly from a copy thereof, such motion was not sustainable, because no foundation had been laid for the use of such copy.

12. RAILROADS—REGULATION—TRAIN BULLETIN—STATUTES—SEPARATE PENALTIES.

Under Burns' Ann. St. § 5187, providing a penalty of \$25 for each violation by a railroad company of section 5186, requiring every corporation operating a railroad within the state to bulletin trains, the state is not limited to a single penalty, but is entitled to recover a separate penalty for each violation proved.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 769.]

Appeal from Circuit Court, Dubois County; E. A. Ely, Judge.

Action by the state against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from the Appellate Court (72 N. E. 174), under Burns' Ann. St. 1901, § 1337. Reversed.

A. P. Humphrey, John D. Welman, M. W. Fields, and Bretz & McFall, for appellant. L. H. Fisher, Pros. Atty., Cox & Hunter, A. L. Gray, and H. M. Kean, for the State.

JORDAN, J. The state of Indiana, by the prosecuting attorney of the proper judicial circuit, instituted and prosecuted this action against appellant, under sections 5186, 5187 Burns' Ann. St. 1901, on account of its failure to report the arrival of certain passenger trains as required by the provisions of the first-mentioned section. Trial by jury. Verdict and judgment, \$4,500. Section 5186, supra,

*Rehearing denied December 12, 1905.

reads as follows: "That every corporation, company or person, operating a railroad within this state shall immediately after taking effect of this act, cause to be placed in a conspicuous place in each passenger depot of such company located at any station in this state at which there is a telegraph office, a blackboard at least three feet long and two feet wide, upon which such corporation, company or person shall cause to be written at least thirty minutes before the schedule time for the arrival of each passenger train stopping upon such route at such station, the fact whether such train is on schedule time or not, and if late, how much: provided, however, that any device, indicator, or register, painted or printed in large letters and figures giving the required information set forth in this act in a more legible form than is practicable on a blackboard, may be substituted in place of said blackboard: and provided, further, that the provisions of this act shall not apply to any freight train carrying passengers, or any train carrying both freight and passengers, or to any station during hours when railroad companies do not regularly have a telegraph operator or operators on duty at any such telegraph office." Section 5187: "That each violation of the provisions of this act, in failing to report or in making a false report, such corporation, company or person so neglecting or refusing to comply with the provisions of this act, shall forfeit and pay the sum of twenty-five dollars, to be recovered in a civil action, to be prosecuted by the prosecuting attorney of the county in which the neglect or refusal occurs, in the name of the state of Indiana; one half of which shall go to said prosecuting attorney, and the remainder shall be paid over to the county in which such proceedings are had, and shall be part of the common school fund." This latter section since the commencement of this action has been amended by providing therein that the total amount of recovery for all violations at any one station by any one corporation, company, or person to the time of filing the complaint shall not exceed \$300. It is provided, however, that this amendatory act shall not affect any pending litigation. Acts 1903, p. 37, c. 22.

The complaint upon which the cause was tried in the lower court consists of 404 paragraphs, each of which charges a separate and distinct violation on the part of appellant company. These separate paragraphs embraced alleged violations from June 25, 1901, and each day thereafter to October 9, 1901, inclusive. Upon each paragraph the state demanded a recovery of \$25 as a penalty, and a total demand of over \$10,000. Appellant appeared to the action, and petitioned the court to transfer the cause to the federal court on the ground of diverse citizenship; said petition disclosing that appellant is a corporation organized and existing under

and by virtue of the laws of the state of Virginia, that it is a resident and citizen of the said state and a nonresident of the state of Indiana, and that it had never been a resident or citizen of the latter state. The petition further disclosed that the amount in controversy in this action, exclusive of interest and costs, exceeded the sum of \$2,000. The court denied the petition for removal, and upon this ruling appellant predicates error. A state cannot be regarded as a citizen of any state. Consequently an action between the state, in which it is the real party in interest, and a citizen or corporation of another state, cannot be removed from the state court to the federal court solely on the ground of diverse citizenship. *Upshur County v. Rich*, 135 U. S. 470, 10 Sup. Ct. 651, 84 L. Ed. 196; *Postal Telegraph Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Indiana v. Alleghany Oil Co. (C. C.)* 85 Fed. 870; *Huntington v. Attrill*, 146 U. S. 672, 13 Sup. Ct. 224, 38 L. Ed. 1123; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; *State v. Tolleston Club (C. C.)* 53 Fed. 18; 18 Ency. Pl. & Prac. 190, and authorities cited; *Black's Dillon on Removal of Causes*, § 81. In this latter authority it is said: "Since, in the nature of things, a 'state' cannot be a citizen of a state, the federal courts have no jurisdiction, on removal from a state court on the ground of diverse citizenship, of a suit between a private individual and a state, whether the former be a citizen of the same or of a different state. Such a controversy cannot in any just sense be said to be 'between' citizens of different states." In *Huntington v. Attrill*, supra, the court said: "Beyond doubt (except in cases removed from a state court in obedience to an express act of Congress in order to protect rights under the Constitution of the United States) a circuit court of the United States cannot entertain jurisdiction of a suit in behalf of the state, or of the people thereof, to recover a penalty imposed by way of punishment for a violation of a statute of the state."

Counsel for appellant, however, insist that the state of Indiana cannot be considered as the real party in interest, for the reason that under the provisions of the statute in question one-half of the amount recovered goes to the prosecuting attorney and the remainder is to be paid over to Dubois county, wherein the action arose, to become a part of the common school fund of that county. This contention is untenable, and is at variance with the holding in the case of *Indiana v. Alleghany Oil Co.*, supra. An action under the statute herein mentioned is, within the meaning thereof, instituted and prosecuted by the state in the interest of the public. The state may therefore be said to be the real party in interest. The recovery of the penalty is by the state, and not by the prosecuting attorney, nor the county. The

mere fact that a moiety of the money recovered is directed by the statute to be paid to this official does not change the public character of the proceeding. *State ex rel. v. Halter*, 149 Ind. 292, 47 N. E. 665; *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937. It follows that there was no error in denying the petition to remove the cause to the federal court.

Appellant unsuccessfully demurred to each paragraph of the complaint, and thereupon filed its answer of general denial. All of the paragraphs are substantially alike, except as to the particular dates, trains, and the schedule time of arrival. A statement, therefore, of the material facts alleged in one, will suffice. The first paragraph, after disclosing that the defendant is a railway corporation duly organized under the laws of the state of Virginia, and that it owns and operates a railroad within the state of Indiana, from Evansville, through Dubois county, to Jasper, Ind., and to Louisville, Ky., and also to St. Louis, Mo., alleges "that said defendant, keeps, maintains, and has a railway station upon its said railway route in said Dubois county, at Johnsburg post office, which it designates and calls "Ferdinand Station," and that at said Ferdinand Station at the time hereinafter alleged said defendant maintained and kept a telegraph office in connection with its said line of railway; that said defendant owned, operated, and ran a regular passenger train on the said route from Evansville, Ind., to Jasper, Ind., passing by and through said Ferdinand Station; that said passenger train, so owned and operated by said defendant, traveling upon said route between said stations as aforesaid, was due and scheduled to arrive and stop at said Ferdinand Station at 2:35 o'clock p. m. on the 25th day of June, 1901, and that said passenger train did pass by and stop at said Ferdinand Station on said day; that said defendant then and there unlawfully failed and neglected to cause to be written upon a blackboard placed in a conspicuous place in the passenger depot of said company at said telegraph office and said station, at least 30 minutes before the scheduled time for the arrival of said passenger train, the fact whether said train was on schedule time or not, and, if late, how much late; and that at said time and hour, to wit, 30 minutes before the scheduled time for the arrival of said passenger train, the defendant regularly employed and had on duty at said Ferdinand Station a telegraph operator." The paragraph further discloses that the defendant did not then and there have any device, indicator, etc., for use instead of a blackboard in giving information as to whether its trains were on schedule time, and the further fact that the train mentioned in the paragraph was not then and there a freight train carrying passengers, etc.

Several objections are urged by appellant's counsel against the sufficiency on demurrer of each paragraph of the complaint. Principal among these is the contention that the averments therein relative to appellant's failure to make a report do not show or mean, either "grammatically or logically," that no report was made, but, upon the contrary, do disclose or admit that some report was made. The gist of the offense under the provisions of the statute in question is the failure or neglect to report the fact, by the method prescribed by the statute, not less than 30 minutes before the schedule time for the arrival of the expected train, whether it is on time or not, and, if late, "how much." The failure to make such a report, or the making of a false report, is made an offense by the statute. As shown, the complaint fully negatives the fact that appellant had any device, indicator, or register as a substitute for a blackboard for giving the required information. The paragraph in controversy charges substantially, in the language of the statute, the failure of appellant to make upon a blackboard, placed in a conspicuous place in its passenger depot at the station mentioned, the required report in regard to the arrival of the particular train. There is no attempt on the part of the pleader to charge appellant with having made a false report, and under the facts as alleged there is no room for the contention that the pleading can be said to show that a report of any kind was made by appellant at the time in question. In considering the sufficiency of the paragraph, the court will not indulge in surmises or conjectures in favor of either party. We have considered all of the objections interposed by appellant relative to the sufficiency of the complaint, and, while the pleading might be improved in some respects, nevertheless we are constrained to hold that it is good on demurrer, and that the ruling of the court thereon was proper.

Ferdinand, where the offenses in question are alleged to have been committed, is a small station on the line of appellant's railway, situated in Dubois county, Ind. At this station there is one store and a saloon owned and conducted by Peter Schell. The saloon is located immediately across the railroad tracks from the depot. Said Schell at the trial was introduced and testified as a witness on behalf of the state relative to appellant's failure to post the arrival of its trains on a blackboard which it kept and maintained at its depot at said station for that purpose. He, as shown, was employed by the prosecuting attorney, who resided in Dubois county, to watch and examine this blackboard each day, and keep a memorandum of appellant's failure to report the arrival of any of its trains, and for his services he was to be paid by said official \$1 for each case that was made "to stick" against appellant upon a prosecution. Schell appears to have zealously and faith-

fully served said official in this business for a period of time running from June 25, 1901, to the 10th day of the following October. This witness during the period of his services appears to have made up some three books with memoranda or notations in regard to various or multiplied failures on the part of appellant to bulletin its trains. As each of these books were filled with notations or memoranda in respect to appellant's neglect, the witness would send it to the prosecuting attorney for the use of the latter. A day or two after the third book was sent to the prosecutor, which was about the 10th day of October, 1901, an action seems to have been commenced by the prosecuting attorney against appellant, and thereafter, according to the statements of this witness, the company fully complied with the requirements of the law. Another witness, who testified for the state in regard to appellant's omissions to report the arrival of its trains, admitted on cross-examination that the prosecuting attorney had promised to pay him \$25 for going to Ferdinand Station on a certain day to watch and examine the blackboard kept in said station, when called into court to testify what he observed as to the posting of trains thereon. This witness was only to receive the money upon the contingency that the prosecutor succeeded in making the cases "stick" which the witness reported and to which he testified; otherwise, he was not to receive the promised compensation.

Appellant by its counsel at the proper time requested the trial court to give to the jury two certain instructions, 9 and 10, which instructions, as requested, are as follows: "(9) If you find from the evidence that any witness was employed to procure evidence for the plaintiff, and was to be paid the sum of \$1 for each violation of the law the plaintiff should succeed in establishing, and that he was to receive nothing for any paragraph of complaint plaintiff should fail to establish, then you should consider such facts in determining what weight should be given to the testimony of such witness. (10) If you should find from the evidence that any witness in the case was promised the sum of \$25 by the prosecuting attorney of the plaintiff in this case, and that the payment of said sum was contingent upon the success of the plaintiff in this cause, then you should consider such promise of money in determining what weight should be given to the testimony of such witness." The court, however, declined to give these charges as requested, but modified each of them by substituting therein for the word "should" the word "may," making the charge read "may consider," instead of "should consider," as requested, and further changed each of them by adding thereto the following: "But you can consider it for no other purpose than for the purpose of deter-

mining such witness' credibility." The court gave each of the instructions as modified.

Appellant's counsel very forcibly and with much reason insist and argue that it was the legal right of appellant to have the court advise the jury that they "must," or at least "should," consider the facts mentioned in the instructions, if found to be true, for the purpose of testing the credibility of the witnesses, instead of advising them that they "may," as the court did by reason of the modification in question. In this contention we concur. As shown by the evidence, there were at least two witnesses who testified on behalf of the state to which the instructions in controversy were applicable. The state's most important testimony appears to have been given by the witness Schell, who was to receive, according to his own admission, \$1 in each case in which the appellant was convicted, and by the other witness, who, according to his own statement, was to be paid \$25 in the event a conviction was secured in the cases which he reported to the prosecuting attorney and testified to in court. These two witnesses were certainly interested in a pecuniary sense in securing the conviction of appellant. It was the imperative duty of the jurors to consider the facts relative to such interest in determining what weight or credibility should be accorded to the testimony of these witnesses. It was therefore the legal right of appellant to have the jurors informed by the court in positive terms in regard to the duty imposed upon them by the law under the circumstances. The word "should" in the instructions requested served the purpose of advising the jurors in respect to the imperative duty, under the circumstances, exacted of them by law, much better than the word "may," and in no sense would the use of the word "should" have been an invasion by the court upon the province of the jury. Our holding herein is fully sustained by the cases of *Deal v. State*, 140 Ind. 368, 39 N. E. 930; *Smith v. State*, 142 Ind. 292, 41 N. E. 595; *Fifer v. Ritter*, 159 Ind. 8, 64 N. E. 463; *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494; and *Indianapolis St. Ry. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571.

Our decision in this appeal upon the point in controversy, however, is not to be construed as holding that where a trial court in a cause, in giving on its own motion, and not over the request of a party, an instruction of the character of those involved herein, employs the word "may," instead of the word "should," or "must," such action of the court will alone constitute reversible error. The action of the court in inserting in the instructions in dispute the words "but you can consider it for no other purpose than for the purpose of determining such witness' credibility" was proper, and the contention of appellant's counsel that thereby the court erred is not sustained. It may, however, be said that the charge in this respect would have been more

positive, had the court used the word "should," instead of "can." It follows that the court erred to the prejudice of appellant in modifying the instructions in controversy by substituting therein the word "may" for "should," and in giving the charges to the jury as so modified.

Appellant further complains of the refusal of the court to give other instructions upon request. Upon an examination, however, we are satisfied that some of the charges in question were refused for the reason apparent that under the evidence they did not correctly state the law. Others seemingly were refused because they were substantially covered by those given by the court. By the eleventh instruction appellant requested the court to state to the jury that it had the legal right to subpoena its own witnesses and transport them to the place of trial. This charge was applicable to evidence given which disclosed that appellant subpoenaed some of its witnesses and furnished them with transportation to the place of trial. Under the circumstances it would have been proper for the court to have given the instruction in question, but its refusal to do so cannot be held to be reversible error.

Peter Schell, as previously shown, was a witness on behalf of the state. He was procured, as heretofore disclosed, to watch and examine the blackboard at appellant's station, and in the performance of this service he kept a memorandum relative to what the blackboard disclosed in regard to appellant's failure to post the arrival of its trains on certain dates. A day or two before he was examined as a witness he appears to have made in what is termed a "fourth book" a condensed copy of the memoranda as originally made by him. This witness apparently was confronted with much difficulty in testifying independently of the memorandum which he had made in three books. He was permitted by the court to refresh his memory therefrom as to what he observed or saw when he examined the blackboard at appellant's station on the various days between June 25, 1901, and October 10th of the same year. The witness admitted in his answer to the question propounded by appellant's counsel that he had no recollection of the transactions in question, and that he depended upon all four of the books, including the one which contained a condensed copy, to refresh his memory. In fact, the admissions or statements of the witness made in court at the time he testified disclose that in the main he had no present recollection, independently of the memorandum, relative to the failures about which he testified of appellant to report the arrival of its trains on the various days embracing the period of time in controversy. While it was proper for this witness to refresh or stimulate

his memory by reference to the original memorandum, still as a general rule he could not be permitted to testify wholly or entirely therefrom, which to some extent at least he apparently did. It was essential that he possess some knowledge or recollection independently of the memorandum, or, in other words, it could not be substituted instead of the recollection of the witness. This is the rule adhered to and enforced at least in this jurisdiction. *Clark v. State*, 4 Ind. 156; *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Sage v. State*, 127 Ind. 15-25, 26 N. E. 667. As affirmed by *Lord Ellenborough* in *Henry v. Lee*, 2 Chlt. 124: "It is not the memorandum that is the evidence, but the recollection of the witness." The memorandum in question was neither made in the ordinary course of business nor in the pursuance of some duty owing by the person who made it to make the same correct. It was no part of the *res gestæ*, but was a mere private memorandum, which ordinarily is not competent evidence, although the correctness thereof may be verified by the testimony of a witness or witnesses. *Gillett, Indirect & Col. Ev.* § 186. It may be further said, however, that under the statements of the witness relative to this private memoranda no case was presented which would authorize its admission in evidence.

Appellant appears to have unsuccessfully made several motions to strike out and reject the evidence of the witness Schell, given relative to the neglect of appellant to bulletin its trains during the period of time in controversy. It is insisted by its counsel that his testimony should have been rejected for two reasons at least: (1) Because the memorandum in question was admitted indirectly in evidence under the guise that the witness was refreshing his memory therefrom; (2) because the witness refreshed his memory partly from the original memoranda and partly from a copy thereof. While some of this witness' testimony ought to have been rejected, because as to a portion thereof he testified entirely from his memoranda, and not from his recollection after refreshing his memory, still appellant is not in the position to successfully complain of the court's adverse ruling upon its motions for the reasons: (1) That they were too broad, embracing as they did all of the evidence given by the witness; (2) no grounds were assigned in the motions for rejecting the evidence in question, except in one, wherein it was stated that the witness had refreshed his memory partly from his original memorandum and partly from a copy thereof. If the witness relied on a copy of the original for the purpose of stimulating or reviving his memory in regard to the transactions in question, appellant should have interposed proper objections; for the rule is that the original

memorandum must be shown to have been lost or destroyed before the witness can be permitted to resort to a copy thereof for the purpose of refreshing his memory.

The insistence of counsel that the court erred in denying appellant's motion to require the state to elect upon which paragraph of its complaint would rest the prosecution cannot be sustained. The further contention that only a single penalty can be recovered in this action is against the plain provisions of section 5187, *supra*, which declares that for "each violation of the provisions of this act in failing to report, or in making a false report, such corporation, etc., shall forfeit and pay the sum of \$25." The particular question was raised and decided adversely to appellant's contention in *State v. Indiana, etc., Ry. Co.*, 183 Ind. 69, 32 N. E. 817, 18 L. R. A. 502.

For the errors arising out of the court's modification of instructions 9 and 10, requested by appellant, as herein pointed out, the judgment below is reversed, with instructions to grant appellant a new trial.

(37 Ind. App. 702)

CHICAGO & S. E. RY. CO. et al. v. GRANT-HAM. (No. 4,883.)

(Appellate Court of Indiana, Division No. 1.
Dec. 15, 1905.)

Appeal from Circuit Court, Clinton County; James V. Kent, Judge.

Action by James F. Grantham, as administrator, against the Chicago & Southeastern Railway Company and others. From a judgment in favor of plaintiff, the defendants railway company and Theodore P. Davis, trustee, appeal. Dismissed as to the trustee, and otherwise affirmed.

A. O. Harris and Urban C. Stover, for appellants. Clodfelter & Fine and T. E. Ballard, for appellee.

PER CURIAM. The matters involved in this cause are substantially like those decided by the Supreme Court in *Chicago & Southeastern Railway Company v. Grantham*, 75 N. E. 265; and upon the authority of that decision the appeal of the appellant Theodore P. Davis, trustee, is dismissed, and the judgment is affirmed.

(38 Ind. App. 780)

CINCINNATI, R. & M. R. CO. v. TROUTMAN et al. (No. 5,439.)¹

(Appellate Court of Indiana, Division No. 1.
Jan. 2, 1906.)

Appeal from Circuit Court, Miami County; Joseph N. Tillett, Judge.

Action by Andrew Troutman and others against the Cincinnati, Richmond & Muncie Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Transferred from the Supreme Court. Affirmed.

Robbins & Starr and Loveland & Loveland, for appellant. Cox, Reasoner & O'Hara and Albert Ward, for appellee.

BLACK, P. J. The material questions in this case were decided adversely to the appellants in *Cincinnati, R. & M. R. Co. v. Miller* (Ind. App.) 72 N. E. 827; *Id.*, 73 N. E. 1001, and upon the authority of that case the judgment herein is affirmed.

¹ Rehearing denied. Transfer to Supreme Court denied.

(165 Ind. 230)

LA PORTE CARRIAGE CO. v. SULLENDER. (No. 20,716.)

(Supreme Court of Indiana. Oct. 6, 1905.)

1. MASTER AND SERVANT—INJURIES TO MINOR SERVANT—STATUTORY DUTIES—COMPLAINT.

Burns' Ann. St. 1901, § 7087b declares that no child under 14 years of age shall be employed in any manufacturing or mercantile establishment, and requires the factory owner to keep a register of every person employed by him under the age of 14 years, and to obtain from the servant's father an affidavit relative to his age, place of birth, etc., which he is required to file prior to employing such minor. *Held*, that a complaint in an action for injuries to a minor employé, expressly alleging that plaintiff was 14 years of age, and failing to charge that defendant did not keep a register and did not obtain the statutory affidavit, did not state a cause of action for violation of such section.

2. SAME—COMMON-LAW NEGLIGENCE.

Where, in an action for injuries to a minor servant while working near an unenclosed emery belt by a particle of emery flying into his eye, the complaint merely charged that plaintiff was only 14 years of age at the time of his injury, without any facts showing that he was either ignorant or inexperienced in regard to the hazards, if any, of the work he was hired to perform, the complaint did not state a cause of action for common-law negligence for the employer's failure to warn or instruct him in regard to the dangers.

3. SAME—GUARDING MACHINERY—STATUTES—CONSTRUCTION.

Factory Act, § 9 (Burns' Ann. St. 1901, § 7087i), provides that all vats, pans, saws, planers, cogs, gearing, belting, shafting, and set screws, and "machinery of every description" shall be properly guarded. *Held*, that the term "machinery of every description" did not include all machinery, but was a mere general term following words of specific description, and therefore included only things or cases of a like character to those designated by the specific words.

4. SAME.

Factory Act, § 9 (Burns' Ann. St. 1901, § 7087i), requiring that all vats, pans, saws, planers, etc., and machinery of every description" shall be properly guarded, only requires the guarding of such parts of machinery in a factory within the statute as are dangerous to employes whose duty requires them to work in the immediate vicinity thereof, and which may be properly guarded without rendering it useless for the purposes for which it was intended.

Appeal from Circuit Court, La Porte County; John C. Richter, Judge.

Action by John H. Sullender against the La Porte Carriage Company. From a judgment in favor of plaintiff, defendant appeals. Transferred from Appellate Court (71 N. E. 922), as authorized by Burns' Ann. St. 1901, § 1337j. Reversed.

Osborn & McVey, for appellant. E. E. Weir, P. Q. Doran, and E. D. Salisbury, for appellee.

JORDAN, J. This action was commenced by appellee, a minor, by next friend, to recover damages alleged to have been sustained by reason of the loss of an eye while in the employ of appellant as its servant. The amended complaint, upon which the cause

was tried, consists of two paragraphs, to each of which a demurrer for want of facts was overruled. Answer, general denial. Trial by jury, with verdict in favor of appellee awarding him \$3,000, upon which judgment was rendered over appellant's motion for a new trial. The errors assigned and relied on for a reversal are (1) overruling the demurrer to each paragraph of the amended complaint; (2) overruling the motion for a new trial.

The first paragraph of the complaint in substance alleges: That the defendant is a corporation duly organized and existing. That on February 5, 1902, the plaintiff was a minor of the age of 14 years residing with his father, and on said day he was in possession of perfect eyesight in both of his eyes and was free from physical infirmities. He was a boy of the usual size, growth, and development for one of his age, which fact was patent to an ordinary observer. On said day the plaintiff was employed by the defendant to serve or act as an errand boy and performed general work about the defendant's factory, and was, by the foreman of the department in which he was put to work, instructed to bring materials from the stock room to various places and workmen in said department. Subsequently on said day the plaintiff "was instructed by said foreman to work at putting up 'reaches'; and, obeying the instructions of the foreman, he at once proceeded to and did perform the work thus assigned to him." The paragraph then alleges: "That neither at the time of his employment nor while so employed by defendant was any inquiry whatever made as to his age, knowledge of the work he was about to undertake, experience in factories where machinery was employed, or his physical ability to perform the labor he was about to engage in; nor was he informed by the defendant or any of its officers or representatives of the dangers incident to his employment, or instructed as to the best and safest manner in which to perform the labor he was to undertake, or of the danger or possibility of injury by reason of the proximity of machinery near the place where he was to perform his labor. But, on the contrary, without information or instructions and without any knowledge on his part of any danger to him of injury, he was by said foreman placed at work within 10 or 15 feet of what is commonly known as an 'emery belt,' used by the defendant for polishing and finishing metal parts of the wagons and buggies which said defendant is engaged in making, at a point where he was exposed to flying particles of emery and metal, and without any protection whatever from said flying particles. That the defendant must have known and did know of the likelihood of said particles being thrown by said emery by reason of the constant friction, but did not protect said belt or the place where plaintiff was engaged at work with

any screen or other device to prevent injury to him or other employes who were passing said place, as required by law to be done. That on the 6th day of February, the same being the second day of his employment, and while he was still ignorant of the danger of his employment and of the dangerous character of the place where he was engaged at work, while actually engaged in the work which he was instructed to perform, this plaintiff was struck in the eye with a flying particle of emery or metal, thrown off by said emery belt. That said emery or metal penetrated the sight of said eye, destroying the same, and rendering the plaintiff blind in said eye, causing him great suffering and discomfort." It is further averred that by reason of said injury "plaintiff was compelled to and did enter a hospital wherein an operation was performed on his eye, the latter being removed; that he suffered great pain and agony, and that great danger exists that the injury will affect his other eye and thereby render it necessary to have the same removed." The paragraph closes with the averment "that by reason of the foregoing the plaintiff has been damaged in the sum of \$5,000, for which he demands judgment."

The first and second paragraphs in some respects are substantially alike. The second, in like manner as the first, charges that the defendant is a corporation, duly organized, etc., and that on the 5th day of February, 1902, plaintiff was a minor of the age of 14 years, residing with his father and in possession of perfect sight in both of his eyes and free from any physical infirmities, and on said day he was employed by the defendant to act as an errand boy to perform general work about the factory of the defendant, and in the course of his employment he was instructed by the foreman of the defendant in the department in which he went to work to bring materials from the stock room to various places and workmen, which he did; that he was directed by said foreman to work at putting up reaches; and that he proceeded to perform the work thus assigned to him. All matters relative to the failure of the defendant to make any inquiry in regard to appellee's age, knowledge, and experience, as alleged in the first paragraph, are omitted. The pleading, however, charges: "That the place where he was instructed by said foreman to work was located about 10 or 15 feet from a point where what is commonly known as an 'emery belt' was in operation. That said emery belt was used by the defendant for polishing and finishing metal parts to wagons and buggies. That the point at which he was instructed to and did work was exposed to flying particles of emery and metal. That said emery belt and the pulley over which the same ran was not protected by any screen, guard, or fence, as required by law; but, on the contrary, no protection was af-

forded, at the point where plaintiff was engaged in work under the direction of said foreman, from the flying particles of emery and metal from said belt. That in the use of said belt particles of metal and emery did as a matter of fact fly in the direction and toward the point where plaintiff was engaged at work, and plaintiff, while actually engaged in the work which he was instructed to perform, on the second day of his employment, to wit, on the 6th day of February, was struck in the eye with a flying particle of emery or metal which was thrown off of said belt. That said emery or metal penetrated the eye, destroying the sight of the same, and rendered the plaintiff blind in said eye at the time, and thereafter caused him great physical suffering and discomfort." The pleading then, in like manner as the first paragraph, proceeds to disclose the fact that the plaintiff entered a hospital wherein his eye was removed and by reason thereof he suffered great agony and pain, etc. It is then averred that by reason of the foregoing facts the plaintiff has been damaged in the sum of \$5,000, wherefore he demands judgment, etc.

Counsel for appellee in their attempt to expose what they consider to be the theory of the first paragraph of the complaint, assert: "There was charged, therefore, an unlawful hiring, want of knowledge on plaintiff's part, failure to instruct as to danger, failure to furnish a safe working place, knowledge of the danger by defendant, violation of a statutory duty in failure to guard the emery belt, the injury to plaintiff, and that by reason of the facts stated plaintiff was damaged." Counsel, continuing their argument, say: "The only inference to be drawn from the facts stated is that the damage suffered by appellee was caused by reason of the unlawful hiring, the failure to instruct as to dangers, the failure to furnish a safe working place, the violation of the statutory duty to guard the emery belt, and the knowledge of the danger by appellant." In regard to the second paragraph counsel assert that it "counts upon the appellant's failure to guard the emery belt as required by law; the neglect or omission of a statutory duty, 'which, without reference to any other averment, is a sufficient charge of negligence.'"

The contention that the facts as alleged in the first paragraph disclose a case of noncompliance on appellant's part with the provisions of section 2 of what is known as the "Factory Act," being section 7087b, Burns' Ann. St. 1901, is wholly untenable. It would certainly require a stretch of imagination to hold that the facts as averred in the first paragraph show that appellant employed appellee in violation of the above section of the statute, and that therefore, as insisted by counsel, the employment was unlawful, or a breach of duty on the part of the employer to which the injury in

question must be attributed. Section 7087b, supra, declares that "no child under fourteen years of age shall be employed in any manufacturing or mercantile establishment," etc. In both paragraphs of the complaint it is expressly shown that appellee was of the age of 14 years. Therefore it is evident that he was not employed in violation of this prohibitory clause of the statute. But the argument is advanced that appellant violated the provisions of the above section, which exacts of the factory man the duty of keeping a register in which shall be recorded the name, etc., of every person employed by him under the age of 16 years, and, further, that appellant company violated the statute by failing to obtain from appellee's father an affidavit relative to his age, place of birth, etc., and in not placing such affidavit on file prior to taking appellee into its employment. But, even though in reason it could be asserted that a neglect by appellant to keep a register and obtain an affidavit from the father of the minor could in any manner, under the facts averred in the first paragraph, give appellee a right of action, there certainly is nothing positively averred to establish that appellant in this respect was guilty of violating the statute. The general rule, which has been repeatedly affirmed by our decisions, is that, where a party seeks to maintain an action under a statute, he must state or allege specifically and fully every act requisite to bring his cause of action within the provisions of the statute upon which he relies. No omission in this respect can be supplied by intent. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460 and authorities there cited; *Board, etc., v. Jarnecke*, 164 Ind. 225, 74 N. E. 520; *Chicago, etc., Ry. Co. v. Barnes* (Ind. App.) 73 N. E. 91. The first paragraph is wholly insufficient in charging negligence against appellant under the provisions of section 7087b, supra.

The next inquiry is, does this paragraph sufficiently state a cause of actionable negligence against appellant at common law? As it appears to us, the pleader in drafting the paragraph in controversy has attempted to travel upon the theory that appellee, by reason of his youth and his inexperience in working about dangerous machinery, was incapable of appreciating the perils and risks incident to the work which he was employed to perform, and that therefore, under the circumstances, appellant, his master, owed the duty of giving him, an inexperienced servant, proper instructions and caution in regard to the manner of safely performing his work. This is the theory in fact recognized by the trial court in respect to the paragraph in controversy. It appears that the court instructed the jury that, before they could find for the plaintiff upon the first paragraph, it must appear by a preponderance of the evidence that plain-

tiff's injury was caused by a failure to instruct him. In answering an interrogatory the jury also found that "plaintiff's injury was caused by the defendant's failure to instruct and warn him." It is seemingly the omission of this duty which constitutes the negligence upon which appellee attempts to base his right of action under the first paragraph of the complaint. It, however, falls short of presenting a case within this theory. Aside from the fact that appellee was 14 years of age, there is nothing in addition thereto to disclose that he was either ignorant or inexperienced in regard to the hazards, if any, of the services or work which he had been hired to perform. There are no positive facts, aside from the averment as to his age, averred to disclose that appellant was in duty bound to instruct or warn him in regard to the dangers of the particular employment. The presumption is that appellant was not guilty of a breach of its legal duty, and we cannot supply by intentment facts tending to establish such breach. The mere recital of facts as employed in the pleading in controversy will not suffice for material averments. The fact alone that appellee was 14 years of age will not raise or justify the inference that he did not know or appreciate the risks of his employment and was not qualified by experience to judge of the character and hazard of the work which he had undertaken to perform. In order to have properly charged appellant with a neglect of duty in not giving proper instructions or warning, facts should have been alleged to establish appellee's inexperience and ignorance to judge for himself as to the character and perils of his employment, and that appellant with knowledge thereof, either actual or constructive, failed to give him the necessary warning and instructions. These were essential elements which the pleading should have disclosed. Louisville, etc., R. Co. v. Frawley, 110 Ind. 18, 9 N. E. 594; Brazil, etc., Co. v. Young, 117 Ind. 520, 20 N. E. 423, and cases cited; Brazil, etc., Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 4 L. R. A. 850, 12 Am. St. Rep. 422.

The argument of appellee's counsel that the first paragraph must be held to sufficiently disclose several grounds of actionable negligence, viz.: (1) Unlawful hiring of appellee by appellant; (2) failure to instruct him; (3) neglect to furnish a safe working place; (4) violation of a statutory duty to guard the emery belt by which he was injured—is without support. It is true, in actions at common law predicated upon the negligence of the defendant, where several acts or grounds of negligence are sufficiently alleged in the complaint, a recovery at the trial will be justified if it be proven that the injury complained of was the result of one or more of said acts. Chicago, etc., Co. v. Barnes, supra. We have already shown the insufficiency of the plead-

ing to state a right of action based on the first and second grounds enumerated by appellee. That it is deficient in facts in respect to the other enumerated grounds is manifest. It will be observed that negligence against appellant is not charged by the pleader in direct or general terms; but the pleading relies upon the facts averred to justify or raise the presumption or inference that appellant was guilty of actionable negligence, without any direct averment relative thereto. In common-law actions based upon negligence, the negligence relied upon must be either directly alleged or such facts must be stated as will compel the presumption or inference that it was the proximate cause of the injury sustained by the complaining party. This rule is well supported and settled by our decisions. Pennsylvania Co. v. Marion, 104 Ind. 239, 3 N. E. 874 and the many cases there cited. It must be remembered that the question presented herein is in regard to pleading, and not one in respect to evidence. There is a material difference between matters relating to the former and those pertaining to the latter. In pleading facts must be directly and positively alleged, while in regard to evidence conclusions may be inferred from facts and circumstances without positive statements. In addition to the other infirmities of the paragraph in question, it may be asserted that there are no such facts alleged as will authorize an inference that any negligence on the part of appellant was the proximate cause of appellee's injury. This fact is essential, in order to render the complaint sufficient on demurrer. City of Logansport v. Kihm, 159 Ind. 68, 64 N. E. 505, and cases there cited; McElwaine, etc., Co. v. Wall, 159 Ind. 557, 65 N. E. 753; Davis v. Mercer Lumber Co. (Ind. Sup.) 73 N. E. 899. The first paragraph, at least for the reasons which we have stated, does not respond to the requirements of the well-settled rules of pleading. Hence the court erred in overruling the demurrer thereto.

We cannot yield our sanction to the contention of appellee's counsel that the second paragraph states a case of negligence against appellant because it did not comply with section 9 of our factory act (section 70871, Burns' Ann. St. 1901) in not guarding the "emery belt," to which fact appellee attributes his injury. This section provides that "all vats, pans, saws, planers, cogs, gearing, belting, shafting and set screws and machinery of every description shall be properly guarded." Aside from the alleged facts that the emery belt mentioned in the pleading was used by the defendant for polishing and finishing metal parts of wagons and bugles, there are no other facts alleged to disclose its construction or character, or to show whether the operation thereof is attended with danger. As to these facts we are left to conjecture. An examination, how-

ever, of the evidence, shows that the machinery or appliance herein in question consists of two wheels or pulleys, one of which, together with an emery belt, is fastened upon a driving shaft, and the other, adjusted about eight feet distant, over which pulleys pass the emery belt or strap. In *Monteith v. Kokomo, etc., Co.*, 159 Ind. 149-152, 64 N. E. 610, 58 L. R. A. 944, in considering section 70871, *supra*, we said: "Its effect is to impress upon certain kinds of machinery, such as saws, planers, cogs, gearing, belting, or shafting, in any manufacturing establishment, the character of dangerous machinery, and to interdict their use by the employer unless properly guarded." In *Robertson v. Ford*, 74 N. E. 1, in placing an interpretation or construction on the requirements of the above section, we held that under its express provisions, "that all vats, pans, saws, etc., shall be properly guarded," it becomes the imperative duty of all persons operating manufacturing concerns which come within the scope of the statute to comply with its provisions. It was further said in that case: "Of course, the act does not intend to exact a compliance where as to some particular machinery or appliance it is impossible to properly guard it without rendering the same useless for the purpose for which it was intended. The law never exacts the performance of an impossibility." In the same appeal we approved as correct the interpretation accorded by the New York Court of Appeals in *Glens Falls, etc., Co. v. Travelers' Ins. Co.*, 162 N. Y. 399, 56 N. E. 897, to a similar statute of that state to the effect that the Legislature, in enacting the act in question, did not intend that every piece of machinery in a large building should be covered or guarded, as that would be impracticable.

What evidently was intended or contemplated by the Legislature was that those parts of the machinery which were dangerous to employes whose duty required them to work in the immediate vicinity of such dangerous machinery should be properly guarded, in order to minimize as far as practicable the perils or dangers attending their labor. When considered in connection with this construction of the statute, it is manifest that the second paragraph of the complaint does not state facts sufficient to show a breach of duty required of appellant under the provisions of the section of the statute in controversy. It will be noted that the machine or appliance denominated an "emery belt" in the paragraph is not one of the particularly enumerated or designated pieces of machinery or appliances required to be properly guarded. It does not come within the term or word "belting," as employed in the statute; for that term is used in a collective sense, and contemplates such belts as are employed in running or operating the machinery of a factory or manufacturing concern. The general phrase, "and machin-

ery of every description therein," under a well-recognized canon of construction applicable to the interpretation of statutes, must be held to be limited and qualified by the specific designation of the machinery or appliance which immediately precedes it. The rule, generally affirmed by our decisions and also by other authorities, is that, where words of a particular or specific description in a statute are followed by general words which are not so specific and limited, the latter are to be construed as applicable to persons, things, or cases of like character to those designated by the preceding, particular, or specific words, unless there is a clear manifestation on the part of the Legislature of a contrary purpose. *Miller v. State*, 121 Ind. 294, 23 N. E. 94; *Nichols v. State*, 127 Ind. 406, 26 N. E. 839; *State ex rel. v. Board, etc.*, 162 Ind. 183, 70 N. E. 138; *Cleveland, etc., R. Co. v. Bergschicker*, 162 Ind. 108, 69 N. E. 1,000; *Burks v. Bosso* (N. Y.) 73 N. E. 58; *Black on Interpretation of Laws*, p. 141; *Endlich, Int. of Statutes*, §§ 404, 405. The rule in question is commonly denominated by the authorities "ejusdem generis," because it usually restricts expressions in a statute, for example, such as "all others," or "any others," to persons and things of the same kind or class of those specifically designated by the preceding words. There being nothing in the statute in question to indicate to the contrary, the general phrase, namely, "and machinery of every description therein," must, under the rule stated, be construed as meaning and including machinery or appliances belonging to or of the class or character designated as "vats, pans, saws," etc.

The paragraph in question, however, utterly fails to aver facts to show that the emery belt mentioned therein is of the kind or character of the class of machinery specifically designated by the statute to be guarded. Aside from the fact that it throws off particles of emery as alleged, there is nothing to show a necessity for guarding it, for the reason that its operation or use is attended with danger to the employes of appellant who work in the vicinity thereof. There is also an entire absence of facts to disclose whether it is possible or practicable to properly guard this particular machine without rendering it useless for the purpose for which it is intended to be operated. The burden of showing these facts in the pleading rested on appellee, and the fact, if it is a fact, that the machine or appliance in question is of such a character that it cannot be properly guarded, cannot be said to be a matter of defense to be proven by appellant; for, as previously said, a party who relies upon a statute must bring himself fully and clearly within all its provisions. The act is highly penal, and a violation thereof subjects the offender to the punishment therein provided. In charging a case of neglect to comply with its provisions, intendments or inferences can-

not be resorted to to supply the omission of material facts. For the insufficiencies pointed out in respect to the second paragraph, and possibly for others, it must be held that the court erred in overruling the demurrer thereto. Other questions are discussed by appellant's counsel; but what we have said herein, in considering the sufficiency of the pleading, will serve, we think, to render it improbable that these questions will arise again upon another trial. We therefore pass them without consideration.

For the error in overruling the demurrer to each paragraph of the complaint, the judgment is reversed, with instructions to sustain said demurrer, with leave to appellee, upon request, to file an amended complaint.

(165 Ind. 659)

GLENN v. LAKE ERIE & W. R. CO.*

(No. 20,717.)

(Supreme Court of Indiana. Oct. 6, 1905.)

1. CARRIERS—PASSENGERS—TERMINATION OF RELATION.

The relation of passenger and carrier does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 991, 992.]

2. SAME.

A passenger, on arriving at his destination, voluntarily and without any necessity therefor, went into the depot waiting room with some acquaintances and engaged in social converse for 10 or 15 minutes, after which he left the depot, and in passing over the station grounds fell and was injured. *Held*, that the relation of passenger and carrier had as a matter of law terminated at the time of the injury, and no recovery therefor could be based on such relation.

Appeal from Circuit Court, Warren County; Jos. M. Rabb, Judge.

Action by James Glenn against the Lake Erie & Western Railroad Company. From a judgment for defendant, plaintiff appeals. Transferred from the Appellate Court (73 N. E. 861) under Burns' Ann. St. 1901, § 1337j, subd. 2. Affirmed.

Thompson & Storms and C. V. McAdams, for appellant. Jno. B. Cockrum and Stuart, Hammond & Simms, for appellee.

MONTGOMERY, J. This action was brought by appellant to recover for a personal injury caused by falling over a railroad tie upon appellee's station grounds. The cause was tried by a jury, and, after hearing the evidence and argument of counsel, the court by a peremptory instruction directed the jury to return a verdict in favor of appellee. Appellant's motion for a new trial was overruled, and an exception duly saved, and that ruling is assigned as error on appeal.

Appellant resided at the town of Dayton, and at the time of receiving his injury was

returning from a trip to the city of Lafayette. The complaint is in a single paragraph, and charges that appellant was a passenger over appellee's road from Lafayette to Dayton, and arrived at his destination after night, and in going from the depot toward the business part of town in the darkness fell over the obstruction and broke his leg. Appellant's right of action is manifestly founded upon the relation of passenger and carrier, and if that relation did not exist between him and the appellee at the time of the accident there can be no recovery upon the complaint. The rule is that the relation of passenger and carrier, when established, does not terminate until the passenger has reached his destination, alighted from the train, and had a reasonable time in which to leave the place where passengers are discharged. Elliott on Railroads, vol. 4, § 1592; McKimble v. Boston R. R. Co., 139 Mass. 542, 2 N. E. 97; Houston & T. C. R. Co. v. Batchler (Tex. Civ. App.) 83 S. W. 902; Chicago & Alton Ry. Co. v. Tracey, 109 Ill. App. 563; Chicago, R. I. & P. Ry. Co. v. Wood, 104 Fed. 663, 44 O. C. A. 118. In case of an accident involving a passenger, who on alighting from the train intended and desired to depart from the place at once, but was hindered and delayed, the question as to what is a reasonable time should be determined from the attendant facts and circumstances given in explanation or excuse for such delay. In this case appellant, on arriving at Dayton and leaving the train, had no apparent desire to proceed on his journey, and offered no legitimate excuse for lingering about the station; but it appears from his own statement that he voluntarily went into the waiting room of the station with six or seven acquaintances, sat down, talked, joked, sang a song, and had a jolly time for 10 or 15 minutes. He was not detained after leaving the car by any business with the company or connected with his journey, or by any circumstance which made delay either necessary or expedient, but abstained from proceeding homeward to secure amusement for himself and to furnish entertainment for his companions. After 10 or 15 minutes thus jovially spent, appellant left the depot, and in passing over the station grounds fell and was injured. The admissions of appellant, as well as the other evidence, make it clear that he merely loitered for an unreasonable time about the station for his own pleasure, and it was wholly unnecessary to ask the jury to determine as a question of fact whether or not 10 or 15 minutes was an unreasonable time for him to have remained at the place where he was discharged as a passenger from appellee's train. The court, upon the undisputed facts, could say as a matter of law that, upon his arrival at the station, appellant of his own volition, in quest of pleasure, broke the continuity of his journey, and thereby terminated at once his relation as appellee's passenger. Appellant's right.

*Rehearing denied December 14, 1905.

of recovery, as pleaded, depended upon proof of a breach of duty owing by appellee to him as its passenger, and, that relation having terminated before the accident occurred resulting in his injury, his suit must fail. The court did not err in directing a verdict for appellee. *Heinlein v. Boston & P. R. Co.*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Quantz v. Southern Ry. Co.* (N. C.) 49 S. E. 79; *Batteree v. Galveston H. & S. A. Ry. Co.* (Tex. Civ. App.) 81 S. W. 566.

The conclusion reached makes it unnecessary to consider any other questions discussed by counsel. There was no error in overruling appellant's motion for a new trial.

The judgment is affirmed.

(36 Ind. App. 219)

ELKHART PAPER CO. v. FULKERSON.

(No. 5,001.)

(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1905.)

1. JUDGMENT—RES JUDICATA—MATTERS NOT IN ISSUE.

A decree determining the relative priorities of various power rights in the waters of a stream is competent evidence of such rights in a subsequent suit by the lessee of one of the parties to the suit in which the decree was rendered against another party to such suit, brought to recover damages for an unlawful use of water by the latter, but is not competent as an adjudication of the question of damages, which was not in issue nor adjudicated in the suit in which the decree was rendered.

2. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF VERDICT.

The appellate court only takes cognizance of the question of the sufficiency of the evidence to support the verdict where there is no evidence to support the same, as otherwise a mere question of fact for the determination of the jury and the trial court is presented.

3. TORTS—INJURY CAUSED BY COLLECTIVE ACTS—LIABILITY OF INDIVIDUAL TORT FEASORS.

Where several owners of junior power rights in the waters of a stream, though acting independently of each other, accomplish collectively, by an unlawful and excessive use of water, the diminution of the supply of water to which the owner of the senior power right is entitled, and it is very difficult or impossible to determine the proportion of the injury caused by the several wrongdoers, each is severally responsible for the injury caused to the owner of the senior right, and may be individually sued for the damages resulting from such injury.

4. WATERS AND WATER COURSES—INTERFERENCE WITH WATER POWER RIGHT—EXCESSIVE DAMAGES.

In an action by the owner of the senior power right in the waters of a stream for an unlawful appropriation of water by the owner of a junior right, there was evidence that plaintiff was obliged to close his mill for 167 days by reason of the deficiency of water, and that the rental value of his mill was from \$25 to \$30 a day. *Held*, that a verdict for \$4,000 was not excessive.

5. SAME—APPROPRIATIONS OF WATER—PRIORITIES—INSTRUCTIONS.

In an action by the owner of the senior power right in the waters of a stream for an unlawful appropriation of water by the owner

of a junior right, there was evidence that plaintiff had the right of first priority to the use of a certain quantity of the waters of the stream, and that defendant's rights were fifth and sixth in order of priority; other parties having the second, third, and fourth rights. These rights had been established by a decree of court, which provided that, in case of the insufficiency of the water to supply the parties having rights therein, such parties should cease using the water in the inverse order of their priorities. There was further evidence from which it might be inferred that there had been sufficient water in the stream to furnish the owners of the first four priorities the amount of water to which they were entitled, without interfering with plaintiff's rights. *Held*, that a charge that the parties, having the second, third, and fourth priorities of right to the water had the right to use the same, if they did not use more than they had a right to use and did not interfere with plaintiff's rights, was proper.

6. SAME—DEFENSES.

Plaintiff, who had the first power right in the waters of a stream, operated a mill which was constructed with the view of being run by the power which an eight-foot head of water would furnish. This right was preserved to plaintiff by a lease from the owners of the right, who were protected against the owners of junior rights by a decree of court establishing the priorities of the parties interested in the stream. *Held*, that an owner of a junior right was bound to respect plaintiff's right as established, and could not defend an action for a violation of that right on the theory that plaintiff might have reconstructed his mill and water wheels, and by the use of additional water wheels and upon some speculative theory have obtained sufficient water to run his mill with a four-foot head of water.

Appeal from Circuit Court, Elkhart County; J. D. Fenall, Judge.

Action by Fremont Fulkerson against the Elkhart Paper Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Van Fleet & Van Fleet, for appellant. Arthur Darling and Anthony Deahl, for appellee.

MYERS, P. J. At the time of the commencement of this action and for some time prior thereto appellee was the lessee, and Sage & Sage lessors, of a flourmill in the city of Elkhart, propelled by water furnished by means of a canal or race from the St. Joseph river. Appellant owned a paper mill run by water taken from the same canal at a point above the mill of appellee. Appellee claimed that appellant took water which rightfully belonged to him, and by reason of the unlawful appropriation of the water by appellant he was compelled to close his mill during certain months of the year 1895 and 1896, to his damage in an amount equal to the reasonable rental value of such mill while so disabled by the cause stated. An answer of general denial to the complaint formed the issue. This issue was submitted to a jury, resulting in a verdict for appellee in the sum of \$4,000. Judgment followed the verdict. The only error in this court assigned is the overruling of appellant's motion for a new trial. While this motion contains many

grounds for a new trial, our inquiry will be limited to the ones here by it discussed.

1. The verdict of the jury is not sustained by sufficient evidence. The undisputed facts are: That there were certain lands and water rights and a water power, created by a dam across the St. Joseph river in the city of Elkhart, Ind., owned by the Elkhart Hydraulic Company. This dam, at an ordinary stage of the river, furnished about 1,200 horse power of water. The Hydraulic Company conveyed in fee certain portions of this land and water power, giving to the first grantee a priority of right in the use of water, and to the second grantee a second priority, and so on in seven different grants, thus making seven different priorities in the use of water; the company retaining the surplus. It took 1,118 $\frac{1}{4}$ horse power of water to satisfy the seven different grants, as found and fixed by the Elkhart circuit court in its decree in the case of the Elkhart Hydraulic Company against Sage & Sage, the Elkhart Paper Company, and others, entered November 9, 1896, and which is in full force and effect, in substance as follows: The first priority to Sage & Sage, 113 $\frac{1}{4}$ horse power. The second priority to Kulp & Ummell, 37 $\frac{1}{2}$ horse power. The third priority to the St. Joseph Hydraulic Company, which includes the Home Electric Light & Power Company and all plants on the north side of the river, the right to one-third of all of the water in the St. Joseph river above the dam, subject to the first and second priorities, or, upon a basis of 1,118 $\frac{1}{4}$ horse power, to the use of water for 322 $\frac{1}{4}$ horse power. The fourth priority to the Muzzy Starch Company, 80 horse power. The fifth priority to Charles G. Conn, 30 horse power; Excelsior Starch Mfg. Company, 45 horse power; Muzzy Starch Company, 30 horse power; Owen & Campbell, 115 horse power; Elkhart Paper Company (appellant), 102 $\frac{1}{2}$ horse power; and the successors of one Hubler, 7 $\frac{1}{2}$ horse power—with equal priorities to all mentioned in this class. The sixth priority to the Excelsior Starch Company, for 60 horse power; the Elkhart Paper Company (appellant), 60 horse power; Owens & Campbell, for 45 horse power; the Muzzy Starch Company, for 30 horse power; the Globe Tissue Paper Company, for 60 horse power—with equal priorities to all in this class. The seventh priority to the Elkhart Knitting Company, for 30 horse power. By this same decree the court fixed the number of cubic feet of water per minute for each horse power that each party was entitled to under a head of eight feet and upwards of water. The decree also provides that in no case shall the water be drawn down more than six inches below the effective crest of the dam, and, if there is not sufficient water to furnish all the parties with water to which they are entitled under the decree, then the water is to be shut off in the inverse order of the priorities as in the decree fixed, until

those having prior rights shall have the amount which they are entitled to receive.

The course of the St. Joseph river at the point in controversy is from east to west. The water was taken from the river by means of one main race on the north side and one on the south side of the river; each race being furnished with water from a pond created by a dam across the river. Of the plants taking water from the main race on the south side of the river for power, the appellant's mill was nearest to the race intake, and appellee's mill the last one, or the one farthest away from the intake. The others were located between these two. There is evidence that all of these mills for lack of water were compelled to close down a part of the time covered by the complaint, except appellant's mill, which ran all the time, except when closed for repairs, as did also the Home Electric Light & Power Company. The testimony of appellee was that "occasionally the paper mill shut down to make repairs, and we would have 10 or 11 feet of water then. Q. Well, when would anybody else stop? A. When anybody else stopped, it would not make so much difference. There wasn't so much of an increase in the quantity of water. Q. Who was broke down so you could have 10 or 11 feet of water? A. The Elkhart Paper Mill. Q. Who else? A. Others would break down; but I say we couldn't notice them. Q. Did you have more water then, when others shut down? A. Well, not to make enough difference to amount to anything." There is evidence that from January 15 to February 15, 1896, the water was from three to five feet below the crest of the dam, and that from the middle of May to the middle of November, 1895, and from August to October, 1896, both inclusive, appellee had water to run but a small portion of the time, during all of which time, except during the month of August, 1896, while the Hydraulic Company were making repairs and while there was no water in the race, appellant was using from 250 to 400 horse power of water, except in August, September, and October, 1896, when it used water sufficient to produce 500 horse power, and the water was from two to four feet below the crest of the dam. There is evidence tending to show that appellee's mill could have been operated to its full rating with water sufficient to produce 110 horse power. There is evidence in the record tending to prove that the water used by appellant over and above the amount authorized in its grants was the cause of appellee's damage.

Appellant's grant, as found by the judgment of the court heretofore referred to, gave it all told the use of water sufficient to produce 162 $\frac{1}{2}$ horse powers, subject to certain priorities, and there is evidence that it used water sufficient to produce from 87 $\frac{1}{2}$ to 337 $\frac{1}{2}$ horse powers in excess of its authorized amount. The lease of appellee is of date

July 6, 1894, operative from September 1, 1894, and contains the following stipulation: "Also all rights to water and water power held by first party as lessee of the Elkhart Hydraulic Company for water and water power for the purpose of propelling the machinery of said mill; it being agreed that said second party shall have, during the existence of this lease, the same right to use said water and water power that said first party would have if this lease had not been made, and that such use of said water and water power by the said second party shall be subject to all the restrictions, limitations, conditions, liabilities, and priorities that its use by said first party would be subject to if this lease were not made." The complaint in the case of the Elkhart Hydraulic Company against Sage & Sage and others was filed at the October term, 1887, of the Elkhart circuit court, and by this action the plaintiffs therein sought to fix the priorities in the use of water as authorized by said several grants and to have provided means by which the use of water by the parties authorized in said several grants could be regulated, and for injunctive relief against excessive use of water, and for damages accrued to said plaintiff by reason of such excessive use of water. The pleadings and judgment in that case were introduced as a part of the evidence in the case at bar.

Appellant now contends that this evidence conclusively shows that the matters now being litigated were adjudicated in the Hydraulic Company Case, and that it is entitled to the benefit of this defense. To the Hydraulic Company Case appellee was not a party, the question here being one of appellee's damages, which were not in issue in that case, and, so far as we know from the record now before the court, he had no knowledge of that controversy, and therefore his rights to damages were not adjudicated. Under his lease from Sage & Sage he obtained their right to the use of the water taken from the St. Joseph river under their grant from the Hydraulic Company, and that right was fixed by the court in the Hydraulic Company Case. Under the issues in the case at bar the pleadings and judgment in that case were properly admitted in evidence for the purpose of establishing the rights of Sage & Sage, but not for the purpose of proving former adjudication of the matters set up in this action, as no such issue is tendered. *Crum v. Rea*, 14 Ind. App. 379, 42 N. E. 1033; *Denny, Clerk, v. State ex rel.*, 144 Ind. 503, 537, 42 N. E. 929, 31 L. R. A. 726; *Louisville, etc., Ry. Co. v. Cauley*, 119 Ind. 142, 21 N. E. 546; *Westfield, etc., Co. v. Noblesville, etc., Co.*, 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244. Adhering to the decisions above cited, in our opinion appellant's contention of res adjudicata is not well taken.

On the question of evidence to support the verdict, this court only takes cognizance

when there is no evidence to support the same, as then it becomes a question of law; otherwise, a question of fact for the jury and the trial court to determine. *Cincinnati, etc., R. R. Co. v. Madden*, 184 Ind. 462, 34 N. E. 227.

The following interrogatory was submitted to the jury: "No. 5. What percentage or proportion of the water of which appellee was wrongfully deprived, as alleged in his complaint, was taken by defendant? A. One hundred per cent." The appellant bitterly complains of this answer, and insists that the uncontradicted evidence shows that other parties were using water from the same source as appellant during the time covered by appellee in his complaint. If there is any evidence authorizing the answer, there could be no reasonable grounds upon which to argue the question of lack of evidence to support the verdict. If the amount of water used by appellant in excess of what it is authorized to use under its grants was the sole cause of appellee's damage, then the answer of the jury to the interrogatory was right, as a reasonable inference or conclusion drawn from the evidence. But, aside from the question as to whether there is evidence in the record authorizing such an answer, we are unable to agree with appellant's theory, granting that the proof does show the taking of some water by other mill users at different points along the race after it passed appellant and before reaching appellee, that each were liable only for the injury by each committed. It seems to us, from the uncontradicted facts and the evidence in this case, that all parties using water after it fell six inches below the effective crest of the dam were doing so in violation of appellee's rights, and while the water was taken from different points along the race, yet as a matter of fact it was being taken by all at the same time from the same general and one source of supply. There is evidence which tends to show that, when the head waters or the water in the pond was below a certain depth, to wit, eight feet, its use for the purpose there collected would be to a certain extent a waste. The irregular use of water by the parties taking water from the general source of supply, other than appellant and the Home Electrical Light & Power Company, at the varying stages of the water during the time for which appellee claims damages, makes it very difficult, and it might be said impossible, to determine just what proportion of the water each used; and under such circumstances, although the acts of each may have been separate and independent, yet it cannot be said that they together were not the direct cause of the single injury of which appellee complains, and, this being true, either is responsible for such injury. *Westfield Gas, etc., Co. v. Abernathy*, 8 Ind. App. 73, 80, 35 N. E. 399; *City of*

Valparaiso v. Moffitt, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 522; *Slater v. Mersereau*, 64 N. Y. 138; *South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908. In the latter case this court said: "Intention, purpose, and concert of action is usually necessary to create joint liability between tortfeasors. But there is a class of cases in which, although the negligent acts are separate and distinct, they are concurrent in place and time, and which result in producing a single injury. * * * It would be impossible to apportion the damage between the two acts of negligence, or determine the amount produced by each. The case is analogous to that of an injury produced by the collision of two railroad trains under different ownership and management, caused by the concurring negligence of both companies. Each company is jointly and severally liable for the whole injury." The law does not permit one person to shield himself from liability for an act resulting in injury by reason of the fact that some other person has at the same time contributed to producing the same injury, nor will the fact that plaintiff is prosecuting his suit against the one, instead of both, avail the defendant to defeat a recovery. *South Bend, etc., Co. v. Liphart*, supra.

2. Appellant contends that the damages assessed were excessive. There is evidence tending to show that the fair rental value of appellee's mill was from \$25 to \$30 per day, and the number of days lost by appellee 167. From this evidence it will be seen that the jury had a basis upon which to assess the amount of damages stated in the verdict, and the finding is not erroneous.

3. Appellant contends that the fifth instruction given by the court on its own motion is erroneous. The instruction reads as follows: "If you find from the evidence that the parties having the second, third, and fourth priorities of right to said water used the water, but by their use of it did not use more than they had a right to, and did not interfere with plaintiff's rights, then they would have the right to so do." It is in evidence that the appellant's use of water came within the fifth and sixth priorities as fixed by the court in its decree in the *Hydraulic Company Case*, and that, in case of an insufficient supply for all the users and to maintain the water in the pond within six inches of the crest of the dam, the users coming within the seventh, sixth, fifth, and so on should cease using water in the inverse order of their priorities until the main head of water could be maintained as aforesaid, and those supplied in the use of water in the order of their priorities in the amount as fixed by the court in its decree. It also appears that appellee had the right of the first priority, and the second, third, and fourth had a superior right to those in the fifth and sixth; and as appellant's right comes within the latter two

priorities, and with the evidence tending to prove that it used from 250 to 500 horse powers at a time when the water was not maintained in the pond as it should have been, and that appellee had not sufficient water to run his mill, except when appellant closed down, and then the water would raise to a head of from 10 to 11 feet, the jury might have reasonably drawn the inference from such evidence that there was sufficient water in the St. Joseph river to have maintained the water to the required depth, and to furnish the users in the first four priorities during the time complained of the amount to which they were entitled without interfering with the rights of appellee. With this view of the record, we cannot say that the instruction is not pertinent to the evidence, or not along the lines of what the evidence tends to show.

We are well aware of that line of cases holding that, where the instruction is not applicable to the evidence and is liable to mislead and confuse the jury, it is error and cause for reversal. *McMahon v. Flanders*, 64 Ind. 334; *Moore v. State*, 65 Ind. 382; *Summerlot v. Hamilton*, 121 Ind. 87, 22 N. E. 973; *Reed v. State*, 141 Ind. 116, 40 N. E. 525. There is also a line of cases which hold that, where it is apparent that the irrelevant instruction does not injure the complaining party, such error will not be sufficient cause to reverse the judgment. *Robinson v. State*, 152 Ind. 304, 308, 53 N. E. 223; *Reed v. State*, supra. It is also the law that an instruction which correctly states the law, with some evidence tending to support it, will not be considered reversible error. *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107; *State ex rel. v. Carey*, 23 Ind. App. 378, 55 N. E. 261; *Harris v. State*, 155 Ind. 265, 58 N. E. 75. The giving of this instruction was not reversible error.

4. Appellant complains of the eighth instruction given by the court upon its own motion. This instruction reads as follows: "If you find from the evidence that at a certain time alleged in the complaint the water at the plaintiff's mill became so low that he could not get 118% horse power on four wheels which he was using, and that he had six wheels in his flume, I instruct you that it was his duty to make use of the two other said water wheels in an effort to get his 118% horse power, provided you find from the evidence that the mill was so constructed and the wheels so connected therewith that they could be used in operating the mill to manufacture flour; but if you find from the evidence that the plaintiff's amount of water was diminished by the wrongful act of the defendant, he would be under no obligation to change or rearrange his mill in order to get his full portion of water." Appellant contends that by this instruction it was made responsible for the faulty construction of appellee's mill; "that appellee was only entitled to have a specified num-

ber of cubic inches of water per minute, varying inversely as his head varied; and that he was not entitled to water sufficient to run his particular wheels with such a power and speed as to manufacture flour." While we agree with appellant that it is quantity of water which fixes the horse power, yet, in our opinion, the instruction is not subject to the criticism placed upon it. The instruction was given in the light of the evidence, which tends to show that appellee's mill throughout, including the water wheels, was in the best of repair, and under a head of eight feet of water entitled him to 82.75 cubic feet of water per minute for each horse power, and that his mill could have been run at full rating on a little less than the power to which he was thus entitled. In case of a greater head of water, he was entitled to a less number of cubic feet per minute; but, in all events, the minimum head of eight feet was to be maintained before its use by others was authorized at all. It appears from the evidence that in the flume of appellee's mill there are six water wheels—two 35-inch, one 40-inch, and two 48-inch, all known as "Standard" wheels, and one 44-inch, known as a "Special" wheel. Appellee's plant was a flourmill. The two 48-inch and the one 44-inch water wheels under an 8-foot head of water furnished power sufficient to run the mill for the manufacture of flour, when with less than an 8-foot head of water the 40-inch wheel was added. The other wheels were attached to and ran other parts of the mill, when necessary on account of low water, to cut off these parts to help out the other wheels. The uncontradicted evidence shows that during the time appellee's mill was closed down he had not to exceed $4\frac{1}{2}$ to a 5 foot head of water, and that he did some work under a 6-foot head. The wheels used by appellee were of the James Leffel & Co. make. Tables of this make of wheels were introduced in evidence, showing, so far as applicable to this case, the following:

Capacity of Wheels.

Style & Size of Wheels	Head in Feet	5	6	7	8	9
Standard 35	Power	8 $\frac{1}{2}$	11 $\frac{1}{2}$	14 $\frac{1}{2}$	17 $\frac{1}{2}$	20 $\frac{1}{2}$
	Water	1074	1185	1259	1332	1457
Standard 40	Power	11	15	19	23	27
	Water	1390	1590	1715	1817	1918
Standard 48	Power	16	21 $\frac{1}{2}$	27	33	39
	Water	2023	2260	2437	2607	2738
Special 44	Power	19	25	32	39	46 $\frac{1}{2}$
	Water	2401	2633	2869	3081	3265
	Speed	70	77	83	89	94

Power—Horse power. Water—Cubic feet per minute.
Speed—Revolutions per minute.

From this table it will be seen that the three wheels in use under a head of 8 feet of water will produce 105 horse powers by

the use of 8,295 cubic feet of water per minute, when, according to appellant's admission, he was entitled to 9,402.80 cubic feet of water per minute. Under a head of 6 feet of water and the four wheels in use 83 horse powers could be produced, which was insufficient to run the mill. Under a 5-foot head all of the wheels combined would give only 79 horse powers; but, inasmuch as appellee was to have a specified number of cubic feet of water per minute for each horse power, appellant claims that under a 5-foot head of water he was entitled to 15,018 cubic feet per minute, and at a 4-foot head, 18,770 cubic feet per minute, and before he would be entitled to recover he must show that he could not get the number of cubic feet of water per minute awarded him by the decree in the Hydraulic Company Case. As we have said, the minimum head of water was fixed at 8 feet, and the maximum number of cubic feet of water to which appellee was entitled was fixed at 82.75 cubic feet per minute for each horse power; under a head of $8\frac{1}{2}$ feet, 77.86 cubic feet per minute; and under a head of 9 feet, 73.53 cubic feet per minute for each horse power. It is apparent that appellee's mill was constructed with a view of being run by the power that an 8-foot head of water would furnish. That right was preserved to him by his lease from Sage & Sage, and they in turn were protected against all other users, including appellant, by the decree in the Hydraulic Company Case. It does not lie with appellant to say that appellee might have reconstructed his mill, flume, and water wheels, and by the addition of additional water wheels and upon some theory purely speculative a head of water might have been maintained at 4 feet, thereby giving him sufficient water to run his mill. It is not what appellee might have done. It is a question of what his rights are under the facts, that appellant is legally bound to respect. Therefore, in our opinion, the instruction in question, fairly construed, refers to the quantity of water obtainable by appellee, and is not objectionable.

5. Appellant insists that the court erred in the admission and rejection of certain testimony. We have carefully examined the record relative to these grounds for a new trial, and, without extending this opinion to any greater length, we deem it sufficient to say that, in our opinion, we find no error in the record upon this question authorizing us to reverse the judgment of the lower court. Therefore, in view of all the evidence and uncontested facts which appear from the record in this case, in our judgment a correct conclusion was reached by the trial court, and the judgment should stand.

Judgment affirmed.

(38 Ind. App. 232)

SHAVER v. HOME TELEPHONE CO.

(No. 5,421.)

(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1905.)**1. MASTER AND SERVANT—INJURY TO SERV-
ANT—COMPLAINT—CONFLICTING ALLEGA-
TIONS.**

An averment, in a complaint in an action by a servant for injuries received in the course of his employment, that he was ignorant of the danger, cannot stand in the face of specific averments showing that the actual conditions surrounding the employment were such that he must have known of the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 850.]

2. SAME—ASSUMPTION OF RISK.

Plaintiff was employed with others in unloading telephone poles from a flat car. The poles had been loaded lengthwise and piled up about eight feet high, and were held in place by three standards on each side of the car, which were stayed in pairs with a wire extending transversely across the car. The end standards on one side of the car were removed. The stay wires were cut, except the one binding the center standards. The men had tried to break the middle standard, but failed, and plaintiff was ordered by the foreman to cut the wire holding the center standards, and, on having cut the wire, the standard broke and the poles rolled off the car and struck him. Plaintiff claimed that he did not know that the wire extended through to the opposite standard, but he did not negative knowledge of the fact that the wire was helping to hold the standard, and there was nothing to prevent his seeing the actual conditions. *Held*, that he assumed the risk as a matter of law, precluding a recovery.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 648-651.]

3. SAME.

The rule that a servant has the right to presume, in the absence of warning and notice, that in conforming to the order of a foreman he will not be subjected to injury, has no application where the danger is obvious, and the servant has ample time to see the danger, and must have known it had he used his senses.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 649.]

Appeal from Circuit Court, Clinton County; Joseph Claybaugh, Judge.

Action by Earl T. Shaver against the Home Telephone Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Crane & McCabe, for appellant. Finley P. Mount, for appellee.

ROBINSON, J. Appellant appeals from a judgment against him on a demurrer to his complaint asking damages for a personal injury. Appellant was working under the direction of a foreman, and was injured while unloading a car load of telephone poles. It is averred: That the poles, from 25 to 35 feet long and 10 to 15 inches in diameter, were loaded lengthwise on a flat car, piled up about 8 feet high and held in place by wooden standards at the sides of the car. These standards were placed three on each side of the car, one at the middle and one near each

end, and were stayed in pairs with wire extending transversely across the car; one of such wires being near the top, and the other near the middle, of the standards. That the wires attached to the middle of the standards had been fastened when the car was about half loaded, and the remainder of the load was placed on top of these wires, so that the weight of the poles drew the middle and upper part of the standard inward, tightly binding the load together. Appellant was employed as one of a number of men to assist in unloading the poles, and he and the other laborers were at all times subject to, and were bound to conform to, the order and direction of one Ramsey, who was employed by appellee for the purpose of having charge and control of, and who had charge and control of, the laborers, and who was appellee's only representative present at and in charge of the work of unloading the cars. That Ramsey ordered certain laborers to, and they did, cut all the wire stays, except the lower stay across the middle of the car, and also cut near the floor of the car all the standards on the west side of the car, except the center standard. That thereupon three or four of the men, in obedience to Ramsey's order and direction, attached a wire to the top of this remaining standard, and by pulling thereon attempted, but were unable, to break the same, and were unable to break the standard after one of the men had cut into and weakened it near the floor of the car. That, after several unsuccessful efforts had been so made to break the standard, Ramsey negligently ordered appellant to take a hand ax and go in by the side of the car and cut the stay wire. That at that time the poles remained on the car in exactly the same position they were in when the work of preparation for unloading the same began, without any shifting or change resulting from the cutting of the other stay wires or removal of the other standards, but that the poles appeared to be sufficiently and safely maintained in position by the remaining standard on the west side of the car. That, acting in obedience to Ramsey's order, appellant went to the standard and cut the stay wire. The standard immediately broke, letting the poles fall, striking appellant and injuring him. It is also averred that the appellant was 20 years of age, and had no knowledge or experience in handling telephone poles, did not know how they were loaded or by what means they were held together on the car, nor of their liability to burst apart and break the standards as soon as the stay wires were cut, nor that the weight of a large number of them rested upon the stay wire and drew the middle standard inward with great force, nor that when the wire should be cut the standard would not be strong enough to support them, nor the manner in which they were loaded on the car, "or the means by which the same were held together thereon, if any, other than said standards and said

stays across the top of said load, but he did not and could not see the wire stays which passed through said load of poles, and between the poles from standard to standard, about the middle thereof, and did not know that the same passed through the load to the opposite standard"; that he knew nothing as to the danger involved in cutting the wire, and that his inexperience and want of knowledge in all such respects were known to appellee and Ramsey. There are also averments as to Ramsey's experience and knowledge of all present conditions, that under his direction the work was done in a negligent and careless manner, his failure to warn appellant of the danger, and the manner in which the work might have been done without danger.

The pleading shows that appellant was employed to do the particular work in which he was engaged when injured, and that nothing had been done towards unloading the poles until after appellant and the other men arrived at the car, and that he knew all that had been done in the way of preparing to unload the poles. It does not appear that any machinery or appliances were used in the work, and that the work of beginning the unloading consisted in loosening the stay wires and removing the standards from one side of the car and permitting the poles to roll off the car on to the ground. It is averred that Ramsey omitted to do certain things, which, if they had been done, would have made the work less dangerous; but it does not appear that appellant was relying upon the work being done in any manner other than that pursued. The employer's liability act requires that an employe, asking damages for an injury, must have been in the exercise of due care and diligence. It is true appellant avers that he was ignorant of the danger; but can this general averment stand in the face of the specific averments showing the actual conditions surrounding him immediately before and at the time he was injured? He was 20 years of age, of average intelligence, and in possession of all his faculties. He must have known that the sole purpose in view in removing the end standards and cutting the stay wires was to permit the poles to roll from the car to the ground; that, if all the standards were removed and the wires cut, the poles, piled eight feet high against the standards, would fall. He knew that the end standards on the west side of the car had been removed, and that the stay wires had all been cut, except the one at the middle of the center standards. He knew that the men with the pull wire had tried to break the middle standard, and failed; that this standard was cut into; and that the men were still unable to break it. He must have known that, if that standard was removed, the poles would fall. It is true he avers he did not know that the middle stay wires extended

through to the opposite standard; but he knew there was a stay wire fastened to the middle of the standard the men were trying to remove, and he does not negative knowledge of the fact that this wire, no matter to what the other end was fastened, was helping to hold the standard, and that the purpose in cutting the wire was to release the standard. There was nothing to prevent his looking and seeing the actual conditions as they then existed. He was not required to do the act hurriedly before another act apparently disastrous might happen.

Appellant was employed to do the particular work in which he was engaged when injured. He assumed such risks as were naturally and reasonably incident to the work, so far as the hazards of the work were obvious and within the apprehension of a person of his experience and understanding. *Republic Iron & Steel Co. v. Ohler*, 161 Ind. 393, 68 N. E. 901; *Jenney Electric, etc., Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30. The process of unloading the poles was a very simple one. There is nothing to show that anything prevented him from seeing the actual conditions existing at the time. The danger arose as the unloading progressed. It is not shown that he did not have ample time and opportunity to see and understand each step taken in the process. He cannot be heard to say that he was ignorant of a danger which the use of his senses would have disclosed.

It is well settled that the servant has the right to presume, in the absence of warning and notice, that in conforming to the order of a foreman he will not be subjected to injury. *Republic Iron & Steel Co. v. Berkes*, 162 Ind. 517, 70 N. E. 815. But this rule has no application where the danger is obvious, and the servant has ample time to see and comprehend the danger, and must have known the danger had he used his senses. If he has time and opportunity to see the danger, he has notice of it. In the case at bar, from all the facts pleaded, appellant must have known the purpose in cutting the wire. He knew the standard had been weakened by chopping into its base. He knew, if the standard was removed, the poles would fall. With the end standards removed, and all the stay wires cut but this particular one, the middle standard weakened, he must have known the wire was assisting to hold the standard, and that, if it was released, the standard would probably break. All the steps taken in the process of unloading the poles were simple, all the conditions existing were open and apparent, and there is nothing in the pleading from which it can be said that appellant, 20 years old and in possession of all his faculties, was prevented from understanding and appreciating the danger to which he would be exposed by cutting the wire.

Judgment affirmed.

SOVEREIGN CAMP, WOODMEN OF THE WORLD, v. COX et al. (No. 5,414.)¹
(Appellate Court of Indiana, Division No. 2.
Oct. 3, 1905.)

1. APPEAL—WAIVER OF ERRORS.

The sufficiency of the complaint to withstand demurrer, when not discussed on appeal, is waived.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4258.]

2. PLEADING—DISMISSAL OF PARAGRAPHS.

It is not error to permit plaintiff to dismiss a paragraph of his reply.

3. INSURANCE—PAYMENT OF ASSESSMENTS—EVIDENCE—SUFFICIENCY.

In an action on a beneficiary certificate, evidence held insufficient to show payment of the assessment due on the certificate for a certain month.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Action by Annie Bell Cox and others against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiffs, defendant appeals. Reversed.

Charles L. Wedding, for appellant. P. W. Frey and Denton & Seller, for appellees.

COMSTOCK, J. The suit was brought by the appellees against the appellant upon a beneficiary certificate issued by the appellant May 29, 1902, for \$1,000. The complaint is in one paragraph, and alleges the issuing of a certificate to James A. Williamson, providing that, if the member died during the second year, there should be paid \$750 and \$100 for a monument; that Williamson died August 24, 1903; that the member, Williamson, and the appellees, performed all the conditions; that the defendant denied all liability on the ground that all rights had been forfeited by Williamson's failure to pay certain assessments and dues payable prior to his death; and that the money was due with interest. The demurrer to the complaint for want of facts was overruled. Appellant then filed an answer, alleging that the member, Williamson, failed to pay his assessment for July, 1903, and that under his contract and the law he thereby forfeited all rights under the certificate sued upon. To this answer the appellees replied: First, a general denial; second, that the appellant had, by custom of accepting assessments after due and by express contract and agreement, waived payment of the assessments. A demurrer for want of facts sufficient to avoid the answers was overruled to this second paragraph of reply. The second paragraph of reply was dismissed when both sides had rested. The trial by jury resulted in a verdict for the appellees for \$770.50, on which judgment was rendered. The errors assigned are that the court erred in overruling the appellant's

demurrer to the complaint and its motion for a new trial.

The sufficiency of the complaint is not discussed, and is therefore waived. The court permitted appellee to dismiss the second paragraph of reply, pleading waiver of the conditions of the certificate. In this there was no error. This left the issue formed on the complaint and the answer denying the payment of certain assessments.

The controlling question is, was the assessment for July paid? J. A. Murray, in behalf of defendant, testified that he was clerk at Live Oak Camp, No. 5, W. O. W., located at Memphis, Tenn., during the year 1903; that James A. Williamson was a member of said camp; that the last assessment paid to him (Murray) for Williamson was paid to him by H. J. Schilling, July 3, 1903, \$1.25, for assessment No. 153. H. J. Schilling testified that he held the office of escort during the year 1903 of Live Oak Camp, W. O. W. He was then asked the following questions: "Q. If you were acquainted with James A. Williamson, state if he was a member of your camp, and what, if anything, you know of any one for him paying an assessment for dues during the month of June, 1903. A. Yes, I knew him, and paid his assessment for the month of June, 1903. Q. State with whose money such assessment or dues was paid in June, 1903; and, if your own, whether said Williamson ever repaid you. A. I paid it with my own money, and he had not paid me at the time of his death." It was admitted by the plaintiff that the assessment for July, 1903, was \$1.25, and due, but not admitted that it was unpaid. The plaintiff introduced in evidence a receipt for assessment No. 152, which receipt in words and figures is as follows:

"\$1.25. Clerk's Receipt, Woodmen of the World.
"Received of James A. Williamson this 19th day of June, 1903, as follows:

For assessment No. 152.....	\$.75
Emergency Fund Dues.....	.10
Sovereign Camp monthly dues.....	.15
Camp Dues from ———, 190—.....	.25

Total..... \$ 1.25

"J. A. Murray, Clerk."

The foregoing was all the evidence introduced upon the issue of the payment of the assessment for July, 1903. It does not tend to show payment of the assessment for such month.

One of the reasons set out in the motion for a new trial is that the verdict is contrary to law and not sustained by sufficient evidence; another, that the damages assessed are excessive. The court erred in overruling said motion.

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

¹ See 76 N. E. 888. Both superseded by opinion, 78 N. E. 683. Rehearing denied, 80 N. E. 850. Transfer to Supreme Court denied.

(38 Ind. App. 174)

STRONG v. ROSS. (No. 5,596.)(Appellate Court of Indiana, Division No. 1.
Oct. 4, 1905.)**1. APPEAL—PRESERVATION OF EXCEPTIONS—INSTRUCTIONS—STATUTE.**

Acts 1903, p. 338, c. 193, § 1, requires instructions given by the court of its own motion to be in writing, numbered and signed by the judge, and filed with the clerk, and authorizes exceptions to the giving of instructions to be taken at any time during the term and entered on the record or minutes of the court, or in writing at the close of the instructions, in which case the party excepting shall enter a memorandum stating, in substance, that such party excepts to the giving of each of the above instructions, designated by its number, and provides that all instructions given by the court of its own motion, together with the exceptions taken thereto as therein prescribed, shall be a part of the record without any bill of exceptions. A proviso authorizes the court, with the consent of the parties, to instruct the jury orally, in which case the instructions given shall be taken in shorthand by the reporter and be written out in longhand and numbered consecutively and signed by the judge and filed with the clerk, and when so filed shall be deemed to have been given in writing and are subject to exception in the modes above provided. *Held*, that section 9 of the act, which provides that it shall not be so construed as to preclude any matter from being made a part of the record by bill of exceptions under the rules of practice then in force, cannot be regarded as abrogating the method prescribed by the act for taking exceptions to oral instructions, and the bill of exceptions must show that the exceptions were taken in the manner prescribed.

2. TRIAL—INSTRUCTIONS—EXCEPTIONS.

Where the jury is instructed orally in accordance with the proviso of the act (Acts 1903, p. 338, c. 193), the various portions of the charge being given unnumbered, such portions must be particularized by number before valid exceptions may be taken thereto.

Appeal from Circuit Court, Benton County; Joseph M. Robb, Judge.

Action by Joseph Ross against Luther G. Strong. From a judgment for plaintiff, defendant appeals. Transferred from the Supreme Court. Affirmed.

See 71 N. E. 918.

Stuart, Hammond & Simms and Fraser & Isham, for appellant. Everett & Everett, for appellee.

BLACK, J. The appellee sued the appellant, who has sought to present for our consideration the sixth instruction given to the jury by the court of its own motion. By entries of record it is shown that the trial was commenced June 23, 1904, and that on the next day, "after the conclusion of the evidence and the argument of counsel, and the instructions of the judge," the jury retired, and afterward, on the same day, they returned their verdict, which is set out; also, that on Monday, June 27, 1904, the appellant filed his motion for a new trial, in which the only specification of alleged error in the giving of instructions is as follows: "That the court erred in giving to the jury each and singular the following instructions, being the instructions given by the court and taken

down in shorthand by the reporter of the court, and numbered respectively from and including No. 1 to and including No. 1 to 8." The motion in the transcript of the record before us is in typewriting, except that the last three words of the above-quoted specification in the motion are in handwriting. On the same day (June 27, 1904) the motion for a new trial was overruled, and the appellant was granted time, extending beyond the term, to prepare and file his bills of exceptions; and thereupon the court rendered judgment. Afterward, in vacation, within the time so granted, the appellant filed in the clerk's office his bill of exceptions, wherein it was stated that on the trial of the cause at the June term, 1904, the court, "with the consent of said parties, at the conclusion of the evidence and the argument of counsel, instructed the jury orally in said cause, which instructions so given were taken down in shorthand by the court reporter of said court, and by him written out in longhand and numbered consecutively by said judge; and that the following are the instructions so given by said court to the jury." Then follow eight instructions, extending through more than eight typewritten pages of the transcript, at the close of which it is stated in the bill: "To the giving of each of which said instructions said defendant at the time excepted."

It was apparently intended by the court and the parties to proceed with reference to the instructions under the proviso of section 1 of the statute of March 9, 1903. Acts 1903, p. 338, c. 193. It is by the first section of that statute provided that all instructions given by the court of its own motion shall be in writing, and shall be numbered consecutively and signed by the judge; that all instructions given by the court of its own motion shall be filed with the clerk of the court at the close of the instruction of the jury; that exceptions to the giving of instructions may be taken at any time during the term, and the same may be taken orally and entered upon the record or minutes of the court, or in writing at the close of the instructions, in which case the party excepting, or his counsel, shall enter at the close of such instructions a memorandum, which shall be dated and signed, setting forth in substance that such party excepts to the giving "of each of the above instructions, designated by its number"; that all instructions given by the court of its own motion, together with all exceptions taken to the giving of instructions, "as herein prescribed, and all entries upon the minutes or records of the court in respect to such instructions and exceptions, shall be a part of the record without any bill of exceptions, and as such may be included in the transcript on appeal." These provisions are followed by a proviso that, if the parties consent thereto, the court may instruct the jury orally, in which case the instructions so

given shall be taken in shorthand by the court reporter and by him written out in longhand, and the same shall be numbered consecutively and signed by the judge and filed with the clerk at least one full day before the close of the term, and "when so filed" such instructions shall be deemed to have been given in writing and exceptions thereto may be taken "in either of the modes hereinbefore provided"; that is to say, "orally and entered upon the record or minutes of the court, or in writing at the close of the instructions," in which latter case the party excepting, or his counsel, shall enter at the close of such instructions a memorandum, dated and signed, setting forth in substance that such party excepts to the giving of each of "the above instructions, designated by its number." The exceptions to instructions may be so taken at any time during the term; but, if they are oral instructions, the exceptions thereto may be taken "when so filed," opportunity for excepting to them as written instructions being given by requiring the filing with the clerk at least one full day before the close of the term. If in a particular case the fulfillment of these requirements concerning oral instructions would be impossible or inconvenient, such difficulty is obviated by the requirement that all instructions shall be in writing, unless the parties consent to the giving of oral instructions.

Under the former practice the court might give its instructions orally, unless required by a party to give them in writing. Sections 542, 543, Burns' Ann. St. 1901. The statute of 1903, above mentioned, in section 9 provides that no provision thereof shall be so construed as to preclude any matter from being made a part of the record by bill of exceptions under the rules of practice then in force; but this, we think, cannot be regarded as abrogating or modifying the method previously in this statute clearly designated for taking exceptions to oral instructions, and, if the matter may be preserved in the record by bill of exceptions, it must show the taking of the exceptions in the manner prescribed. The record does not show that the instructions were ever signed by the judge, or that they were filed with the clerk at least one full day before the close of the term, or at any other time, or that all the required steps were taken to cause them properly to be deemed to have been given in writing, and thereby to make it possible to take exceptions to them as provided by the statute, which provides for the

taking of exceptions to them when, having been taken down in shorthand by the reporter and by him written out in longhand and numbered and signed by the judge, they shall have been filed with the clerk within one full day before the close of the term. Then they shall be deemed to have been given in writing, and exceptions "thereto" may be taken in either of the previously prescribed modes. There is no permission to give instructions orally, except that contained in the proviso in the first section of the act of 1903, which makes such special provision for the taking of exceptions thereto. The proviso, by its direction for the numbering of the instructions, contemplates that they will be given unnumbered.

Where the jury is instructed orally, and the several charges or propositions are not numbered, the instructions being a continuous whole, it manifestly would be inconvenient or impracticable, and quite unfair to the court, to permit a general exception to each proposition or charge, without designation of any particular one, and then to allow the party, after the ruling upon the motion for a new trial and after the matter is out of the control of the trial court, to select by its number, since acquired, a particular proposition and attack it on appeal as erroneous. The statute manifestly contemplates particularizing by numbering before the taking of exceptions to particular portions of the instructions. It does not seem to have been contemplated that an exception might properly be taken at the time of the oral instruction of the jury to some particular designated language which would afterward form the whole or the part or parts of some particular instruction, as the court in its discretion should afterward number the parts of the oral instruction, though, perhaps, the question not being directly involved, it is not necessary to decide here whether or not such an exception, or an exception to the entire oral instructions, the exception not being entered upon the record or minutes of the court, might be saved by bill. Certainly such a method could not be regarded as conducing to the orderly disposal of causes with desirable accuracy. The provision of this statute for the filing with the clerk "at the close of the instruction of the jury" has been strictly enforced. *Speck v. Kenoyer* (Ind. Sup.) 73 N. E. 896.

We do not find any available error in any matter properly shown by the record and duly presented in the brief of the appellant. Judgment affirmed.

(36 Ind. 215)

CORBIN OIL CO. et al. v. SEARLES.
(No. 5,437.)(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1905.)**1. QUIETING TITLE—PLEADING—PARTIES NOT NAMED.**

A complaint in an action to quiet title does not show any cause of action against parties joined as defendants who are not named or referred to therein.

2. PLEADING—ANNEXED EXHIBITS.

An instrument annexed to a complaint as an exhibit, but not forming the foundation of the action, is not available to supply deficiencies in the complaint.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 944-947.]

3. QUIETING TITLE—PLEADING—NECESSARY AVERMENTS—TITLE OF PLAINTIFF.

A complaint in an action to quiet title to real estate and to cancel a lease as a cloud thereon must allege clearly and directly, and with certainty to a common intent, title to the real estate in plaintiff.

4. PLEADING—COMPLAINT—SUFFICIENCY IN GENERAL.

It is essential to the sufficiency of a complaint on demurrer that upon a reasonable construction of the language used it may be seen by an inspection of the pleading that all the facts necessary to a complete right of action are stated in such a manner that such right may be said to arise necessarily from them upon some definite theory, and in such form that, the defendant being thereby fully informed of the nature of plaintiff's claim, the pleading will be susceptible of denial by answer, so that, upon being so traversed, a distinct issue of fact will be formed for trial.

5. SAME—DIRECTNESS.

Material facts in a pleading should be shown by direct and issuable averments, and not merely left to inference, nor pleaded by way of recital.

Appeal from Circuit Court, Huntington County; James C. Branyon, Judge.

Action by Alpheus T. Searles against the Corbin Oil Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Field W. Swezey and Robert M. Van Natta, for appellants. Branyon & Feightner, for appellee.

BLACK, J. A demurrer of the appellants to each of the two paragraphs of the appellee's complaint, for want of sufficient facts, was overruled. The first paragraph was in the ordinary brief form of a complaint to quiet title to certain real estate in Huntington county. In the second paragraph, which the appellants here insist was insufficient, it was alleged that "the defendant is a corporation doing business in the state of Indiana; that the business of said corporation is leasing and putting down oil wells and operating the same"; that May 3, 1901, the appellee and "defendant entered into a written agreement, a copy of which agreement is filed with the complaint, and marked 'Exhibit B,' and made a part thereof; that said agreement was acknowledged and recorded

in," etc; "that by the terms of said agreement defendant was to enter upon said premises of this plaintiff and prospect for oil and gas, and operate wells thereon; that, in the event gas was found on said premises in sufficient quantities to transport, this plaintiff was to receive \$100 a year for each well from which the product was transported; that plaintiff, in event that oil was found, was to have one-eighth part thereof delivered in the pipe line; that, in event no well was put down by defendant within 90 days from date of agreement, the agreement was to become null and void, unless defendant would pay to this plaintiff \$31.50 in advance for each three months thereafter such completion is delayed, said amount to be reduced \$6.80 for each well put down by defendant; that, in event no well was put down within three years, the agreement of said parties was to cease and be of no effect, but defendant was to have the right to cancel and annul said agreement, or any part of it, at any time it saw fit;" that, "pursuant to said agreement, defendant entered upon said premises and put down a well and found oil, but not in paying quantities; that said defendant operated said well for a short time, and then abandoned it, and that thereafter defendant paid this plaintiff \$25.20 each three months in advance for the sole purpose of holding said premises; that defendant has long since removed all their machinery from plaintiff's premises, and have wholly abandoned the same"; that "the only consideration for which he executed said lease was the prospective royalties to be derived from said well; that all the premises which adjoined his premises have many good and paying wells upon the same, and plaintiff avers that he believes and has good reason to believe, that there is oil and gas in his premises, which could be found if defendant would prosecute the search for the same with diligence"; that, "if defendant is permitted to hold said premises, that in a short time all the oil and gas in his premises will be drawn off and extracted through the wells on the adjacent premises; that defendant has wholly failed to prosecute said search for oil and gas with diligence, and that it failed to insert in its agreement with this plaintiff that it would prosecute said search with diligence; that said lease is a cloud on his title, which is unfounded and without right and adverse to this plaintiff's title"; that "he refused the last money due him from this defendant and demanded that said agreement be released and canceled of record, but the defendant refused to comply with said demand. Wherefore plaintiff demands judgment that said lease be canceled of record, and that his title be quieted as against defendant, and that he be given judgment for \$1,000 for detention of the same and for all other proper relief." An instrument, marked "Exhibit A," follows the complaint in the transcript of the

record. Besides the Corbin Oil Company, seven natural persons were made defendants. The defendants severally demurred to each paragraph of the complaint, and they have severally assigned here various alleged errors, among them that the court erred in overruling the demurrer to the second paragraph of complaint.

If this paragraph stated any cause of action against the Corbin Oil Company, it certainly did not show any cause against any other of the appellants, none of whom are named or referred to in the paragraph. The action was not founded upon the written instrument appended to the complaint as an exhibit, and it was not proper to look to it to supply anything wherein the complaint is lacking. It was not shown that the appellee had been damaged in any amount, and the prayer for damages had no basis in fact to give it any efficiency as a part of the complaint. The action was one to quiet title to real estate, and, by way of removing a cloud thereon, to have the instrument in question canceled of record. For such purpose it was essential that the complaint should show that the appellee was the owner of the real estate. "It is thoroughly settled in this state that a complaint to quiet title will be bad, on demurrer for want of sufficient facts to constitute a cause of action, if the facts stated therein fail to show title in the plaintiff." *Chapman v. Jones*, 149 Ind. 434, 47 N. E. 1065. The object of the action is to settle the title of the plaintiff and to clear it from all claims of the defendant. *Ragsdale v. Mitchell*, 97 Ind. 458. "Of course, in such an action, the plaintiff or cross-complainant must allege in his complaint or cross-complaint that he is the owner of certain real estate, or of a certain interest therein, describing the same, and that the claim of the defendant to his action or cross-action in or to such real estate or interest therein is adverse to the title asserted

by the plaintiff, or is unfounded, and a cloud upon plaintiff's title." *Johnson v. Taylor*, 106 Ind. 89, 5 N. E. 89. See, also, *Woodward v. Mitchell*, 140 Ind. 406, 39 N. E. 437; *Island Coal Co. v. Combs*, 152 Ind. 379, 53 N. E. 452; *Indiana Nat. Gas & Oil Co. v. Sexton*, 31 Ind. App. 575, 68 N. E. 692.

It is essential to the sufficiency of a complaint on demurrer that upon a reasonable construction of the language used it may be seen by an inspection of the pleading that all the facts necessary to a complete right of action are stated in such a manner that such right may be said to arise necessarily from them upon some definite theory and in such form that, the defendant being thereby fully informed of the nature of the plaintiff's claim, the pleading will be susceptible of denial by answer, so that, upon being so traversed, a distinct issue of fact will be formed for trial. Material facts should be shown by direct and issuable averment, not merely left to inference, and not pleaded by way of recitals. In such an action as the one at bar, title, being a material and traversable fact, must be clearly and directly alleged with certainty to a common intent. "It is a familiar rule of pleading that a demurrer admits only such facts as are sufficiently pleaded, and it is quite as well settled that facts must be directly averred, and not pleaded by way of recital." *Indiana, etc., R. Co. v. Adamson*, 114 Ind. 282, 284, 15 N. E. 5. It must be admitted that the objection urged by counsel for the appellants that the appellee is not directly alleged to be the owner of the real estate in question is not without foundation.

We will not take special notice of other features of the complaint, or questions thereunder, which counsel have somewhat meagerly argued, and which may be more definitely raised upon a more carefully prepared complaint.

Judgment reversed.

INDIANA & C. COAL CO. v. NEAL.

(No. 5,228.)*

(Appellate Court of Indiana. Oct. 5, 1905.)

1. MASTER AND SERVANT—INJURY TO EMPLOYE—COAL MINES—OPENING DOORS—STATUTORY DUTY OF MASTER.

Though the duty imposed on the operator of a coal mine by Acts 1891, p. 61, c. 49, § 18 (Burns' Ann. St. 1901, § 7478), that the doors used in assisting ventilation of the mine, when coal is being hauled through, shall be opened and closed by persons designated to do the same, so that they may not be caused to stand open, is primarily designed to secure proper ventilation, all employes in the mine are entitled to the benefit of such protection as its observance gives as against injury, however caused.

2. SAME—ASSUMPTION OF RISK.

The danger arising from breach of a specific duty imposed by statute on the master is not assumed by an employe because of his knowledge that the statute is being violated.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 580.]

3. SAME—PROXIMATE CAUSE—QUESTION FOR JURY.

It cannot be said as matter of law that failure of the operator of a coal mine to designate persons to open and close the doors used in assisting ventilation in the mine, as required by Acts 1891, p. 61, c. 49, § 18 (Burns' Ann. St. 1901, § 7478), was not the proximate cause of the injury to the driver of a coal car, who, while driving through such a door, at the same time being required to hold the door open, made a miscalculation as to how much he had to stoop, and was injured by a crossbar above the door.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1026, 1036-1039.]

4. SAME—APPOINTMENT OF PERSONS TO OPEN DOORS.

For the operator of a coal mine to order the drivers of coal cars to open and close the doors used in assisting ventilation in the mine is not a compliance with the duty imposed on him by Acts 1891 p. 61, c. 49, § 18 (Burns' Ann. St. 1901, 7478), to designate persons to open and close them when coal is being hauled through, so that the driver or other person may not cause them to stand open.

Appeal from Circuit Court, Sullivan County; Orion B. Harris, Judge.

Action by James Neal against the Indiana & Chicago Coal Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Rehearing denied, January 5, 1906.

John S. Bays, Lee F. Bays, and E. E. Stevenson, for appellant. John T. & Will H. Hays, for appellee.

ROBY, J. Action for damages, complaint in one paragraph, demurrer overruled, exception reserved, answer of general denial, verdict for \$500, motion for a new trial overruled, and exception. Error assigned upon the action of the court in overruling the demurrer, and also in overruling the motion.

Section 18 of "An act regulating the weighing of coal, providing for the safety of employes, protecting persons and property injured, providing for the proper venti-

lation of mines, prohibiting boys and females from working in mines, conflicting acts repealed, and providing penalties for violation" (Acts 1891, p. 61, c. 49; section 7478, Burns' Ann. St. 1901), is as follows: "'Breaks-through' or airways shall be made in every room at least every forty-five feet, and all 'breaks-through' or airways, except those last made near the working faces of the mine, shall be closed up and made air-tight. The doors used in assisting or directing the ventilation of the mine when coal is being hauled through shall be opened and closed by persons designated to do the same, so that the driver or other persons may not cause the doors to stand open."

The complaint shows appellant to be a corporation operating a coal mine, and employing 75 men on April 18, 1903, at which time the plaintiff was working for it as a driver, hauling coal in the mine from the rooms where the same was mined. It is averred that there was a cross-entry between entries 13 and 15, in which cross-entry there was a trapdoor constructed for use in the proper ventilation of the mine, so that, when opened, it would shut itself, and that the plaintiff was injured, while hauling a car loaded with coal through said entry and attempting to hold the door open, by being caught between the crossbar over said door and the top of the coal on his car. It is averred that the appellant was negligent (1) in having failed to designate any person to open and close said door when coal was being hauled through it; (2) that in constructing said door it had negligently placed a crossbar 12 inches square next to the roof and above the top of said door, thereby making it dangerous for drivers passing through with loaded coal cars when attempting to open said door; (3) in furnishing appellee a new car so large as not to pass through said opening with its driver in safety. The objections to the complaint are that the statutory duty alleged to have been violated was not one owing to appellee; such violation not therefore forming the basis of an action by him. If the premise is granted, the conclusion follows. *Zimmerman v. Baur*, 11 Ind. App. 607-612, 39 N. E. 299. The premise cannot be granted. A positive statutory duty is declared, its violation is alleged, together with resulting injury to an employe, to provide for whose safety the act was passed, and who, therefore, is within the intention and spirit of the act. *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654-657, 58 N. E. 856. While the provision requiring the doors to be opened and closed by persons designated, so that the drivers or other persons shall not cause the doors to stand open, was primarily designed to secure proper ventilation, employes are entitled to the benefit of such protection as is carried with it. In other words, the employes, to secure whose safety the law was enacted, are en-

*Rehearing denied, 76 N. E. 527. Both superseded by opinion, 77 N. E. 850.

titled to the protection which its observance gives as against injury, however caused. The danger arising from the breach of a specific duty specifically imposed upon the master by the Legislature is not one which the employé assumes because of knowledge possessed by him as to the violation of the statute. *Davis Coal Co. v. Polland*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. The complaint was not, therefore, defective in failing to negative such knowledge.

So far as the second and third specifications of negligence are concerned, lack of knowledge is averred. Inasmuch as the complaint is sufficient, having regard to the first specification only, and in view of a lack of evidence to sustain the verdict if based upon either the second or third specification, that phase of the case will not be recurred to.

Appellee was a driver, hauling coal in said mine and through the cross-entry and door referred to in the complaint. The coal was hauled along a track and on a car drawn by a mule. The driver stood with one foot on the drawbar or bumper of the car, the drawbar being in the center, and the bumpers at each corner thereof, with his other foot on the "tail chain." The door had to be held away from the car while it was passing. One witness described the process, with regard to which there is no controversy, as follows: "We stopped just before we got to the door, and walked and opened the door, and spoke to the mule, and the mule brought the car up to us, and we stepped on the chain and stepped on the car. If you did not hold the door, it would catch the car before you got through. Q. Tell the jury whether or not it was necessary for you to get on the car and ride it through and hold the door. A. Certainly it was. You could not stand between the car and door. If you did, it would smash you. You had to stand on the end of the car." Appellant was caught between the timber forming the top of the door frame and the top of the coal upon his car. He testified that the car he was driving was a new car, that it was the first time it had ever been loaded with coal, and that it was an inch and half higher than the old ones, and described his procedure as follows: "I had to face that door first. I would stop my car, and go and open the door, hold it open, and speak to the mule, and, as it came to me, I would step onto the car with my right foot, my left foot on the chain, and would hold the door with my right hand, and hold myself on with my left, and I would slide my hand along the door to hold the door open till the car would pass it far enough not to catch the door." He had been working in the mine where he was injured about 20 months, and had worked in other mines 17 years. The door frame was of two upright pieces and a cross-piece; the latter being 9 or 12 feet long and 5 or 5½ feet above the bottom of the entry,

so that in going through the drivers were required to stoop down, which they always did. Appellee knew the crosspiece was there and stooped to avoid it, but did not stoop low enough by 3 inches. The cross-piece caught him. It would have caught him, had he stooped an inch and a half lower, and because of his miscalculation as to stooping low enough he was caught and hurt. He also testified that he received the injury by "holding the trapdoor open to keep it from catching the car, so that it would follow me to and go shut when I got through. Q. And in holding the door you made a miscalculation in stooping low enough? A. Yes, sir. Q. And that is what caused you to be hurt? A. The two together; yes, sir." The general verdict carries with it a finding that the negligence averred caused appellee's injury. If the facts do not permit such inference, then the court erred in overruling the motion for a new trial.

Appellee failed to stoop low enough. He testifies that such failure was due to a miscalculation, and attributes the same to the occupation made necessary by appellant's failure to comply with the statute. It is impossible to say as matter of law that the injury was not fairly attributable to such cause. In *Thompson v. Citizens' Street Railway Company*, 152 Ind. 461, 53 N. E. 462, the facts were that the person injured stepped backward into danger and was struck by a moving car. "In a moment of confusion and excitement he miscalculated the space occupied by the moving cars on the north track, and was struck by the front part of the trailer car." He stepped back to get out of the way of horses which were upon the south track, and so acting as that he had reason to believe that he was in danger of being injured by them. The court said: "It is evident, we think, that the proximate cause of the accident and injury to the appellant was the threatening appearance of the horses drawing the car on the south track." This reasoning, applied to the facts under consideration, supports the finding of the jury. The cause of the miscalculation is found in the extrinsic circumstance, confusion owing in the one case to a threatening danger, occupation owing to an extrinsic task in the other; the presence of the horses, the absence of a person to open the door, being alike responsible for an injury caused in the one case by a car running against the plaintiff and in the other by the plaintiff being carried against the timber. We cannot say that the verdict is without support, either upon the question of proximate cause or contributory negligence.

In the fourth instruction given by the court it was said, having reference to the section of the act above set out: "This section means that it is the duty of the mine operator, referred to in the act, to designate

some person, other than the drivers, to open and close the break-through doors, and whose duty it shall be to see that the drivers and other persons do not cause the doors to stand open." The order by appellant to its drivers directing them to open and close the doors was not a compliance with the statute, which is not merely to the effect that such doors shall be opened and closed, but that persons shall be designated to open and close them, so that they may not be caused to stand open by drivers or other persons. This last specification implies an incongruity between the duties of the drivers as such and the duty devolved upon the designated person. There was, therefore, no error in giving the instruction.

The same considerations are applicable to the refusal of the court to give the nineteenth and twenty-first instructions requested by appellant.

The sixth instruction, requested and refused, related to the question of contributory negligence. The sixth instruction given covered the subject fully, and accurately stated the law.

The ninth instruction, refused, stated the doctrine of assumption of risks incident to the employment. Its substance is contained in the tenth instruction given at appellant's request, but in any event the question is unimportant as applied to the facts proven.

Judgment affirmed.

WILEY, C. J., MYERS, P. J., and ROBINSON, BLACK, and COMSTOCK, JJ., concur.

(36 Ind. App. 193)

EVANS v. DUNLAP et al. (No. 5,420.)

(Appellate Court of Indiana, Division No. 1.
Oct. 5, 1905.)

1. DEEDS—CONSTRUCTION—ESTATE CONVEYED—LIFE ESTATE.

A deed conveying property in general terms to a grantee, "to have and to hold the same during his natural lifetime," which without the habendum would have been sufficient to convey a fee, conveyed but a life estate.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 267-271, 436-444.]

2. SAME—REMAINDER.

The fact that the grantor did not expressly dispose of any remainder was immaterial, since a deed by a grantor holding the fee, conveying a life estate with or without a reservation, confers no title on the grantor, but merely operates to carve a life estate out of the fee, leaving the grantor the owner of the remainder.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Action by James Evans against Mary Dunlap and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Issac W. Addison and Kittinger & Diven, for appellant. Bagot & Bagot, for appellees.

ROBINSON, J. Appellant sues to quiet title, claiming that the following deed conveyed to him in fee the land therein described: "Jacob Evans, of Madison county, in the state of Indiana, for ten hundred dollars conveys and warrants to James Evans, of Madison county, in the state of Indiana, the following described real estate, situate in Madison county, in the state of Indiana, to wit: The southwest quarter of the southwest quarter of section twenty-two (22), township eighteen (18) north, range eight (8) east, containing forty acres, except three (3) acres out of the southeast corner of the above-described forty acres of land. To have and to hold the same during his natural lifetime." The deed was signed and acknowledged February 26, 1860, and recorded September 18, 1860.

It has been stated as a general rule that reservations and exceptions in a deed are to be construed against the grantor, yet this rule is to be applied "only when the language of the instrument will equally admit of either of two or more interpretations." *Falley v. Giles*, 29 Ind. 114; *Waldorf v. Elkhart, etc.*, R. Co. 13 Ind. App. 136, 41 N. E. 396; 3 Washb. Real Prop. (4th Ed.) 397. The deed, without the habendum clause, would, under the statute, be sufficient to convey the fee. But did the parties intend that the deed should convey a less estate, and may this intention be fairly ascertained from the language used? It is quite true that more liberality for the purpose of ascertaining intention is exercised in construing wills than in construing deeds. *Shimer v. Mann*, 99 Ind. 109, 50 Am. Rep. 82; *Ridgeway v. Lanphear*, 99 Ind. 251. Yet every part of a deed should be compared with every other part, so as to obtain the sense of the whole deed; and, if possible, all the parts should be harmonized. "And," as said in *Edwards v. Beall*, 75 Ind. 401, "it is the duty of the court to so construe the language of the deed as to carry out the intention, if this can be done, without doing violence to the language used." See, also, *Flagg v. Eames*, 40 Vt. 16, 94 Am. Dec. 363; *Thornton v. Mulquinne*, 12 Iowa, 549, 79 Am. Dec. 548; *Pike v. Munroe*, 36 Me. 809, 58 Am. Dec. 751; 3 Washb. Real Prop. (4th Ed.) 436.

It is a well-settled general rule that, if there is an irreconcilable difference between the premises and the habendum, the former will prevail over the latter. See *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486, and cases cited. This rule is applicable where the premises contain a specific limitation, followed by a more general limitation in the habendum, as in the *Chamberlain Case*; but it is not applicable when the habendum explains, limits, or qualifies what is stated in general terms in the premises. *Carson v. McOaslin*, 60 Ind. 334; *Prior v. Quackenbush*, 29 Ind. 475; *Edwards v. Beall*,

supra. In these cases, as in the case at bar, the premises do not contain a specific limitation, but the granting part of the deed is in general terms. In *Carson v. McCaslin*, *supra*, the language of the premises of the deed conveyed the property to "Hervey McCaslin, and his heirs and assigns, forever," while the habendum stated that the land was to be held by him during his natural life, and, if his wife should be living at his death, then she and her heirs were to hold it in fee, but, if she should then be dead, the heirs and assigns of Hervey were to hold it, forever. It was held that the premises granted the land to Hervey McCaslin in fee, but that what was thus stated in general terms in the premises was limited by the habendum to a life estate. The court adopted what appeared to be, from all the terms of the deed, taken together, the manifest intention of the parties, and in the opinion said: "It was well said by Chief Justice Tilghman in *Wager v. Wager*, 1 Serg. & R. 374, that 'one of the most important rules in the construction of deeds is to so construe them that no part shall be rejected. The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. It never could be a man's intent to contradict himself. Therefore we should lean to such a construction as reconciles the different parts, and reject a construction which leads to a contradiction. The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent part of the deed. Such explanations are usually found in the habendum.'" This language is quoted with approval in *Prior v. Quackenbush*, *supra*, and *Edwards v. Beall*, *supra*.

If we take all the terms of the deed together, it was manifestly the intention of the parties to convey a life estate to the grantee. The granting clause is expressed in general terms. It must be presumed that the parties had some purpose in view, when they followed the description of the land with the words "To have and to hold the same during his natural lifetime." Those words were manifestly intended to limit and define the estate which the grantee should have in the property granted. The limitation "for and during the natural lifetime" of the grantee could have been set out in the premises; but the intention to convey a life estate only would not have been any the more manifest in that case than this. Under the doctrine of the *Prior*, *Carson*, and *Edwards* Cases, *supra*, the habendum clause cannot be held void, but must be construed as limiting the estate which is granted in general terms by the premises. The limitation in the habendum is to be given the same effect it would have if it had been expressed in the granting part of the deed.

The fact that the grantor did not expressly dispose of any remainder adds nothing to appellant's claim. If the grantor had, in

the premises of the deed, expressly conveyed a life estate to the grantee, there would have been no remainder to dispose of. Holding the fee, he would simply have taken out of that a life estate and conferred it upon the grantee. Such a deed, with or without a reservation, would confer no title whatever upon the grantor. He still held all that he had not conveyed away. He held the fee subject to the life estate he had created by the deed, and at the expiration of the life estate nothing would pass back to him. See *Clark v. Hills*, 134 Ind. 421, 34 N. E. 13. Judgment affirmed.

(38 Ind. App. 179)

BOTKINS v. STATE. (No. 5,637.)

(Appellate Court of Indiana, Division No. 1.
Oct. 4, 1905.)

1. INFORMATION—SURPLUSAGE.

Burns' Ann. St. 1901, § 1825, provides that no information shall be quashed on account of any repugnancy or surplusage. Section 7283c declares it unlawful for the proprietor of a saloon to "permit" any person to go into the saloon room at times when the sale of liquor is prohibited by law. *Held*, that an allegation that defendant did unlawfully "suffer, allow, and permit" a certain person to go into the saloon room on a day when the sale of liquor was prohibited by law was sufficient, excluding the words "suffer" and "allow," which would be rejected as surplusage.

2. INTOXICATING LIQUORS—REGULATIONS—OFFENSES.

A conviction of a violation of *Burns' Ann. St. 1901, § 7283c*, declaring it unlawful for the proprietor of a saloon to permit any person to go into the saloon room at times when the sale of liquor is prohibited by law, should not be sustained where the person who entered the saloon at the prohibited time did so in violation of orders of the saloon keeper, given in good faith, with the intention and expectation that they should be obeyed.

3. SAME—QUESTIONS FOR JURY.

In a prosecution of a saloon keeper for violation of *Burns' Ann. St. 1901, § 7283c*, declaring it unlawful for the proprietor of a saloon to permit any person to go into the saloon room at times when the sale of liquor is prohibited by law, whether an order of the saloon keeper forbidding his bartender to enter the saloon during prohibited times was given in good faith or not *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 325.]

4. CRIMINAL LAW—APPEAL—CONCLUSIVENESS OF VERDICT.

Where there is any properly admitted evidence before the jury from which inferences may be drawn to sustain their verdict, the question of the sufficiency of the evidence to sustain the verdict is one of fact, and not of law, and is within the exclusive control of the trial court.

Appeal from Circuit Court, Adams County; R. K. Erwin, Judge.

L. G. Botkins was convicted of a violation of the liquor law, and appeals. Affirmed.

Shaffer Peterson and S. A. M. Butcher, for appellant. C. W. Miller, Atty. Gen., W. C. Grake, C. C. Hadley, and L. G. Rothschild, for the State.

MYERS, P. J. Upon affidavit and information based upon section 7283c, Burns' Ann. St. 1901, appellant, a retail liquor dealer, was tried and convicted in the court below of permitting one William Hall to go into a room kept by appellant for the sale of intoxicating liquors, and at a time when the sale of such liquor was prohibited by law; the said Hall not being a member of appellant's family. From a judgment against appellant in favor of the state, he prosecutes this appeal, and assigns as error:

"(1) The overruling of his motion to quash the affidavit and information."

The information follows the affidavit and charges that "said L. G. Botkins, being then and there the holder of said license, * * * did then and there upon a day when the sale of such liquors was prohibited by law, to wit, on Sunday, the 29th day of May, 1904, unlawfully suffer, allow, and permit a person other than himself or member of his family, to wit, one William Hall, to then and there go into such room." Appellant contends that the information does not substantially follow the language of the statute, and is therefore bad. The pleader uses the words "suffer" and "allow," in addition to the word "permit," as found in the statute. In this particular we cannot agree with appellant's contention. In our opinion the words "suffer" and "allow" may be treated as surplusage, and with such disposition of these words the information sufficiently charges the offense as defined by section 7283c, supra. Any other disposition of this question would be in conflict with section 1825, Burns' Ann. St. 1901, which expressly provides that no indictment or information shall be quashed on account of the use of "any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the person charged." See, also, *State v. White*, 129 Ind. 153, 28 N. E. 425; *Musgrave v. State*, 133 Ind. 297, 32 N. E. 885; *Drake v. State*, 145 Ind. 210, 41 N. E. 799, 44 N. E. 188; *Fisher v. State*, 2 Ind. App. 365, 28 N. E. 535.

"(2) The court erred in overruling his motion for a new trial."

By his motion for a new trial, appellant asserts that there is no evidence to support the verdict; that the verdict is contrary to the evidence, and is not sustained by the evidence. The uncontradicted evidence shows that at the time of the alleged violation appellant's business was that of selling intoxicating liquors, and the place where carried on was in a room fronting on Line street, in the town of Geneva, in Adams county, Ind.; that one William Hall was his bartender, and at the time not a member of his family; that Hall, to the knowledge and with the consent of appellant, had a key to the door of appellant's barroom; that on Sunday, May 29, 1904, by means of

said key, Hall unlocked the door and entered the room and place where the business of appellant was carried on; that others were in a room immediately in the rear of appellant's barroom, the two rooms being connected by an open door. Oren E. Whiteman, a witness for the state and marshal of the town of Geneva, testified that he saw Hall in the saloon, and that Hall and two other persons and himself left said rear room through a door leading to the alley, and that within a few minutes after leaving Hall he met appellant near the front door of the saloon, and told him that he had caught Hall "in there [meaning the saloon] again," and in response appellant said: "I have told him to be more careful about going in there. I told him to be more careful and not let you see him there." As to what was said between appellant and the witness upon this occasion there is sharp conflict. Appellant testified that he had ordered Hall to keep away and out of his place of business during prohibited hours, and that he did not know Hall was in the saloon, and that he was not in there with appellant's consent or permission. Hall corroborated the evidence of appellant. Fen Reynolds, another barkeeper of appellant, also testified that he heard appellant give Hall orders to stay out of the saloon on Sunday.

Appellant insists that this case comes clearly within the case of *Wilson v. State*, 19 Ind. App. 389, 46 N. E. 1050 and *Rosenbaum v. State*, 24 Ind. App. 510, 57 N. E. 156. This court, in deciding the *Wilson Case*, found that there was absolutely no evidence that Wilson permitted his bartender to go into the saloon, or knew or in any way assented to his being in there during prohibited hours. "On the contrary, the uncontradicted, unimpeached evidence is to the effect that appellant did all he could reasonably be expected to do to prevent the violation of the law at his place of business;" that Wilson was not in the city where his business was located, and had not been for more than a month prior thereto. Under substantially this state of facts, this court held, as a matter of law, Wilson not guilty, and reversed the case. In the *Rosenbaum Case*, the proprietor of the saloon was indicted and convicted of selling intoxicating liquors on Sunday. Upon the trial it appeared that the liquor was sold by a bartender from a cold storage room belonging to Rosenbaum, and not in the room where he was engaged in business, and that his bartender had no key or means of ingress into the room where the business was carried on, and that Rosenbaum had no knowledge of such sale, nor did he consent thereto, and the sale was made in violation of his instructions to the bartender not to sell liquor on Sunday under penalty of discharge,

The Wilson and Rosenbaum Cases rest upon the theory that there was no evidence whatever from which an inference could be drawn tending to show a permit or consent by the principal to his agent or servant to do the unlawful act charged against the principal, while in the case at bar there is some evidence from which an inference of consent or a permit by appellant to his barkeeper to commit the violation might be inferred, as, for instance, the intrusting with the barkeeper a key to the door of the room, which under the law during prohibited hours he was forbidden to enter, and the statement of appellant to the marshal on the evening of the day of the alleged violation. All of this evidence the jury had a right to consider as circumstances tending to show want of good faith in the orders given his bartender on Saturday evening not to enter the saloon on Sunday.

Black, in his work on Intoxicating Liquors (section 369), aptly states the rule supported by authority, that "where the defense is that the agent violated the direction or instruction requiring him not to make such sales it must be shown that the order was given honestly and in good faith and with the intention and expectation that it would be obeyed, and the question whether or not the order was so given is for the jury to determine." So in this case, if the order of appellant to Hall was to stay out of the room where appellant was engaged in selling intoxicating liquors during prohibited hours, and such orders were given in good faith, and with the intention and expectation that they should be obeyed, and they were not obeyed, a conviction ought not to stand; but under the settled rules of law

in this state this court is not authorized to disturb the judgment of the lower court, based upon a verdict of a jury, unless the question presented is purely a question of law; and a question of law on the sufficiency of the evidence only arises where there is no evidence to support a fact essential to the upholding of the verdict. If there is any properly admitted evidence before the jury from which inferences might be drawn to sustain their verdict, the question then becomes one of fact, and within the exclusive control of the trial court, and is not within the province of this court at all. *Smith v. State*, 24 Ind. App. 417, 56 N. E. 924; *Schnuer v. State*, 18 Ind. App. 226, 47 N. E. 843; *Shields v. State*, 149 Ind. 395, 49 N. E. 351; *Braxton v. State*, 157 Ind. 213, 61 N. E. 195; *Rosenbarger v. State*, 154 Ind. 425, 56 N. E. 914; *Siberry v. State*, 149 Ind. 684, 39 N. E. 936; *Madden v. State*, 148 Ind. 183, 47 N. E. 220; *Deal v. State*, 140 Ind. 354, 39 N. E. 930; *Cincinnati, etc., Ry. Co. v. Madden*, 184 Ind. 462, 34 N. E. 227.

In our opinion there is enough evidence in the record in this case, although exceedingly conflicting, to make the material question here presented one of fact and not of law; and, if the jury fell into error, it is clearly a case where it was the duty of the trial court to correct such error in its ruling on a motion for a new trial. It is to be presumed that in passing upon the motion for a new trial the trial court took into consideration the opportunities and means it had of weighing such evidence, and its decision is conclusive upon this court. *Deal v. State*, supra.

Judgment affirmed.

(36 Ind. App. 156)

CONSOLIDATED TRACTION CO. v. JORDAN. (No. 5,489.)(Appellate Court of Indiana, Division No. 2.
Oct. 3, 1905.)**1. EMINENT DOMAIN—CONDEMNATION FOR RIGHT OF WAY—MEASURE OF DAMAGES—INSTRUCTIONS.**

The instruction, in proceedings to condemn land for a railroad right of way, that the damages are to be determined by finding the value of the land remaining after the company has appropriated its right of way and built its road, and determining the value of the entire lot as it now is, and deducting one from the other, the difference being the measure of damages, sufficiently states the measure of damages, the difference in value of the real estate at the time of the appropriation, and the value of the residue after the strip is taken.

2. EVIDENCE—OPINIONS—VALUE OF LAND.

A witness who has testified as to his knowledge of land in question is competent to give his opinion as to its value before and after appropriation of a right of way through it, basing his opinion on the facts to which he has testified, though he shows that he is not familiar with the value of lands in the neighborhood, and knows of only one transfer.

3. APPEAL—HARMLESS ERROR—REJECTING EVIDENCE.

Rejecting testimony of a railroad company's witness that the damages from its appropriation of land for a right of way was only \$200 is harmless; the company having introduced the testimony of many other witnesses that the damages were only from \$45 to \$150.

4. EMINENT DOMAIN—DAMAGES—EVIDENCE.

In proceedings to determine damages for condemnation of land for a railroad right of way, it is not error to admit evidence of a cut in the grade of the road along by the land in question.

Appeal from Circuit Court, Hendricks County; Thomas J. Cofer, Judge.

Proceedings by the Consolidated Traction Company against John A. Jordan to appropriate land for a right of way. From the judgment for damages, the company appeals. Affirmed.

James L. Clark, for appellant. Brill & Harvey and T. S. Adams, for appellee.

WILBY, C. J. Appellant filed its instrument of appropriation in the office of the clerk of the Hendricks circuit court, by which it sought to appropriate for its right of way certain lands belonging to appellee. Such proceedings were had that appraisers were appointed and filed their report of damages assessed in favor of appellee. Within the time fixed by statute appellee filed his exceptions to the report on account of the inadequacy of the damages assessed. Upon the issues joined by the instrument of appropriation and appellee's exceptions thereto, the cause was tried before a jury, resulting in a general verdict assessing his damages at \$550. Appellant's motion for a new trial was overruled, and the only error assigned is the ruling on such motion. A reversal is asked upon three grounds: (1) Because the court erred in giving instruction No. 3;

(2) because of the admission of certain evidence on behalf of appellee; (3) because the court refused to admit certain evidence on behalf of appellant.

The instruction complained of is as follows: "The question which you are called upon to try is to ascertain how much damage the plaintiff, Jordan, will sustain by reason of the appropriation of his real estate and the construction of their road thereon. This question you will determine by finding the value of the land that remains after the company has appropriated its right of way and built its road, and by determining the value of the entire lot as it now is and deducting one from the other, and the difference will be the measure of plaintiff's damage." The measure of damages to a landowner for land appropriated for a railroad right of way is the difference in the value of the real estate at the time of the appropriation and the value of the residue after the strip is taken under the appropriation proceedings. *Chicago, etc., Ry. Co. v. Mason*, 26 Ind. App. 395, 59 N. E. 185; *Evansville, etc., Ry. Co. v. Swift*, 128 Ind. 34, 27 N. E. 420; *Indianapolis, etc., Ry. Co. v. Pugh*, 85 Ind. 279; *Indiana, etc., Ry. Co. v. Allen*, 100 Ind. 409. While the instruction complained of does not announce this rule in as clear and explicit language as it might, we do not think that it materially departs from the rule which is so well established in this state. We do not think there was any error in giving this instruction.

Complaint is made because the trial court over the objection of appellee, refused to allow the witness Logan S. Halfacre to answer a question as to the value of appellee's real estate just as it was at the date of the trial without any railroad on it. It is contended by counsel for appellee that the court correctly sustained the objection, on the ground that the witness had not shown himself competent to answer it. Appellee's land was in the town or village of Pittsboro. The witness lived about two miles north of Pittsboro, where he owned real estate and had lived for about 18 years. The witness disclosed by his answers to preceding questions that he knew the location and surroundings of appellee's land; that he had made measurements of this particular land with reference to the buildings upon it; the amount appropriated for the right of way; the particular manner and direction the proposed road would pass over and through it; and that he observed there were some fruit trees upon it. It was also disclosed by his evidence that he was not familiar with the value of lands in the neighborhood of Pittsboro, and that he only knew of one transfer. Upon these facts it is urged by counsel for appellee that he had shown himself incompetent to express an opinion as to the value of appellee's land, both before and after the appropriation for right of way. The rule in this state is that, where a witness has testified

as to the knowledge of the very property in controversy, he is competent to give his opinion as to its value, basing such opinion upon the facts to which he has already testified. *Evansville, etc., Ry. Co. v. Fettig*, 130 Ind. 61, 29 N. E. 407; *Smith v. Indianapolis, etc., Ry. Co.* 80 Ind. 233; *Chicago, etc., Ry. Co. v. Burden*, 14 Ind. App. 512, 48 N. E. 155. Under these authorities it was error for the court to refuse to permit the witness to answer the question. In this connection it was said in *Evansville, etc., R. R. Co. v. Fettig*, supra, that "the extent of the witness' information affects the weight of his testimony, but not its competency. Special knowledge relating to the value of lands in that locality would, no doubt, add value and weight to his opinion." Considering the whole record, however, we do not think the error in refusing to allow the witness to answer the question as to the values is sufficient to reverse the judgment. Appellant offered to prove by the witness, in answer to the question, that the value of appellee's land without the railroad was \$1,200, and with it was \$1,000. The record shows that appellant introduced a great number of witnesses as to the value of appellee's land before and after the construction of the railroad. These several witnesses placed the value of the land with the road constructed at from \$45 to \$150 less than it would be without the road. In the light of these facts, we cannot believe that appellant was prejudiced by the exclusion of the evidence.

It is next insisted that it was error, in overruling appellant's objection, to permit a witness to answer the following question: "Now then tell what kind of a cut this road has, whether or not they have it cut down there part of the work done on this road as it approached the east end?" We have quoted the question literally. The answer was: "There is a cut that comes up there to the ground where they aim to use at the east end." Both the question and the answer seem almost unintelligible; but, from the context, it appears that an attempt was made to show that there was a cut in the grade along by appellant's land. We are unable to see any error in the admission of this evidence. This disposes of all the questions discussed.

Judgment affirmed.

(36 Ind. App. 207)

CROWE et al. v. BEEM. (No. 5,478.)

(Appellate Court of Indiana, Division No. 1.
Oct. 6, 1905.)

1. BILLS AND NOTES—CONSTRUCTION—MATURITY BY INSTALLMENTS.

A note for \$800, commencing, "90 days after date, we promise to pay \$800," and thereafter providing, "Payments to be \$10 per month, or more if maker desires," is an installment note, payable \$10 per month.

2. SAME—ACTION—COMPLAINT.

The complaint in an action on a note for \$800, payable \$10 per month, and containing no provision declaring the entire amount due on default in a payment, states a cause of action for \$130, and no more; the action being commenced 29 months after date of note, and the complaint showing that only \$160 had been paid.

3. ALTERATION OF INSTRUMENTS—MATERIALITY.

An alteration of a note which does not change its effect is immaterial, and does not invalidate it.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, § 4.]

Appeal from Circuit Court, Owen County; David E. Watson, Special Judge.

Action by John S. Beem against Benjamin P. Crowe and another. Judgment for plaintiff. Defendants appeal. Reversed.

Thomas G. Spangler, for appellants. John L. Duncan and Willis Hickam, for appellee.

WILEY, C. J. Appellee sued appellants upon a note, of which the following is a copy: "\$800.00. Spencer, Ind., Dec. 25, 1900. 90 days after date, we promise to pay to the order of John S. Beem, at Spencer, Indiana, eight hundred dollars, value received, without any relief from valuation and appraisement laws with interest at 8 per cent. per annum from date until paid, and attorney's fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and nonpayment of this note. Payments to be \$10.00 per month, or more if maker desires. 90 days' time allowed on all payments. No interest to be paid until note is paid." On the back of the note were indorsed 16 separate payments of \$10 each, the first of which was on the 25th day of December, 1900, and the last of which was June 7, 1902, aggregating \$160. Appellants filed a joint answer in six paragraphs. The first was a general denial, and the second and third pleas of payment before the commencement of the action. The fourth paragraph averred that the note sued on was executed on the 25th day of December, 1900, and was to draw interest at 8 per cent. from its date; that it was agreed between the maker, Benjamin P. Crowe, and the payee, that said note should be due and payable by the month, in the sum of \$10 per month, or more if the maker desired, and that 90 days' time should be allowed on all payments, and that no interest should be paid until the principal was fully paid; that said agreement was inserted in and made a part of said note as follows: "Payments to be \$10.00 per month, or more if maker desires. 90 days' time allowed on all payments." It was also further agreed that the makers of said note should be allowed 8 per cent. interest on each payment from the date of the same until the note was fully paid; said agreement being in the following words: "No interest to be paid until note is paid. 8 per cent. interest allowed maker on

all payments made from date of payments until note is all paid." It is further averred that appellants paid upon said note 18 separate and distinct payments, ranging from December 25, 1900, to October 4, 1902, and that each of said payments, with the exception of one, was in the sum of \$10, and that one of said payments, to wit, March 4, 1901, was in the sum of \$100, all aggregating \$270, and that by the terms of said note appellants are entitled to 8 per cent. interest on each of said payments from the date they were made, aggregating the sum of \$45. It is then charged that there were only 26 payments, or \$260, due on the note at the time the action was commenced, and that appellants were entitled to credits thereon in the sum of \$315, which left nothing due at the time of the commencement of the suit. In the fifth paragraph of answer appellants admit that they signed a note payable to appellee for the sum of \$800, dated December 25, 1900, that the appellant Crowe was principal and appellant Carter surety thereon, and that said Crowe received all of the consideration. It is then averred that after they signed the note and the same was delivered to appellee, without their knowledge or consent appellee materially altered and changed said note by inserting the figures "90" at the beginning of said note, and just before the word "days," thus making said note read, "90 days after date," etc., and thus attempting to make said note due 90 days after date, instead of by the month, as originally provided in said note, when said note at the time it was delivered to appellee read, "— days after date, we promise to pay," etc., with the conditions as in the note filed with the complaint. In the sixth paragraph of answer appellants admit the execution of the note, but allege that at the time it was signed and delivered to appellee such note was written and printed and read as follows: "\$800.00. Spencer, Ind., Dec. 25, 1900. — days after date, we promise to pay to the order of John S. Beem, at Spencer, Indiana, eight hundred dollars"—with the conditions and provisions stated therein, as set out in the copy of the note filed with the complaint. It is then averred that after the execution of the note appellee materially altered and changed the same in this: "He inserted the figures '90' in said note, immediately preceding the word 'days' at the beginning of said note, thus making said note read, '90 days after date, we promise to pay to the order of John S. Beem, at Spencer, Indiana, eight hundred dollars,' together with the further conditions and provisions set out in said note, the same as set out in the copy of note filed with plaintiff's complaint; thus making, or attempting to make, the whole of said note due and payable 90 days after date, all without the consent of these defendants or either of them." The fifth and sixth paragraphs of answer were verified. A demurrer to the fifth and sixth paragraphs of answer was sustained, and the cause put at issue by

a reply in general denial. Trial by the court, resulting in a general finding and judgment for appellee in the sum of \$741.21. Appellants' motions for a new trial and to modify the judgment were overruled. In their assignment of errors appellants for the first time attack the sufficiency of the complaint. They also aver error in each of the adverse rulings against them to which we have referred.

Counsel for appellants argues that the complaint does not state facts sufficient to constitute a cause of action, for the reason that it proceeds upon the theory that the note matured 90 days after date, and that the entire amount was then due, while on its face it shows that it was an installment note, and that only \$10, or more at the option of the maker, was due and payable monthly. Our first inquiry must therefore be directed to the character of the instrument sued on, which is the contract between the parties. The contract is an unusual one, but not difficult of interpretation. The first part of it is in the usual and commercial form of a promissory note, and would be a complete contract without the additional clauses. Including the word "payments," and all that follows it, were evidently written in and added to the usual printed form, and this is conceded. While the first part of the note contains the stipulation, "90 days after date, we promise to pay," etc., the added stipulations control, and evidently express the intentions of the parties. That is, appellants (the makers) promised to pay appellee (the payee) \$800 at the rate of \$10 per month after date, with an option given to the makers to pay more than \$10 per month if they desired. That is, the debt of \$800 matured at the rate of \$10 per month, and on the 25th of each month after the execution of the note \$10 became due and payable. The appellants were required under the terms of the contract to pay \$10 each month, and had the option to pay more. It was an installment note, and it was not all due when the action was commenced, as affirmatively appears from the note and the indorsements thereon. The note also provides: "90 days' time allowed on all payments." The only construction that can be given to that provision is that, as each payment of \$10 became due, the payors were given 90 days' grace in which to pay it. While in the main body of the note it is provided it shall bear interest at the rate of 8 per cent. from date, in a subsequent clause it is provided: "No interest to be paid until the note is paid." There is no inconsistency in these provisions; the latter one simply postponing the payment of the interest until the last payment is made. It is further provided that all payments should bear 8 per cent. interest from the dates of such payments. These provisions make clearly manifest the intentions of the parties that the note was an installment note, that the principal should bear 8 per cent. interest from date,

that the payment of interest on the principal should be postponed until the final payment became due, and that all payments should bear a like interest from the time when paid. This is the construction of the contract put upon it by the parties. Our conclusion is that, while the contract is clear and unambiguous, and will admit of but one construction, it affirmatively appears from the indorsements on the note, which must be considered the acts and conduct of the parties, that they gave it a construction in harmony with what we have said, and in such case they will be held to that construction by the courts. *Roush v. Roush*, 154 Ind. 562, 55 N. E. 1017; *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; *Childers v. Bank*, 147 Ind. 430, 46 N. E. 825; *Toledo, etc., Ry. Co. v. Burgan*, 9 Ind. App. 604, 37 N. E. 31. It does not necessarily follow from what we have said that the complaint is insufficient. The note is dated December 25, 1900. There are 16 payments of \$10 each indorsed on it, the first on the date the note was executed and the last June 7, 1902. This action was commenced June 10, 1903, being 29 months after the execution of the note. By the express terms of the note 29 payments of \$10 each had fallen due when the suit was commenced, aggregating \$290. The complaint affirmatively shows that only \$160 had been paid, which left due \$130. Under the terms of the note, if any amount was due, appellee could enforce collection. It thus appearing that the amount indicated was due, the complaint states a cause of action.

It is next urged that it was error to sustain the demurrer to the fifth and sixth paragraphs of answer. These paragraphs set out facts to show that after the execution of the note appellee made a material alteration in it, by adding the figures "90" preceding the word "days," as fully indicated above in this opinion, without the knowledge or consent of appellants. By the demurrer the appellee admits the truth of the allegations with reference to the alteration. This leaves the question to determine: Was such alteration material? We

think not. We have held that the note in suit was a note payable in monthly installments of \$10, maturing each succeeding month after the date thereof. The insertion of the figures "90" did not in any manner affect the rights of the payee or payors. The alteration, being immaterial, did not destroy the validity of the note, and a recovery may be had on it in its original condition. *Kingan v. Silvers*, 13 Ind. App. 80, 37 N. E. 413. There was no error in sustaining the demurrer to the fifth and sixth paragraphs of answer.

This leaves for consideration the questions presented by the motion for a new trial, to wit: (1) That the amount of recovery is erroneous, being too large; (2 and 3) that the decision is not sustained by sufficient evidence and is contrary to law. Appellee prosecuted this action upon the theory that by the terms of the note the whole debt became due 90 days after date. It is evident that the trial court adopted this theory, for the only basis upon which the judgment can rest is to calculate the interest on the \$800 from date, add to it the attorney's fees agreed upon, and deduct from this the aggregate amount of payments, together with the interest thereon. This being true, the judgment is erroneous.

It is urged by appellee that we cannot consider the questions presented by the motion for a new trial which depend upon the evidence, because the evidence is not in the record. Under the act of 1897 (Acts 1897, p. 244; section 638a, Burns' Ann. St. 1901), the evidence is in the record. *Hanger v. Benua*, 153 Ind. 642, 53 N. E. 942. The note not containing any provision declaring that, upon failure to pay any installment when due, the entire indebtedness should become due and payable, and the judgment being for the entire amount upon the basis above indicated, it follows that the finding is not sustained by sufficient evidence.

Judgment reversed, and the trial court is directed to sustain appellants' motion for a new trial.

(132 N. Y. 445)

In re TROTTER'S WILL.

(Court of Appeals of New York. Oct. 17, 1905.)

COURTS—JURISDICTION OF SURROGATE.

Though Code Civ. Proc. § 2624, gives the surrogate no power to construe a will as far as it relates to the disposition of real estate, yet, where a clause of the will creates a trust as to real and personal estate, the surrogate can construe such clause and declare the trust invalid as to the personal estate.

Appeal from Supreme Court, Appellate Division, Second Department.

In the matter of the probate of the will of Charles W. Trotter. Action by Edgar A. Trotter and others against Edgar T. Van Deusen to construe a will. From an order of the Appellate Division (93 N. Y. Supp. 404, 104 App. Div. 188), which modified and affirmed a decree of the Surrogate's Court, Trotter and others appeal. Affirmed.

The material portion of the will is as follows: "First, I give, devise, and bequeath to my executors and trustees, hereinafter named, all my real and personal property, of whatsoever nature or name or wheresoever situate, until all the bequests and annuities hereinafter set forth are paid and conditions performed, with power to lease or sell the same and to collect and receive all property, revenue, interest, rents, and profits therefrom, and all moneys from any source whatever, and to invest the proceeds in any manner which, in their judgment, shall be proper and of advantage to said estate, to have and to hold the same and the proceeds in trust, nevertheless, for and subject to the following legacies, bequests, annuities, and purposes, excepting, however, a lease between myself and the Lehigh Zinc & Iron Company, a corporation formed under the laws of Pennsylvania, and August Heckscher, now of the city of New York, dated August 11th, 1887, and recorded in Sussex county, New Jersey, as a mortgage, and any subsequent agreements made by himself and the same parties relating to the same property, which shall not be sold, assigned, or transferred, but shall remain in possession of said executors and trustees for the full term thereof."

Frank G. Wild and William W. Niles, for appellants. Robert Leslie Moffet, for respondent.

BARTLETT, J. The decree of the Surrogate's Court of Kings county construed the will of Charles W. Trotter, deceased, holding as follows: That the first paragraph, which sought to create a trust, is void, as an improper suspension of the power of alienation; that there were no separate trusts created under this paragraph, and consequently various annuities chargeable on the single trust fund were also void; that the provision for the charge upon the trust fund of taxes, etc., of 161 Warren street, borough of Brooklyn, contained in the fourth

paragraph, falls with the trust, but the specific bequests of personal property therein are valid; that the direction of the twelfth paragraph releasing certain persons is valid; that the various specific bequests contained in the third, fifth, sixth, eighth, and ninth paragraphs, as modified by the codicils, are valid; that with the exception of the specific bequests the estate passes by operation of law to the next of kin. The Appellate Division modified the decree of the Surrogate's Court so as to adjudge that the devise of the life estate to Edgar A. Trotter, under the fourth paragraph, as to No. 161 Warren street, borough of Brooklyn, is valid, and, as thus modified, the decree was affirmed. Matter of Trotter, 104 App. Div. 188, 93 N. Y. Supp. 404. No appeal is taken by any of the appellants from the aforesaid modification and we do not consider the same.

We are of opinion that the learned surrogate properly disposed of the other questions presented on the probate of the will, and that the decree entered on his decision should be affirmed, including the modification by the Appellate Division. This appeal presents but one question. It is argued that under section 2624 of the Code of Civil Procedure the surrogate had no jurisdiction to construe this will. That section reads as follows: "Sec. 2624. Validity and Construction of Testamentary Provisions. But if a party expressly puts in issue, before the surrogate, the validity, construction, or effect of any disposition of personal property, contained in the will of a resident of the state, executed within the state, the surrogate must determine the question, upon rendering a decree; unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the last section." It is undoubtedly the law, under this section, that the surrogate has no power to pass upon the validity, construction, or effect of any will as to its disposition of real estate. In the case before us the testator sought to create a trust which embraced all his real and personal property, with the exception of a few specific legacies, which was clearly invalid and properly declared void by the surrogate. As to the personal property involved in the void trust the surrogate had jurisdiction. The real and personal estate were inseparably blended in the first paragraph, which sought to create the trust, and we regard the decision of the surrogate as passing only on its effect upon the personal property. We express no opinion as to the status of the real estate of the testator.

The order appealed from should be affirmed, without costs to either party.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order affirmed.

Digitized by Google

(182 N. Y. 460)

In re FIRST NAT. BANK OF OSSINING.

(Court of Appeals of New York. Oct. 10, 1905.)

TAXATION—BANK STOCK—ASSESSMENT.

Under Laws 1901, p. 1350, c. 550, § 2, amending Laws 1896, p. 806, c. 908, § 24, and providing a method for the assessment and taxation of shares in banks, when the assessors ascertain the value of the shares of bank stock from the total value of the corporate properties, they must include the value of the real estate, and cannot deduct it in making the assessment.

Appeal from Supreme Court, Appellate Division, Second Department.

Application of the First National Bank of Ossining for writ of certiorari against the board of assessors of the town of Ossining. From an order of the Appellate Division (95 N. Y. Supp. 1128, 107 App. Div. —) affirming an order of the Special Term quashing the writ, applicant appeals. Affirmed.

Thomas F. Gilroy, Jr., Smith Lent, and Samuel Watson, for appellant. Benjamin Fagan, for respondent.

GRAY, J. The First National Bank of Ossining, N. Y., sued out a writ of certiorari to review the proceedings of the board of town assessors upon the assessment of its shares of capital stock for the purposes of taxation for the year 1904. Its complaint is that the assessors, in determining the value of the stock, included the value of the bank's real estate and refused its application to make any deduction thereof. The bank has failed, in the courts below, to obtain the relief to which it deemed itself entitled, and now appeals to this court, claiming, in substance, that under the provisions of section 24 of article 2 of the tax law (Laws 1896, p. 806, c. 908) the real estate should have been "eliminated from consideration as part of the capital stock, surplus and undivided profits of the bank." That the bank was aggrieved, within the meaning of section 250, p. 882, of the tax law, and, therefore, was entitled to sue out the writ of certiorari, is, in my opinion, beyond question. The tax law makes the bank the agent for the collection of the tax, and subjects it to a penalty for failure to pay over the same to the county treasurer, or, in the city of New York, to the receiver of taxes. The representative capacity of a bank to maintain a suit in behalf of its stockholders, in relation to the assessment and taxation of its shares of stock, was sufficiently declared in the recent case of *Mercantile National Bank v. Mayor, etc.*, of N. Y., 172 N. Y. 35, 45, 64 N. E. 756, and it can, undoubtedly, institute such a proceeding as this. Such was the procedure as far back as the case of *People ex rel. Gallatin National Bank v. Commissioners of Taxes*, 67 N. Y. 516.

As to the principal question in this case, the relator argues that chapter 550, p. 1350, of the Laws of 1901, which amended sec-

tion 24, art. 2, of the tax law of 1896 (Laws 1896, p. 806, c. 908), should be construed as intending that the real estate shall be excluded in ascertaining the value of the shares of bank stock, and suggests, in favor of such a construction, that, if the law is not so construed, the result is double taxation. I think that the board of assessors proceeded correctly. The tax law, as amended with respect to banks in 1901, devised a new plan for the assessment and taxation of shares of stocks of banks and banking associations. It is apparent from the language of the enactment, among other things, that their real estate remained, as before, subject to taxation as a part of the corporate property, although entering into the valuation of the shares when assessed against the shareholders. As section 24 of the tax law read, when originally enacted in 1896 (chapter 908, p. 806, Laws 1896), it was expressly provided that the assessed value of the real estate should be deducted, in the assessment, from the value of the shares of stock. In 1901 the Legislature passed the act in question, which was entitled "An act to amend the tax law relating to the taxation of the stockholders of banks and banking associations." Section 24 was re-enacted without that provision for the deduction of the value of the real estate, and there was provided a new and complete system for taxing the shares of banks, under which a uniform rate of 1 per cent. upon their value was imposed as a tax, which was to be in lieu of all other taxes whatsoever for state, county, or local purposes. This was to be collected and paid over by the bank, and the privilege to share owners to claim deductions from the taxable value of their shares, on account of their personal indebtedness or otherwise, was withdrawn. The Legislature proposed a simple, certain, and uniform mode of taxation of this kind of personal property throughout the state, and the loss of the prior privileges of making deductions was compensated for in an exemption of that property from all other taxes for state, county, or local purposes. The question of what represented the value of the shares of stock ought not to be in doubt. According to the act, it is ascertained by "adding together the amount of the capital stock, surplus and undivided profits" of the bank. That necessarily comprehends the real estate, which represented an asset of the bank. The president of the bank admitted it, in stating that a part of the capital, surplus, and undivided profits was invested in real estate. The rule has been laid down, in cases in this court, that the capital of a corporation includes every asset, or investment, and that the actual value of the corporate shares is to be ascertained from the total value of the corporate possessions. See *People ex rel. Tradersmen's Nat. Bank v. Commissioners of Taxes*, 69 N.

Y. 91; *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 27 N. E. 818, 12 L. R. A. 762; *People ex rel. Equitable Gaslight Co. v. Barker*, 144 N. Y. 94, 39 N. E. 13. I think that the statutory provision in question, clearly requires of the assessing officers, when ascertaining the value of the shares of bank stock from the total value of the corporate properties, to include the value of the real estate. Not only was there no authority in the act to make any deduction of the value of the real estate, but the concluding words of section 24 evidence the legislative intent that no such deduction should be allowed. It had been provided in the section that "mortgages, judgments and other choses in action and personal property held or owned by banks, or banking associations, the value of which enters into the value of said shares of stock, shall, also, be exempt from all other state, county and local taxation." The concluding words of the section are that "this act is not to be construed as an exemption of the real estate of banks or banking associations from taxation." The significance of this clause is that, although the value of the real estate was to be considered and taken into account in fixing the value of the shares of stock, no exemption should be implied of the real estate as a subject of taxation.

The tax to be collected under this section of the tax law is upon the shares of stock held by stockholders. It is not upon the property owned by the bank, and the distinction in the scheme of taxation is evident. What is intended to be reached, for the purposes of taxation, is the personal property held and owned by persons in shares of the capital stock of banks. The value of that species of property is required by the law to be ascertained by adding together the amount of the capital stock, surplus, and undivided profits of the bank, and that necessarily must include the value of every corporate possession. I think that the assessing officers were correct in their proceedings, and that the assessment should be upheld. The order of the Special Term quashed the writ of certiorari and dismissed the proceedings; but, as there was no ground for the dismissal of the writ, except that the determination of the board of assessors was correct, the order should be amended so as to read that it affirms the proceedings of the board of assessors and dismisses the writ of certiorari. As so amended, the order should be affirmed, with costs.

CULLEN, C. J., and BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Ordered accordingly.

(182 N. Y. 415)

PEOPLE v. ABEEL.

(Court of Appeals of New York. Oct. 3, 1905.)

FORGERY—NATURE OF INSTRUMENT—INJURY FROM FORGERY.

Under Pen. Code, § 514, subd. 3, providing that a person who shall alter or utter any letter, telegram, or other written communication purporting to have been written or signed by another person, by which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented, shall be guilty of forgery, the false making of a letter of introduction, misrepresenting the identity of the defendant, and asking the employes of the corporation of which the purported signer was an officer to show defendant any favors they could, constituted the crime of forgery, although there was no injury to the person whose name was forged to the letter.

Cullen, C. J., and O'Brien and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

James N. Abeel was convicted of forgery, and from an order of the Appellate Division, affirming the judgment of conviction (81 N. Y. Supp. 1107, 100 App. Div. 516), he appeals. Affirmed.

Jesse Stearns and Martin S. Lynch, for appellant. William Travers Jerome, Dist. Atty. (Robert C. Taylor, of counsel), for the People.

WERNER, J. In the month of October, 1903, a young woman named Eleanor Anderson was employed as a telegraph operator by the Western Union Telegraph Company at one of its branch offices in the Grand Hotel in the city of New York. The defendant saw her there, was attracted by her, and sought an introduction. For the purpose of creating a favorable impression, he falsely represented himself to be J. Ogden Goelet, the son of a wealthy resident of New York, and his first step in that direction was to send a telegram to James N. Abeel (himself), signed J. Ogden Goelet, making an appointment at the University Club and asking for an answer at the Grand Hotel. This telegram was delivered to Miss Anderson and transmitted by her. This was followed on the same day by a note from the defendant, asking Miss Anderson for the honor of an introduction and apologizing for the method employed to obtain it. Without waiting for a written reply to his note the defendant went to the Grand Hotel and verbally repeated to Miss Anderson his desire to become acquainted with her. In this conversation the defendant suggested that he would try to find some one to give him a letter of introduction. Several days later the defendant again called on Miss Anderson, stating that he had been so fortunate as to attend a dinner at which he had met Mr. Van Every, one of the vice presidents of the telegraph company, from whom he had obtained a letter of introduction, which was somewhat gen-

eral and informal, because the defendant had desired not to compromise or embarrass Miss Anderson. The defendant then presented the letter, which reads as follows: "New York, October 31, 1903. To Any Employee Western Union Telegraph Company: This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favors shown him will be duly appreciated by the corporation and myself. Yours truly, J. B. Van Every, 2nd Vice President." The presentation of this letter was followed by a series of visits and attentions on the part of the defendant, in the course of which he artfully strengthened the deception that he was a member of the prominent Goelet family, with the result that he proposed marriage to Miss Anderson on the Monday following their first meeting, was accepted on Tuesday, and the wedding day set for the ensuing Thursday. Meanwhile arrangements were made for the consummation of the marriage. The defendant gave Miss Anderson a check for \$100,000, drawn on the Astor National Bank, signed "George B. De Witt, Co-Trustee," and indorsed "J. Ogden Goelet." On the wedding day the defendant appeared at the home of Miss Anderson, gave her a marriage ring, and then, upon the pretext of going down stairs to attend an interview with newspaper reporters, he surreptitiously departed from the house, never to return. This is a bare outline of the events that led to the arrest, indictment, and conviction of the defendant upon the charge of forgery in the third degree.

The statute under which the defendant was indicted and convicted is subdivision 3 of section 514 of the Penal Code, which, so far as pertinent to the case at bar, provides that "a person who * * * shall alter, or who shall cause, aid, abet, or otherwise connive at, or be a party to the uttering of any letter, telegram, report or other written communication, paper or instrument purporting to have been written or signed by another person, * * * which said letter, telegram, report or other written communication, paper or instrument * * * as aforesaid, the person uttering the same shall know to be false, forged or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected, * * * is guilty of forgery in the third degree." The case rests entirely upon the facts established by the prosecution, as the defendant introduced no evidence. Thus the broad question presented by this appeal is whether these uncontroverted facts constitute the crime of forgery as defined in the statute above quoted. The most obvious feature of this statute is that it adds to the list of forgeries several that were not known to the common law or to our statutes as they existed prior to 1884. And since it is beyond dispute that the act charged against the de-

fendant is not one that would have constituted the crime of forgery under the common law or the earlier statutes, it is evident that it will not be profitable to discuss the cases decided under the law as it then stood.

The power of the Legislature to designate as statutory offenses acts that were lawful and innocent at common law is not challenged by the defense, and, indeed, is too well established to permit of doubt or discussion at this late day. We proceed, therefore, directly to the discussion of the statute and its bearing upon the act charged against the defendant. And here we are confronted with the difficulty that always exists when the technicalities of legal reasoning are brought to bear upon simple English. The able and ingenious arguments of counsel admirably illustrate the possibilities in this direction; but when we get away from the briefs, and look at the letter of the statute, it seems so plainly designed to cover just such a case as the one before us that it is like carrying coals to Newcastle to demonstrate it. The act committed by the defendant, and charged in the indictment, was the uttering of a letter containing the false representation that the defendant was Mr. J. O. Goelet, a friend of the management of the Western Union Telegraph Company, and bespeaking for him the favors of its employees. This letter purported to have been signed by J. B. Van Every, one of the vice presidents of that company. It was used to deceive a young woman, one of the employees of the company, into believing that the defendant was a young man whose financial and social position made him a most desirable acquaintance, and the result of that belief was that he was permitted to become a most welcome suitor. The record does not clearly disclose by what providential interference this insidious and dastardly attempt upon the honor and happiness of a young woman was intercepted just at the point of culmination; nor is it necessary that we should know, because the criminality of the defendant's act in uttering the letter in question depends wholly upon other considerations. That the letter was a falsehood from beginning to end, and that the use of Van Every's name thereon was unauthorized, is beyond dispute. That it thoroughly misrepresented any opinion or sentiment harbored by Van Every, or conduct indulged in by him towards the defendant is clear; for it imputed to the supposed writer an acquaintance with the defendant as Mr. J. O. Goelet and a desire to introduce him in that capacity to the employees of the telegraph company, when in fact Van Every did not know him at all.

The statute declares a person guilty of forgery who knowingly utters a false or counterfeited letter, etc., by which the sentiments, opinions, conduct, character, prospects, interests, or rights of the person whose utterance the writing purports to be are misrepresented or otherwise injuriously af-

fect. The coincidence between the act of the defendant and the declaration of the statute seems to be so complete that there would scarce be room for construction, if it were not for the technical suggestion that the word "misrepresented" is coupled with and qualified by the succeeding words "or otherwise injuriously affected." In our language there are frequently two or more possible constructions of sentences when their meaning may depend upon punctuation or upon the juxtaposition of certain words with others. The sentence under consideration is capable of a construction that will limit the forgeries punishable under subdivision 3 of section 514 of the Penal Code to cases where the misrepresentation is literally injurious in its effect upon the person whose name is used. But that, we think, would be a strained and unnatural construction. The context of the subdivision in which it is placed seems to indicate that it was the purpose of the Legislature to cover cases in which the mere misrepresentation is the gist of the offense, as well as other cases in which the act injuriously affects the person whose name is improperly used. When the sentence is thus construed, the word "otherwise" has a proper and natural meaning in connection with what precedes and follows it. It is perceivable that sentiments, opinions, conduct, and character may be misrepresented; but just how they may be injuriously affected is not so apparent. Prospects, interests, or rights, however, may be of such a material character as to be injuriously affected by misrepresentation of sentiments, opinions, conduct, and character. Thus, we think, the phrase "or otherwise injuriously affected" may properly be referred to prospects, interests, and rights, as distinguished from sentiments, opinions, etc., and in that view of the statute the crime of forgery in the third degree is committed whenever a person willfully—that is, knowingly—misrepresents the sentiments, opinions, conduct, or character of another by means of a false, forged, or counterfeit writing, just as it may be committed in other cases through the injurious effect of such writing upon the prospects, interests, or rights of the person misrepresented.

In construing this statute several things are to be remembered. We are living in an age when the wisdom of Legislatures and the learning of courts are put to the severest tests by the cunning and skill of the unscrupulous adventurer and the professional criminal. Statutes are rarely the precursors of crime. They usually follow in their wake. Our centers of population are infested with persons whose highest aim in life seems to be the circumvention of the criminal law by the invention of new crimes. The grosser crimes, such as murder, arson, and larceny, are easily defined and classified. The same is true of the more common forms of forgery and of many purely statutory crimes. Ex-

perience has shown, however, that no generic definition of forgery can be comprehensive enough to include all the crimes that may be committed by the simple use of pen and ink. And that is why the Legislature has found it necessary to frame statutes so broad as to include in the category of forgeries many acts which are criminal in their tendency and effect, but do not fall within the earlier definitions of that crime. One needs only to glance over the chapter on forgeries in the Penal Code to appreciate how manifold are the methods by which the crime of forgery may be committed. In one class of cases the intent to defraud is of the essence of the crime. In another class the commission of the act presupposes criminal intent. In still another class the mere commission of the act constitutes the crime, without reference to criminal intent. The section under discussion (514) is fairly illustrative of this condition. Its first subdivision deals with the corrupt falsification, alteration, erasure, obliteration, and destruction of corporate, copartnership, and individual books of account. Subdivision 2 relates to the forging, alteration, or counterfeiting of letters, telegrams, etc., with intent to injure or defraud, when the act injures any other person in his good name, standing, position, or general reputation. The third subdivision is the one relied upon by the prosecution, and the fourth deals with the forgery of tickets of admission and the like, in which the element of fraud is also an essential ingredient. As is clearly shown in the very lucid and exhaustive opinion of the learned recorder, written upon the motion in arrest of judgment, that portion of the Penal Code which includes section 514 deals with acts which an enlightened public policy finds it necessary to place in the category of crimes, but which, on account of the difficulty inherent in the subject, it is impossible to classify or define with precise accuracy; for they spring from a great variety of motives and purposes and are multiform in their effect upon those against whom or in whose name they are committed. The Legislature, in the exercise of its undoubted power, has chosen to classify as a forgery the act charged against the defendant. It is true that this act would not have been a forgery as that term was understood under the common law. It may be equally true that the same act might be punished with even greater effectiveness under a different name; but it is not the province of courts to legislate or to nullify statutes by overstrict construction. That is particularly true when the legislature has ordained a rule of construction. Section 11 of the Penal Code provides that "the rule that a penal statute is to be strictly construed does not apply to this Code or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law." Tested by

that simple rule, we think the indictment herein charges a crime which was established by ample evidence.

Some of the exceptions taken at the trial are covered by the general discussion upon the merits, and as to the others it is enough to say that we think no error was committed that requires a reversal of the judgment.

The judgment of the Appellate Division should therefore be affirmed.

CULLEN, C. J. (dissenting). I dissent from the affirmance of the conviction of the appellant in the courts below because, first, in my judgment, the statute under which he has been indicted does not include the offense proved against him, and, second, under any construction of the statute the greater part of the evidence against the appellant was incompetent and immaterial; in other words, he has been indicted for one offense, and tried, convicted, and punished for a totally different offense. The section of the Penal Code (section 514, subd. 3) was enacted in 1884 as a new and original provision of the criminal law. It has no predecessor in either the statute or the common law, and I know of no similar legislation; but the meaning of the very words of the statute seems to me reasonably plain. The vital point of difference between the majority of the court and myself is the question whether, to constitute the offense, the misrepresentation of the sentiments, opinions, or conduct of the person whose name is unauthorizedly used must be injurious to such person, or whether mere misrepresentation, whether injurious or harmless, falls within the statute. I agree with the prevailing opinion that intent is not a necessary ingredient of the offense, except the intent to commit the prohibited act. I also agree with the proposition that the statute is not in any respect limited to obligations for the payment of money or affecting rights of property, which alone would be the subject of forgery at common law. In fact, I doubt whether the statute was primarily directed against offenses of that character. But I insist that the misrepresentation which this statute constitutes a felony must be injurious to the person whose name is forged. To this the majority of my Brethren say, "No." In the learned prevailing opinion it is said, referring to the statute: "The sentence under consideration is capable of construction that will limit the forgeries punishable under subdivision 3 of section 514 of the Penal Code to cases where the misrepresentation is literally injurious in effect upon the person whose name is used. But that, we think, would be a strained and unnatural construction. The context of the subdivision in which it is placed seems to indicate that it was the purpose of the Legislature to cover cases in which the mere misrepresentation is the gist of the offense." The best test I know of to determine whether a particular construction

is natural and reasonable is to consider the results that follow from the particular construction. If those results are unreasonable, it is strong proof that the construction which leads to them is unnatural and unreasonable.

The doctrine about to be declared is that the fabrication of a letter misrepresenting the sentiments of another, regardless of the intent (which I concede), and regardless of the character or effect of the misrepresentation (which I deny), constitutes the perpetrator of the act a felon and a forger. I am entirely willing to admit that probably in all cases the fabrication of a letter is reprehensible; but one must be dead to all sense of proportion who does not appreciate that there are infinite differences in the moral culpability of such acts, from the comparatively harmless, though intensely silly, fabrication of an invitation to dinner, as a practical joke, to the utterance of a declaration which, if credited, might destroy a man's reputation or be injurious to his property and pecuniary interest. Assuming, in the case of a practical joker (always detestable), that the offender should be punished; should he be declared a felon? Our provisions for criminal punishment are far different from the old English Penal Code, which inflicted the same penalty on practically all offenses from the theft of a handkerchief in a shop to the most atrocious of murders, to wit, death. If the character or effect of the misrepresentation is no element of the offense, then it is just as felonious to impute, by a fabricated letter, to the keeper of a brothel a belief in the moral obligation of chastity as to impute to an eminent divine or statesman the most degrading and infamous sentiments. The effect of this doctrine, which I combat, goes much further. The statute is general. It includes all misrepresentations of a person's sentiments, opinions, or conduct. It no way limits the subject as to which the sentiments or opinions relate, but, on the contrary, includes the infinite number of subjects on which it is possible for human beings to have sentiments or opinions—religion, politics, law, ethics, esthetics, and so on indefinitely. If it be true that mere misrepresentation is sufficient to constitute the crime, and that injury, at least to some one, is not a necessary element of it, then it is a felony to misrepresent by a fabricated letter the sentiments or opinions of another upon the most academic question—on the identity of the Man in the Iron Mask, on the authorship of the Junius Letters, on the relative merits of Austen and of the "Sweet Singer of Michigan," on the relative prowess of the two combatants at the last national prize fight, and on the superiority of the various entries for the next great horse race. In the case before us the only charge in the indictment is that the defendant uttered a false letter, purporting to bear Mr. Van Every's signature, stating "Any favors shown him [the defendant] will be duly appreciated by the corpo-

ration and myself," thus representing that the writer desired the extension of favors to the defendant, when in fact he did not. Not a word is to be found in the indictment relating to the conduct of the defendant towards Miss Anderson (the real offense for which he was tried and convicted); indeed, her name is not mentioned in it, nor is there any charge in the indictment that the letter tended to injure, or was used to injure, Mr. Van Every or any other person.

The learned district attorney in his brief suggests that the object of the statute was to prevent fraud or imposition on third parties by the production of forged letters. In reply to this it may be stated that such frauds upon third parties are very thoroughly covered by other provisions of the Penal Code, which punish obtaining money or property under false pretenses and procuring employment under forged letters of recommendation. But the conclusive evidence that the statute had no such object is that only misrepresentations of the sentiments, opinions, or conduct of the purported writer fall within the statute, which in no way includes false statements of facts, except facts constituting part of the conduct of the writer, nor misrepresentation of the sentiments or opinions of others than such writer. Such statements, to say the least, would be as apt to injure third parties as any statement of opinion. Thus the uttering of a fabricated letter asserting that A. was the president of some great financial institution and the owner of some specific piece of property of great value would constitute no offense, unless the utterer obtained, or sought to obtain, money or property on the strength of such letter, in which case, under another statute, the gist of the offense would be the obtaining of the money or property, or the attempt so to do, not the utterance of the letter; while if the letter were cast in the following form, "I regard A. as a very rich man," the offense would be complete at the time of its utterance, even though the sole object of A. was to pose as a man of great wealth and excite the admiration of the vulgar. If a boy over 12 (under 12 he would be presumed incapable of crime), desirous of attending a ball game, should present to his teacher a fabricated excuse purporting to be signed by his mother, "Please excuse Johnny from school to-morrow, as I wish to have his services at home," he would certainly fall within the provision of this statute as it is about to be construed, for the excuse would misrepresent the sentiments and opinions of his mother. That the boy should be soundly flogged I am entirely willing to concede, but I deny that he would be a felon or that the Legislature intended to declare him such. But a more incongruous result from the doctrine asserted remains. If the boy, having taken legal advice, should present as his excuse, "Johnny's aunt died yesterday, the funeral has been fixed for to-morrow," while in truth he had

no aunt, or, if one, she was still living, these being merely statements of fact, Johnny, though a very bad boy, would not break any penal law of the state, but he would, or certainly should, be subjected to the flogging to which I have alluded. Equally true would this be of an excuse, purporting to be signed by the mother, which stated, "Johnny's father wishes you to excuse him from attendance at school to-morrow," because, under the statute, to constitute the offense the misrepresentation must be of the sentiments of the supposititious writer, not those of other persons.

The learned district attorney has appreciated the remarkable results that would follow from the doctrine that under this statute neither the subject-matter nor the effect of the misrepresentations is an element of the offense, and says that in the cases suggested no jury would convict. I think that ordinarily this would be so, but I had supposed that our Penal Code was not such as to require jurors to violate their oaths to avoid the perpetration of a great wrong, not like the old English criminal law, where a jury at times found five guineas to be less in value than five shillings to avoid the infliction of death for a petty crime.

The learned district attorney seems somewhat perplexed in ascertaining what was the real evil which this statute was intended to prevent or punish, at one time suggesting, as already stated, that it was to prevent fraud on third parties, and at another to punish libels that imputed to the supposititious writer of the letter degrading or infamous sentiments. The inquiry is important; for it is settled law that in the construction of a statute there must be considered the mischief intended to be remedied and the object to be attained by its enactment. *Pierson v. People*, 79 N. Y. 433, 35 Am. Rep. 524. So, also: "The circumstances existing at the time of the passage of the act, which led to its passage, may be regarded for the purpose of furnishing something in the nature of a guide to its proper construction and interpretation." *O'Brien v. Mayor, etc.*, of N. Y., 139 N. Y. 548, 588, 35 N. E. 323, 337. In the case before us, though the statute has no predecessor, there is no mystery as to the mischief it was intended to prevent, nor as to the occurrence which led to its enactment. In the presidential campaign of 1880 there was attributed to one of the candidates a letter, asserted to be a forgery, which imputed to him the utterance of sentiments in no respect morally or intellectually discreditable, but which were deemed to be most injurious to his prospects of election. It was believed by a large number of our citizens that through this letter the candidate lost the votes of the Pacific states. The utterance of this letter, if forged, was a grievous offense, both against the individual and the public, and justly the subject of severe punishment. In

1884, to prevent a repetition of the offense at the presidential election then approaching, this statute was passed. It enacts that the utterance of a fabricated letter shall be a felony, when by such letter the sentiments, opinions, or conduct of the supposititious author is misrepresented or otherwise injuriously affected. The use of the word "otherwise," in connection with "injuriously affected," clearly imports that the misrepresentation must be injurious, or the word "otherwise" has no meaning or application whatever. It is true the statute is carelessly drawn. Nevertheless, its meaning is to me perfectly clear. The misrepresentation must be injurious to the supposed writer. The statute was also properly drawn, so as not to limit the subject-matter on which the sentiments of the writer might be misrepresented. For a subject concerning which the misrepresentation of his opinions or sentiments might be of absolutely no importance to one man might be of vital consequence to another. Surely he must be an extreme partisan who would assert that the declaration of a belief in the doctrine of free trade or in that of protection reflects any discredit upon the person holding such belief. To the writer of this opinion it would be of no moment that his views on the tariff were misrepresented, but it would probably be fatal to the success of a candidate for Congress in the Pittsburgh district to attribute to him the advocacy of free trade. The statute, of course, is not confined to misrepresentation of political opinions. There are many subjects as to which the misrepresentation of one's opinions might cause him great injury. To misrepresent one's sentiments towards his employers, or towards those from whom he was seeking employment, might lead to his discharge or prevent employment. To the great mass of people a misrepresentation of their sympathies in the present war between Russia and Japan would be of no possible consequence; but in the case of a party dealing with either belligerent such misrepresentation would be disastrous. It seems to me unreasonable that a man should be declared a felon for attributing to another a letter in which was expressed the opinion that Julia was more beautiful in person and more attractive in character than Alice, when the supposed writer had no acquaintance with either, and the only relation existing between them was the admiration of an occupant of a stall in a theater for the artist on the stage. But if the circumstances were different, and the writer were engaged to Alice, and the forged letter were used to break the engagement, then the perpetrator of the act would be properly convicted under the statute before us and justly punished. If we construe the statute as, in my opinion, it is written—that is to say, that the misrepresentation, to constitute a crime, must be injurious to the supposed author—we

eliminate all of what seem to me the extravagant and unreasonable results of a contrary doctrine. We are brought down to a simple and clear test of criminality. Was the misrepresentation injurious, or did it tend to injure the apparent writer? If it was, or did, the crime was committed, no matter to what subject the sentiments misrepresented related, whether politics, religion, or love. If the fabricated letter had no such tendency or effect then it was not within the statute.

I may here add another consideration which I think should attract the attention of any one seeking to elucidate the statute. By it not only is the utterance of a forged letter made a crime, but the utterance of anything that purports to be a copy of such letter, when no letter exists. No similar provision is found elsewhere in the law, either common or statute. This clearly shows that, as I have stated, it was the so-called Morey letter that led to the enactment of the law. In that case the publication of what was asserted to be a copy of the letter written by the candidate was just as injurious to the candidate as the production of the forged letter itself. In fact, not one in a thousand, and probably not a single one, of those whose votes are supposed to have been influenced by it, ever saw or could have seen the original letter.

But, even if the doctrine of the prevailing opinion be adopted, there was a fatal error in the admission of evidence on the trial. The so-called letter of introduction, which is the subject of the indictment, was presented to Miss Anderson, and from that time forward no further allusion was made to it. Then the offense was complete. Despite this, the prosecution was allowed to prove, under objection and exception, that after the introduction to Miss Anderson the defendant paid her the attentions of a suitor, and finally, after the lapse of some time, became engaged to be married to her. On the day fixed for the marriage, either through baseness or through fear of exposure, the defendant absconded. The prosecution was allowed to prove that during the period of his attentions to Miss Anderson the defendant gave to her a check for \$100,000 purporting to be signed by the executor of a deceased Mr. Goelet. That the conduct of the defendant towards this young lady was base and detestable to the last degree is certain, but under the doctrine of the prevailing opinion, that the effect of the misrepresentation is no ingredient of the offense, what possible materiality had it on the trial of this indictment? The defendant, under the guise of a member of a family of wealth and social position, sought by imposture to obtain the hand of the lady. But under the law about to be declared he would have been equally criminal, had the deception been of an opposite character and he had really been

Prince Charming masquerading as a peasant. This defendant has been indicted simply for uttering the false letter of Mr. Van Every. He has been tried, convicted, and punished for an imposture practiced on Miss Anderson, to which no reference of any character is to be found in the indictment. Such a practice is to be deprecated, especially so when, as in this case, it is by no means clear that the real offense of the defendant cannot be punished under other statutes.

The judgment appealed from should be reversed, and the defendant discharged, unless a new indictment is presented against him at the next term of the court in which he was convicted.

GRAY, BARTLETT, and HAIGHT, JJ., concur with WERNER, J. O'BRIEN and VANN, JJ., concur with CULLEN, C. J.

Judgment of conviction affirmed.

(132 N. Y. 431)

LEONARD v. PIERCE et al.

(Court of Appeals of New York. Oct. 3, 1905.)

PARTIES—DEFECT OF PARTIES—DEMURRER.

Where, in the summons and title of the complaint, defendant is named only in his individual capacity, and in the complaint a cause of action is stated against him in his capacity as trustee under the will of a decedent, a demurrer for defect of parties and on the ground that the complaint does not state a cause of action was properly sustained.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 115.]

Werner and Bartlett, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Chatfield Leonard, receiver of Curtis A. Barnum, against Carlton B. Pierce and others. From a judgment of the Appellate Division (87 N. Y. Supp. 978, 94 App. Div. 266), reversing a judgment of the Special Term overruling a demurrer of defendant Pierce to the complaint and sustaining such demurrer, plaintiff appeals. Affirmed.

Clarence L. Barber, for appellant. Carlton B. Pierce, pro se.

HAIGHT, J. The cause of action as alleged in the complaint was that Pierce, as trustee, be compelled to render an account of the trust funds in his hands, that he be enjoined from making improper investments, and that he be compelled to make restitution of such of the trust funds as had been lost through his fault. In the summons and in the title of the complaint he is named only in his individual capacity, and it is conceded that no cause of action is alleged against him in that capacity. The demurrer is "that there is a defect of parties, in that Carlton B. Pierce as trustee under the will of Abijah Barnum, deceased, is a necessary defendant,"

and again, "that the complaint does not state facts sufficient to constitute a cause of action." It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual; and consequently a former judgment concludes a party only in the character in which he was sued. If the judgment was for or against an executor, administrator, assignee, or trustee, it would not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved. *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 69; *Landon v. Townshend*, 112 N. Y. 93-99, 19 N. E. 424, 8 Am. St. Rep. 712; *Rathbone v. Hooney*, 58 N. Y. 463-467. The defendant Pierce individually, being in contemplation of law a distinct party from that of Pierce as trustee under the will of Barnum, deceased, I think adopted the correct practice to relieve himself from liability personally by interposing the demurrer to the complaint. The Code of Civil Procedure provides that an action is commenced by the service of a summons; that the summons must contain the title of the action, specifying the names of the parties to the action. Sections 416, 417. It further provides that the defendant may demur when there is defect of parties plaintiff or defendant and when the complaint does not state facts sufficient to constitute a cause of action. Section 488. It thus appears that the action was commenced by the service of the summons in which the defendant was named as a party individually, and that no cause of action was stated in the complaint against him in that capacity. The defendant, therefore, brings himself squarely within the express provisions of the Code in interposing his demurrer. This practice imposes no unjust hardship upon the plaintiff. He is only called upon to determine the nature of his own cause of action, as to whether it is against the person in his individual capacity or in his representative capacity.

It is true that there are cases in which it has been said that the title and pleadings may be considered together to ascertain the true nature of the action, and the cases of *Stilwell v. Carpenter*, 62 N. Y. 639, *Beers v. Shannon*, 73 N. Y. 292, *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58, and *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517, 12 N. Y. Supp. 848, affirmed 128 N. Y. 625, 28 N. E. 485, are relied upon to sustain the plaintiff's position. But these cases are not in conflict with our views upon this subject. In the case of *Stilwell v. Carpenter* the action was entitled "Charlotte Stilwell, Executrix, etc." Upon the trial the defendant moved to dismiss the complaint on the ground that the action was brought by the plaintiff in her representative capacity as an executrix. It was held that the motion was properly denied, for the reason that it did not appear

that the action was brought by the plaintiff as executrix, nor did it appear what estate she was executrix of. Therefore the words "Executrix, etc.," were merely descriptio personæ. In the case of *Beers v. Shannon* it was claimed that the action was not brought by the plaintiff in his representative character. The plaintiff gave his name, and following it the words "executor of, etc., of John Beers, deceased." He omitted the word "as" before executor. It will be observed that the *Beers* Case differs from that of *Stilwell v. Carpenter*, for in the *Beers* Case the estate of which he was executor is given. It was held that while without the word "as" it had frequently been held that the addition to the name of the party was descriptio personæ, yet in view of the allegations of the complaint it was apparent that he intended to sue in his representative capacity, and that the description of him was sufficient for that purpose. In the case of *Litchfield v. Flint*, the title was "Electus B. Litchfield, Executor, etc." The complaint alleged a cause of action in his favor in his individual capacity, and not as a representative. In the complaint there was an allegation that he was an executor of the will of a deceased person, naming him. It was held that the words "executor, etc.," were merely descriptio personæ. In the case of *Knox v. Met. El. Ry. Co.*, it was contended that the plaintiffs could not maintain the action, because in the caption of their complaint they styled themselves "as executors," and not "as trustees," of the last will and testament of Richard Smith Clark. In the body of the complaint, however, they set forth the testator's will and allege the devise of the property in question to his executors in trust. Under the circumstances it was held that the plaintiffs had the right to describe themselves as "executors," and that the action was properly brought.

It will readily be seen that none of these cases reach the question involved in this case. All of these cases were considered in the case of *First National Bank v. Shuler*, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep. 601, in which it appears to us the question involved in this case was decided and disposed of. That case was a creditor's action to set aside a general assignment and certain transfers of property as in fraud of the rights of creditors. The action was brought against one Waldron as assignee and against Elizabeth N. Shuler individually, to whom it was claimed certain transfers of property had been made. After the action had been brought Isaac C. Shuler, the judgment debtor, died, leaving a will in which Elizabeth N. Shuler was appointed his executrix. Subsequently, upon the application of the plaintiff, the court made an order permitting the plaintiff to serve a supplemental complaint alleging the death of Shuler and the appointment of his executrix, etc. But no order was made continuing the action against her as

executrix or directing that she be brought in and made a party in her representative capacity. Andrews, C. J., in delivering the opinion of the court, says: "We think the proceedings and judgment in this case are fatally defective for the omission of the plaintiff to bring in and make the defendant Elizabeth N. Shuler a party defendant in the action in her capacity as executrix of the original defendant, Isaac C. Shuler. * * * Cases are cited to support the contention that the defendant Elizabeth N. Shuler, having been in fact a party to the action in her individual name, should be regarded as a party in her representative character also." Then he refers to the cases above alluded to and continues: "But a suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by or against him as an individual, although the same identical issue is involved and the decision in the first action was upon the merits." The defendant Pierce may be liable as trustee, but is not liable individually. But, if he is not permitted to interpose a demurrer, how can he shield himself from the entry of a judgment against him personally. Must he appear and serve an answer? If so, what is he to answer? He may not be able to truthfully deny the allegations against him as trustee, and no facts have been alleged against him individually which call for an answer. But, assuming that he may answer and go to trial and upon the trial procure a ruling to the effect that he is not liable personally, it would be the adoption of a cumbersome and expensive practice, reaching a result in a roundabout way when the Code authorizes a simple remedy by demurrer.

The judgment of the Appellate Division should be affirmed, with costs.

WERNER, J. (dissenting). After many vicissitudes, in the course of which there have been several demurrers, amended complaints, and a severance of inconsistent causes of action, the complaint in its present form has reached this court upon a demurrer that was overruled at Special Term, but sustained at the Appellate Division. Of the five specifications in the demurrer only two need be noticed, and they are (1) that there is a defect of parties, in that persons described in paragraph 5 of the complaint as "other devisees therein named" are necessary defendants in the action, and (2) that there is a defect of parties defendant, in that Carlton B. Pierce as trustee under the will of Abijah Barnum, deceased, is a necessary defendant. The plaintiff is receiver under several judgments recovered against one Curtis A. Barnum. The latter is the contingent remainderman under his father's will, subject to his mother's life estate, of certain premises in Otsego county, which have been sold. The proceeds of the sale are now in the hands of the de-

fendant Pierce as trustee under that will, who pays the income to the life tenant. This action is brought to compel the trustee to render an account, to enjoin him from continuing or making unauthorized investments of the trust fund, and to make restitution of such part thereof as may have been lost through his fault. All this is upon the theory, of course, that the receiver has a present qualified interest in the trust estate that may ripen into an unqualified title and right of possession upon the death of the cestui que vie. That portion of the complaint which sets forth the interest of the judgment debtor in the estate of his deceased father is to the effect that a certain house and premises in Otsego county were devised to the judgment debtor in fee simple, subject to the life use of his mother, Laura Barnum. This devise was subject to the further contingency that, if the judgment debtor and all of his descendants should die before his mother, the property devised to him should pass to other devisees named in the will. One of the questions now to be decided is whether these "other devisees" are necessary parties to this action.

It is to be observed that this complaint is not singular, in that it prays for several forms of relief which are not justified by its allegations. That is a common fault in equity pleading. It contains one statement, however, that qualifies all its allegations and limits the relief sought. In the seventeenth paragraph the pleader says that "no relief is prayed for * * * which shall affect the custody of said fund or the income thereof during the continuance of the trust estate. This allegation practically eliminates the prayer that the accounts of the trustee be judicially settled, as well as every other that is inconsistent with the main purpose of the action; and, when the complaint is viewed in that light, it is evident that what the plaintiff really wants is to have the trust fund accounted for and properly invested under the direction of the court. The present custody of the fund is not sought to be disturbed, and no direction is prayed for concerning its ultimate disposition. In short, the complaint, fairly construed, seeks nothing more than an intermediate or interlocutory accounting respecting a fund in which the plaintiff has now a contingent interest, and in which the "other devisees" mentioned can have no interest, unless the interest of the plaintiff is annihilated by the death of the judgment debtor and his descendants pending the continuance of the trust estate. A decree directing the trustee to disclose his proceedings, and restricting his investments to legitimate channels, cannot detrimentally affect the interests of these "other devisees," and it is therefore not apparent that they are necessary parties to this action. They may be proper parties, and, if so, the Supreme Court may, in its discretion, direct them to be brought in. But that result is

not to be accomplished by demurrer. "Necessary parties," when the term is accurately used, are those without whom no decree at all can be effectively made determining the principal issues in the cause. 'Proper parties' are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude all the persons who have any interest in the subject-matter of the litigation." Pomeroy's Remedies and Remedial Rights, § 329. "If the person is a necessary defendant, a demurrer for defect of parties on account of his nonjoinder will be sustained; and, conversely, if the demurrer will be sustained, the person is a necessary party. If the person is merely a proper party, such a demurrer will not be sustained on account of his nonjoinder, although the court may undoubtedly, in the exercise of its discretion, order him to be brought in." *Id.* § 330. In determining who are necessary parties and who are merely proper parties to an action for an accounting, it should be borne in mind that there is a well-recognized distinction between the rendering of an account and its final settlement. Woerner's Am. Law of Administration (2d Ed.) vol. 2, §§ 501, 502; *Remington v. Walker*, 21 Hun, 322; *Westervelt v. Glegg*, 1 Barb. Ch. 469. This distinction was applied in *Wood v. Brown*, 34 N. Y. 337, where it was held that creditors, legatees, and next of kin are not necessary parties, except in cases of final accounting. This court there said: "The case was a proper one to call on the defendant to render an account of his proceedings. If a final settlement was not contemplated, it was not necessary to make the other legatees parties. The decree does not affect them. If further proceedings are taken upon the basis of the decree, they may be brought in, if necessary." And in *Matter of Robinson*, 37 N. Y. 261, where the question was whether the cestui que trustent were necessary parties upon an application for the appointment of a trustee, it was held that the disposition of such applications rests largely upon considerations of convenience, as to which the court will exercise its sound discretion. In the course of the discussion in that case the court quoted certain passages from Judge Story that are quite applicable in the case at bar. The rule relating to parties in equitable actions and proceedings, says Judge Story, "does not seem to be founded upon any positive or uniform principle, and therefore it does not admit of being expounded by the application of any universal theorem as a test. It is a rule founded partly in artificial reasoning, partly in considerations of convenience, partly in the solicitude of courts of equity to suppress multifarious litigation, and partly in the dictates of natural justice—that the rights of persons ought not to be affected in any suit without giving them an opportunity to defend them." This doctrine was

approved in *Harvey v. Harvey*, 4 Beav. 215, *Birdsong v. Birdsong*, 2 Head's Term Rep. 289, and *Wiser v. Blachly*, 1 Johns. Ch. 438; and from it there would seem to flow the logical conclusion that the persons who may be entitled to the fund here in question, in the event of the death of the judgment debtor and all of his descendants during the life of the cestui que vie, are not necessary parties to this action, for nothing is really asked in the complaint, and nothing can properly be done by the court that will affect their interests. The cases of *Riggs v. Cragg*, 89 N. Y. 479, and *Matter of Gall*, 182 N. Y. 270, 74 N. E. 875, are not in conflict with these views. Neither of those cases came up on demurrer, and in each of them there was an effort to compel distribution of a portion of the estate.

The substance of the second ground of demurrer is that the defendant *Pierce* is named only in his individual capacity, while the only cause of action alleged is against him as trustee. It is true that in the title he is named without any officio designata, and that the complaint does not allege any cause of action against him as an individual; but it is equally true that it contains an undoubted cause of action against him as trustee, and no other. We think that the case falls within the rule laid down in *Stilwell v. Carpenter*, 62 N. Y. 639, *Beers v. Shannon*, 73 N. Y. 292, *Litchfield v. Flint*, 104 N. Y. 543, 11 N. E. 58, and *Knox v. Met. El. R. R. Co.*, 58 Hun. 517, 12 N. Y. Supp. 848, affirmed 128 N. Y. 625, 28 N. E. 485, to the effect that the title of the action must be read in connection with the allegations of the complaint in order to determine the capacity in which a party sues or is sued. Thus, if the pleading clearly shows that the cause of action is for or against a party in his representative capacity, the mere failure to add the official designation to the name in the title may be disregarded by the court or corrected by amendment (Code Civ. Proc. § 723); and, conversely, if a party is designated as a representative when the cause of action is for or against him as an individual, the affix to his name may be treated as surplusage. This is thoroughly consonant with the liberal rules of pleading and practice enjoined by the Code of Civil Procedure and supported by numerous decisions in the Supreme Court. It is undoubtedly the better practice to designate in the title of the action the capacity in which a party sues or is sued; but we do not think a failure to do so renders a pleading bad on demurrer, if its context clearly and definitely fixes the legal character of the party suing or sued. There are many instances, of course, in which the neglect to properly denominate a party may prove fatal. That is the usual result when the pleading does not supply the defect in the title. The case of *First Nat. Bank v. Shuler*, 153 N. Y. 163, 47 N. E. 262, 60 Am. St. Rep.

601, is an illustration in point. That was a judgment creditor's action to set aside a general assignment, as well as certain specific transfers alleged to have been fraudulent. The debtor died pending the action. His widow was appointed his executrix. She had originally been made an individual party defendant in the creditor's action. After her husband's death the plaintiff obtained leave to serve an amended complaint, setting forth the fact of the debtor's death and his widow's appointment as his executrix; but no attempt was made to bring in the executrix as a defendant in her official capacity. The case proceeded to judgment in favor of the creditor, but was reversed in this court on the ground that the executrix had not been made a party in her representative capacity, and therefore was not bound by the judgment. The reason for the decision is readily discernible in the following brief extract from the opinion of Chief Judge Andrews. He said: "The fact that the defendant *Elizabeth N. Shuler* was a party defendant in her individual character does not obviate the objection. She had a separate individual interest in the litigation, which was instituted in part to avoid transfers made to her by the debtor, and it was during his lifetime that she was joined as defendant in the action and answered the complaint. By his death and her appointment as executrix she was invested with a new character as the representative of her husband and his creditors and of his estate." In another part of his opinion the learned chief judge made it clear that the pleadings did not show that the executrix had been made a party in that capacity, or that her interest as such had been considered or determined. The case at bar is the complete antithesis of that case. Here the defendant *Pierce* is simply named in the title as a party defendant, while every line of the complaint discloses that he is sued as trustee and in no other capacity.

It is suggested, however, that if the practice pursued by plaintiff herein is sustained a judgment by default may be entered against a defendant in one capacity, while he may regard himself as having been sued in another. That is one of the possibilities of such a situation. But similar dangers are incurred by every defendant who fails to appear when he is sued. In every such case a plaintiff may obtain greater or different relief than he may be entitled to, but that does not make the complaint demurrable. If it should be held, for instance, that this complaint does not state a cause of action against the defendant *Pierce* as an individual, and the title of the action should then be amended, so as to conform to the allegations of the complaint, a personal judgment might still be rendered against him if he failed to appear. Of course, the plaintiff would have no legal right to such a judgment; but the

mere fact that it was physically possible for him to obtain it would not render the complaint demurrable. We think the complaint clearly and unmistakably shows that the defendant Pierce is sued in his capacity of trustee, and no other. Therefore the mere omission to designate him as trustee in the title to the action is not such a defect of pleading as to render the complaint bad on demurrer.

We shall not discuss at length the respondent's contention that the appeal should be dismissed in accordance with the practice indorsed by a majority of this court in *Abbey v. Wheeler*, 170 N. Y. 122, 62 N. E. 1074. It is enough to say that, since it does not affirmatively appear that the final judgment herein was not entered in the Appellate Division, we shall assume that it was so entered; and hence there was no occasion for a second appeal to that tribunal before coming to this court.

For these reasons I dissent from the judgment about to be rendered, and advise that the judgment of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs to the appellant in all the courts.

CULLEN, C. J., and GRAY and VANN, JJ., concur with HAIGHT, J. BARTLETT, J., concurs with WERNER, J. O'BRIEN, J., not voting.

Judgment affirmed.

(182 N. Y. 483)

EVANS v. SOUTHERN TIER MASONIC RELIEF ASS'N.

(Court of Appeals of New York. Oct. 3, 1905.)

INSURANCE—MUTUAL BENEFIT ASSOCIATION—CHANGE OF BY-LAWS—EFFECT ON BENEFICIARY.

Where all dues and assessments required by the by-laws of a mutual benefit association have been paid, the beneficiary named in the certificate cannot be deprived of the benefit specified by amendments to the by-laws adopted after the issue of the certificate, though the application for membership contained a clause by which the applicant agreed to comply with the by-laws then in force or which might thereafter be adopted, and though the certificate contained a clause that the payment to the beneficiaries should be of such sums as the by-laws of such association may from time to time prescribe.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1855.]

Appeal from Supreme Court, Appellate Division, Third Department.

Action by Martha Evans, administratrix of Eliza J. Evans, against the Southern Tier Masonic Relief Association. From a judgment of the Appellate Division (88 N. Y. Supp. 162, 94 App. Div. 541), affirming a judgment for plaintiff, both parties appeal. Reversed.

E. J. Baldwin, for appellant. Frederick Collin, for respondent.

HAIGHT, J. This action was brought to recover the sum of \$1,000, which it is alleged became due and owing to Eliza J. Evans upon the death of her husband, John J. Evans, under a certificate of membership issued to him by the defendant. The certificate was issued under date of July 13, 1885, in favor of Eliza J. Evans, wife, No. 3,589, amount \$1,000, and certifies that "John J. Evans of Bethel, Conn., is a member of the Southern Tier Masonic Relief Association of the State of New York, and is entitled to all its rights, privileges, and benefits, and subject to the laws, rules, and regulations governing said association." At the time Evans joined the association he signed an application for membership, in which he agreed to make punctual payment of all the dues and assessments for which he may become liable, and to conform in all respects to the by-laws, rules, and regulations of the association then in force or which may hereafter be adopted by its board of directors. Under the by-laws then in force there were three classes of membership, and upon the death of a member of the class which Evans joined he became liable to an assessment for \$1, and in case of his own death his widow became entitled to have a like assessment imposed upon the members of that class and to receive the same, but not to exceed the amount specified in the certificate. In January, 1886, the by-laws were amended, so that all three classes were consolidated into one class and the assessment thereafter to be paid upon the death of a member was graded according to the age of the member paying the same, and under the table of rates then adopted Evans was still required to pay \$1, upon the decease of each member of the association. Other amendments were adopted in January, 1892, November, 1892, and March, 1893, by which members of Evans' age were finally required to pay \$2.40 per month, but distribution should be made only every other month of the dues received, and that out of such assessment there should first be paid, in full, the death claims of new members who had joined after the amendment of 1892, and the balance distributed pro rata among the representatives of deceased members, but not to exceed the amount designated in their certificate of membership. Evans fully performed all of the obligations imposed upon him and paid all his assessments that had matured and become due and payable down to the date of his death, which occurred on the 16th day of November, 1895. On the 10th day of December thereafter a notice of assessment was served upon the members of the association liable to contribute to the death fund, of which Evans was the only person named whose death had been reported. On the 10th day of January following, another

notice of assessment was ordered in which the names of eleven members are reported to have died. Upon these assessments the amount of \$21,500 was due, but only the sum of \$8,544.01 was received. Out of this was deducted the sum of \$1,212.78, expenses of the association, and the sum of \$500, the claim of Emil Krume, who became a member on the 11th day of November, 1895, and had died shortly thereafter, and the balance was distributed among the representatives of the remaining deceased members, and under that distribution the plaintiff became entitled to the sum of \$340.98 only, for which sum she was awarded damages.

It is now contended that Mrs. Evans, as the widow of a deceased member and the person for whose benefit the certificate was issued, had acquired a vested right of which she could not be deprived by the subsequent amendments of the defendant's by-laws, under the authority of *Beach v. Supreme Tent of the Knights of the Maccabees*, 177 N. Y. 100, 69 N. E. 281. The opinion in that case received the approval of all of the members of this court except myself. I entertained the view that under the contract entered into in that case the right to amend the by-laws was reserved, and the certificate holder, or those for whose benefit he procured the same, did not acquire an absolute vested right under existing by-laws, but that they were subject to the reasonable amendments that should thereafter be found necessary and proper. But a contrary view was adopted by my associates, and it therefore becomes my duty to submit to the views of the majority. The question now raised is whether this case can or ought to be distinguished from that case. The defendant was incorporated on the 9th day of October, 1869, under chapter 319, p. 447, of the Laws of 1848. The purpose of the incorporation, as stated in the certificate of incorporation, was "to provide for the payment to the widow, children, or mother (or to such person or persons as may have been designated to receive the same) of any member of such association as may from time to time decease of such sum as the by-laws of such association may from time to time prescribe, the said sum to be raised by the voluntary contribution to the same by the members of such association of such dues as such by-laws from time to time prescribe." Under the by-laws persons desiring to become members must agree to comply in all respects with the by-laws, rules, and regulations of the association and its board of directors. Upon becoming a member a certificate is issued to him, in form the same as that to which we have already called attention. The by-laws further provide that they may be amended at any annual meeting of the asso-

ciation, or at any special meeting thereof called for that purpose, a printed notice of such proposed amendment to be sent to each member of the association, together with the notice of the time and place where the meeting will be held, and a two-thirds vote of the members present is required to pass the amendment. The certificate of incorporation, while specifying the purposes for which the association is organized, evidently was not intended to form a part of the contract between the association and its members, but the application of Evans, the certificate issued to him, and the by-laws of the association became the contract between the parties. This being so, the question arises as to whether the amendments of 1892 and 1893, under the right reserved in the by-laws to amend the same at any annual or special meeting of the association, operated to change the contract between the parties, so as to conform it to such amendments.

This question was answered in the negative in the case of *Beach v. Supreme Tent of the Knights of the Maccabees*, supra. The Maccabees was incorporated as a fraternal mutual benefit association. It had a constitution providing for the establishment of a benefit fund to pay the widow, children, dependent mother, father, sister, or brother of a member as he shall direct in case of death, or upon the total disability of a member in good standing, such sum of money and in such manner as may be fixed by the endowment laws of the association. It also provided that the laws governing the endowment fund might be altered or amended by two-thirds vote of the members present at any regular meeting of the supreme tent or at a special meeting called for that purpose. A person desiring to become a member was required to sign an application in which he agreed that the statements contained therein and the constitution of the supreme tent shall form the basis of the contract for the endowment. The certificate issued to Beach provided that: "This certifies that Sir Knight Benjamin C. Beach is a member of the Center Tent, No. 28, located at Yorkshire Center, and that he is a beneficiary in good standing and in accordance with and under the provisions of the laws governing the order he is entitled to receive one assessment on the membership, but not exceeding the amount of \$2,000, as a benefit to Sarah J. Beach, his wife, upon satisfactory proof of his death, * * * and in case of permanent or total disability or upon attaining the age of seventy years he would be entitled to receive one-half of such endowment as provided in the laws of the order." Subsequently to his becoming a member the laws of the order were amended so as to provide that in case of his disability he should receive annually one-tenth of the endowment fund provided for him, instead of one-half in gross sum. In that case it was held that

he had a vested right to recover one-half of the endowment fund upon his becoming totally disabled, and that the power reserved in the constitution of the society to amend its laws did not authorize it to so amend as to provide for the payment of the endowment fund in ten equal annual installments.

We are now asked to distinguish this case from the Maccabees Case, and our attention is called to the purpose of the incorporation as stated in its certificate, to the effect that the payment to the persons designated by the deceased was to be "of such sum as the by-laws of such association may from time to time prescribe." But, as we have seen, the certificate of incorporation forms no part of the contract, and, if it did, this clause would doubtless have to be construed in connection with the by-laws upon the subject in force at the time the certificate was issued. That this clause was not understood as forming a part of the contract is apparent from the action of the association in amending the by-laws in 1893 so as to provide that upon the death of a member the sum to be paid to his representatives "shall be the maximum amount as designated in his certificate of membership, provided, however, that no rates, terms, or conditions shall be changed upon the policies as in force on the 30th day of September, 1892, but shall remain subject to the following by-laws of this association as existing at that time, and shall be regarded as a contract upon sufficient consideration between the members therein mentioned and the association," thereby expressly doing away with the right to change the rights of the members from time to time by its by-laws as specified in the articles of incorporation. The object and purpose of this amendment was to pay in full all policies or certificates issued after the 30th day of September, 1892, leaving the old members to be satisfied out of that which may remain of the assessments collected. It is true that there is a variation in the certificates. In the Maccabees Case the certificate provided for payments to be made in case of total disability. In this case the certificate contains no provision of that character, but I am unable to see that this distinguishes the two cases in principle. In the Maccabees Case the beneficiary would ultimately receive the full amount of his certificate. In this case the beneficiary gets only about one-third of the amount of the certificate.

We think that the former case is controlling upon us, and that the judgment should be reversed, and a new trial ordered, with costs to abide the event.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(216 Ill. 539)

CITY OF GIBSON v. MURRAY.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

The failure of a charge requiring a city to keep its sidewalks in "good and safe condition" to contain the word "reasonably" before the quoted phrase was not ground for reversal, where other instructions correctly stated the law and it was clear therefrom that the error was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4219.]

2. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—ACTIONS FOR INJURIES — EVIDENCE.

In an action against a city for injuries to a pedestrian caused by a defective sidewalk, the admission in evidence of ordinances of the city making it the duty of the superintendent of streets to see that streets, alleys, and sidewalks were kept in good repair, such evidence being introduced for the purpose of showing that complaints as to the defective condition of the sidewalk in question were made to the proper officer, was not reversible error.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1736.]

Appeal from Appellate Court, Third District.

Action by Belle Murray against the city of Gibson. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit brought by the appellee against the appellant city on November 21, 1903, in the circuit court of Ford county, to recover damages for personal injuries sustained by appellee through a fall on March 28, 1903, upon a sidewalk in said city. The trial below resulted in verdict and judgment in favor of appellee. An appeal was taken to the Appellate Court, where the judgment has been affirmed. The facts are substantially as follows: The walk in question was on the east side of Union street, in said city, and on the north side of South Second street at the intersection of the two streets. Union street runs north and south, and South Second street, which crosses it, runs east and west. The walk was a section of sidewalk about 16 feet long and 4 feet wide, with three stringers running lengthwise, one at each side and one in the middle. It crossed a ditch, which ran east and west along the north side of South Second street. This ditch was 5 or 6 feet wide and from 18 inches to 2½ feet deep from its bottom to the top of the walk. When the accident occurred several of the planks, which had lain crosswise upon the stringers, had become loosened therefrom, and lay lengthwise of the walk across the opening therein. The space covered by these loose planks was from 3 to 4 feet wide. On March 28, 1903, when the accident occurred, there were two boards lying lengthwise of the walk near the center of the hole under the walk, which was about 3 feet in length from north to south. These boards were from 6 to 8 inches in width, and appeared to be about 4

feet long. Before March 23, 1903, the two boards in question were lying crosswise of the hole, about the center of it; that is, across the stringers in the same direction as the other boards of the walk. But on March 23, 1903, when appellee came out of the west door of a house near the corner of Union and South Second streets, and crossed the sidewalk to catch up and walk with her husband, whom she saw on the opposite side of the street, the two boards were lying lengthwise of the walk, side by side, near the center of the hole. She was walking south, and stepped on the west one of the two boards, which turned or flew up, and she fell astride the board with her feet in the ditch, but not touching the bottom. She fell forward to the right in a doubled-up position, her hands striking the walk on the south side of the hole. Her weight struck with full force upon the upturned edge of the board upon the right side of the abdomen in the pelvic region. The evidence tends to show that her injuries were serious. Two operations were performed upon her, in the first of which her womb was stretched, and in the second of which the abdomen was opened.

Cloud & Thompson, for appellant; L. A. Cranston and A. L. Phillips, for appellee.

MAGRUDER, J. (after stating the facts). In this case three instructions were given in behalf of appellee, and ten instructions were given in behalf of appellant. Four instructions, asked by the appellant, were refused, but no point is made in the argument of counsel as to the refusal of these instructions. The evidence tends to show, and upon this point is not seriously contradicted, that the appellant city was guilty of negligence in allowing the sidewalk, at the place where the accident occurred, to remain defective and out of repair; and although there is some evidence to the effect that complaint in regard to its condition was made to some of the city authorities, and it was repaired by reason of such complaint, yet afterwards it again became out of repair, and remained so for a long time before the accident occurred. The proof tended to show that it was out of repair for some two years before March 23, 1903, when appellee was injured. Appellant's counsel, at the close of all the evidence and before the commencement of the argument, presented to the court and to appellee's counsel a written motion to submit to the jury the following instruction and interrogatory, and moved the court in writing to submit to the jury said interrogatory to be answered by them, and to give to them the instruction attached to the interrogatory; and thereupon the court gave such instruction, and its accompanying special interrogatory, which are as follows, to wit: "The jury are instructed to answer the interrogatory hereunder written by the word 'Yes' or 'No,' as they shall find the fact from the evidence, and to sign the same and

to return the same into court with their general verdict. Interrogatory: Could the plaintiff by the exercise of due and ordinary care, as defined in the instructions given you, have avoided the fall and injury mentioned in her declaration and in the evidence?" To which special interrogatory, submitted to them by the court, the jury answered "No."

First. The giving of the first instruction, given on behalf of appellee by the trial court, is assigned as error by the appellant. This instruction required the jury, among other things, in order to entitle the appellee to recover, to believe from the evidence "that the corporate authorities of the city of Gibson did not exercise all reasonable care and caution and supervision over the sidewalk where the alleged injury in question is alleged to have occurred, to keep it in good and safe condition, and by that means allowed it to become defective and unsafe." This instruction is alleged to be erroneous upon the ground that it required the city to exercise reasonable care over the sidewalk "to keep it in good and safe condition," instead of requiring the city to keep it in a "reasonably good and safe condition." The instruction required the city to exercise "reasonable care and caution," to keep the sidewalk in good and safe condition, but omitted the word "reasonably" before the words "good and safe condition." In this respect the instruction was defective. It is undoubtedly the law that cities and villages are only required to keep the sidewalks in a reasonably safe condition. *Town of Grayville v. Whitaker*, 85 Ill. 439; *City of Chicago v. Bixby*, 84 Ill. 82, 25 Am. Rep. 429; *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246. It is to be observed that in this instruction the words complained of are followed by this clause, "and by that means allowed it to become defective and unsafe." A finding of the jury in behalf of the plaintiff was conditioned upon their believing from the evidence that there was a failure to exercise reasonable care over the sidewalk to keep it in good and safe condition, and that by that means the sidewalk was allowed by the city to become defective and unsafe. If the sidewalk was allowed to become defective and unsafe, the city had failed to keep it even in a reasonably good and safe condition.

In addition to this, the court gave to the jury instruction numbered 9 at the request of the appellant, which is as follows: "The law imposes upon cities the duty to exercise reasonable care to keep its streets and sidewalks in reasonably safe condition for use by persons traveling thereon. The city is not an insurer against injuries received by reason of defects in its streets or sidewalks. If it maintains them in reasonably safe condition, it is not liable; and in this case, if you believe, from all the facts and circumstances shown by the evidence, that the

places where the plaintiff claims to have been injured was in such condition for travel thereon or thereover that a person, while in the exercise of ordinary care for his own safety, would have passed safely over, then the defendant is not liable in this case." This instruction stated the law correctly, and therein stated the requirement of the city to be that of maintaining the sidewalk in a reasonably safe condition, and not in an absolutely good and safe condition. The defect in the first instruction given for appellee was cured by the ninth instruction given for appellant and other instructions to the same effect. It cannot be said, as is claimed by the appellant, that the ninth instruction given for appellant is inconsistent with the first instruction given for appellee, and that therefore the latter is not cured by the former. The use of the words "keep it in good and safe condition" did not authorize the jury to find that the sidewalk must be kept in a perfectly good and safe condition any more than that it should be kept in a reasonably good and safe condition. In other words, where the words "good and safe condition" are used, as here, without qualifying words, the jury are as much authorized to construe them to mean "reasonably good and safe condition" as to regard them as indicating a higher and more perfect condition. Such was the construction given to a similar instruction in *Village of Mansfield v. Moore*, supra. While, therefore, the first instruction given for the appellee was technically defective in the respect thus indicated, such defect is not sufficient to authorize a reversal of the judgment, in view of other words used in the instruction, and in view of the correct declaration of the law upon this subject given in other instructions read to the jury.

Second. Appellant complains that the trial court erred in giving the third instruction given for appellee. That instruction told the jury that if they believed, "from the preponderance of the evidence, that the plaintiff was injured by reason of the defendant negligently failing to keep its sidewalk in reasonably safe condition, or negligently allowing the same to remain in an unsafe condition, as charged in the declaration, and without fault on her part, and that she has sustained damages, then the jury have a right to find for her such an amount of damages as the jury believe from the evidence will compensate her for the personal injury so received and her expenses necessarily incurred in respect thereto, if any such expense has been proved, and also for the pain and suffering undergone by her, if any is proved by the evidence." The objection to the instruction is to the last clause thereof, to wit, "and also for the pain and suffering undergone by her," etc. It is said that the jury were thus authorized to find for the plaintiff for pain and suffering undergone by the appellee, which may not have been caused

by the injury in question, but which may have resulted from some other cause. But the instruction is not capable of such construction. The damages which the instruction authorized the jury to give are such damages as "will compensate her for the personal injury so received"; the words "so received" referring back to the injury suffered by her by reason of the defendant negligently failing to keep its sidewalk in reasonably safe condition, etc. The instruction also authorized the jury to give damages for "her expenses necessarily incurred in respect thereto"; the words "in respect thereto" also referring back to the same injury, caused by the failure to keep the sidewalk in a reasonably safe condition. The words immediately following could not have been construed by the jury to refer to any other pain and suffering than that which she underwent on account of this particular injury. The instruction is not justly subject to the criticism made upon it.

Third. It is said that the court erred in admitting in evidence two ordinances of the city of Gibson, introduced by the appellee at the beginning of the trial. One of these ordinances was passed by the city council on May 14, 1901, and provided that the city marshal should be ex officio superintendent of streets, and should have general supervision of all streets, alleys, and sidewalks under the direction of the committee on streets and alleys, and should see that the same were kept in good safe condition of repair. The second ordinance was passed on May 14, 1902, and provided that the superintendent of streets should have general supervision of the streets, alleys, and sidewalks under the direction of the committee on streets and alleys, and should see that the same were kept in good safe condition of repair. The second ordinance repealed the first. The object of introducing these ordinances was not to show that it was the duty of the city to keep the sidewalks in a good and safe condition of repair, instead of a reasonably good and safe condition of repair; but their introduction was for the purpose of showing whose duty it was to supervise and look after the sidewalks of the city. The proof tended to show that in June, 1901, complaint was made to the superintendent of streets about the condition of this sidewalk, and that, in response to this complaint, a workman at that time nailed on a couple of boards. At that time the city marshal and the superintendent of streets were the same person; the former being ex officio superintendent of streets. The ordinance tended to show that, in making complaint to the city marshal, complaint was made to the proper person, inasmuch as the city marshal was the superintendent of streets. It is true that at the time of the trial the ordinance of 1901 had been repealed. But the complaint was made, and the repairs also were made upon the sidewalk, in June, 1901, and while the

first ordinance, subsequently repealed, was in force. The proof tends to show that the repairs were made in June, 1901, although one of the witnesses says that the complaint was made in June, 1902. But Swan Poff, to whom the complaint was made, says that he was superintendent of streets two years, in 1900 and 1901. The proof also tends to show that the sidewalk only remained in repair, after it was fixed in pursuance of the complaint made, for about two months. Other portions of the evidence tended to show that it was out of repair for two years prior to the injury in question, which occurred on March 28, 1903. The introduction of the ordinances may have been unnecessary and immaterial, because the duty to keep its sidewalks in a reasonably safe state of repair is imposed upon cities and villages by the law, and independently of their assumption of that duty through ordinances. But we cannot see how the appellant was materially injured by their introduction, as they merely related to the duty of the city, and the duty of a particular official of the city in reference to the matter in controversy, and the evidence was undisputed that the sidewalk was dangerously out of repair. In *City of Champaign v. Patterson*, 50 Ill. 61, which was an action on the case against the city of Champaign to recover damages for an injury received by the plaintiff by reason of a defective sidewalk, an ordinance was introduced in evidence in relation to the city officers of that city, and objection was made to its admission. It prescribed the duties of the city supervisor as to streets and alleys, and authorized him to make all necessary repairs thereof, and required him to examine into the condition of the streets and alleys, etc., and report the same to the city council and recommend such repairs as he deemed necessary; and in that case this court, speaking through Mr. Chief Justice Breese, said: "The objection to the introduction of this portion of the ordinance was that it proved nothing and tended to mislead the jury. We cannot see it in that light. It was proper evidence to show that the city had taken under their cognizance and control these structures, and, if the defects complained of could be remedied by the outlay of \$25, which was a matter of proof, then the failure to expend this money in making the repairs would constitute neglect by this officer of the city."

Fourth. The evidence shows that the second operation performed upon the appellee was so performed after the beginning of the present suit; and it is claimed that this evidence was improperly received, because there was no allegation in the declaration under which it was admissible. In other words, it is insisted by appellant that there was no direct averment of permanent injury to appellee in the declaration. The declaration alleged that appellee was obliged to pay out money for board, lodging, nursing, care, house help, and other necessary ex-

penses, "and now continues to lay out divers sums of money endeavoring to be healed thereof." This was substantially an allegation of the continuance of the effect of the injury after the beginning of the suit. The court, however, limited appellee in its instructions and in the introduction of evidence in the matter of actual expenses on account of the injury, to the commencement of the suit, and, in the matter of pain and suffering, to the time of the trial.

Fifth. Complaint is also made by appellant of improper remarks, made by counsel for appellee in his closing argument to the jury. The remark complained of was improper, but the appellant's counsel objected to it, and the court then stated to the jury and made a ruling that the remark was improper, and directed the jury to disregard it. We concur with the Appellate Court in the following statement, made by them in their opinion deciding the present case upon this subject: "We do not think that the amount of the verdict indicated that the jury were in any degree influenced by the remark in arriving at the verdict. They seem to have followed the direction of the court, and disregarded it."

We have thus noticed all of the objections, which have been called to our attention in the argument of counsel for appellant, and do not find that any of them are sufficiently well taken to justify us in reversing the judgments of the lower courts, which settle all the facts of the case against appellant. Accordingly the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(216 Ill. 598)

COWAN v. CURRAN et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. STATUTE OF FRAUDS—CONTRACTS CONCERNING LAND—AUTHORITY OF AGENT—NECESSITY OF WRITING.

A contract assuming a pecuniary obligation on the purchase of land and agreeing to execute a note and trust deed upon property securing the same, when made by an agent who has no written authority from his principal, is within the statute of frauds and does not bind the principal.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 254, 255.]

2. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—SCOPE.

Oral authority to an agent to use his principal's name in the purchase of land does not empower the agent to pledge his principal's credit by binding her to give a note and trust deed for the purchase price.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 313.]

3. SAME—WANT OF AUTHORITY—ATTEMPTED RATIFICATION.

A contract to purchase land, made by an agent who has no authority to act for the vendee in the premises, is not binding upon the vendor, and cannot be made binding on him by the act of the purchaser in instituting suit for specific performance and attempting to ratify the contract.

4. SPECIFIC PERFORMANCE—WHEN GRANTED.

A contract to sell land cannot be specifically enforced against the vendor by a purchaser whose identity was concealed from the vendor, where the contract was not binding between the nominal parties thereto and the vendor rescinded the same before he was apprised of the purchaser's claims.

5. PRINCIPAL AND AGENT — UNDISCLOSED PRINCIPAL—CREDIT TO AGENT.

Where exclusive credit was given to an agent in his own name, the agent's undisclosed principal could not sue on the contract.

6. SAME—NOTICE TO AGENT.

Notice to an agent is not notice to his principal, where the party seeking to benefit by the notice conspires with the agent to conceal the facts from the principal and defraud him.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 689, 690.]

7. SPECIFIC PERFORMANCE—MISREPRESENTATION OR MISAPPREHENSION.

A contract for the sale of land, entered into through misrepresentation by one party or misapprehension of the other, will not be enforced.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 155, 160.]

8. APPEAL—SUPERSEDEAS—EFFECT.

An appeal to the Supreme Court operates as a supersedeas, staying further proceedings, and depriving the trial court of jurisdiction to render any further decision affecting the rights of the parties in the case.

Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Bill by James E. Cowan against Teresa Kane and another, in which Richard Curran filed an answer and cross-bill. From a decree in favor of cross-complainant, plaintiff appeals. Reversed.

See 71 N. E. 1097.

This case has been here before, as will be seen by reference to Cowan v. Kane, 211 Ill. 572, 71 N. E. 1097. After the decree was reversed and the cause remanded, by order of this court entered on October 24, 1904, the cause was redocketed in the court below on November 30, 1904. On February 8, 1905, the appellee, Richard Curran, who had not theretofore been a party to the proceeding, and whose absence from the record as a party was one of the causes of reversal upon the former hearing, filed a petition, representing that he had an interest in the contract described in the bill, and asking leave to become a party defendant, to file an answer and cross-bill instant, and for a rule on appellant, Cowan, to answer the same. On the same day, to wit, February 8, 1905, Curran was given leave to become a party defendant, answer the bill, and file a cross-bill instant, and rule was entered upon appellant to answer the cross-bill. On February 8, 1905, appellee, Curran, filed an answer to the original bill of the appellant, which had been filed for the purpose of removing the recorded contract as an alleged cloud upon Cowan's title, setting up that he was a contractor and builder in Chicago, and desired to purchase land in the vicinity of the land in controversy for

the purpose of erecting a block of buildings thereon, and wished to make the purchase in Mrs. Kane's name; that she consented, and authorized him to sign her name and pay the earnest money for her and represent her in matters connected therewith; that the contract is a bona fide contract of sale by appellant and of purchase by Kane for and in behalf of Curran, signed by him in her name at her request; that he furnished Kane the sum of \$500 as a deposit, and afterwards furnished her \$2,500, and tendered it in the name of Kane to Pridmore; that he desired to construct a building before fall weather set in, and repeatedly urged Pridmore to close the sale; that he was satisfied with the title; that he prepared and sent by Pridmore to Cowan a warranty deed for execution by Cowan and his wife, but denies that such action was taken with fraudulent intent; that he believes Cowan delivered an abstract of title to Mrs. Kane, and afterwards called at her home and had conversations with her, but denies that Kane made the representations alleged to have been made by her; that Mrs. Kane prepared a note and trust deed for \$7,000 to conform with the contract, and alleged that the contract was performed on the part of the purchaser. On February 8, 1905, Richard Curran, the appellee, filed a cross-bill, praying for a specific performance of the contract by the conveyance of the property either to himself or to Mrs. Kane, and therein alleged that in August, 1903, he applied to Pridmore for terms of the sale of the property, and was advised that the price was \$10,000, payable \$3,000 cash and the balance in six months; that he agreed to purchase upon those terms, "but, in order to avoid the advertising of his intentions, he would arrange with Teresa Kane to make the purchase in her name and to hold the title thereto for him; that the proposed arrangement was agreed to by Pridmore"; that Mrs. Kane agreed to the use of her name by him for the purpose of acquiring the title to the property, and to sign a trust deed or mortgage to secure the deferred payment of \$7,000; that she empowered him to act for her in all matters in connection with the transaction; that the written contract was entered into, as set forth in the bill of August 24, 1903; that he signed Mrs. Kane's name to the contract, and on August 24, 1903, deposited with Pridmore in the name of Kane \$500 as earnest money; that on or about August 26, 1903, Cowan delivered to Mrs. Kane an abstract of title, which was examined and pronounced good by the attorney of Curran and Mrs. Kane; that on October 31, 1903, Curran tendered to Pridmore the further sum of \$2,500 and demanded a deed, but was informed that the deed had not been forwarded to him by Dr. Cowan; alleges that he is ready and able to carry out the contract, and offers to pay to Cowan, or to pay into court, \$9,500, the balance due on the contract for a deed to either Kane or himself. On February 8,

1906, a decree was entered by the court below, dismissing the cross-bill of Teresa Kane for want of equity at her cost, which cross-bill had theretofore been filed on March 17, 1904. On February 17, 1906, the appellant, Cowan, filed an answer to Curran's cross-bill, and therein denied that he ever entered into any contract with Curran for the conveyance of the land, or that Curran ever agreed with him to purchase the land, or that Curran became a party to the contract, or assumed its obligation; that he never heard of Curran, or his interest in or connection with the transaction, until the contract had been rescinded and the pretended obligation thereof either upon himself or Kane was at an end; that he (Cowan) was induced to execute the contract by representations, made to him by Pridmore, that the purchaser was a responsible builder, who desired to improve the property immediately by the erection of buildings thereon, which would enhance the security for the deferred payment of \$7,000; that said representations were false, and known to be false at the time by both Pridmore and Curran; that said Kane was not engaged in the building business, was not a responsible person, but was financially irresponsible, and did not have the money required to carry out the contract, and did not intend to improve the property; that said contract was not binding upon Kane; that she did not sign the same, but that her name was signed without any sufficient authority from Curran; that she never executed any authority in writing in accordance with the statute of frauds; that she was ignorant of the terms of the contract, and never bound herself, nor authorized Curran to bind her, to purchase said land or impose upon her any personal liability in connection with the purchase thereof, and that she never advanced any of the money paid or tendered; that, after the discovery of these facts, and before he knew that Curran had or claimed to have any interest in the contract, and before the contract had become binding upon Teresa Kane or himself, he rescinded said contract and notified her of such rescission, and returned to her the note and trust deed, which had been sent to him on or about October 31, 1903; that said Kane acquiesced in such rescission and told Cowan that she knew nothing about the contract, and that he need not carry it out if he did not desire to do so; that the filing of his original bill was defended by and at the expense of Curran, although the latter was not a party thereto; that in her answer and cross-bill Mrs. Kane stated that Curran was her agent, and claimed that she was the principal and entitled to enforce the contract as such; that she and Curran testified on her behalf on the trial, and sought to establish her right to enforce the contract upon the theory that she was the principal therein; that not until she was defeated by the decision of the Supreme Court did she or Curran take the position that he was the principal or entitled to have

the contract enforced. The answer of Cowan pleads the record of this cause, and the decision of the Supreme Court that the contract was not binding between him and Kane, in bar of any right of relief by Curran under his cross-bill; and in the answer Cowan denies that he ever received the money alleged to have been paid under the contract, alleges that Pridmore never paid any part of the money which he received to Cowan, and denies that Curran has any right to specific performance. By stipulation between the parties, all the testimony introduced upon the first trial was used upon the second trial. Upon the latter trial, also, an additional letter, written by Mrs. Kane's attorney, was introduced in evidence, and testimony was also introduced showing the rendition against appellee, Curran, in the circuit and superior courts of Cook county of some nine judgments in the years 1901, 1902, 1903, and 1904, and also showing the filing of a creditors' bill on one of these judgments, alleging that Curran had transferred the land belonging to him for the purpose of hindering and defrauding his creditors, and asking for the appointment of a receiver of his property. On May 3, 1906, the court rendered a decree substantially in compliance with the prayer of Curran's cross-bill, decreeing that appellant, Cowan, execute to Curran, upon tender by the latter within five days from the date of the decree of the balance of the purchase money due under the terms of the contract, a good and sufficient warranty deed, conveying in fee to Teresa Kane the premises in question, and that the sufficiency of the deed shall not be called in question by reason of the nonjoinder of the wife of Cowan; that Curran, upon the tender to him of such conveyance, do, in the name of Teresa Kane, pay to Cowan \$2,500 within five days, and a note of \$7,000, due on or before six months from the date of the contract, to be secured by mortgage or trust deed in the name of Teresa Kane on said premises, or an option by Cowan to pay upon such conveyance the sum of \$9,500 in cash, and, upon failure of Cowan to so execute said deed, a master in chancery be required to execute the same in the name of Cowan. The present appeal is prosecuted from the decree thus entered on May 3, 1906.

Horace Kent Tenney and James H. Wilkerson, for appellant. Alexander Sullivan and Edmond McMahon (Frank L. Kriete, of counsel), for appellees.

MAGRUDER, J. (after stating the facts). In August, 1902, William A. Pridmore, a real estate agent in Chicago, wrote a letter to the appellant, Dr. James E. Cowan, living in Galesburg, Ill., and owning the lots here in controversy, at the corner of Sixty-First street and Ellis avenue, in Chicago, asking the price at which Cowan would sell the lots. On September 15, 1902, in answer to a letter from Pridmore of that day asking: "Will you please let me know your lowest

figure for all cash? If you can make the price low, I think I can sell it." Cowan wrote in reply: "One hundred and seventy feet frontage on Sixty-First, ninety on Ellis avenue, ripe for immediate improvement; price \$10,000.00." Nothing further was done until August, 1903, when Pridmore again wrote to Cowan, asking "your present price for cash, or you can telegraph me at my expense." Thereafter, between August 21, 1903, and November 11, 1903, the latter day being three days before the filing of the original bill herein by Cowan, a large number of letters passed between Pridmore and Cowan in reference to the proposed purchase of the lots in question by Teresa Kane, and in reference to the procuring of an abstract of title, and the execution of the deed and note and trust deed called for by the contract. The evidence shows, and we find no contradiction in the record, that before the contract hereinafter mentioned was executed some communication was had between Pridmore and Cowan through the telephone. Through the telephone Pridmore told Cowan that his buyer was a builder, and wanted to and would improve the property at once; and when asked in regard to the responsibility of the buyer, and whether there was any assurance that Cowan would get his money at the expiration of the six months, Pridmore said that the buyer was a responsible builder, and would improve the property at once, and, as soon as he commenced building, would be able to raise money on the property, so that there would be no doubt about Cowan getting his money. A day or two afterwards, on August 24, 1903, Pridmore sent to Cowan by mail a written contract, dated August 24, 1903, by the terms of which Cowan agreed to sell and Teresa Kane agreed to purchase at the price of \$10,000 the lots in question, subject to certain taxes, etc., and the contract recited that the purchaser had paid \$500 as earnest money to be applied on said purchase when consummated, and agreed to pay, within five days after the title had been examined and found good, the further sum of \$2,500 at the office of Pridmore in Chicago, provided a good and sufficient warranty deed, conveying to the said purchaser a good title to the said premises (subject as aforesaid) should then be ready for delivery, the balance to be paid as follows: \$7,000 on or before six months from date, with interest thereon at the rate of 6 per cent. per annum, to be secured by notes and mortgages, or trust deed, of even date therewith, on said premises. A complete abstract of title, or merchantable copy, to be furnished within a reasonable time, with a continuation thereof brought down to date, and in case the title, upon examination, was found materially defective within 10 days after said abstract was furnished, then, unless the material defects were cured within 60 days after written notice thereof, the said earnest money should be refunded, and the

contract become inoperative. And the contract further provided that, should the purchaser fail to perform it promptly on his part, the earnest money should, at the option of the vendor, be forfeited as liquidated damages, including the commissions payable by the vendor, and the contract should be and become null and void. Time was made of the essence of the contract and of all the conditions thereof, and the contract also contains this clause: "This contract and earnest money shall be held by W. A. Pridmore for the mutual benefit of the parties hereto." The contract purported to be signed by Teresa Kane in her own proper person, and, when sent to Cowan, was signed by him and returned to Pridmore in a letter written by Cowan to Pridmore, dated August 25, 1903. Its receipt was acknowledged by Pridmore on August 26, 1903. The contract for the sale of the property showed upon its face that it was made between Cowan and Teresa Kane. Upon the original hearing the case was tried by the then defendants, Teresa Kane and William A. Pridmore, two of the present appellees, upon the theory that Teresa Kane was the purchaser of the property, and the appellee, Richard Curran, was her agent in the matter of such purchase. After the decision of this court in *Cowan v. Kane*, 211 Ill. 572, 71 N. E. 1097, an answer and cross-bill were filed by Richard Curran, who by leave of court was made a party defendant to the proceeding, in which he takes the ground that he was the real purchaser of the property, and that Teresa Kane merely held the title for him and at his request.

First. This court has already decided that Teresa Kane had no interest in the purchase of the property, and knew nothing about the terms of the contract, and never even signed the contract. All through the correspondence the fact that Curran was the real purchaser of the property, and that the name of Teresa Kane was being used as merely a proposed holder of the title, was concealed from Cowan by Pridmore. The proof shows that the appellant, Cowan, never had any notice or information that Curran was the purchaser of the property, or had any interest in the purchase, until about the 6th day of November, 1903. On October 30 or 31, 1903, or on some day between that date and November 6, 1903, Cowan had an interview with Mrs. Kane, in which she admitted to him that she never saw the property, that she never had seen Pridmore, that she knew nothing about the contract, that she had never signed the contract, that she cared nothing about its execution, and that, if he felt like refusing to carry it out, he was at liberty to do so. Some of the testimony of Cowan upon this subject is contradicted by Mrs. Kane, but its material features are sustained by the proof. After Cowan had this interview with Mrs. Kane, in which he learned from her that she had never executed

the contract, and knew nothing about its terms, Cowan sent to Mrs. Kane a written notice, dated at Chicago, November 5, 1903, in which he notified her that the contract, dated August 24, 1903, purporting to be signed by her and executed by Cowan, providing for the sale and conveyance of the land in question, was procured from Cowan by fraud and misrepresentation, and that he thereby rescinded the same, and declared it canceled and made void; and in said notice he stated that he thereby returned and declined to accept her note for \$7,000, dated October 28, 1903, and trust deed of same date, "which were recently mailed to me by your agent, Mr. W. A. Pridmore. I also demand an immediate release from you of any claim on this property and the return of my abstract; otherwise, I shall take legal proceedings to compel the same." When this notice was sent to Mrs. Kane and received by her, Cowan had no notice whatever of Curran's relation to the property or to the transaction. This court found upon the former hearing, and announced in its opinion in *Cowan v. Kane*, supra, the following state of facts: "The party who made the contract in fact, and the only party in interest, was Richard Curran, who was not a party to the suit. Pridmore, the real estate agent who made the sale, never saw Teresa Kane. She never saw the property, did not know the terms of the contract, and did not advance the money deposited with Pridmore, nor offer the check of \$2,500 to him, nor tender the \$9,500 on the hearing. None of the money belonged to her, and all that is claimed is that she authorized the use of her name by Curran, the real purchaser, without the slightest interest in the contract, or any expectation of interest in the property, when conveyed. Curran signed her name to the contract, and the only authority he had was stated by him as follows: 'I told her we were buying the corner and were using her name for it, and I would sign the contract, and was it all right? And she said, "Yes, go right ahead; anything I wanted to do, do it." * * * But in this case Curran was the actual purchaser and made the contract, and the evidence showed that Teresa Kane had no interest in it, knew nothing about it or its terms or the property, and was not the real purchaser. The decree recites that the covenants were intended to be binding on Curran and be performed by him, and whatever performance there was was by him. He was not acting as agent for her in transacting her business, but was acting for himself. Here was one not a party to the suit, performing the contract in part in his own interest, and on the trial tendering \$9,500 as a performance of the remainder. Cowan is not attempting to hold her as one who is apparently the principal, but insists that she repudiated the contract and disavowed the authority of Curran." The views thus expressed in our former opinion are binding upon us upon the present hearing.

Second. Upon the former hearing Mrs. Kane sought a specific performance of the contract by filing a cross-bill for such purpose in her own name. Since the re-docketing of the cause her cross-bill has been dismissed for want of equity, and no appeal has been taken from such order of dismissal. The present cross-bill, asking for specific performance, is filed by Curran alone; Mrs. Kane not joining with him as co-complainant, and not being a defendant to the cross-bill, although the original bill, filed by Cowan asking for a removal of the contract as a cloud upon the title, made her a defendant, and she still remains a defendant to that bill in the suit. The question then arises whether Curran can enforce a specific performance of this contract against Cowan under the facts already stated. Certainly there was no written contract between Cowan and Curran. Cowan's contract, if it was a contract, was with Mrs. Kane, and Curran was not a party to it upon its face. It cannot be said that Mrs. Kane was bound by this contract, or that it could have been specifically performed as against her by Cowan, if she had chosen to resist an application for such performance by Cowan. She never signed the contract herself. Curran signed her name to it. The evidence tends to show that she never knew that her name had been signed to it until after the act had been done. The evidence also tends to show that she never gave any authority to Curran to sign a contract for the purchase of the property and which obligated her to pay money and to execute a note and trust deed. If she gave any authority at all, it was merely oral and amounted to a promise only to permit the title to be conveyed to her to be held for Curran. It is not claimed that she ever gave any written authority to Curran to execute the contract in question. By the terms of the contract she was not only to assume a pecuniary obligation, but she was to execute a note and a trust deed upon the property securing the same. Without written authority from her, Curran's act in signing her name to this contract was not binding upon her under the statute of frauds. The execution by her of the trust deed would be a conveyance of the legal title by her to a trustee, and it required written authority from her to authorize any agent to bind her by a contract to do this. It follows that, as between Cowan and Mrs. Kane, there was a want of mutuality of obligation. She was not bound by the contract. "It is a general rule, well understood, that a contract between parties must be mutual. * * * In *Chitty on Contracts*, supra, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that, if the one party never were bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality." In 1 *Wharton on Con-*

tracts, p. 5, the author says: "The parties to a contract, therefore, must both be bound. * * * Without this reciprocal obligation, no contract can be constituted." "It is a general principle," says Mr. Fry, "that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other party, though its execution in the latter way might in itself be free from difficulty attending its execution in the former." Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Weaver v. Weaver, 109 Ill. 225; Dodge v. Hopkins, 14 Wis. 686; Townsend v. Corning, 23 Wend. 435; Atlee v. Bartholomew, 60 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103. In 1 American and English Encyclopedia of Law (2d Ed.) p. 1020, it is said: "A mere agency to purchase does not imply authority to pledge the credit of the principal." The evidence shows nothing more here than merely an oral authority from Mrs. Kane to Curran to use her name as holder of the title; but, if it be considered as orally authorizing Curran to purchase the property for her, such authority to purchase did not authorize him to pledge her credit by obligating her to execute a note and trust deed for the purchase money.

Third. It is said, however, that, even though a written contract is signed by one party only, it may be binding upon the other party if the latter accepts its terms. It is contended here that Mrs. Kane ratified the contract by subsequently filing a bill for the specific performance of it. But, even if such ratification took place, it could not bind Cowan, the other party to the contract, without his consent. If Curran had no authority at the time he executed the contract to bind Mrs. Kane as her agent, then she was not bound, and, this being so, Cowan was not bound because there was a want of mutuality in the contract; and if Mrs. Kane was not bound by the act of Curran, then the contract was void as to Cowan, and the subsequent act of Mrs. Kane, affirming the authority of Curran acting as her agent, could not validate the contract so as to bind Cowan without his assent. 1 Am. & Eng. Ency. of Law (2d Ed.) p. 1194; Atlee v. Bartholomew, 69 Wis. 43, 33 N. W. 110, 5 Am. St. Rep. 103. In Lowber v. Connit, 36 Wis. 183, speaking of a vendee in the contract for the purchase of land who had not signed the written contract, the court said: "He ought not to be in a position where he can hold the other party to the contract and compel its performance if advantageous to him, and at the same time be at liberty to avoid the contract on his part if disadvantageous. Both parties ought to be bound by the contract, or neither should be bound." Quoting this language in Atlee v. Bartholomew, supra, the Supreme Court of Wisconsin said: "This seems to be a most just rule; and where the plaintiffs were not bound by the contract when it was

entered into by one claiming to be their agent, but who in fact was not such agent and had no power to bind them, they cannot afterwards, when they find the contract is advantageous to them, affirm the contract made on their behalf by such unauthorized person, and compel the other party to perform it on his part." In 1 American and English Encyclopedia of Law (2d Ed.) p. 1194, it is said: "Where a contract sought to be ratified is partly executory, and the party seeking to ratify does so to avail himself of the unauthorized act in order to enforce a claim against a third person, such ratification is held, on the ground of want of mutuality, to be of no effect unless agreed to by such third party." There was no such agreement in the case at bar on the part of Cowan. On the contrary, as soon as he ascertained from Mrs. Kane herself her want of interest in the matter, he gave her notice of a rescission of the contract.

Fourth. It being true, then, that the contract was invalid as between Mrs. Kane and Dr. Cowan, it must necessarily follow that there can be no enforcement of the contract by Curran as against Dr. Cowan. Mrs. Kane was represented to Dr. Cowan to be the purchaser of the property, and he could not be compelled to convey the title to any other person than the person with whom he contracted, under the circumstances of this case. If the contract was not binding when made as between Mrs. Kane and Dr. Cowan, then it was not binding as between Curran and Dr. Cowan, because Mrs. Kane was merely a figurehead, representing Curran. It is true that, where an agent makes a contract in his own name, the unknown principal may sue thereon; but this doctrine cannot be applied where exclusive credit is given to the agent. Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62. The letters of Cowan to Pridmore, and of Pridmore to Cowan, show that Cowan desired to sell his property to a responsible party, and to take from such party paper which would be marketable. Mrs. Kane was not a responsible party, and her paper was not and would not be, under any circumstances, such marketable paper as Cowan desired to have as a part of the purchase money. The sale was made by Cowan, because Mrs. Kane was represented to him as being a responsible builder, who had the means and the intention to improve the property immediately, so that it would be good security for the balance of the purchase money. Indeed, in one of the letters of Pridmore, he urges Cowan to send forward the deed, or the abstract, upon the ground that the parties desire to commence the improvement of the property immediately, and before the cold weather set in. The credit, therefore, in this case was given, not to the undisclosed principal, Curran, if he was an undisclosed principal, but to the proposed holder of the title, Mrs. Kane, who was represented to Cowan to be the purchaser. He was kept in the dark as to the interest of Cur-

ran, and knew nothing about the latter's interest in the matter. In *Kelly v. Thuey*, supra, the contract was for the sale of certain real estate by one Thuey and was in writing, and in it one D. T. Kelly was named as the purchaser and signed the contract, and a part of the purchase price was to be paid by a note of the purchaser, secured by a trust deed on the real estate, but it appeared that the actual purchaser was not D. T. Kelly, but James T. Kelly, and James T. Kelly brought an action for the specific performance of the contract; and in that case it was held that under those circumstances the doctrine of undisclosed principal did not apply, and that James T. Kelly could not compel specific performance of the contract, the court, after referring to the doctrine of undisclosed principal, saying: "Now, in this case, the written contract is full, complete, and formal. It expresses just what the parties thereto intended it should express. The plaintiff had it prepared, and must be taken to have directed it to be made in the name of D. T. Kelly, and not in his own name. In short, the contract is one between Thuey and D. T. Kelly, and was so intended by all the parties. It contains agreements to be performed by both parties. Thuey agreed to sell the land to D. T. Kelly, and agreed to take the latter's notes and deed of trust for the deferred payments. He did not agree to take the notes and deed of trust of the plaintiff for the deferred payments. To admit parol evidence to show that D. T. Kelly acted as an agent of the plaintiff, and then substitute, or add, the plaintiff as a party, is simply to make a new contract for the parties. To say that the admission of such evidence does not alter the written contract, in a case like the one in hand, is a doctrine too subtle and refined to be comprehended. D. T. Kelly contracted for the warranty deed of Thuey, and he is entitled to Thuey's covenant of warranty, and could not be required to take the covenants of some person to whom Thuey should sell the property. * * * So, on the other hand, Thuey contracted for, and is entitled to have, the notes and deed of trust of D. T. Kelly, and he cannot be compelled to take the notes of another person. Whatever the rights may be as between the Kellys, the plaintiff is not a party to the contract with Thuey, and he cannot enforce specific performance of it, and thereby compel Thuey to accept his obligations for the deferred payments." This language is precisely applicable to the case at bar. Curran directed the contract to be made in the name of Teresa Kane, and not in his own name. W. A. Pridmore says in his testimony: "The person who made the arrangement for the purchase was Richard Curran. * * * The name of the purchaser to insert in the contract was given me by Richard Curran. I sent the contract to Dr. Cowan for signature and got it back with his signature. It was signed by the purchaser before I

sent it to him." Curran says in his testimony that Pridmore told him he could sell the property for \$10,000, and furthermore says: "We agreed to take the property. The contract was signed then. He asked me in whose name to put the contract. I told him to put in Teresa Kane's name, for the reason that, if there was any trouble about raising the money, her father, William Gavin, a contractor, would give me all the money I required. * * * We made a contract in Teresa Kane's name, his daughter. I signed her name to the contract. Before doing so I had a conversation with her at her house on the subject." Mrs. Kane, after stating, when she was on the stand that she never gave any authority to Curran to sign her name to the contract, at a subsequent sitting corrected her testimony by saying that she authorized him orally to do so through the telephone, thus differing with him as to the matter, because he says that he had a conversation with her at her house on the subject. As the fact that Curran was the purchaser was not known to Cowan before he sent the notice of rescission in November, and as Mrs. Kane was put forward as the real purchaser, the contract as to Dr. Cowan was between him and Mrs. Kane, and not between him and Curran. He agreed to take Mrs. Kane's note and trust deed upon representations made by Pridmore. He did not agree to take the note and trust deed of Curran. As was said by the Supreme Court of Missouri in the *Kelly Case*, so it may be said here, that to admit parol evidence to show that Mrs. Kane acted as an agent of Curran, and then substitute or add Curran as a party, is simply to make a new contract for the parties. So, also, it may be said here that Cowan contracted for, and is entitled to have, the note and trust deed of Mrs. Kane, and cannot be compelled to take the note of any other person; and, whatever the rights may be as between Mrs. Kane and Curran, Cowan is not a party to the contract with Curran, and Curran cannot enforce a specific performance of it and thereby compel Cowan to accept his obligation for the deferred payment. It is true that the decree in this case requires Cowan to make a deed upon receiving a note and trust deed executed by Mrs. Kane for Curran. But this feature of the decree cannot be sustained, because the contract between Mrs. Kane and Cowan has already been shown to have been a void contract for want of mutuality and for want of the signature thereto of Mrs. Kane. In *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, the Supreme Court of Massachusetts said: "A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent." Again, in *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93, it was said: "It is true that an agent may sell the property of his principal without disclosing the fact that he acts as an agent, or that the property is not his own,

and the principal may maintain an action in his own name to recover the price. If the purchaser says nothing on the subject, he is liable to the unknown principal. * * * But, on the other hand, every man has a right to elect what parties he will deal with." So, in the case at bar, we think that under the circumstances Dr. Cowan could not be forced to execute a contract with Curran, when he never made any agreement with Curran, nor knew anything about Curran as a purchaser or proposed purchaser of his property.

Fifth. It is claimed, however, on the part of the appellees, that Cowan is to be regarded as having notice or knowledge of the fact that Curran was the real purchaser of the property. The basis of this contention is that Pridmore was the agent of Cowan in making the sale, and that Pridmore knew that Curran was the real purchaser of the property, and that Cowan was bound by the notice or knowledge which his alleged agent, Pridmore, had. As a corollary from this position, the further position is taken that, inasmuch as Cowan is affected with the notice which his agent had, the acts of ratification already referred to were binding upon him. It is a general rule that notice to an agent, while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal. *Mechem on Agency*, § 718; *Burton v. Perry*, 146 Ill. 71, 84 N. E. 60; *Snyder v. Partridge*, 138 Ill. 173, 29 N. E. 851, 82 Am. St. Rep. 130. One of the main grounds upon which this rule rests is that it is the duty of the agent to disclose to his principal all notice or knowledge which he may possess, and which is necessary for the principal's protection and guidance, and that the law presumes the agent to have performed this duty. *Mechem on Agency*, § 719. Here Pridmore, assuming that he was the agent exclusively of Cowan, had knowledge or notice that Curran, and not Mrs. Kane, was the real purchaser of the property. And the reason why Cowan is said to be affected with such notice or knowledge is the presumption that Pridmore, if a faithful agent, would communicate the notice or knowledge which he had to his alleged principal, Dr. Cowan. It certainly was his duty, if he was exclusively the agent of Cowan, to tell Cowan that Curran was the purchaser of the property, because the apparent purchaser, Mrs. Kane, was irresponsible and unable to meet the obligations of the contract. But he did not perform his duty in this respect. On the contrary, he sedulously concealed from Cowan the fact that Curran was interested in the purchase. The rule, however, that notice to the agent, under the circumstances stated, is notice to the principal, has certain well-defined exceptions. One of these exceptions is where the agent's relations to the subject-matter render it

certain that he will not disclose the information to his principal; and another exception is where the person claiming the benefit of the notice colludes with the agent to deceive or defraud the principal. *Mechem on Agency*, § 721. The presumption that the agent communicates the knowledge which he has to the principal does not prevail where it is certainly to be expected that the agent will not perform this duty, "as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." *Mechem on Agency*, § 723; *Reinhard on Agency*, §§ 356, 357; *Frenkel v. Hudson*, 82 Ala. 159, 2 South. 758, 60 Am. Rep. 736. In *Reinhard on Agency*, § 356, supra, it is said: "If, however, the knowledge was such * * * as it was reasonable to presume he [the agent] would not disclose, * * * the latter [the principal] will not be affected by the agent's knowledge, though it was received by the agent in the course of the agency." In *Frenkel v. Hudson*, supra, it was said: "The general rule is that notice of a fact, acquired by an agent while transacting the business of his principal, operates constructively as notice to the principal. * * * It is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule for two reasons: First, that he will very likely, in such case, act for himself, rather than for his principal; and, secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject."

After a careful examination of all the evidence, and particularly of the correspondence between Pridmore and Cowan, as shown by the record, we are unable to resist the conclusion that Pridmore was either a broker, acting for both vendor and vendee, Cowan and Curran, or else was swayed by his interest in favor of Curran. It was for the interest of Curran that he should not be put forward as the purchaser, but that the real purchaser should be concealed under the name of some third person. The proof shows that a large number of judgments had been rendered against Curran and that creditors were pursuing him with suits. It was, therefore, unsafe for him to hold property in his own name. He admits that he was not himself able to furnish the money to buy this property, but expected to obtain it from one Gavin, who was his uncle, and that Gavin,

who was the father of Mrs. Kane, would be more inclined to let him have the money if the title was in Mrs. Kane, and not in himself. Whether his object in concealing his interest in the matter proceeded from a desire to avoid trouble with his creditors, or was due to the reason assigned by him for it, it was a matter which concerned him; that is to say, it was for the interest of Curran that the fact of his being the purchaser should be concealed. Pridmore knew that Curran was the purchaser, and was aware of the fact that Curran desired to cover up his own connection with the matter under the name of his cousin, Mrs. Kane. Pridmore helped Curran to carry out this scheme by accepting from him the name of the apparent purchaser, Mrs. Kane, and forwarding her name to Cowan. He was thereby acting in the interest of Curran, and not of Cowan. It was his duty, if he was the exclusive agent of Cowan, to tell Cowan that Curran was the purchaser. But, instead of performing that duty, he lent himself to the plan of Curran, which was to conceal his own interest under the name of another person. He was, therefore, acting in the interest, to that extent, of the purchaser of the property, and not in the interest of the seller of the property. Again, the testimony of Curran shows that, as soon as the contract was signed on the 24th of August, 1903, Curran paid to Pridmore \$500 earnest money in a check drawn to the order of Pridmore. This check for \$500 was cashed, and Pridmore had and still has the \$500, and never paid a cent of it to Cowan. He was to receive, if he carried out the sale, \$250, his commission of 2½ per cent. on \$10,000, and by this payment of Curran to him he had in his hands the money out of which he could take his commission of \$250. He says that he received this money when the contract came back signed from Dr. Cowan. Cowan had no information of this payment to Pridmore, except such as was obtained from the recital in the contract to the following effect: "Said purchaser has paid \$500 as earnest money." The contract contains this provision: "This contract and earnest money shall be held by W. A. Pridmore for the mutual benefit of the parties hereto." That is to say, Pridmore was to hold the \$500 and was to hold the contract for the mutual benefit of both Cowan and Kane, or Curran. Instead of doing this, he recorded the contract in the recorder's office of Cook county on August 28, 1903, four days after it was executed, and two days after he received it from Cowan, and he so recorded it at the request of Curran. Why should he have recorded the contract at the request of Curran, if he was not acting in the interest of Curran? He was thereby, in case anything should happen afterwards to prevent an execution of the contract, beclouding Cowan's title. The very contract, which he sent to Cowan, provided that, in case the title upon examination was

found materially defective, the contract should become inoperative, and yet, before any examination was had of the title, he put the contract upon record at the request of the purchaser, notwithstanding the fact that, by the terms of the agreement he sent to Cowan, he was to hold it "for the mutual benefit of the parties."

In nearly all of the letters written by Pridmore to Dr. Cowan, he speaks of the buyer in such a way as to indicate that he was rather a representative of the buyer than of the seller. In the letters he makes use of the expressions, "my buyer," "my purchaser," "my party," referring to Curran, or Mrs. Kane. There was delay in obtaining an abstract of title. The correspondence shows that Cowan had had an abstract of title given to him when he purchased the property, but that this abstract was in the hands of other parties. It could not be obtained from these parties, or was lost, so that he had to procure a new abstract, or a certified copy of an abstract. Cowan admits that this created a delay, but that it was unintentional on his part, as he could not obtain the abstract, which Pridmore kept writing for. In one of his letters to Cowan Pridmore says: "I had my parties waiting for you and received your letter. * * * My purchaser wants to commence building and is very much annoyed at the delay." This was not true. There was no purchaser who wanted to commence building. In a letter written by Pridmore to Cowan, after having written several letters urging Cowan to execute a warranty deed to the property, which Pridmore had sent to him, he says: "The Kanes called upon me to-day, and they say their plans are out to build on the corner of Sixty-First street and Ellis avenue, and they are waiting for you to close. They insist on an immediate delivery of your deed, as they do not want to get into severe cold weather to start the building. They have gone to considerable expense in getting ready, and are impatient at your delay. I informed them that you would close soon, but they are mistrusting me on account of my repeated promise to them to close. Can't you make a definite promise, so that I can assure them of an early delivery of your deed? I informed them to-day that I would try and get you to close at once." It will be noted that in this letter Pridmore states to Cowan as a fact: "The Kanes called upon me to-day." This language was calculated to make the impression upon Cowan that Mrs. Kane and her husband had called upon him. In his testimony, however, he says: "I never saw Mrs. Kane until after this bill was filed." His own testimony thus contradicts his statement in his letter, and shows its falsity. It would be impossible to point out all the expressions in this correspondence which indicate that the leaning of Pridmore was

toward the purchaser in this matter rather than toward the vendor. At any rate, the letters sufficiently show that the interest of Pridmore lay in closing the matter favorably to Curran, so as to prevent the operation of the rule that notice to him, as agent of Cowan, was notice to Cowan.

Sixth. Even if it be regarded as a mistaken view that Pridmore was acting more as the agent of Curran than of Cowan, yet the most favorable view of the matter is that he was the agent or broker of both parties. The rule is that "when a professional land agent acts as agent for both the seller and the buyer, and that is known to them, the law exacts the most perfect good faith, honesty, and fairness on his part, and will not adjudge the specific performance of a contract thus made, unless it has been entered into with perfect fairness and without misapprehension or misrepresentation." *Morgan v. Hardy*, 16 Neb. 427, 20 N. W. 337; 1 Am. & Eng. Ency. of Law (2d Ed.) p. 1075, and notes; *Fish v. Leser*, 69 Ill. 394. It cannot be said that the proof shows the most perfect fairness on the part of the broker here, and therefore his knowledge cannot be imputed to Cowan; the latter having had no actual notice or knowledge whatever upon the subject.

Seventh. Courts of equity will not always enforce a specific performance of a contract. Such applications are addressed to the sound legal discretion of the court, and the court will be governed to a great extent by the facts and merits of each case as it is presented. Specific performance will not be decreed, unless the agreement has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression. *Fish v. Leser*, 69 Ill. 394, and cases there referred to. In *Skeen v. Patterson*, 180 Ill. 289, 294, 54 N. E. 196, 198, this court said: "The law applicable to such a case is clear and well settled. Whenever there is any unfairness used in the obtaining of a contract for the sale of land, or where an agreement for such a sale has been entered into through misrepresentation by one of the parties or misapprehension on the part of the other party, equity will not enforce a specific performance. *Taylor v. Merrill*, 55 Ill. 52. The rule is that a decree for specific performance will not be entered, unless the agreement has been made with perfect fairness, and without misapprehension, misrepresentation, or oppression. *Hatch v. Kizer*, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258." In view of the principles thus announced, it cannot be said here that this agreement was entered into by Cowan without misapprehension on his part and misrepresentation on the part of the purchaser or his representative.

Hence the case does not call for a specific performance of the contract by a court of equity. The facts of the case do not appeal to the sound legal discretion of a court of chancery in favor of the specific performance of the contract as between Curran and the appellant.

Eighth. The decree in this case, which is appealed from, was entered on May 3, 1905, and the appeal was perfected by the filing of the appeal bond on May 12, 1905. This appeal operated as a supersedeas, and its effect was to stay further proceedings until it was dismissed. The appeal having been thus perfected, the jurisdiction of this court over the subject-matter and the parties attached, and the trial court had no power to render any further decision affecting the rights of the parties in the cause until it should be remanded. When an appeal is perfected, the jurisdiction and control of the court below cease, and the appeal becomes a stay of all proceedings to enforce the execution of the judgment or decree. 1 Am. & Eng. Ency. of Law (2d Ed.) p. 623; *Oakes v. Williams*, 107 Ill. 154; *Shirk v. Gravel Road Co.* 110 Ill. 661; 2 Ency. of Pl. & Pr. p. 328; *Skinner v. Bland*, 87 N. C. 168; *Isler v. Brown*, 69 N. C. 125; *Freeman v. Henderson*, 5 Cold. 647. Consequently the proceedings in the lower court in June, 1905, after the present appeal was perfected by the filing of a bond, can have no effect upon the decision of this cause. At a session of the court in June, 1905, the appellee, Curran, introduced certain evidence for the purpose of showing that the judgments against him, which had been introduced in evidence, had been satisfied. The proof tends to show that these judgments were satisfied after the appeal was perfected in this case by the filing of a bond on May 12, 1905. The supplemental abstract, which brings this matter before this court, cannot be considered by the court, because such evidence was presented to the trial court after the latter court had lost jurisdiction over the cause. The case, as presented to the trial court on the second hearing, showed the existence of these judgments against the appellee, Curran, and the fact that, after the case was appealed to this court, he paid off some or all of these judgments, can have no influence upon the present decision.

For the reasons above stated, we are of the opinion that the decree of the superior court of Cook county, in dismissing the original bill and granting the relief asked by the cross-bill, is erroneous. Accordingly the decree of the superior court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(216 Ill. 624)

ODIN COAL CO. v. TADLOCK.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—PRESERVATION OF ERRORS—MOTION FOR NEW TRIAL—NECESSITY OF SPECIFYING ERROR.

Error in refusing to direct a verdict and to grant requested instructions is waived, when not specified in the written motion for a new trial as a ground thereof.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 1697, 1743, 1753.]

2. SAME—HARMLESS ERROR—INSTRUCTIONS.

In an action for injuries to a servant, a charge making it the absolute duty of the master to furnish reasonably safe appliances was not prejudicial to defendant, where there was no dispute about facts and the jury must have inferred from the facts that the master failed to "exercise reasonable care" to furnish reasonably safe appliances.

3. MASTER AND SERVANT—VICE PRINCIPALS.

A machine boss, whose particular duty it is to repair defects in the machinery, is a vice principal of his employer for the performance of such duty, and notice to him of a defect therein is notice to the employer.

4. SAME—DEFECTIVE APPLIANCES—KNOWLEDGE OF SERVANT—PROMISE TO REPAIR.

Where a servant had received a promise that a defective truck would be immediately repaired, and supposed, when he was injured,—it being then dark—that it had been repaired, it was not necessary for him to prove, in order to recover for his injuries, that he did not know, and had no equal means with his master of knowing, of the defect.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 642.]

5. SAME.

A servant may rely on a promise to repair a defect, made by the master to other persons, who communicated the same to the servant.

Appeal from Appellate Court, Fourth District.

Action by Elmer Tadlock against the Odin Coal Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. **Affirmed.**

Louden & Crow, for appellant. Frank F. Noleman and W. F. Bundy, for appellee.

CARTWRIGHT, C. J. The Appellate Court for the Fourth District affirmed a judgment recovered by appellee in the circuit court of Marion county for personal injuries received by him while engaged in the service of appellant as a mule driver in its coal mine, which were alleged to have been caused by defective appliances upon a truck furnished by appellant for his use. The case has been brought to this court by appeal.

In the argument of counsel for appellant it is contended that the circuit court erred in refusing to direct a verdict of not guilty at the close of the evidence, as requested by defendant, and also that the court erred in refusing to give to the jury instruction numbered 4 asked by the defendant; but neither of these questions can be considered, for the reason that they were not among the grounds stated in defendant's motion

for a new trial. If there was error in refusing to direct a verdict or give the instruction, it was proper ground for the motion for a new trial. Defendant filed its written motion, specifying in detail the errors which it alleged occurred in the course of the trial, and the refusal to direct a verdict was not mentioned. The fourth ground of the motion was that the court improperly refused to give instructions numbered 1, 2, and 3 asked by the defendant; but the refusal to give instruction numbered 4 was not alleged to be erroneous. The circuit court, therefore, in overruling the motion for a new trial, did not pass on those questions, and defendant waived its right to assign error as to either. *West Chicago Street Railroad Co. v. Krueger*, 168 Ill. 586, 48 N. E. 442.

Plaintiff was injured while hauling from one part of the mine to another a machine weighing about 3,000 pounds, which was used for undercutting coal. For the purpose of moving the machine it was drawn upon a truck by a windlass and chain, and the truck was provided with two ratchet wheels, with dogs, to prevent the chain from unwinding and allowing the machine to slide off the truck. The evidence for plaintiff tended to show that neither dog was fit or sufficient, and the fact was undisputed that the upper ratchet wheel, and the dog which held it in place, had been out of repair and unfit for use for four or five days. The machine boss of the defendant, whose duty it was to make repairs, had been notified of the defective condition of the appliances, and had tried to file the cogs on the ratchet wheel, but did not succeed in making the wheel fit for use. He had promised to have it fixed, and there had been ample time to comply with the promise. The making of the repairs was a simple thing, which could have been attended to at any blacksmith or repair shop without delay. For several days the machine men had used a machine bit in place of the dog to load the machine, and on this occasion the upper dog was taken out and carried to the repair shop. The machine boss knew of the condition of the appliances, and knew that injury was liable to result from such condition. Plaintiff knew of the defective condition of the appliances, and two or three days before the accident complained to the machine runners of such condition, and said he was not going to move the machine any more unless it was fixed. One of the machine runners told him the machine boss had promised to fix it, and that was all he could do. When the machine boss failed to make the machine safe by filing the cogs, he said that he would get it fixed as soon as he could, and would get a dog made and come the next day and fix it. There was a palpable omission of duty on the part of the machine boss. When the plaintiff was called to haul the machine, it was already loaded, and the place where it stood was dark. The plaintiff did not make

any inspection of the truck, but testified that he supposed the promise of the machine boss had been kept and the repair made. On the trip the machine slid off the truck and injured plaintiff.

It is contended that the court erred in giving to the jury the first instruction asked by the plaintiff, which informed the jury that if the defendant neglected or failed to furnish the plaintiff with reasonably safe appliances with which to work, and the other conditions of fact stated in the instruction existed, they should find the defendant guilty. The instruction required the defendant, as an absolute duty, to furnish reasonably safe appliances, and made it an insurer of the safety of the machine. It was inaccurate in its statement of the law, which only required the defendant to exercise reasonable care to furnish the plaintiff with reasonably safe appliances. But, while the instruction was not a correct statement of the law, there was no dispute about the facts, and the jury could not have come to any other conclusion than that the defendant neglected to exercise reasonable care to furnish plaintiff with reasonably safe appliances. If there had been any room for controversy on that subject, the instruction would have been harmful; but, as there was none, the misstatement of the law could have had no ill effect.

It is also urged that the instruction was bad because it authorized the jury to find for the plaintiff if he did not know of the defective condition of the appliances when he attempted to move the machine, and omitted the element of means of knowledge. The twelfth instruction given at the request of defendant informed the jury that if the plaintiff knew, or had reason to know, or by the exercise of ordinary care might have known, that the machine and ratchet wheel were out of repair, and with such knowledge continued the work without calling defendant's attention to the same, he assumed the risk and could not recover. That instruction, when read in connection with the one complained of, fairly stated the law to the jury, when it is considered that the place where the machine stood was dark, that the plaintiff had no general duty of inspection, and there had been ample time for the simple repairs to have been made.

It is also contended that instruction numbered 2 given at the instance of plaintiff was bad because it told the jury that notice to William Hawley was notice to the defendant, if it was the duty of Hawley to repair the mining machinery and trucks of defendant when they became out of repair. Hawley was the machine boss in the employ of the defendant, and it was his duty to repair the trucks. Notice was given to him, and he attempted to fix the appliances, and, failing, promised to make the repairs. The instruction correctly stated the law. A

corporation acts by its agents, and notice to an agent having charge of a particular department is notice to the corporation. Hawley was charged with the duty to repair the machinery and appliances, and it was an absolute personal duty of the defendant for the performance of which it was responsible. Hawley was a vice principal, who is one who performs personal duties of the master which cannot be delegated, as distinguished from a foreman or superior servant. *Mobile & Ohio Railroad Co. v. Godfrey*, 155 Ill. 78, 39 N. E. 590; *Baier v. Selke*, 211 Ill. 512, 71 N. E. 1074, 103 Am. St. Rep. 208; 12 Am. & Eng. Ency. of Law (2d Ed.) 948. The defendant was directly responsible for the performance of the personal duty through Hawley, and there was no error in so instructing the jury.

It is further insisted that the court erred in refusing instruction numbered 3 asked by the defendant. That instruction stated that the plaintiff could not recover upon a failure to prove either one of several propositions, one of which was that he did not know of the defective condition of the appliances and had no equal means of knowledge with the defendant. Instructions should be applicable to the case on trial, and, while this instruction would have been correct in some cases, the rule of law could not be applied to this case. The plaintiff admitted previous knowledge of the defect, and introduced evidence of the promise of the machine boss to make the repairs, together with evidence that, when he hitched to the truck, he supposed the repairs had been made. The instruction ignored the promise to repair, which there was evidence tending to prove, and assumed to state as a rule of law applicable to the case that plaintiff could not recover unless he proved that he did not know of the defect and did not have equal means of knowledge with the defendant.

There was no error in admitting evidence of the promise made by Hawley to repair the appliances. The objection made to the evidence is that the promise was made to the machine runners who operated the machine, and was communicated to the plaintiff by them, instead of being made to the plaintiff direct. It was proper to prove that the promise was made through other servants of the defendant, who notified the machine boss of the defect. The promise to repair was made to the machine runners, and when the plaintiff complained of the condition of the appliances, and said that he was not going to move the machine any more unless it was fixed, they told him of the promise and he relied upon it. It was not necessary for him to go to Hawley and receive the promise personally.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(216 Ill. 639.)

DONOVAN v. PURTELL.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MONEY RECEIVED—ACTIONS—EVIDENCE—SUFFICIENCY.

In assumpsit, evidence showing that defendant received plaintiff's money and used it for his private purposes, and covered up such use by delivering to plaintiff worthless securities in a corporation organized for the transaction of his own private business and which was entirely under his own control, justified the court in refusing to direct a judgment for defendant.

2. CORPORATIONS—OFFICERS—PERSONAL LIABILITY—FRAUDULENT ACT.

An officer of a corporation was personally liable for loss occasioned to a creditor by the act of the officer in transferring worthless securities to the corporation in exchange for the creditor's money, which the officer received and used for his own private purposes.

3. STATUTE OF FRAUDS—COLLATERAL PROMISES.

Where an officer of a corporation used the corporation as a cloak for the transaction of his own private business, and personally received and used money for which he gave worthless securities of the corporation, his oral promise to pay the debt evidenced by such securities is not a promise to pay the debt of a third person, within the statute of frauds.

Appeal from Appellate Court, Fourth District.

Action by Julia Purtell against Joseph T. Donovan. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in assumpsit, begun by appellee against appellant on November 24, 1908, by attachment in the circuit court of St. Clair county. The writ of attachment was levied on appellant's interest in certain land situated in that county. Before the trial, to wit, on March 23, 1904, by agreement of the parties, an order was entered releasing the real estate levied upon under the writ of attachment upon the execution and filing by appellant of an indemnity bond. The declaration consists of the common counts for money lent by appellee to defendant at his request, for money paid out and expended by appellee for the use of appellant at his request, for money received by appellant for the use of appellee, for money for interest on divers sums of money forborne by appellee to appellant at his request, etc. A bill of particulars was filed, which, besides the items for money loaned and due in 1901, contains items for money lent by appellee to appellant in the name of the Fidelity Realty Company in 1901, and for money lent to appellant by appellee and promised to be paid by him in the name of the J. T. Donovan Real Estate Company in 1901. The general issue was filed to the declaration. A trial was had before the court and jury, resulting in a verdict in favor of appellee against appellant for the sum of \$1,430, from which the plaintiff remitted the sum of \$71.80, making the amount of the verdict \$1,358.20, which remittitur was approved by the court. Motion for new trial was over-

ruled, and judgment rendered on the verdict in favor of appellee against appellant for \$1,358.20 and costs. An appeal was taken to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance. Upon the trial of the cause, at the close of the evidence of appellee, plaintiff below, plaintiff's counsel tendered to the defendant the notes and trust deed, dated January 19, 1901, hereinafter referred to, and also the written guaranty hereinafter described, which counsel for the defendant refused to accept. The notes, trust deed, and guaranty were then tendered into the care of the court for the use of the appellant, the defendant below. At the close of the appellee's evidence the appellant asked the court to give a written instruction to the jury to find the issues for the defendant below, which instruction the court refused, and such refusal was excepted to. At the close of all the evidence the defendant below again asked of the court a written instruction to the jury to find the issues for the defendant, which instruction was refused, and such refusal was excepted to.

The facts of this case, as stated by the Appellate Court in their opinion, are as follows:

"Appellee for many years worked for her living in St. Louis, Mo., doing housework. Some time prior to this suit, having accumulated the sum of \$1,200, she placed it at interest on real estate security, and the note representing the loan came due in January, 1901. At that time appellant was engaged in the real estate and loan business in the city of St. Louis. He was president of the J. T. Donovan Real Estate Company, of which his son, Joseph M. Donovan, was vice president. The latter was also president of the Fidelity Realty Company, which did business in the same room with the other company, and in which appellant was likewise interested. Shortly after her note became due, appellee took it, and the trust deed by which it was secured, to appellant's place of business, for the purpose of having him collect the money due and reinvest it for her; but at the office she made arrangements to that end with Joseph M. Donovan, whom, she testified, she considered a clerk. In June, 1901, she left the city and did not return until the following October. In the meantime she made arrangements with a friend, Miss Slaterly, to attend to her business. During her absence the note owned by her was collected, and a new one for a like amount secured by deed of trust was given Miss Slaterly, who afterwards turned the papers over to appellee. The new note was made by the Fidelity Realty Company, by J. M. Donovan, its president, and was payable to the order of George M. Cooper, a clerk in appellant's office, who indorsed the same without recourse. It was secured by a deed of trust upon a 25-foot lot on San Francisco avenue in the city of St. Louis,

made by the Fidelity Realty Company to appellant, as trustee. The note and trust deed were dated January 19, 1901, but were not delivered to Miss Slaterly until the following August. With these papers there was also delivered to Miss Slaterly a written guaranty, executed by J. T. Donovan Real Estate Company, by J. T. Donovan, its president, which, after reciting the assignment to appellee of the note and securities in question, proceeded as follows: 'And whereas, there is being erected on said lot of ground certain improvements, which may not yet be fully completed and paid for: Now, therefore, in consideration of said sum of \$1,200, we hereby promise and agree to cause said improvements to be fully completed and paid for, and to hold the said Miss Julia Purtell harmless from all loss or damage on account of mechanics' liens, or on account of the failure of the said Fidelity Realty Company to fully complete said improvements, and to pay for the same. For the consideration aforesaid, we further obligate ourselves to hold Miss Julia Purtell and her assigns harmless from all loss on account of said investment, principal or interest.' The guaranty also contains an undertaking on the part of the maker to pay the interest notes in case of default in the payment thereof for a longer period than 30 days, and to purchase the principal at its face value, with interest added, within 6 months after default in the payment of the same. Some time after appellee received the last-named papers she ascertained that the lot described in the deed of trust was vacant, that no improvements were being made, and that it was worth only about \$150. She thereupon called upon J. M. Donovan, the president of the Fidelity Realty Company, who offered to give her in exchange other securities, which, on examination, she found to be entirely inadequate to properly secure the debt. She then made a similar demand of appellant, and he offered her to substitute some other piece of property for that which appellee had; but, upon an examination of the properties named, appellee refused to accept any of them on the ground that the security was wholly insufficient. While negotiations were pending, two of the interest notes were paid by appellant. Appellee testified that, when she asked appellant what security he could give on said notes, he said he could not give her money, but offered to pay her in 18 months, and told her she would not be at any loss; but this appellant denies. Afterwards negotiations ceased, and this suit was brought. Upon the trial the appellant * * * introduced the evidence of himself and Joseph M. Donovan. * * * These witnesses were corroborated to some extent by the securities held by appellee, purporting to have been executed by the two corporations above named. On the contrary, appellee * * * testified that she dealt with appellant on account of the con-

fidence she had in him; that his boys, several of whom were in the office, acted just as other clerks. She said: 'I paid all the confidence to Mr. Donovan I could. I would not pay as much to my brothers as I paid to Mr. Donovan, because he was a Catholic and a member of my church and a good living man, as I supposed.' The manner of transacting business at the Donovan office was fully explained by Lydia M. Cooper, who was appellant's stenographer and typewriter from October, 1897, to April, 1903. She testified that the office was a long, narrow room, about 20 feet wide and 60 to 75 feet long; that there was a partition in the front, like a banking counter, and in the rear there was a place about 10 feet square, where a number of different companies, known as the J. T. Donovan Real Estate Company, the Fidelity Realty Company, the Cunliff Realty Company, the Fenimore Realty Company, the Cappa Realty Company, and the McKinley Company, had headquarters; that the different corporations had different presidents, but that appellant was really the man who ran the whole thing; that there were three sons of appellant in the office, and several other clerks; that J. T. Donovan controlled the business of the Fidelity Realty Company; that there was a bookkeeper and cashier in the office; that over the door there was the sign, 'J. T. Donovan Real Estate Company'; that J. M. Donovan 'never made any transaction without J. T. Donovan sanctioned it'; that the Fidelity Realty Company did not have any financial standing, but was simply gotten up to keep the property out of judgment, so that the property could be sold and transferred without the judgment being paid off; that she had heard appellant say so himself; that he said there were judgments against these different companies, and he would get up another company and put the property in the name of the new company, in order that it could be transferred, so that there would be no judgment against it; that he used the property of the companies indiscriminately; that he would settle the debts of the J. T. Donovan Real Estate Company with those properties, no matter to which company they belonged; that the stock of the J. T. Donovan Real Estate Company was all held by members of the family; that Mr. Donovan got the property named in the deed of trust in question for \$325, and put a \$1,200 loan on it. Joseph M. Donovan, when placed upon the witness stand, denied some of the statements made by Miss Cooper; but appellant, when placed upon the stand, did not see fit to deny any of them."

Louden & Crow, for appellant. James M. Dill and W. F. Smith, for appellee.

MAGRUDER, J. (after stating the facts). The salient facts of this case are that the appellee had a note and trust deed for \$1,200 against a man named Hayden; that they be-

came due in January, 1901, and she took them to the office of the appellant, with directions to him, or to his son in the same office with him, to collect them for her and reinvest the money; that the money was collected by appellant, or some one of his sons in the office with him, either in his own name or in the name of one of the corporations doing business in his office, and which he controlled and managed. The evidence tends to show that the \$1,200 belonging to appellee went into appellant's hands, or into the hands of some one or more of his sons or clerks. Appellee's money, therefore, was had and received by the appellant. Appellant turned over to Miss Slaterly, appellee's agent and friend acting for her while she was out of the city, a note for \$1,200, payable in three years, together with certain interest notes, and a trust deed securing the same upon a 25-foot lot in St. Louis. These notes and trust deed bore date January 19, 1901. The evidence tends strongly to show that at that time the lot was not worth more than from \$125 to \$150, or from \$5 to \$6 per front foot. The principal note for \$1,200, and the interest notes, dated January 19, 1901, were signed by the Fidelity Realty Company, by J. M. Donovan, president. They were payable to the order of George N. Cooper, a clerk in appellant's office, who indorsed them without recourse. The trust deed securing them was made to appellant, as trustee. The evidence tends to show that appellant controlled and managed the Fidelity Realty Company, and, the trust deed being made to himself as trustee and the notes being made to the order of his clerk, the conclusion is almost irresistible, in the light of the facts set forth in the statement preceding this opinion, that the papers thus prepared were really the papers of the appellant, though nominally those of a corporation in his office and under his control.

The written deed of guaranty, dated January 22, 1901, was signed by the J. T. Donovan Real Estate Company, by J. T. Donovan, president. It begins as follows: "Witnesseth, that for and in consideration of the sum of \$1,200, paid to us by Miss Julia Purtell, we have assigned and transferred to her certain notes of Fidelity Realty Company, dated January 19, 1901, secured by a deed of trust," etc. Appellant signed this indenture, and in it recites that the sum of \$1,200, belonging to Miss Purtell, was paid to "us," meaning thereby the J. T. Donovan Real Estate Company, of which he was president. In this guaranty he also recites that "we have assigned and transferred to her certain notes," etc. The notes were indorsed without recourse by his clerk, Cooper; but, in view of the recital thus quoted, Cooper merely acted for the appellant or his company, the J. T. Donovan Real Estate Company. Miss Cooper swears that she drew all the deeds of trust and notes and guaranties that were executed while she was in

appellant's employment from October 15, 1897, to April 7, 1903. She also swears that she drew up these notes and trust deed and the deed of guaranty, and that they were in her handwriting. She says that she drew them up at the direction of the appellant; that is to say, the appellant directed her to draw the notes to be signed by the Fidelity Realty Company, payable to the order of his clerk Cooper, and also the trust deed to be executed to himself, as trustee. She says that she did not deliver those papers, but merely turned them over to be signed. It is quite evident that these notes and this trust deed represented no consideration whatever; that is to say, there was no note for \$1,200, owned by Cooper, but the notes and the trust deed were merely drawn up to be given to appellee in return for her \$1,200. The transaction did not by any means represent a purchase of securities amounting to \$1,200 from Cooper, the payee in the note. The fact that they were drawn up by Miss Cooper, under the direction of the appellant and at his dictation, shows that the transaction was under his control and management. The written guaranty stated that certain improvements were then in course of erection upon the property described in the trust deed of January 19, 1901; but the proof shows conclusively that this statement was false. No improvements were then in course of erection upon the premises, nor were any ever made upon the premises. The evidence also tends to show that there were judgments then existing against the Fidelity Realty Company, and that it had no financial standing whatever, but that it was, as is said by one of the witnesses, "gotten up to keep the property out of judgment." The proof shows that none of these corporations, controlled by appellant, paid their debts. One of the witnesses swears that, "when any adjustment was to be made, Mr. Donovan would use the property of any of these companies to make it, indiscriminately. He would settle the debts of the J. T. Donovan Real Estate Company with these properties, no matter to which company it [they] belonged."

When the appellee discovered that the notes and trust deed which had been turned over to her were worthless, the appellant began to offer her other property in place of that described in the trust deed, and promised that he would pay her in 18 months, and told her that she should lose nothing. If the debt was not his, but was really and bona fide the debt of the Fidelity Realty Company, it is difficult to understand why he should thus seek to substitute other securities for those held by the appellee and promise to pay the indebtedness himself. The promise to pay the indebtedness was made as though the debt was his own, and not as though it was the indebtedness of a third person, to wit, the Fidelity Realty Company. The evidence tends to show that, al-

though the appellant and his sons turned over to appellee these worthless securities in exchange for her money, yet that appellant himself received the money and used it for his own private purposes, and sought to escape personal liability by covering up the transaction in the name of a corporation, which was entirely under his own control. This being so, the trial court committed no error in refusing to instruct the jury to find the issues for the defendant. It would have been improper to give such instruction, in view of the fact that the evidence tended to prove that the appellant received the money and declined to pay it over. This suit is not brought upon the notes executed by the Fidelity Realty Company. Those notes and the trust deed securing them were tendered back to the appellant upon the trial, and, upon his refusal to receive them, placed in the custody of the court for the use and benefit of appellee. The object of the suit is to recover, under the common counts, the money actually received by the appellant. The instructions given by the court to the jury on behalf of the appellee submitted to the jury the question of fact whether the affairs of the J. T. Donovan Real Estate Company and the Fidelity Realty Company were controlled by J. T. Donovan for the transaction of his private business, and whether or not he personally controlled both of these corporations when they received the appellee's money, and whether or not her money was received for appellant's own private individual uses and purposes. The instructions also left it to the jury to find whether or not the appellant was conducting his business in the name of the J. T. Donovan Real Estate Company, and through that company received appellee's money and appropriated the same to his own use, and gave her, in payment of it, the worthless securities above referred to. The judgments of the lower courts, finding for the appellee, settle these questions of fact, so far as we are concerned, against the appellant.

Appellant was president of the J. T. Donovan Real Estate Company, and his son, Joseph M. Donovan, was the vice president of that company, and Joseph M. Donovan, the appellant's son, was the president of the Fidelity Realty Company. Both of these concerns were controlled, managed, and dominated by the appellant, J. T. Donovan. The officer or controlling manager of a corporation cannot use it and its name for the transaction of his own private business and to escape personal liability on his part. The theory upon which the appellant defends this suit is that the liability to appellee was not his liability, but that of the corporation known as the Fidelity Realty Company. In *Hoffman v. Reichert*, 147 Ill. 274, 35 N. E. 527, 37 Am. St. Rep. 219, it was held that the directors of a private corporation have

no right under any circumstances to use their official position for their own individual benefit. In the case of *Bank v. Trebeln Co.*, 59 Ohio St. 316, 52 N. E. 834, it was said: "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members—and have repudiated it in all cases where it has been insisted on as a protection to fraud or any other illegal transaction." In *Cook on Corporations* (5th Ed., § 663), it is said: "A corporation is often organized to act as a 'cloak' for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud." See, also, *Lachman v. Martin*, 139 Ill. 450, 28 N. E. 795. In 1 *Morse on Banks and Banking* (4th Ed.) § 123, it is said: "If bank directors do not manage the affairs and business of the bank according to the directions of the charter and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders or creditors, or both. * * * They may be held to account to an injured party in a court of chancery, or they, or any of their number, who shared in the wrongdoing, may be sued at law for damages." So, in the case at bar, appellant, as an officer of one or more of the corporations here involved, was guilty of such a fraud in transferring to appellee these worthless securities in payment of the money which he owed her that he can be held liable personally for the loss inflicted upon her. Even if the corporation be regarded as the real debtor, and the appellant as only its agent, yet, inasmuch as he was guilty of the fraud perpetrated upon appellee, the law will hold him liable. In 1 *American and English Encyclopedia of Law* (2d Ed.) p. 1135, it is said: "An agent will be held personally liable to third persons for all damages sustained by them in consequence of any fraudulent or malicious acts committed by him on behalf of his principal, and in an action against the agent for fraud the fact that he derived no personal profit or benefit therefrom is immaterial." In *Reed v. Peterson*, 91 Ill. 238, it is said: "In an action at law for damages, the fact that a defendant acted throughout in the capacity of agent in a fraud perpetrated by him will afford him no

excuse." See, also, *Seddon v. Connell*, 10 Simons, 86; *Windram v. French*, 151 Mass. 549, 24 N. E. 914, 8 L. R. A. 750.

It is claimed, on the part of the appellant, that the court below erred in permitting appellee to prove that the appellant promised to repay the money to her. It is said that this was a promise to pay the debt of a third person, to wit, of the Fidelity Realty Company, and that under the statute of frauds the promise to pay the debt of a third person must be in writing. The statute of the state of Missouri in relation to the statute of frauds upon this subject, which is almost identical with our own, was introduced in evidence over the objection of appellee. It was not pleaded as a defense; and the general rule is that, where the statute of another state is relied upon as a defense, it must be pleaded as set out, at least in substance, and must be proved on the trial, and, if it is not pleaded, it is error to permit it to be proved. *Palmer v. Marshall*, 60 Ill. 289. But whether or not this rule applies here, where the declaration contained merely the common counts and did not set up any contract, makes no difference under the circumstances of this case, because the proof tends to show that, when appellant received appellee's money, he was not conducting business under a bona fide corporate organization, but was using a corporate entity for the transaction of his private business, and, as he was, therefore, personally liable to the appellee for the repayment of her money, his promise was to pay his own debt, and not the debt of a third person.

It is said that the court erred in the admission of certain testimony introduced by the appellee. We are satisfied with the following statement upon this subject, made by the Appellate Court in their opinion deciding this case, to wit: "Appellant also claims that the court erred in permitting appellee to show the course of business pursued by him, his exercise of control over the various companies in the same office, and the indiscriminate manner in which he used the money of said companies, and in admitting evidence tending to show the reason why appellee had special confidence in him. In our opinion this evidence was all proper, as bearing upon the question whether the appellant was really conducting his own business under the name of the several corporations for his own benefit, and also whether he took advantage of appellee's special confidence in him to use her money and give her securities which were practically worthless."

The objection is made that a recovery cannot be had in this kind of case under the common counts. We are unable to concur in this contention. In *Wilson v. Turner*, 164 Ill. 398, 403, 45 N. E. 820, 821, this court said: "An action for money had and received will lie whenever one person has re-

ceived money which in justice belongs to another, and which in justice and right should be returned. * * * When, therefore, according to this rule, one person obtains the money of another which is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery." Inasmuch as, in the case at bar, there was evidence tending to show that appellant had obtained money from appellee which it was unjust and inequitable for him to retain, she is entitled to maintain the present action for the recovery of such money. In *First Nat. Bank v. Gatton*, 172 Ill. 625, 50 N. E. 121, this court said, quoting from other cases therein referred to (page 627 of 172 Ill., page 121 of 50 N. E.): "It is the well-recognized doctrine that the action for money had and received may be maintained whenever the defendant has obtained money of the plaintiff which in equity and conscience he has no right to retain. * * * When money has been thus received, the law implies a promise to pay, notwithstanding there was no privity between the parties. * * * In an action of assumpsit for money had and received, the main inquiry is whether the defendant holds money which, ex æquo et bono, belongs to the plaintiff." See, also, *Belden v. Perkins*, 78 Ill. 449; *Allen v. Stenger*, 74 Ill. 119; *Seeberger v. McCormick*, 178 Ill. 404, 53 N. E. 340. In *City of Elgin v. Joslyn*, 136 Ill. 525, 532, 26 N. E. 1090, 1092, it was said: "The act of the city may have been tortious; but the plaintiff had the right to waive the tort and sue in assumpsit, as the city applied the property to its own use and benefit. Where one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort and charge the wrongdoer in assumpsit on the common counts as for goods sold, or money received. *Toledo, Wabash & Western Railway Co. v. Chew*, 67 Ill. 378." In *Moore v. Shields*, 121 Ind. 268, 23 N. E. 89, it was held that, "where a party is induced by fraudulent representations to purchase worthless township warrants, he can recover the money paid by him to those knowingly making such representations in an action for money had and received." In *McQueen v. State Bank of Indiana*, 2 Ind. 413, it was held that "an action for money had and received will lie, where one man has obtained money from another through the medium of oppression, imposition, extortion or deceit; and the law implies a promise from such person to return it to the lawful owner."

For the reasons above stated, we are of the opinion that the judgments of the lower courts were correct. Accordingly the judgment of the Appellate Court, affirming that of the circuit court, is affirmed.

Judgment affirmed.

(217 Ill. 424)

BENNETT v. BENNETT et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. WILLS—CONSTRUCTION—ASCERTAINMENT OF INTENTION.

In construing a will, the intention of testator as ascertained from the entire will must be effectuated, unless it is in violation of some established rule of law.

2. TRUSTS—SPENDTHRIFT TRUST—PROHIBITION ON ALIENATION.

A trust vesting the estate in a designated trustee, and giving the income only to a cestui que trust, who is already past his majority, indicates an intention to create a spendthrift trust, although there is no provision against voluntary alienation of the trust fund.

3. SAME.

A devise of a fund in trust to invest the same and pay the income semiannually to the cestui que trust until he is 40 years old, when he is to be paid the principal, if testator's wife is then living, but, if not, the interest to be paid to him for 10 years thereafter, at which time the principal shall become his absolutely, creates a spendthrift trust, although the cestui que trust was to have a part of the residue of testator's estate as his absolute property if testator's widow should be dead when the cestui que trust reached the age of 40 years.

4. WILLS—LEGACIES—TIME OF VESTING.

A legacy to a trustee, which expressly provides that it shall not become the absolute property of the cestui que trust until a certain future date, does not become vested in the cestui que trust at testator's death, although the amount of the legacy is then immediately segregated and invested.

5. SAME—RULE IN SHELLEY'S CASE—APPLICATION TO PERSONALTY.

The rule in Shelley's Case, while applicable to gifts of personal property, must give way before the expressed intention of testator, and the fact that a legacy is to go to the "heirs" of the legatee in case of his death before a certain future time does not vest the legatee's interest immediately upon testator's death, where the will clearly postpones the time that it shall vest until a future date.

6. TRUSTS—RENOUNCEMENT BY TRUSTEE.

The refusal of a trustee of an active trust created by will to accept the trust does not vest title to the trust fund in the cestui que trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 56, 204.]

Appeal from Appellate Court, Second District.

Bill by Charles W. Bennett against Mary A. Bennett and others. From a judgment of the Appellate Court affirming a decree dismissing the bill, complainant appeals. Affirmed.

On December 27, 1891, Charles D. Bennett, late of De Kalb county, Ill., died, leaving a last will and testament, which was duly admitted to probate in said county on January 9, 1892. The testator left surviving him the defendants Mary A. Bennett, his widow, and Ernest A. Blake, a grandchild, and the complainant, Charles W. Bennett, his only surviving child. By his said will testator appointed his wife, Mary A. Bennett, and the defendant David A. Syme, executrix and executor thereof; the latter being also named as trustee. David A. Syme refusing to act either as executor or trustee, the defendant

Mary A. Bennett was appointed sole executrix, duly qualified, and at the time of filing the bill herein was still acting as such. No trustee, at the time of bringing this suit, had been appointed. By the second clause of his will, the testator gave to his wife, Mary A. Bennett, "for her comfortable support and maintenance, the use, during her natural life, of all my estate, both real and personal, of whatever name or nature, together with the right and authority to dispose of the same, or any part thereof, as she may see fit, and to use the interest and so much of the principal of my said estate as may be necessary for her support and maintenance, as aforesaid, charged, however, and subject to the payment of the sum of \$3,000 to my trustee, David A. Syme, as hereinafter provided, for the benefit of my son, Charles W. Bennett, and also to the payment of a legacy of \$500 to my grandson, Ernest A. Blake, as hereinafter provided." The third clause of said will, out of which this controversy arises, is as follows: "I give, devise, and bequeath to my trustee, David A. Syme, the sum of \$3,000 in trust, to invest the same in notes and mortgages on unincumbered real estate, or other safe investments, as his good judgment may dictate, with interest semiannually, to be collected and paid to my son, Charles W. Bennett, semiannually until he attains the age of 40 years, and, if my said wife is then living, to pay to my said son, Charles W. Bennett, at such time, the said sum of \$3,000, which shall then become his absolutely; but, if my said wife is not living when my said son becomes 40 years of age, then and in that case, said David A. Syme shall retain the said \$3,000 and invest the same, and pay the interest to my said son, Charles W. Bennett, as hereinbefore provided, for 10 years thereafter, or until he arrives at the age of 50 years, at which time the said \$3,000 shall be paid to my said son and become his absolutely, and in case of his death before the time or times herein fixed for the payment of the \$3,000 to him it shall go to his heirs." By the fourth clause of his will the testator devised \$500 to Ernest A. Blake, and in addition thereto \$500 and one-third part of the remainder of his estate upon the death of the wife of the testator, but directed that the estate should be held by the trustee until said Ernest A. Blake should attain the age of 22 years. By the sixth clause of the will he devised to his trustee, in trust, the remainder of his estate, to be managed, controlled, and invested for the use and benefit of appellant in the same manner as the \$3,000 trust, to be held until appellant should attain the age of 40 years, at which time said remainder was to be paid to him.

Complainant filed his amended bill, setting up the foregoing facts, and the further fact that the sum of \$3,000 had been separated from the rest of the estate of Charles D. Bennett, deceased, and since February 29,

1892, has been in the hands of Mary A. Bennett as such executrix; that she has invested said sum on May 16, 1892, in a loan to one Samuel Whitney on his note, secured by unincumbered real estate in said county, said note being payable in five years after date, with interest at 6 per cent., payable semi-annually; also that said Mary A. Bennett has paid and accounted to complainant for interest on said sum of \$3,000 at the rate of 6 per cent. per annum, semiannually, since the 29th day of February, 1892, up to and including November 16, 1894. The bill herein was filed October 8, 1894. Complainant alleges in his amended bill that he is 34 years of age, in poor health, and unable to perform manual labor; that he has no trade or profession by which he can earn a living; that his only source of income is the interest on this \$3,000, or \$180 per year, which he avers is insufficient to support him; that he is now in debt about \$800, and has no means of paying it; that a trustee should be appointed, and that there should be decreed to be paid to him out of said sum of \$3,000 a sufficient amount to pay all his outstanding obligations, and a further sum sufficient to enable him to enter into some trade or business out of which he could earn money enough to support him; that by the terms of the third clause of the will said sum of \$3,000 vested in him is subject to levy and sale upon execution, and he fears that the indebtedness against him may be put into judgment and his interest in the \$3,000 sold to satisfy the same, and that he will be put to great cost and expense, unless the said sum of \$3,000 is paid to him—and prays for the appointment of a trustee, and that said Mary A. Bennett be decreed to pay over to such trustee said sum of \$3,000, and that the trustee so appointed be ordered by the court to pay over to complainant the said sum of \$3,000 and take his receipt therefor, and that thereupon said trustee be discharged, or that the court may order the trustee to pay complainant a sum sufficient to enter into some business sufficient for his support.

The defendant Mary A. Bennett filed a demurrer to the amended bill, coupled with an answer. The answer admits most of the material allegations of the bill, except as to the health of the complainant and his inability to perform manual labor, and as to such portions of the bill it denies the same, and avers complainant is in good health and able to earn a support, if he would, but that he is of idle and spendthrift habits, and that is was because of the knowledge the testator had of the idle and spendthrift habits and disposition of the complainant to indulge in imprudent speculations and investments, and his prior losses by such conduct and mismanagement of business, that he, the said testator, prudently provided by the will that the said complainant should not receive the said \$3,000, except under the circumstances set forth in the third clause of the will; that

testator did not intend that complainant should receive the \$3,000 at all, unless the contingencies mentioned in said third clause should occur that would entitle him thereto; that the present heir presumptive of said complainant is the defendant Ernest A. Blake; that what complainant is able to earn, added to his income from said \$3,000, will be quite sufficient to furnish him a comfortable support and maintenance; that it would not be to his advantage or benefit at the present time to engage in any business as the owner and manager thereof; admits that a trustee should be appointed, but denies that otherwise the complainant is entitled to any of the relief prayed. To so much of the bill as claims that said sum of \$3,000 is vested in the complainant, and is subject to levy and sale under executions against him, and that he is entitled to have the same paid to him now, the defendant Mary A. Bennett demurs.

On the hearing the complainant in open court withdrew his application for the appointment of a trustee in place of David A. Syme, who declined to act as such, and thereupon the court sustained the demurrer to the amended bill, and dismissed the same so far as demurred to, and, the complainant having waived a hearing on the other matters in said amended bill and filed no replication to the answer thereto, the court dismissed the amended bill at the cost of the complainant, from which action of the court the complainant prosecutes this appeal.

The court below found by its decree that the principal sum of the \$3,000 legacy to be put into the hands of David A. Syme, as trustee, and to be loaned by him, as provided in the third clause of the will of Charles D. Bennett, deceased, the interest to be paid to said complainant semiannually, is not vested in said complainant nor liable for the payment of his debts, but his right thereto is dependent on the contingencies of his living to be 40 years of age and said Mary A. Bennett living, or, in case she is then deceased, on his living to be 50 years of age, and in case of his being deceased before he becomes entitled thereto the said \$3,000 is to go to whomsoever may be his heirs, as substituted legatees under said will. The Appellate Court for the Second District affirmed the judgment of the court below. Pending this proceeding, and since the decree below, and since the judgment of the Appellate Court affirming the same, it is made to appear that one Clarence D. Rogers has been duly appointed trustee of the estate of Charles D. Bennett under the provisions of the will here under consideration; and it also is made to appear to the court that the appellee Mary A. Bennett has, since the submission of the cause, departed this life, and Clarence D. Rogers, the trustee above named, has been substituted as appellee herein.

W. O. Kellum, for appellant. Carnes & Dunton and H. T. Smith, for appellees.

RICKS, J. (after stating the facts). Many questions are raised and urged by appellant which, under the views we entertain of the will in question, seem to be unimportant and not applicable. We regard the trust here created and under consideration as what is known as a "spendthrift trust," created for the purpose of providing for the maintenance of appellant, and at the same time securing it against his improvidence and incapacity for self-protection. Such estates have become recognized, generally, by most of the courts of the United States, and their treatment of the question has gone into the books as the American doctrine upon the subject of and applicable to such trusts. 26 Am. & Eng. Ency. of Law (2d Ed.) 137 et seq., and authorities there cited. *Steib v. Whitehead*, 111 Ill. 247. Most of the controversy arising in relation to such trusts has involved questions affecting the rights of creditors to the trust fund or property. No such question is here involved. The sole contention is by the appellant, who is the cestui que trust, and who claims that the trust is executed, and, if not, that payment in whole or pro tanto should be accelerated, that he might so apply it as to relieve his creditors.

Appellant's first and main contention is that the trust is a dry or passive trust, so far as the provisions of the will are concerned, and that it is executed by the statute of uses, and that the title to the trust property vested in appellant at the death of the testator. It is a cardinal rule of construction of wills that the intention of the testator shall be ascertained from all that is contained within the four corners of the will, and, when ascertained, shall be given effect, unless it contravenes some well-established principle of law. Whether the trust is executed or executory, and whether the estate is vested or contingent, are matters of sound construction, following the correct interpretation of the provisions of the instrument creating the trust. The testator was, at the time of making his will and at the time of his death, seised of a considerable estate. Appellant was his only living child, and was 31 years of age. Besides appellant the testator left a grandson, Ernest A. Blake, who was a minor, and also left Mary A. Bennett, the widow of the testator. By clause 3 of the will \$3,000 was set apart and placed in trust, and the income was to be paid to appellant until he attained the age of 40 years, at which time, by the provisions of the will, the corpus or principal fund should become the absolute property of appellant, provided the wife of the testator was then living; but, if the wife or widow should be dead at the time appellant attained the age of 40 years, the trust fund here in controversy should be held by the trustee 10 years longer, and at the expiration of the said 10 years should become the absolute property of appellant. The rea-

son for the extension of the time at which appellant might become vested with the property is readily comprehended when the other provisions of the will are looked into. The testator by his will directed that \$500 should go to his grandson, Ernest A. Blake, upon the death of the testator, and \$500 and one-third of the remainder of his estate upon the death of the wife of the testator, and that appellant, after the payment of these sums, should have two-thirds of the remainder of the testator's estate, but that it should be held by the trustee until he should attain the age of 40 years, when it should be paid to him. It will thus be seen that, if the wife of the testator was dead when appellant attained the age of 40 years, appellant would come into two-thirds of the remainder of the estate of the testator absolutely, and it was the clear purpose of the testator to guard against want or improvidence on the part of appellant by providing that if the contingency should happen upon which he might, at the age of 40 years, receive two-thirds of the residuum, there would still be held for him or for his benefit the original \$3,000, the income of which would be secured to him until he should attain the age of 50, when the corpus should vest in him.

In the case at bar, owing to the peculiar state of the pleadings, we are not aided by the averments of the answer, but must place our construction of the will solely upon the matters appearing in it and the bill; but we think, from the provisions to which we have adverted, the intention of the testator was clear and manifest that appellant should never be vested with the title to the fund here in question until he should attain the age of 40 years, and not then if his mother should be then dead, but that the same, in that case, should be postponed until he should attain the age of 50 years. His grandson, who was a minor, was to have the full benefit of his estate when he attained the age of 22 years. Taking these provisions, then, together, it would seem unnecessary to go beyond the will itself to determine the intention of the testator. In determining the character of the trust here created, whether a spendthrift trust or not, we may look to the provisions of the will and the condition of the parties as disclosed by the bill. *Kaufman v. Breckinridge*, 117 Ill. 305, 7 N. E. 668. It is usual in such trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors. "It is not necessary that an instrument creating a spendthrift trust should contain an expressed declaration that the interest of the cestui que trust in the trust estate shall be beyond the reach of his creditors, provided such appears to be the clear intention of the testator or donor as gathered from all parts of the instrument construed together in the light of the circumstances." 26 Am.

& Eng. Ency. of Law (2d Ed.) p. 141; Stambaugh's Estate, 135 Pa. 585, 19 Atl. 1058; Appeal of Grothe (Pa.) 19 Atl. 1058; Baker v. Brown, 146 Mass. 369, 15 N. E. 783; Patten v. Herring (Tex. Civ. App.) 29 S. W. 388. The fact that a trustee was appointed and vested with the estate, and the beneficiary was given the income only, is a circumstance from which the intention of the testator to create a spendthrift trust may be inferred. Stambaugh's Estate, supra.

Appellant contends that there is a present gift to him of the \$3,000 legacy, with the payment merely deferred to one of the future periods mentioned in the will, and that where such is the case, and the subject-matter of the bequest is to be at once separated from the estate and vested in the trustee for the benefit of the legatee, the gift vests at once; and this, whether the fund is to be held for accumulation and final payment, or whether the interest is paid to the legatee as it accrues. In support of this contention, appellant cites 29 Am. & Eng. Ency. of Law (1st Ed.) 454. The language there used, and upon which the rule announced is predicated, is: "Where there is a clear gift, distinct from a direction to pay when the legatee attains a given age, the direction to pay will not postpone the vesting." If there was a clear gift in present, the position of appellant would be unassailable. But, as we read this will, there is no present gift to him of the legacy, but the gift is to the trustee, who, as we think, takes the fee, charged with the exercise of a discretion as to its investment, and is directed to pay the income to appellant until the times designated to pay the corpus. The language used by the testator with reference to the two designated times of payment is as to the period of 40 years, at which time the said sum of \$3,000 "shall then become his absolutely," and as to the second period of payment is, "at which time the said \$3,000 shall be paid to my son and become his absolutely." So that, if the ordinary and usual meaning be given to the language of the will, it would seem entirely clear that it was the intention of the testator that appellant's right to the corpus should not vest until the period of distribution; and the fact that the fund is segregated at once from the estate and devoted to the particular trust should not, we think, defeat the clearly expressed purpose of the testator. Such fact is one of the tests to be used in doubtful cases in determining whether the legacy is vested or not, and most commonly arises in cases where there is an absence of language that can be construed into a gift, as distinguished from a mere direction to pay; but, when the language is not doubtful, and the intention of the testator, as shown by the language in the will, is clear that the legacy should not vest at the death of the testator, rules of construction used in doubtful cases have no application.

The last expression of the third clause is, "In case of his death before the time or times herein fixed for the payment of the \$3,000 to him, it shall go to his heirs." The appellant urges that this provision, that "it shall go to his heirs," brings the bequest within the rule of Shelley's Case, and that the legacy is vested by operation of law; that by analogy to said rule the vesting of the legacy cannot be prevented by the clearly expressed intention of the testator that it shall not be, because, having used the word "heirs" in this manner, the law gives that word controlling effect, and denies to the testator the power to direct his estate in a channel contrary to the course fixed by the law. As applied to a devise of real estate, the position of appellant is sound, for the reason that the policy of the law has been to give stability to titles to such property and hold them vested when it can. As applied to gifts or conveyances of personalty, the word "heirs," strictly speaking, has no application. If, in a devise of the latter class of property, additional words were necessary, the words "executor, administrator, and assigns" would be the proper words to show the extent of the estate to the first taker and indicate absolute property. By analogy, however, the rule in Shelley's Case is applied in gifts of personalty; but in all cases where the word is used in the devise of personalty it is held to yield to the expressed intention of the testator. Taylor v. Lindsay, 14 R. I. 518; Horne v. Lyeth, 4 Har. & J. 431; Williams on Personal Property, 244; Glover v. Condell, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360; 22 Am. & Eng. Ency. of Law (1st Ed.) 512; Gross v. Sheeler (Del. Super.) 31 Atl. 812; 4 Kent's Com. 218. There being no present grant to the appellant by the will in question, we are disposed to regard the provision as to the heirs taking the property, in the event that the appellant should die before the time fixed for him to take it, as being words of purchase or substitution. Beach on Wills, § 287; Williams on Executors (6th Am. Ed.) 1034. Mr. Freeman, in his note to Carpenter v. Van Olinder, 127 Ill. 42, 19 N. E. 868, 2 L. R. A. 455, as reported in 11 Am. St. Rep. 106, says: "Hence a devise to A. in trust for his heirs as long as he shall live, and after his death to his heirs, their heirs and assigns, vests a life estate only, and the fee in his heirs; and, generally, where the use only is given to the first taker, and his heirs, designated as remaindermen, take both the legal and beneficial estate, the rule in Shelley's Case is inapplicable." The rule also seems to be well established and recognized by this court in Baker v. Scott, 62 Ill. 86, that where there is an executory trust created the rule in Shelley's Case has no application. The same rule is also laid down in 27 Am. & Eng. Ency. of Law (1st Ed.) 68.

It is also contended by appellant that the legacy vested by the refusal of the trustee to accept the trust. This result can only follow in cases where the entire beneficial interest

is in the cestui que trust and the trustee is a mere repository of the title. 27 Am. & Eng. Ency. of Law (1st Ed.) 127. Such is not the case here. In *Glover v. Condell*, supra, a trust very similar to this was held an active and not a passive one. It was there said (page 588 of 163 Ill., page 180 of 45 N. E. [35 L. R. A. 360]): "But personal property is not within the statute of uses. In the case at bar the trustees were to hold the proceeds of sale—the money or securities representing two-thirds of Albert's share—during his life, and invest the same and pay him the interest during his life, so that the trust was an active one, and his estate was equitable." It is quite apparent that the postponement of the time of the payment of this legacy was not on account of or for the benefit of the fund or estate of the testator, as there was no charge of any kind against it. It was separated from the other funds or portions of the testator's estate by his direction. The postponement of the time of payment was for reasons personal to the legatee, and if the intention of the testator that the legacy should not vest in appellant until the period of payment was not clear and certain from the language used, in the absence of a present gift to him, we would hold that the legacy did not vest until the period of distribution or payment. *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351.

We are of the opinion that the chancellor and the Appellate Court placed the proper construction upon the will before us, and the judgment of the Appellate Court is affirmed. Judgment affirmed.

(217 Ill. 453)

CRATTY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—IMPROVEMENTS—SECOND ASSESSMENT.

Where a new assessment is made, the question whether the original confirmation proceeding is still pending is one of fact, to be shown by the evidence.

2. SAME—ESTOPPEL.

Where an objection to the confirmation of a new assessment is based on the ground that the original proceedings were not pending in court when the improvement act of 1897 took effect, the objector is estopped to urge that the original proceedings were pending at such time.

3. SAME—INTEREST ON UNPAID VOUCHERS.

A city has no authority, in making a special assessment to pay unpaid vouchers, to include interest on vouchers, where they are non-interest-bearing.

4. SAME—VALIDITY OF ORDINANCE.

An ordinance for a special assessment showed on its face that the vouchers to be paid therefrom did not bear interest, but the assessment included an amount to pay interest on such vouchers. It did not appear in the ordinance what such amount was. *Heid*, that the ordinance was void as a whole.

Appeal from Cook County Court; Orrin N. Carter, Judge.

Action by the city of Chicago against Josiah Cratty and others. Judgment for plaintiff, and defendants appeal. Reversed.

George W. Wilbur, for appellants. William M. Pindell and Edgar Bronson Tolman, Corp. Counsel (Robert Redfield, of counsel), for appellee.

PER CURIAM. The city of Chicago sought to pave Diversey avenue, from Milwaukee avenue to Crawford avenue, in that city, by special assessment. The original judgment of confirmation was reversed, and the cause was remanded by this court in *Boyd v. City of Chicago*, 187 Ill. 115, 58 N. E. 1094. Thereafter, the pavement in the meantime having been constructed, the city of Chicago, by virtue of an ordinance passed in November, 1901, filed a petition in the county court of Cook county for the purpose of having a new assessment made to obtain the unpaid amount due on the cost of the improvement. A trial was had in that court upon objections filed by property owners, and the objections were sustained, and a judgment rendered against the petitioner, whereupon the city prayed an appeal, and the judgment of the county court was reversed and the cause remanded in *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786. Upon the case being redocketed in the county court, the petitioner, on March 23, 1904, dismissed its petition for a new assessment, and shortly thereafter, by virtue of an ordinance passed March 29, 1904, filed a second petition for a new assessment, seeking again to obtain the unpaid balance of the cost of the improvement. That assessment was spread, and certain property owners filed their objections to the confirmation thereof. A trial was had before the court and a jury, a judgment confirming the assessment was entered, and from that judgment certain property owners now appeal to this court.

The original judgment of confirmation was reversed in *Boyd v. City of Chicago*, supra, for the reason that the ordinance in that case provided that the curbstones should be firmly bedded on "flat stones," which were not otherwise described in the ordinance; and it is now urged, on the authority of *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435, that the present proceeding was improvidently begun, for the reason that the original proceeding is still pending and undisposed of. Whether the original proceeding has been disposed of is a question of fact. In *Holden v. City of Chicago*, supra, it was shown that the original proceeding was pending. There is no such evidence here.

It is also urged that the present proceeding should have been brought under the statute of 1872, and not under the statute of 1897, for the reason that proceedings for the collection of the original assessment were pending when the latter act became effective.

and that under a saving clause contained in such latter act the proceeding for the new assessment should have been under the act in force prior to July 1, 1897. In the objections filed by appellants in the county court it is stated that the original proceedings "were not pending in any manner in any court" when the statute of 1897 came into force. Having made such a statement in their objections, they will not be permitted to now insist in this court that the original proceeding was pending on July 1, 1897. It is true that in *City of Chicago v. Hulbert*, supra, it was stated as a matter of fact that the original cause was pending on July 1, 1897. That statement was no doubt based on evidence found in the record then under review. No such evidence is preserved in the record now before us.

The unpaid vouchers issued by the city to pay for the improvement now under consideration were noninterest-bearing. The preamble to the ordinance under which the first proceeding for a new assessment was brought recited that there was a balance of \$8,828.06 of principal and \$1,824.20 of interest unpaid. This court held, in *City of Chicago v. Hulbert*, supra, that there was no authority in law for paying interest on the vouchers, but that, as the ordinance specified the amount of money necessary for paying the principal and the amount necessary for paying the interest, it was unnecessary to declare the whole ordinance void, and that under section 52 of the local improvement act (Starr & C. Ann. St. Supp. 1902, c. 24, par. 90) the court had authority to modify and change the assessment by refusing to confirm that portion of it which was sought to be collected to pay interest, and confirm it as to the amount that was legally due upon the vouchers. It was not there held that the ordinance would have been entirely void had it been impossible to separate principal from interest by an inspection of the ordinance. That question was not then before the court.

The preamble to the ordinance now before us recites that the city of Chicago has delivered to the contractor interest-bearing vouchers and improvement bonds in the aggregate amount of the cost of the improvement, "of which there now remain outstanding and unpaid the amount of \$11,886.05," and the ordinance itself finds that the unpaid balance of the cost of the improvement is \$11,886.05. We think this ordinance is obnoxious to the same objection that was successfully made to the one considered in *City of Chicago v. Hulbert*, supra. The preamble recites that the vouchers were interest-bearing, and that "the amount" unpaid is \$11,886.05. In speaking of interest-bearing obligations, the word "amount" is ordinarily used to designate the total of principal and interest. Counsel for appellee state that the averment in the preamble to the effect that the vouchers bore interest was a clerical

error and should be given no weight, in view of the fact that the ordinance itself states that the total amount specified in the preamble was the unpaid balance of the cost of the improvement. So far as the language of the ordinance itself is concerned, it is identical with that of the ordinance considered in *City of Chicago v. Hulbert*, supra, except that in the present ordinance the amount is about \$1,700 greater than in the former, and it is conceded that the former ordinance according to its terms included interest; but it is said that the present does not, and this is explained by the statement of counsel for appellee that the amount fixed in the preamble to the earlier ordinance as the amount of principal unpaid was by mistake stated at a sum much less than the sum which was actually unpaid. We have examined this record in vain for any evidence showing that the recital in the ordinance now before us that the vouchers were interest-bearing is a clerical error, or that the increased amount in the present ordinance does not include interest, or results from any such mistake as is claimed by appellee. The only conclusion that can be drawn from the ordinance and its preamble is that it does include interest on the vouchers, and to that extent the assessment is for too great an amount.

Appellants' objection No. 21 was that the ordinance was illegal and void because it provided for the collection of interest. This objection was well taken. In *City of Chicago v. Hulbert*, supra, the ordinance in the preamble thereof disclosed that the assessment was to pay both principal and interest, and stated the amount necessary to be assessed for the purpose of paying the principal and the amount necessary for the payment of interest. In the body of the ordinance the total amount of the assessment was stated. We treated the preamble as a part of the ordinance, and held that the ordinance as an entirety should not be deemed void, but that confirmation might be refused as to the amount shown by the preamble that was sought to be collected for interest. The ordinance was not declared void as an entirety, for the reason, as we expressly stated, "that as the amounts are expressly stated by the ordinance itself, so that the portion that is void or the amount which is levied without authority can be ascertained by an inspection of the ordinance, it is unnecessary to declare the whole ordinance void on that account." *City of Chicago v. Hulbert*, 205 Ill. 364, 68 N. E. 793. The ordinance in the case at bar discloses that the assessment is levied to produce a fund to be used in paying both interest and principal, but does not disclose, either in the preamble or the body thereof, the amount of either interest or principal. The adoption of an ordinance is a legislative act, and not within the judicial function to perform. The court will carefully consider the entire

ordinance, to discover the legislative intent, and will give that intent effect so far as it is valid. If it is in part invalid, and that part is distinct and separable and so independent that it can be rejected, leaving the valid portion capable of execution, the ordinance will be upheld so far as it is valid. If that which is invalid is not so distinct, severable, and independent, the entire ordinance must fall. In determining as to the ordinance here in question, resort could not be had to extrinsic testimony to show that the total amount set forth in the body of the ordinance was composed of distinct sums of principal and interest, and the ordinance sustained and executed as to the amount of such principal. That would be to revise and supplement the work of the legislative body, which is entirely beyond the judicial power of construction. The ordinance provides for the assessment of a sum in gross. A portion of such sum is illegal, and the illegal portion cannot be dissevered. The ordinance is therefore void, and, being void, it could not be the basis of a valid judgment of confirmation.

The judgment is therefore reversed.
Judgment reversed.

(217 Ill. 342.)

In re MULFORD.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—RIGHT TO ACT AS EXECUTOR.

The refusal to appoint an applicant named as an executor in a will to act as such is not the denial of a privilege or immunity, prohibited by Const. U. S. art. 4, § 2.

2. SAME—DUE PROCESS OF LAW.

Laws 1897, p. 1, amending section 18, Act 1872 (4 Starr & C. Ann. St. Supp. 1902, p. 32), providing that no nonresident shall be appointed executor, is not in violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.

3. DOMICILE—HOW LOST.

Where a person leaves the place where he has acquired a permanent abode, and removes to another place without a fixed intention to return, his residence is lost.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, §§ 9, 22.]

Appeal from Probate Court, Will County;
John B. Fithian, Judge.

Application by Marlon Mulford for letters testamentary in the estate of Harriet M. Richards, deceased. From an order refusing to issue such letters, the applicant appeals. Affirmed.

John T. White and Morrill Sprague, for appellant. Knox & Akin, for appellees.

BOGGS, J. Harriet M. Richards, a resident of the county of Will, in this state, while temporarily absent from her home, departed this life on the 26th day of April, 1904, at Palacios, Matagorda county, Tex. She left a will bearing date March 15, 1890, in which she nominated as executor Marlon

Mulford, the appellant. The will was presented to the probate court of Will county and duly admitted to probate. It was made known to the probate court that said Marlon Mulford was a resident of the state of Ohio, and the court, on motion of certain legatees and distributees under the will, refused to grant letters testamentary to him, for the reason he was a nonresident of this state. This record presents for decision the correctness of the action of the court in refusing to authorize the appellant, Mulford, to act as executor of said will.

The final proviso of section 18 of chapter 3, entitled "Administration" (4 Starr & C. Ann. St. Supp. 1902, p. 32), as amended by the act of 1897 (Acts 1897, p. 1), provides that "no nonresident shall be appointed or act as executor." But it is urged that this statutory provision is in conflict with section 2 of article 4 of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and is also in conflict with section 2 of article 2 of the Constitution of the state of Illinois, which provides that "no person shall be deprived of life, liberty or property without due process of law." The right to be appointed and act as an executor is not a "privilege" or "immunity," the denial whereof is prohibited by the federal Constitution. The disposition which shall be made of property after the death of the former owner is to be determined by the law-making body of the state. No one has a natural right to take as heir of another, nor has any person the natural right to direct the devolution of his property after he shall have died. The right to devise or bequeath property by will or to take by inheritance exists only because conferred by law. *Evans v. Price*, 118 Ill. 593, 8 N. E. 854; *Wunderle v. Wunderle*, 144 Ill. 40, 83 N. E. 195, 19 L. R. A. 84; *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446. The Legislature may change the course of descent or of the devolution of property by will, and the enactment will operate at once as to all estates not already passed by the death of the owner. *Kochersperger v. Drake*, supra. The state, acting in its sovereign capacity, by appropriate legislation regulates and controls the devolution of property after the death of an owner. Our statute in respect of these matters authorizes the owners of property to provide by will for the ownership thereof after they shall have died, and regulates and controls the manner in which such will shall be executed and authenticated, and provides that they be duly proven in the court given jurisdiction of such matters, and admitted to probate, and that the same, when so duly admitted to probate, shall be carried into execution by the person named therein as executor or executrix, provided such person shall possess the qualifications which the same statute has fixed and declared to be

essential to the legal right to discharge such duty. The judicial procedure thus established to regulate and control the devolution of property by will is the exercise of governmental power and duty by the state, and executors acting by force of such procedure exercise functions that are official in character. The position is denominated an "office" in sections 31 and 36 of the administration act. 1 Starr & C. Ann. St. 1896, pp. 283, 234, c. 3.

The nomination of an executor by the testator in his will does not confer power and authority on the person so nominated to act as executor until he has been found "legally competent" so to act by the branch of the judicial department of the state in which has been vested jurisdiction and power to so determine, save that the statute has granted temporary authority to the person so named as executor to act, to a circumscribed and limited extent, before the probate of the will. But this limited power is possessed in virtue of the statute conferring the same on the person named as executor. An executor receives formal letters testamentary, which constitute his commission as an officer. Before such letters may issue he must take the oath of office prescribed by the statute and must execute a bond to the people of the state of Illinois conditioned for the faithful performance of the duties of his office, unless the will shall direct that no bond be required, and even in the event of such direction in the will the court may, for certain specified reasons, require the bond to be given. The estate is committed to the executor to be administered under the direction and supervision of the court, acting in pursuance of the general statutory enactments relating to the administration of estates. Power resides at all times in the court to control and direct the executor and to revoke his authority to act for any statutory disqualification. His compensation is fixed by public law. He is required to report to the court at stated intervals, and it is essential to the preservation of the rights of widows and children, creditors, legatees, and devisees, and to the proper administration of the estate in compliance with the law, that the court shall have power at all times to compel his personal attendance before the court. An executor is a public officer. Wharton on Conflict of Laws, § 552; Woerner on Law of Administration, § 172.

The "privileges and immunities" which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings, and secure happiness and safety, etc., and do not include within their meaning the right to hold office. *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785. The state may decline to confer official power on residents of other states without depriving such nonresidents of any "privilege" or "immunity" protected

by the Constitution of the general government, or of "liberty" or "property" within the meaning of those words as used in our state constitution. A nonresident can have no property right in the fees provided by law to be paid as compensation for the performance of the duties of an office created by or existing in virtue of the statutes of this state. "Liberty," as the term is used in the constitutional provision, includes freedom from servitude and unlawful restraint, the right to pursue any ordinary calling, trade, or employment, and acquire property, etc., thereby, but does not include any supposed right of a nonresident to receive an appointment to a position created by the general laws of the state for the purpose of carrying into effect legislation affecting the state and its people.

The power to control property of a deceased person, to the end that it shall be applied to the payment of the just debts of the decedent, for the protection of those who were peculiarly dependent upon him and who may otherwise become burdens on the public, and the remainder be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the state has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No nonresident enjoys the "privilege or immunity" to participate as an officer in the administration of the affairs of the state, nor has he any right of "liberty or property" in the fees or emoluments of any such office or public position. The petitioner, Marion Mulford, testified that he was 71 years old and had a wife and two daughters, with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died; that he lived with his family on homestead property owned by himself and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate, and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will; and that he still retained that fixed purpose, whatever time might be required therefor. Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. 24 Am. & Eng. Ency. of Law (2d Ed.) 697. "A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitance, does not constitute residence." *Pells v. Snell*, 130 Ill. 379, 23 N. E. 117.

The court did not err in refusing to issue letters testamentary to the appellant.

Judgment affirmed.

(217 Ill. 220.)

STACK v. PEOPLE ex rel. TALBOT,
County Treasurer.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. JURY—RIGHT TO JURY TRIAL—CONSTITUTIONAL PROVISIONS—ASSESSMENT OF DAMAGES.

Act May 29, 1879 (Laws 1879, p. 131) § 37, authorizing the commissioners in drain proceedings, in case the court so orders, to make assessments of benefits or damages in lieu of a jury, is valid in so far as the assessments of benefits do not include assessments for damages on account of property taken or damaged, but is unconstitutional in so far as it provides for assessments for such damages.

2. DRAINS—ASSESSMENTS—NOTICE.

Act May 29, 1879 (Laws 1879, pp. 121, 131), providing for the construction of ditches and levees, provides, in section 3, for the giving of a notice by posting the same at the door of the courthouse and in 10 of the most public places in the proposed district, and also by three weeks' publication. Section 37 provides for two weeks' notice of the hearing of a petition of an additional assessment, such notice to be given in the manner required by section 3. *Held*, that a notice under section 37, while it must be given in the manner prescribed by section 3, need not run for three weeks as provided in the former section.

3. SAME—PETITION FOR ASSESSMENTS—SUFFICIENCY.

Under Drainage Act May 29, 1879 (Laws 1879, p. 121) § 3, providing that, if any of the landowners of the district are nonresidents of the county, the petition shall be accompanied by an affidavit giving the names and places of residence of such nonresidents, a petition sworn to by the commissioners and containing a statement of the names and residences of nonresident owners of the district is sufficient.

4. SAME—REVISION OF ASSESSMENT—NOTICE.

Drainage Act May 29, 1879 (Laws 1879, pp. 123, 131) § 19, provides that, when the jury shall have completed their assessment of damages and benefits, they shall fix the time and place when and where they will attend, in case the jury was impaneled by the court in which the petition was filed, before the same court, at a time fixed within any term, for the correction of their assessment, and shall give 10 days' previous notice of such time and place. Section 37 provides that, when the court so orders, the commissioners may make assessments in lieu of a jury, and all proceedings required of a jury shall be observed by the commissioners. *Held*, that a notice of hearing to revise an assessment for benefits made by commissioners need not be given 10 days before the first day of the term, but only 10 days before the time fixed by them, within the term, for said hearing.

5. SAME—JUDGMENT CONFIRMING ASSESSMENT—CONCLUSIVENESS.

On application for a judgment of sale, under an additional drainage assessment made pursuant to Act May 29, 1879 (Laws 1879, p. 120), the judgment confirming the assessment is conclusive in its findings and recitals as to the giving of due notice of the hearing of the assessment.

Appeal from Livingston County Court;
O. F. H. Carrithers, Judge.

Application by the people, on the relation of Will. L. Talbot, county treasurer, for a judgment of sale of a tract of land owned by J. J. Stack, as trustee of the estate of P. Stack, deceased, and returned delinquent for

the nonpayment of special assessments. From a judgment of sale, defendant appeals. *Affirmed*.

This is an application by the county treasurer and ex officio collector of Livingston county for a judgment of sale against the N. W. ¼ of the N. W. ¼ of section 28, town 28, range 8, in said county, owned by appellant as trustee of the estate of P. Stack, deceased, and returned delinquent for the nonpayment of special assessments. Objections were made by appellant to the entry of judgment, all of which were overruled. To the action of the court in overruling such objections an exception was taken. Judgment of sale was rendered against the land, to which also appellant excepted. The present appeal is prosecuted from such judgment of sale.

Thomas W. Tipton, for appellant. R. S. McIlhuff, for appellee.

MAGRUDER, J. (after stating the facts). Upon the trial before the county court of Livingston county the collector, petitioning for the sale of the land, offered in evidence the warrant, delinquent list, and accompanying affidavits, certificates, and papers, together with the certificate of publication of the tax list, and the certificate of the treasurer of the Oliver and Corn Grove drainage district that the land in question was delinquent for a special assessment. The appellant, objector below, offered in evidence all the proceedings for the levy of an additional special assessment by the commissioners of the Oliver and Corn Grove drainage district, together with the exhibits to said petition; also the order granting the prayer of said petition, and directing the commissioners of the district to make such additional assessment in lieu of a jury; also the oath of the commissioners and the assessment roll, the order made by the commissioners confirming the assessment roll, and the order of the court confirming said assessment roll, in connection with which were also offered the affidavits and certificates showing the posting, publication, and mailing of notices. Certain oral testimony was also introduced in evidence.

The special assessment proceeding here under consideration was prosecuted under the act of May 29, 1879 (Laws 1879, pp. 121, 123, 131). "to provide for the construction, reparation, and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." The sections of that act, under which the points made by the appellant arise, are chiefly sections 3, 19, and 37, as amended by the acts of 1881 and 1885. 2 Starr & C. Ann. St. 1896 (2d Ed.) pp. 1502, 1503, 1511, 1519, 1520. The record of the proceedings, introduced by the objector, showed that on January 7, 1903, a petition was filed

in the county court of Livingston county by three persons, appointed by said court as commissioners of the Oliver and Corn Grove drainage district, asking the court to authorize an additional assessment to be made by them on the lands in said district, first, to clean out and repair the main ditch of said district where the same has filled in since first excavated, the cost of which was estimated at \$4,430; and, second, to construct 4,800 feet of covered drain in the upper part of the main ditch with profiles thereto attached, the cost of which was estimated at \$1,250, together with \$1,100 for surveyor's pay, court expenses, attorney's fees, commissioners' fees, and treasurer's fees, amounting altogether to \$6,780. The petition was accompanied by itemized statements of accounts, made by the commissioners under oath, showing the money received by the district and the manner in which they expended it on September 2, 1902, and from that date down to January 8, 1903. On January 31, 1903, an order was entered by the court, granting the prayer of the petition and ordering that an additional assessment of \$5,680, being the amount above specified, after deducting \$1,100 for costs and expenses, be made upon the lands of said drainage district, and ordering that three persons therein named, to wit, J. W. Walsh, J. R. Strawn, and M. A. Freehill, commissioners of said district, make such additional assessment in lieu of a jury, and further ordering that the itemized statements of account, filed by the said commissioners on September 2, 1902, and January 3, 1903, be approved. The proceedings, as introduced, showed the publication, posting, and mailing of a notice, stating the date of the filing of said petition, and its object, and the amount of the additional assessment required, and also stating "that at the January term, A. D. 1903, of the said county court, to wit, on the 81st day of January, A. D. 1903, at the hour of 1 o'clock p. m. of said day, application will be made to the said county court for said order, at which time all persons interested may appear and contest the said petition, if they desire."

The record of the special assessment proceedings also showed the oath, taken by the commissioners of said district, to make the assessment of damages and benefits in favor of or against the lands in said district according to law. It also showed the assessment roll of the commissioners, from which it appeared that the sum of \$308 was assessed against the above-described land of the appellant. Attached to the assessment roll was a certificate by the commissioners, certifying that they had fixed on the 21st day of February, 1903, at the hour of 1 o'clock in the afternoon, before said county court, in the courthouse in Pontiac, Livingston county, "as the time and place when and where we will meet and attend to hear and consider any and all objections that may be made to said assessment roll aforesaid, and

for the correction of said assessment, if deemed advisable." On February 21, 1903, the commissioners returned to the county court their verdict and confirmation of said assessment roll, reciting therein that they had been appointed on January 31, 1903, by the county court to make and levy said assessment, and had made the same, and had filed their assessment roll with the clerk of said court on February 9, 1903, and had given notice of said filing as required by law, and had met on February 21, 1903, at the hour and place aforesaid, to hear objections, and further reciting that the court had found that due and proper notice had been given of said objections, and that they had heard the same, and the evidence offered, and had taken into consideration their own personal view of the land. On the same day, to wit, February 21, 1903, the county court entered a judgment, confirming said assessment roll and therein reciting that the commissioners had on that day come and made proof of the filing on February 9, 1903, of their assessment of damages and benefits to the various tracts of land in said drainage district by reason of the additional assessment theretofore ordered on January 31, 1903, and made proof of the posting, publishing, and mailing of notices according to law of the time and place of meeting for the correction of said assessment; and by said judgment of confirmation it was recited as follows: "And the court, being fully advised in the premises, doth find that due and proper notice has been given to all persons interested for the length of time and in the manner required by law of these proceedings and this application, and doth consider and order that the objections to the same be, and they are hereby, overruled, and that the said assessment roll, and each and every entry thereon, and the proceedings of the said commissioners, be, and they are in all respects hereby, confirmed and approved by the court, and spread upon the records of this court," etc.

Accompanying the proceedings in regard to the levy of the additional assessment, as introduced by the objector, is a notice by the commissioners that they had been appointed to make said additional assessment, that the assessment roll had been prepared and deposited in the office of the clerk of said county in Pontiac, and that the court had appointed February 21, 1903, at the hour of 1 o'clock in the afternoon of said day at the county court room in the courthouse in Pontiac "as the time and place where we shall meet for the correction of said assessment, at which time and place we will meet, and any and all objections that may be presented to said assessment will be heard." There was also introduced in evidence in connection with said notice the certificates and affidavits, showing the posting, publication, and mailing of said notice.

This is an appeal, as will appear from the foregoing statements, from a judgment of

sale of appellant's property made upon the application of the county collector. Accordingly, the proceeding is collateral to the original proceeding, in which judgment confirming the special assessment was entered. The only objections now urged upon our attention by the appellant are to the effect that the county court had no jurisdiction to grant the prayer of the petition of the commissioners of the district for an additional assessment, and no jurisdiction to confirm the assessment roll when made. These objections are to be considered in the light of the fact that they are made in a collateral attack upon the judgment of confirmation, and are not made in a direct proceeding for the reversal of that judgment.

First. It is said that the county court acquired no jurisdiction to grant the prayer of the petition, upon the alleged ground that the notice was not given 10 days prior to the first day of the term of the court, at which the order granting the prayer of the petition was made, and upon the further alleged ground that no certificate of mailing notices was shown. This objection involves a consideration of the section of the statute under which the assessment was made: Section 37 of the drainage act of May 29, 1879 (Laws 1879, p. 131), as amended in 1885, provides that the commissioners may use money arising from the collection of assessments, or coming into their hands as such commissioners, for the purpose of constructing, or repairing, or maintaining any ditch, ditches, drains, levee, or levees within said district, or outside of said district necessary for the protection of the lands and complete drainage of the same within such district: "Provided, that * * * assessments from time to time may be levied on the land within any district when it shall appear to the court that the previous assessment or assessments have been expended or are inadequate to complete such work, or are necessary for maintenance and repair, or when it shall become necessary for the construction of any additional work, or the completion of any work already commenced within any drainage district to insure the protection or drainage of the lands in said district, under the order and directions of the court * * * on the petition of the commissioners, accompanied by an itemized statement of accounts made by the commissioners under oath, showing the moneys received by the district and the manner in which they have been expended, together with plats, profiles of such additional work and estimated cost of the same; two weeks' previous notice of the time set for the hearing of said petition in the manner required by section 3 of this act, having been given. Upon the hearing of such petition the court may grant the prayer of the same, and with like proceedings and notice, as near as may be, as in cases of original assessments of damages and benefits under this act; and

such additional assessment, or assessments, when made, shall have the same force and effect and be collected in the same manner as original assessments: provided, that * * * in case the court so orders, the commissioners of said district may make any assessments of benefits, or damages and benefits, in lieu of a jury; and all the proceedings required of a jury in such cases by this act, shall be required of and observed by the commissioners as near as may be in making such assessments." 2 Starr & C. Ann. St. 1896 (2d Ed.) pp. 1519, 1520. The validity of the provisions of this section, allowing the commissioners to make an assessment of benefits in lieu of a jury, has been sustained by this court, so far as they do not include assessments for damages on account of property taken or damaged (*Hosmer v. Hunt Drainage District*, 135 Ill. 51, 26 N. E. 587; *Briggs v. Union Drainage District*, 140 Ill. 53, 29 N. E. 721), in which cases the provisions of the act in regard to assessments by commissioners, or by such a jury as is described in the act, have been held to be unconstitutional. *Juvinall v. Jamesburg Drainage District*, 204 Ill. 103, 68 N. E. 440; *Wabash Railroad Co. v. Coon Run Drainage District*, 194 Ill. 310, 62 N. E. 679. It will be observed that by the terms of section 37 two weeks' previous notice of the time set for the hearing of the petition is to be given in the manner required by section 3 of the act, and that upon the hearing of such petition the court may grant the prayer thereof with like proceedings and notice, as near as may be, as in cases of original assessments of damages and benefits under the act.

A reference to section 3 of the act shows that the notice there required to be given is to be so given by posting notices at the door of the courthouse of the county or counties in which the district is situated and in at least 10 of the most public places in such proposed district, and also by publishing a copy thereof at least once a week for three successive weeks in some newspaper published in the county from which the larger part of the said district is proposed to be formed, and that such notice shall state when and in what court such petition shall be filed, etc., and at what term of said court the petitioners will ask a hearing of said petition. The proviso in section 3 also provides that, if any of the landowners of said district are non-residents of the county or counties in which the proposed district will lie, the petition shall be accompanied by an affidavit giving the names and places of residence of such nonresidents, if known, etc., and that the clerk shall send a copy of the notice aforesaid to each of said nonresidents whose residence is known within three days after the first publication of the same, and that the certificate of the clerk or the affidavit of any other credible person, affixed to a copy of said notice, shall be sufficient evidence of the

posting, mailing, and publication of said notices. Section 37 provides for the giving of two weeks' notice, whereas section 3 provides for the giving of a three weeks' notice. Of course, section 3 does not apply to the case contemplated by section 37, as to the time during which the notice is to run, but only as to the mode of giving the notice. If, under the circumstances of this case, it was proper to introduce in evidence the affidavits and certificates to show how the notice in question was given, then it cannot be said that the proof does not show a compliance with the statute, as set forth in said sections 37 and 3 construed together. The certificate of the publishers, attached to the notice, that application would be made to the court on the 31st day of January, 1903, for the order authorizing the levy of the additional assessment, certifies that such notice was published in a certain weekly public newspaper, printed and published in said county, in every copy and impression thereof for three weeks, successively, of the issues commencing January 16, 1903, and ending January 23, 1903, the dates of the first and last papers containing the same. This certificate certainly shows that the notice that the application would be made before the court on January 31, 1903, was published for two weeks before January 31, 1903. Although the certificate certifies that it was published three weeks, a publication of only two weeks was sufficient under section 37; and such publication was made. There is also an affidavit by one of the commissioners that he posted a copy of the notice in question on the 16th day of January, 1903, in 10 of the most public places in the Oliver and Corn Grove drainage district in said county, giving the names of such places. Inasmuch as these notices were posted on January 16, 1903, they were posted two weeks before January 31, 1903. There is also a certificate by the clerk of the county court of said county that, on the 13th day of January, 1903, he sent by mail a copy of the notice to each one of the parties whose names appear in the affidavit thereto annexed.

Counsel for appellant says in his brief that "no affidavit was annexed, nor was there one on file." The proviso to section 3, as above quoted (2 Starr & C. Ann. St. 1896 [2d Ed.] pp. 1502, 1503), provides that, if any of the landowners of the district are nonresidents of the county, the petition shall be accompanied by an affidavit giving the names and places of residence of such nonresidents, if known, and that the clerk shall send a copy of the notice to each of said nonresidents, etc. The petition filed in the case on January 7, 1903, is sworn to by the commissioners, and states the names and addresses of the property owners, and this statement shows that the residence of the appellant is in Delana, Ill., and outside of the county of Livingston. Inasmuch as the petition contains a statement of the residences of the nonresidents of the county and is sworn to, we think the pro-

vision of the statute that the petition should be accompanied by an affidavit giving the names and places of residence of such nonresidents, if known, was sufficiently complied with. The record of the special assessment proceedings also shows an affidavit by one Norton that on January 14, 1903, he posted a copy of the notice that application would be made to the court on January 31, 1903, for authority to levy the additional assessment, at the north door of the courthouse in Pontiac. Therefore proof was actually introduced showing that two weeks' previous notice of the time set for the hearing of the petition was given, as required by section 3, by the posting of notices at the door of the courthouse, and in at least 10 of the most public places in the district, and by publishing the same for two weeks in a newspaper published in Livingston county, and that notice was mailed to appellant, who was a non-resident of the county.

Second. Counsel for appellant alleges that the county court had no jurisdiction to confirm the assessment roll, upon the alleged ground that notice was not given 10 days before the first day of the term at which the assessment was confirmed, and upon the alleged ground that sufficient time had not elapsed between the filing of the assessment roll and the confirmation thereof. The record of the special assessment proceeding shows that the assessment roll was filed on the 9th day of February, 1903, and the judgment confirming the same was entered on the 21st day of February, 1903. The record shows a certificate by the clerk of the county court of Livingston county, certifying that on February 9, 1903, he sent by mail, postage prepaid, a copy of the notice that the court had appointed the 21st day of February, 1903, at the courthouse in Pontiac, as the time and place where the commissioners would meet for the correction of said assessment, to each one of the parties whose names appeared in the affidavit thereto annexed. There was an affidavit, annexed to the certificate of the county clerk, made by himself, and showing that the appellant was a nonresident of the county. This was sufficient evidence that notice was mailed to the appellant on February 9, 1903. There is also an affidavit to the effect that such notice, at the request of the drainage commissioners of the district, was posted on February 9, 1903, at the north door of the courthouse at Pontiac. There was also an affidavit by the clerk of the county court that he posted said notice on the 11th day of February, 1903, at 10 of the most public places in the district, giving the names and locations of the places. There is also a certificate by the publisher of a weekly public newspaper in Pontiac that said notice was published for two weeks successively in such paper, in every copy and impression thereof, commencing February 11, 1903, and ending February 18, 1903, the dates of the first and last papers containing such notice.

The proofs thus introduced showed that the notice of the time and place where application would be made for the correction of the assessment roll was given 10 days before February 21, 1903. Section 37, as above quoted, provides that, when the court so orders, the commissioners of the district may make assessments in lieu of a jury and that "all the proceedings required of a jury in such cases by this act shall be required of and observed by the commissioners as near as may be in making such assessments." Section 19 of the drainage act provides that, "when the jury shall have completed their assessment of damages and benefits, they shall fix a time and place when and where they will attend, in case the jury was empaneled by the court in which the petition was filed, before the same court at a time fixed within any term, * * * for the correction of their assessment, and the jury shall give at least ten days' previous notice of such time and place, and object of such meeting by posting and publishing notices in the manner required in section 3 of the act to which this act is an amendment; the affidavit of any credible person or persons that he or they has or have posted such notice as herein required, and the certificate of the publishers of such newspaper, as to such publication, shall be sufficient evidence of such facts." 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1511. The commissioners were required to give the same notice as the jury were required to give in case the assessment was made by a jury instead of being made by commissioners. By section 19 the jury were required to give 10 days' previous notice by posting and publishing notices in the manner required by section 3 of the act. The notice required by section 19 is a 10 days' notice, and it is required to be given only by posting and publishing, nothing being said about mailing any notice. The proofs introduced, therefore, went further than the statute required, because they showed that the notice was not only posted and published 10 days before the day fixed, but that it was mailed 10 days before the day fixed. It was not necessary that the notice should be given 10 days before the first day of the term, because section 19 provides that the jury (or the commissioners) shall fix a time and place "before the same court at a time fixed within any term." As the time to be fixed may be within the term, it was not necessary that the notice should be given 10 days before the first day of the term, but only 10 days before the time fixed within the term.

In *Blake v. People*, 109 Ill. 504, this court held, in construing this section 19, that it was sufficient if the record showed the posting of notices and the publication of notices for more than 10 days; and in that case it was said (page 520): "All objections which could have been urged at the time of the confirmation of the assessment roll, and which

were not then urged, must be considered as waived, and cannot be urged for the first time on application for sale of lands for a delinquent assessment. Such has been the repeated ruling of this court in cases of special assessments for the opening, repair, and improvement of streets, and there is no difference in principle between those cases and the present." Section 34½ of the drainage act (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 1518) provides as follows: "This act shall be liberally construed to promote the ditching, drainage and reclamation of wet or overflowed lands; and collection of assessments shall not be defeated by reason of any omission, imperfection, or defect in the organization of any district, or in any proceedings occurring prior to the judgment of the court confirming the assessments of benefits and damages; but said judgment shall be conclusive that all prior proceedings were regular and according to law." In *Calkins v. Spraker*, 26 Ill. App. 159, the Appellate Court, speaking through the late Mr. Justice Baker, in construing section 19, said: "When the jury have completed their assessment, the only notices required to be given of the time and place objections to the damages and benefits assessed will be heard are notices of at least 10 days, by posting notices * * * and by publishing a copy thereof in a newspaper published in the county. Section 19 of the act of 1879 expressly and in terms limits the notices to be given to posted and published notices; and no sending or mailing of notices to nonresident landowners is required in that regard. There is a very essential difference in respect to the extent to which the provisions of section 3 of the statute is, by reference, incorporated into and becomes a part of sections 18 and 19, respectively. In this case the notice given under section 3 was all that the statute required."

Third. It is to be observed, however, that the orders and judgments in this case are to be treated as conclusive evidence in this collateral proceeding that proper notices were given. Inasmuch as counsel introduced certificates and affidavits outside of the recitals of the judgment for the purpose of showing that proper notice was not given, we have considered the question as to whether or not proper notice was actually given under the proofs introduced. But the record of the special assessment proceeding does not show any bill of exceptions, and therefore does not show all the evidence which may have been heard by the court upon the question of notice when the judgment of confirmation was entered. Consequently, it will be conclusively presumed that the evidence heard was sufficient to sustain the judgment of confirmation. *Hosmer v. Hunt Drainage District*, 135 Ill. 51, 28 N. E. 587.

In the judgment entered by the county court upon January 31, 1903, there is the following recital: "And the court, having duly

examined said proofs, finds that due and legal notice of filing of said petition was given as provided by law more than two weeks before the 31st day of January, A. D. 1903, the same being the day set for the hearing of said petition, and further finds that the court has jurisdiction of the subject-matter of said petition and all of the parties interested therein." The judgment of confirmation, entered on February 21, 1903, after reciting that the commissioners appeared and made proof of the filing of their assessment, provides as follows: "And make proof of the posting, publishing, and mailing of notices, according to law, of the time and place of meeting for the correction of said assessment roll; and now in the presence of the court the said commissioners proceed to hear the evidence for and against the said objections, and after hearing and passing upon the same said drainage commissioners return herein their verdict and confirmation of said assessment roll, as the same was originally made and filed herein. And the court, being fully advised in the premises, doth find that due and proper notice has been given to all persons interested, for the length of time and in the manner required by law, of these proceedings and this application, and doth consider and order that the objections to the same be, and they are hereby, overruled, and that the said assessment roll, and each and every entry thereon, and the proceedings of the said commissioners be, and they are in all respects, hereby confirmed and approved by the court, and spread upon the records of this court."

It will thus be observed that the judgment of confirmation finds that legal proof was made of the posting, publishing, and mailing of the notices according to law. The recitals in a judgment confirming a special assessment that all the requirements of the statute as to notice have been complied with, and that due notice as required by law was given by publication, are not overcome by a defective notice or certificate of publication found in the record. It will be presumed that the court acted upon sufficient evidence to sustain its finding, where the same is brought into question in a collateral proceeding. *Casey v. People*, 165 Ill. 49, 46 N. E. 7; *Illinois Central Railroad Co. v. People*, 189 Ill. 119, 59 N. E. 609; *Young v. People*, 171 Ill. 299, 49 N. E. 503; *Reedy v. Camfield*, 159 Ill. 254, 42 N. E. 833. "Where the court has found and recited that notice was duly given, it has been held that the finding cannot be overcome by the production of the publisher's certificate or affidavit showing insufficient notice. * * * Such a finding, like any other judicial determination, can never be contradicted, varied, or explained in a collateral proceeding by parol or other evidence beyond or outside of the record itself. The question must be tried by the record, and, while the finding may be rebutted by other portions of the same record, it cannot

be overcome by other means." *Illinois Central Railroad Co. v. People*, supra. In *Thompson v. People*, 207 Ill. 834, 69 N. E. 842, it was held that the lack of jurisdiction to enter judgment of confirmation must appear upon the face of the record in order to furnish ground for collateral attack. Inasmuch, therefore, as the county court, in the judgment of confirmation, found and recited that due notice was given, such finding of the court in the case at bar was not overcome by the evidence introduced, even though insufficient notice was shown thereby.

For the reasons above stated, we are of the opinion that the judgment of the county court was correct. Accordingly, such judgment is affirmed.

Judgment affirmed.

(217 Ill. 359)

HANKS v. HANKS.

(Supreme Court of Illinois, Oct. 24, 1905.)

APPEAL—REVIEW—HARMLESS ERROR.

Where a husband sued his wife for an accounting, the decree will not be disturbed on appeal in the Supreme Court, on the ground that the trial court should not have treated the transaction as a loan but as an investment of defendant's money, where the amount decreed was no more than the evidence would warrant in either view of the case.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4033.]

Appeal from Appellate Court, Third District.

Bill by David Hanks against Mary Alice Hanks. Decree for plaintiff was affirmed by the Appellate Court (114 Ill. App. 526), and defendant appeals. Affirmed.

This is a bill filed in the circuit court of Macou county on the 9th day of December, 1902, by the appellee, David Hanks, against the appellant, Mary Alice Hanks, his wife, for an accounting. Answer was filed by the defendant, denying the material allegations of the bill, to which a replication was filed. The cause, being at issue, was referred to a master in chancery to take proofs and report his conclusions. The master took testimony and made a report, finding that the appellant was not indebted to her husband, and recommending that the bill be dismissed. The cause was heard before the chancellor upon exceptions to this report. The exceptions were sustained, and on May 13, 1903, the circuit court entered a decree finding that the appellant was indebted to the appellee, her husband, in the sum of \$2,395, and ordering that she convey certain property to which she held the title in the city of Decatur, valued at \$2,000, to her husband within 30 days, and pay to him \$395, in case of her failure to pay the whole amount of \$2,395. By the decree it was ordered that the parties each pay half the costs, and that appellee have execution after 30 days from the filing of the decree against appellant for \$2,395 and interest from date thereof. An appeal was taken

from this decree to the Appellate Court. The Appellate Court has rendered a judgment affirming the decree, and the present appeal is prosecuted from such judgment of affirmance.

Mills Bros. and James J. Finn, for appellant. C. C. Le Forgee and Marshall C. Griffin, for appellee.

MAGRUDER, J. (after stating the facts). The appellee and the appellant were married on January 21, 1878; she being then about 17 years of age. She was then living with her mother and stepfather; her own father having died before that time. At the time of her marriage the appellant had \$1,925 in cash, which she had inherited from her father's estate, and which was then in the hands of her stepfather, whose name was Petzer. Appellant also had a horse given to her by her stepfather valued at \$100, which, added to the \$1,925, made \$2,025. There was another horse owned by her, and some time after the marriage the two horses were sold by the appellee. For some time after their marriage appellee and appellant lived on a farm near Argenta, Ill., belonging to the appellee's father. In 1879 appellee purchased a farm near Blue Mound, Ill., for the sum of \$2,600. There was a mortgage upon the farm for \$600, which appellee assumed, and \$2,000 was paid by him in cash. According to the testimony of the appellee, this \$2,000 was made up of the \$1,925 belonging to appellant and \$75 belonging to appellee. But there is evidence tending to show that the whole of the \$2,000 invested in this farm belonged to appellant. The Blue Mound farm was purchased from a man named Piper, who conveyed the farm to appellee by a deed dated August 9, 1879. Appellee and appellant lived upon this Blue Mound farm until 1885, at which time appellee sold the farm to one Walley for \$3,600. Walley assumed the payment of a mortgage then on the farm of \$600, and paid \$3,000 in cash to appellee. About this time appellee's father died, leaving a farm of over 400 acres, in which appellee, as one of the five heirs of his father, had an interest of 80 acres. Appellee and his brother, John W. Hanks, bought out the other heirs and assumed a mortgage of \$9,700 upon the property. By contract between appellee and his brother, John, appellee took 160 acres, and assumed the payment of one-half of the mortgage for \$9,700, to wit, \$4,850. The farm of 400 acres, thus left by appellee's father, was worth \$50 an acre, so that appellee's interest, after deducting the \$4,850, was worth about \$3,000. In order to make this purchase of 160 acres appellee put in the \$3,000 for which the Blue Mound farm had been sold, and his own 80 acres, worth \$3,000, making \$6,000, and assumed the mortgage of \$4,850. He reduced this mortgage to \$3,150 by payments amounting to \$1,700, and subsequently paid it off by

making a new mortgage to an insurance company for \$3,500. In the summer of 1900 appellee sold this farm of 160 acres, known as the "Argenta Farm," to one Greenfield for \$11,500, or \$11,520. Greenfield assumed the mortgage of \$3,500, and paid in cash the sum of \$8,000. The difficulty between appellee and appellant, which resulted in her leaving appellee and going to the home of her stepfather, arose out of the question as to how the proceeds of this sale should be disposed of. Appellant declined to sign the deed, and insisted that \$5,000 of the purchase money should be paid to her. The money was deposited in a national bank, and the deed was left there, and finally the deed was delivered to Greenfield, and the \$5,000 was paid over to the appellant. She claims that this \$5,000 was her own individual money, and that her husband, the appellee, consented that it should be paid to her in consideration of her signing the deed to Greenfield. The appellee, on the other hand, contends that it was agreed between them that she was to hold the \$5,000 until he found a chance to invest it by the purchase of another farm. Appellee's contention is that prior thereto they had invested their money in farm land, and it was understood that in the same way this new sum of \$5,000 was to be invested.

The evidence shows that in 1888 according to the testimony of the appellee, but in 1889 according to the testimony of appellant, the appellee purchased a lot in the city of Decatur, and had the title to the same conveyed to his wife, the appellant. The lot was estimated to be worth \$1,500, and appellee placed improvements on it to the value of \$500, making it worth \$2,000. The contention of appellee is that this lot and its improvements were given by him to his wife in part payment of what he owed her on account of his use of her separate funds inherited from her father. The evidence tends strongly to show that, when appellee took the sum of \$2,000 belonging to his wife in 1879, and with it purchased the Blue Mound farm, the transaction amounted to a loan of \$2,000 by appellant to appellee. They lived for years upon the Blue Mound farm, and the rents and profits were used for their support and the support of their children. The testimony shows that they had two children, and one of them, a son who is a witness in this case was some 22 or 23 years of age at the time of the hearing of the cause. It is claimed by counsel for appellant that she did not lend her money to her husband, in which case she would only be entitled to legal interest upon the amount of the loan, but that she gave it to him to invest for her, and that she is entitled to such increase as resulted from the investments. Upon this theory appellant claims that the \$3,000 realized from the sale of the Blue Mound farm belonged entirely to her, and that, when the Argenta farm of 160 acres was purchased, there was an investment therein of \$3,000

of her money and \$3,000 of her husband's money, and that therefore she was entitled to one-half of the profits derived from the investment in the 160-acre farm. The court below held that the appellant had received \$2,000 by the conveyance to her of the house and lot in Decatur, and had received \$5,000 in money, part of the proceeds of the sale of the 160-acre farm, making \$7,000 in all, and that she was entitled to the sum of \$4,605 as her own money, which, deducted from the sum of \$7,000, leaves \$2,395, the amount which the decree ordered her to pay to the appellee.

After a careful examination of the record we think that the conclusion thus reached by the circuit court, and affirmed by the Appellate Court, is correct. It makes little difference whether the transaction be regarded as a loan or as an investment. If it be regarded as a loan, then in August, 1879, appellee received \$2,025 belonging to his wife, made up of \$1,925, inherited from her father's estate, and \$100, the value of a horse received by her from her stepfather. Interest on \$2,025 from August, 1879, to the spring of 1901, when the 160-acre farm was sold, at the rate of 6 per cent. per annum, would amount to something over \$2,600, making the whole amount of principal then due about \$4,605, which amount, taken from the \$7,000 received by appellant, would leave \$2,395, the amount named in the decree. This is the interpretation placed by counsel for appellant upon the decree of the lower court, for they say in their brief that the trial court "proceeded to take an accounting between the parties upon the theory that the moneys that were advanced by appellant in the original purchase of the Blue Mound farm were a simple loan, for which, with interest, the appellee was indebted to appellant, amounting to the sum of \$4,605, and then charged her with the \$2,000 invested in the Decatur property, together with the \$5,000 received at the sale of the Argenta farm, making a total of \$7,000 received by her, and leaving appellant in debt to appellee the amount of the difference, being \$2,395, which was decreed that she should pay to him." This view and this mode of calculation were exceedingly favorable to the appellant, for the reason that she received the Decatur house and lot according to her own testimony in 1889. If interest be calculated on the sum of \$2,025 from 1879 to 1889, a period of 10 years, and the \$2,000 be deducted at that date, and interest calculated on the balance up to the spring of 1901, when the farm of 160 acres was sold and appellant received the \$5,000, the amount of principal and interest due her would be largely less than \$4,605.

But, suppose it be true that appellant is entitled to one-half of the profits of the investment of the joint moneys of herself and her husband. There is evidence tending to show that \$3,000 of her money and \$3,000 of his money went towards the purchase of the farm of 160 acres. When this farm was

sold there was realized in cash the sum of \$8,000; the purchaser assuming the mortgage of \$3,500. Upon the theory of investment appellant would be entitled to half of the \$8,000; that is to say, to \$4,000. She had received \$2,000 by the conveyance to her of the Decatur house and lot and \$5,000 in money. As she was only entitled under this theory to \$4,000, one-half of the \$8,000, she was indebted to her husband for the difference between \$7,000 and \$4,000, which would be \$3,000, whereas the court only ordered her to pay \$2,395. But there is testimony tending to show that her husband sold the two horses belonging to her for \$300, and that in 1896 she received from her mother's estate \$305, making \$605. The court held that she was entitled to receive this \$605 from her husband, which, added to the \$4,000, one-half of the investment, makes \$4,605, the amount actually allowed her. In any view of the case, therefore, whether the transaction be regarded as a loan or as an investment, appellant was awarded all that she was entitled to by the decree of the court. As is said by the Appellate Court in their opinion deciding this case: "The bill is for an accounting pure and simple, and not to declare a resulting trust in defendant (appellant) in favor of complainant (appellee) as to the house and lot in Decatur, and the defendant filed no cross-bill to declare a resulting trust in her favor as to the Blue Mound or Argenta farms, as might be inferred from the authorities cited and arguments advanced by counsel for the respective parties."

We find no error in the record, and accordingly the judgment of the Appellate Court, affirming the decree of the circuit court, is affirmed.

Judgment affirmed.

(217 Ill. 561)

HUTCHINS v. VANDALIA LEVEE & DRAINAGE DIST.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EMINENT DOMAIN — DRAIN — CONSTRUCTION.

The county court, in a proceeding for the organization of a drainage district under the drainage act of May 29, 1879 (2 Starr & C. Ann. St. [2d Ed.] p. 1500), and for the assessment of benefits and damages under that act, cannot invoke the provisions of the eminent domain act (2 Starr & C. Ann. St. [2d Ed.] p. 1763) for the purpose of fixing the compensation to be paid to the property owner for taking or damaging his property, where the petition required to be filed by section 2 of the eminent domain act is not filed.

2. SAME—MODE OF PROCEEDINGS—ESTABLISHMENT OF DRAINS.

Laws 1885, p. 129, § 46, amending Act May 29, 1879 (Laws 1879, p. 120), by authorizing drainage districts to proceed under any law of eminent domain, applies only to the construction of additional drains or the repair of drains by districts already organized.

3. SAME — CONDEMNATION PROCEEDINGS — PETITION.

A petition filed by property owners under the drainage act of May 29, 1879 (Laws 1879,

p. 120), for the organization of a drainage district, cannot be regarded as a substitute for the petition which section 2 of the eminent domain act (2 Starr & C. Ann. St. [2d Ed.] p. 1763) requires to be filed by an already existing and established corporation vested by general law and special charter with the power to condemn land.

4. JURY—ASSESSMENT OF DAMAGES—CONSTITUTIONALITY OF STATUTE.

The provisions of the drainage act of May 29, 1879 (Laws 1879, p. 120), as amended by Laws 1885, p. 108, which authorizes the assessment of damages for land taken and of damages to lands not taken by commissioners, instead of by a jury, are unconstitutional, and an assessment of benefits and damages under such provisions does not make a *prima facie* case in favor of the district.

5. EMINENT DOMAIN — PROCEEDINGS—MAINTENANCE BY DRAINAGE DISTRICT.

A drainage district already organized under Act May 29, 1879 (Laws 1879, p. 120), providing for the construction of drains and the organization of drainage districts, may condemn land for its ditches and drains under the eminent domain act (2 Starr & C. Ann. St. [2d Ed.] p. 1763).

Appeal from Fayette County Court; Joseph Story, Judge.

Petition for the organization of the Vandalia Levee & Drainage District and for the condemnation of land therefor. From a judgment confirming an assessment, Moses Hutchins, a property owner, appeals. Reversed.

This is an appeal from a judgment of the county court of Fayette county, entered on the 24th day of June, 1904, ordering that the appellee district pay to the appellant, as and for his damages for lands taken for right of way for levee purposes, the sum of \$334.50, and that the cost of the proceeding be taxed against said district, and further ordering and adjudging that the assessment roll be confirmed as to the benefits assessed against the lands of appellant in section 22, town 7 N, range 1 E of the third P. M., in said county, in accordance with the findings of the jury, and declaring the same to be a lien upon said lands, respectively, as assessed against the same, and ordering the clerk of said court to extend and spread the assessment so confirmed upon the records of the court, and that the payment of said assessment and the interest thereon should become due and payable at the time or times and in the manner provided by the court. The judgment was entered in a proceeding begun by the filing in said county court on March 11, 1903, of a petition praying for the organization of a special levee and drainage district by the name of the "Vandalia Levee and Drainage District in Fayette County in the State of Illinois," the boundaries thereof embracing the lands mentioned in the petition, and also praying for the appointment of commissioners in accordance with the provisions of the statute in such case made and provided, and for the execution and completion of the proposed work, and for such other and further order and decree in the

premises as shall seem meet and the nature of the case may require. The proceeding is under the act of May 29, 1879 (Laws 1879, p. 120), as amended in 1885 (Laws 1885, p. 108), entitled "An act to provide for the construction, reparation, and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts."

The petitioners, describing themselves as the owners of lands in the proposed special levee and drainage district located in said county of Fayette, represent that they are each of lawful age and together constitute a majority of the owners of lawful age of the land within the special levee and drainage district described in the petition, and proposed to be organized into a special levee and drainage district, and that the owners signing the petition own in the aggregate more than one-third of all the lands contained within said proposed district; that said lands are rich and suited for agricultural purposes, if suitably leveed and protected from the annual overflows and suitably drained, but that the same are mostly low, wet, and subject to annual overflows and rendered nearly valueless for agricultural purposes, and producing malarial diseases and unhealthfulness therein, and over all the adjoining lands thereto; that it is necessary for agricultural and sanitary purposes that a levee or levees and drain or drains be constructed and maintained in and upon said proposed district on the lands described in the petition as embraced within the bounds of the proposed district, setting forth particularly a description of the lands embraced within the district. The petition further states that the lands within said bounds require a special combined system of levees and drainage for their protection and drainage from wash and overflow; that the petitioners desire that a special levee and drainage district may be organized, embracing the lands in the petition described, for the purpose of constructing, repairing, and maintaining all necessary and proper levees, embankments, grades, drains, and ditches within said district that may be found to be requisite to render said lands suitable and available at all times for agricultural and sanitary purposes, and to preserve and protect the same by special assessments upon the property therein and benefited thereby; that the levee proposed is to consist of an embankment of earth 4 feet wide on top, etc., the earth for the construction of said levee to be taken from the ground on the river side, or outside of the inclosure of said embankment; all timber, brush, logs, and debris, other than soil, clay, or gravel, to be removed from the ground to be occupied by said embankment, so that the same will be a solid and durable embankment 2½ feet above the high-water mark of 1875; the district containing about 13,000

acres, the main ditch and lateral ditches to provide drainage for the waters of certain lakes and creeks. The petition further alleges that all the lands embraced within the boundaries of the proposed district are affected beneficially by the same, by protection from overflow and drainage in whole or in part, and that it is necessary to provide for an annual assessment upon the lands in the proposed district to pay for the necessary annual repairs and ordinary expenses in maintaining and preserving the improvements when made. The petition sets forth the names of the owners of land in the proposed district, together with their post office addresses and their respective interests in the tracts of land embraced within the district, etc.

On April 13, 1903, the court entered an order, finding that due notice had been given to all parties interested, that it had jurisdiction of the subject-matter and of the parties, that the petition was signed by a majority of the landowners owning more than one-third of the land within the proposed district, and that the proposed work was necessary and would be beneficial for agricultural and sanitary purposes to all the land in the proposed district, and appointing D. M. Clark, George F. Snerly, and William E. Ryan as commissioners "in and for the said proposed levee and drainage district according to the bounds thereof, who shall qualify and organize as provided by the statute, and proceed thereafter under the law and make report to this court in accordance with the provisions of the statute in detail." The commissioners qualified as required by law, entered upon the discharge of their duties, and made their report to the court, which was filed August 3, 1903. A number of objections were filed to the report, and by order entered on September 9, 1903, the report was referred back to the commissioners to correct the same and to report back to the court on September 18, 1903, on which latter day the objections were disposed of, and the court by its order declared the district duly organized. On the same day, to wit, September 18, 1903, an order was entered by the court directing the commissioners "to make the assessment of damages or of damages and benefits, faithfully and impartially, to the best of their understanding and judgment, to which end they each shall respectively subscribe an oath and be sworn so to do, thence proceed to make such assessment, and upon completing the same they shall fix upon a day in this court for the correction of their assessment, and shall give at least ten days' notice of such time and place and the objects of such meeting by posting and publishing notices in the manner required by the statute under which this proceeding is had." The commissioners fixed upon February 23, 1904, as the date upon which objections should be filed.

The assessment roll was completed and filed on February 2, 1904. The report of the

commissioners, making assessments for benefits and damages, recited that they had taken the oath, and examined the lands, and assessed to each tract damaged its proportionate share of the entire damage, and, if benefited, its share of such benefit, and carried the balance to the proper column and assessed to each tract benefited its proportionate share of the entire cost of such benefits. The assessment roll showed tracts belonging to the appellant in section 22 above described—one containing 28.50 acres, and assessment of the same at \$3.35 per acre, a total assessment of the same of \$95.48; showing land taken out of the same for levee or ditch to the amount of 3.90 acres, the value of the same at \$25 per acre, making the total value of the amount taken, \$97.50, and the net damage, \$2.02; no net benefits. The assessment roll also showed another tract, belonging to the appellant in said section 22, containing 68 acres, assessed at \$3.35 an acre, total assessment \$227.80; land taken for levee or ditch, 2.50 acres, valued at \$25 an acre; total value of land taken, \$62.50; net benefits, \$165.30, etc. The roll also showed another tract in said section of 80 acres belonging to appellant, assessed at \$3.35 per acre; total assessment, \$268; net benefits, \$268. Also showing another tract in the same section of 6 acres, assessed at \$3.35 an acre; total assessment, \$20.10; land taken for levee or ditch 4.50 acres, valued at \$25 per acre; total value of land taken, \$112.50; net damages, \$92.40. There were some other tracts mentioned in the roll belonging to appellant, but the assessment of benefits thereto seems not to have been objected to.

The appellant, by his attorneys, objected to the confirmation of the assessment against his lands as thus reported by the commissioners, and made the following specific objections: "First, that the commissioners heretofore appointed by this court to make assessments of benefits and damages have no right under the statute to make an assessment of benefits and damages, as directed by the order of this court; second, that the provision of the statute empowering three commissioners to make an assessment of damages as against this objector for land taken, and for land damaged by the construction of said levee and drainage district and the improvements thereof, are invalid and unconstitutional; third, that there is no authority in said district for commissioners to acquire any part of its right of way or other property, or any right therein, for ditch or other purposes, in the manner attempted by these proceedings, or as directed by the court herein; fourth, that the lands of this objector, situated in section 22, town 7 N., range 1 E., are assessed for benefits at a higher rate in proportion to the benefits received than other lands similarly situated in the said district; fifth, there is no authority of law for three commissioners to agree to build bridges for farm purposes for this objector; sixth, that the said commissioners, in attempting to as-

ness the damages to the lands in said section 22 taken for the right of way for said levee and ditches and to the lands not taken, have made assessments which are not adequate; that the said commissioners have attempted to offset the damages to the said lands taken against the benefits accruing to the lands, and not paying for the said damages in money.

On February 23, 1904, the court entered an order that the assessment be confirmed, as reported by the commissioners, as to all parties excepting those appearing and defending, and as to all those parties appearing and objecting to the assessment roll the cause was continued to March 7, 1904. On March 7, 1904, an order was entered directing the clerk to docket each of the objections filed to the confirmation of the report of the commissioners as to the assessment of benefits and damages separately, and to this order the objectors by their attorneys excepted. The cause was continued until March 9, 1904, on which day the commissioners filed a reply to the objections of the appellant, and the cause was set for trial on Tuesday, March 15, 1904, and the clerk of the court was ordered by the court to issue a special venire for 12 jurors to act as petit jurors, returnable at 10 a. m. March 15, 1904, to try all cases wherein objections are filed to be tried at this term of court, and to this order for the issue of a venire the appellant by his attorneys excepted. On March 15, 1904, came the parties, and the jury was called and impaneled and sworn as jurors, and an order was entered in part as follows: "It appearing to the court that only nine jurors appeared, and it further appearing to the court that this jury was drawn under the eminent domain act, the court designated William Metz, Adam Fink, and William Fouts as jurors to finish the panel. Jury impaneled and sworn to try the issues," etc. The trial was then commenced, and evidence was heard from day to day, and continued from time to time, until April 8, 1904, when the jury retired to consider of their verdict, and retired to view the premises in custody of a sworn officer, and before their retirement the jury were instructed by the court, and returned into open court with their verdict. The verdict of the jury returned findings under the head of "Damages for Land Taken," consisting of six columns, reciting in the first the name of appellant, in the second the description of four pieces of property, in the third the number of acres in each piece of property, in the fourth the amount of land or number of acres taken out of each piece of property, in the fifth the value per acre, and in the sixth the damages; the damages being in the case of the first piece \$97.50, in the case of the second \$62.50, in the case of the third, \$112.50, in the case of the fourth, \$62 (these figures being the same as those mentioned in the assessment roll already referred to), and reciting as "total damages for land taken \$334.50." Under the head of "Damages to

Land Not Taken" was the word "None." Under the head of "Assessment Benefits" were five columns, containing in the first appellant's name, in the second descriptions of said four pieces of property, in the third the number of acres in each piece, in the fourth the amount of assessment per acre, being \$3.35, in the fifth the total assessment—being for the first piece \$95.48, for the second \$268, for the third \$227.80, and for the fourth \$20.10; total, \$611.38 (being the same figures as are set forth in the assessment roll under the head of "Total Assessments"). Under the findings thus showing "damages for land taken," "damages to land not taken," and "assessment benefits," the jury wrote and signed their verdict as follows: "We, the jury, find the above to be our verdict in cause of the Vandalia Levee and Drainage District v. Moses Hutchins."

Appellant filed a motion for new trial, which was continued to the June term. On June 24, 1904, the motion for new trial was overruled, and the defendant by his attorney excepted thereto, and thereupon judgment was entered on June 24, 1904, as above stated, to which judgment appellant then and there excepted, and prayed an appeal to this court, which was allowed upon the filing of a bond of \$500 and bill of exceptions within 60 days from June 24, 1904, the bond to be approved by the clerk. The defendant also made a motion to arrest the judgment and declare the verdict void, which motion was also overruled by the court, to the overruling of which the appellant by his attorneys then and there excepted. Among the written reasons filed by appellant in support of his motion for new trial, besides those to the effect that the court admitted improper and refused to admit proper evidence and gave improper and refused to give proper instructions, were the following: "(5) The verdict is contrary to the law and the evidence in the case. (6) The jury in this case was not properly selected to try the issues in this cause. (7) The petition filed in this cause is not sufficient to sustain a judgment condemning private property for public use. (8) No petition has been filed in this cause asking to condemn the lands of this defendant." Among the written reasons filed by the appellant in favor of his motion to arrest the judgment, besides those relating to the admission of improper and the refusal of proper evidence and the refusal of certain instructions, the following reasons were set up: "(4) That the court erred in overruling the motion by the defendant for a new trial herein; (5) that there was no proper petition filed in said cause to condemn the land of this defendant; (6) that there was no petition to condemn the land of this defendant as required by law; (7) that the jury in this cause was not chosen in accordance with law." The bond and bill of exceptions were filed within the time required by the order of court, and the bond was approved within such time.

In the bill of exceptions, immediately after the judgment of June 24, 1904, is the following statement or recital: "And the court refuses to either overrule or sustain the objections of the defendant herein filed, but rules that the calling of the jury herein disposed of all the objections filed herein, and that, after the verdict of the jury, the assessment of the commissioners was of no effect, but that a new assessment was made by the jury, and they were held to have made the assessment de novo; to which defendant excepts."

Brown, Burnside & Bullington, for appellant. John H. Webb and James M. Taylor, for appellee.

MAGRUDER, J. (after stating the facts). This is a proceeding for the organization of a levee and drainage district under the act of May 29, 1879, as amended in 1885, and entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts." 2 Starr & C. Ann. St. (2d Ed.) p. 1500. It will be seen from the statement of facts preceding this opinion that damages for lands of appellant taken for the improvement in question, and damages to lands of appellant not taken, were assessed by three commissioners appointed by the court. The assessment roll filed by the petitioners and the verdict returned by the jury show that some 14 acres, belonging to appellant, were taken for the building of the levee and ditches in question. This court held in *Juvinall v. Jamesburg Drainage District*, 204 Ill. 106, 68 N. E. 440, that those provisions in the act of May 29, 1879, and the amendments thereto passed in 1885, which authorized the assessment of damages for lands taken and of damages to lands not taken by commissioners, instead of a jury, were unconstitutional. The reasons for this conclusion need not be here repeated. Therefore the objections filed by the appellant to the original assessment of such damages by the commissioners as to appellant's property, so far as such objections relate to the power of the commissioners to make the assessment without a jury, were well taken. The county court did not make any ruling either overruling or sustaining these objections, but, recognizing their validity, ordered a jury to be impaneled, and ruled that the calling of the jury disposed of such objections. In *Wabash Railroad Co. v. Coon Run Drainage District*, 194 Ill. 310, 62 N. E. 679, this court held that the sections of the act of May 29, 1879, which attempted to provide for the assessment of damages by a jury, are unconstitutional as not designating for that purpose such a jury as is contemplated by the organic law. The reasons for this conclusion are stated in the last-named case and need not be here repeated. If, therefore,

the court had ordered the damages to be assessed by such jury as is provided for in the act of May 29, 1879, and in the manner specified in that act, the error of causing the damages to be assessed by commissioners would not have been cured. In view of this difficulty, the court ordered a jury to be impaneled or drawn "under the eminent domain act," as is stated in the order entered on March 15, 1904.

The principal question, therefore, which is presented by this record, is whether the county court, in a proceeding for the organization of a drainage district under the act of May 29, 1879, and for the assessment of benefits and damages under the terms of that act, can abandon such act, and invoke the aid of the eminent domain act for the purpose of fixing the compensation to be paid to the property owner for the taking or damaging of his property. We are of the opinion that the county court had no power to pursue this course, and that its action in this regard was erroneous. The bill of exceptions shows that, when the court directed the jury to be drawn under the eminent domain act, counsel for appellant excepted to such action of the court. It also appears that counsel for appellant asked for a new trial, and made a motion in arrest of judgment, upon the ground that the jury was not properly selected to try the issues in the case. Due exception was taken by the appellant to the action of the court in overruling his motion for new trial and his motion in arrest of judgment. These exceptions bring the question directly before us as to the correctness of this action of the court, and, in view of such exceptions, the right of appellant to object to the action of the court has not been waived. Cases to the effect that there was such waiver by reason of a failure to challenge the array on account of some irregularity in the summoning of the jury or the issuing of a venire have no application here. *McCaleb v. Coon Run Drainage District*, 190 Ill. 549, 60 N. E. 898; *Chicago, Milwaukee & St. Paul Railway Co. v. Hock*, 118 Ill. 587, 9 N. E. 205.

Section 2 of the eminent domain act provides that the petition therein required to be filed is to be filed in cases where the right to condemn property, or to take property for public use without the owner's consent, is conferred by general law or special authority upon any corporate or municipal authority, etc. The act of May 29, 1879, as subsequently amended, is the only law which gives to the levee and drainage districts therein described the power to take private property for the improvements therein permitted. That act provides the specific mode by which damages for taking or damaging such property are to be assessed. In *Trigger v. Drainage District*, 193 Ill. 230, 233, 61 N. E. 1114, 1115, we said: "It is clear from the several sections of the act under which this proceeding was had that the county court may in

the first instance order the assessment of benefits to be made either by a jury or by the commissioners, and that whichever body is ordered to make the assessment must hear and determine objections filed to such assessment." The jury, which is to fix the amount to be awarded as damages for property taken, is the jury described in the act of May 29, 1879. In other words, the power of condemnation of private property for public purposes, as conferred by the act of May 29, 1879, must be exercised in the manner pointed out in that act, and not in the manner pointed out in the eminent domain act. So far as the Legislature conferred the power of condemnation by the act of May 29, 1879, upon levee and drainage districts, it conferred such power to be exercised in the mode described in the act, and its intention was that such power should be exercised only in that mode, and not in some other mode. The object of courts, in construing acts of the Legislature, is to ascertain the intention of the legislative body, and, if it is clear that the intention of the Legislature was to require these districts or their commissioners to proceed in the mode specified in that act, the power to proceed in the mode specified in some other act is excluded. There is nothing in the act of May 29, 1879, or any of the subsequent amendments thereto, which authorizes the county court, or any other court, to proceed in accordance with the provisions of the eminent domain act. Section 46 of the act of 1885 refers only to the construction of additional drains, etc., or the repair of drains already constructed by drainage and levee districts already organized. Under section 2 of the eminent domain act the party authorized to take or damage private property or to construct a public improvement by the taking or damaging of such property must apply to the judge of the circuit court or county court, either in vacation or term time, where the said property or any part thereof is situated, by filing with the clerk a petition. This petition must set forth by reference the authority of the party seeking condemnation, the purpose for which the property is sought to be taken or damaged, etc., and it must pray the judge to cause the compensation, to be paid to the owner, to be assessed. It has been held that this petition is jurisdictional, and the filing of it with the proper averments, as required by section 2 of the eminent domain act, is necessary to put the court in motion, in order to enable it to determine the compensation to be paid for the property taken or damaged. In *Chicago & Northwestern Railway Co. v. Galt*, 133 Ill. 657, page 667, 23 N. E. 425, 427, we said: "To put the court in motion and give it jurisdiction in condemnation proceedings, a petition is, in general, necessary, and must be in conformity with the statute granting the right of condemnation. It

should set forth by appropriate averments all such facts as are necessary to authorize the tribunal to act. * * * The jurisdiction exercised in condemnation cases is always of a special character. The proceedings are to be conducted according to a certain prescribed mode." In the case at bar no petition was filed in this proceeding, as required by section 2 of the eminent domain act. 2 Starr & C. Ann. St. (2d Ed.) p. 1763.

Counsel for appellee seem to be under the impression that the filing of the petition in this proceeding for the organization of the levee and drainage district is such a filing of a petition as will meet the requirements of the eminent domain act. In pursuance of this idea, counsel for appellee asked the court to give, and the court did give in their behalf, an instruction to the jury to the effect "that for all lands taken for a right of way by the levee and drainage district compensation is to be made for the same at their fair, cash-market value at the time of filing the petition." This instruction was clearly erroneous. No other petition was filed in the proceeding at bar, except the original petition for the organization of a drainage district. At the time when that petition was filed, which was on March 11, 1903, no drainage district was organized. It was not until subsequently, to wit, in September, 1903, that the county court entered an order declaring the drainage district to be established in accordance with the provisions of section 16 of the act of May 29, 1879. The original petition was not filed by an existing and established drainage district, but by certain individual property owners, asking for the organization of a district. Section 2 of the eminent domain act contemplates a petition, filed by an already existing and established corporation, vested by general law or special charter with the power to condemn property. Therefore the petition filed in this proceeding on March 11, 1903, before the organization or establishment of the drainage district, cannot be regarded as in any sense such a petition as is contemplated by section 2 of the eminent domain act. It is the doctrine of this court that the compensation to be paid to the property owner, when his property is condemned, must be fixed by the valuation of the property at the time of the filing of the petition, and the right vested in the condemning party, upon the payment of the compensation awarded for the land, relates back to the time of filing the petition. *South Park Com'rs v. Dunlevy*, 91 Ill. 49; *Schreiber v. Chicago & Evanston Railroad Co.*, 115 Ill. 340, 3 N. E. 427; *Chicago, Evanston & Lake Superior Railroad Co. v. Catholic Bishop*, 119 Ill. 525, 10 N. E. 372.

The only petition filed in this proceeding, which was a petition by property owners, and not by a drainage district, is a petition for the organization of a district, and not only fails to ask any such relief as that compensa-

tion be made for lands taken or damaged, but does not allege, as is required by section 2 of the eminent domain act, that the compensation to be paid cannot be agreed upon with appellant. In *Reed v. Ohio & Mississippi Railway Co.*, 126 Ill. 48, 52, 17 N. E. 807, 809, we said: "There is in the petition and proof in this case a total want of any reference to the jurisdictional fact of the inability of appellee railway company to agree with the landowner as to the compensation to be paid. There seems to have been no effort made to purchase the land, or agree on the compensation or price to be paid therefor, before resorting to this proceeding. The petition was clearly insufficient to give the court jurisdiction, or to entitle the appellee company to appropriate appellant's land." After the Vandalia Levee and Drainage District, the appellee herein, had been organized, it had the power to proceed under the eminent domain act by an original proceeding to condemn the property of the appellant. *Cleveland, Cincinnati, Chicago & St. Louis Railroad Co. v. Drainage District*, 213 Ill. 83, 72 N. E. 684. This was not an original proceeding under the eminent domain act, but an attempt to incorporate the provisions of the eminent domain act into the levee and drainage act of May 29, 1879, and to make use of a part of those provisions, without taking the steps required by the eminent domain act to give a court jurisdiction to undertake the condemnation of property.

The views here expressed are in accord with the holding of this court in *Trigger v. Drainage District*, supra, where the appellant moved to submit the case to a jury, which motion was overruled, and the court, after using the language above quoted from that case, said: "The county court had no power to grant the motion of counsel for the objector to impanel a special jury to hear the issues formed on the objections. If evils or hardships result from the statute, the remedy is in the Legislature, and not with the courts." The character of the proceedings, and the nature of the verdict rendered by the jury, show that there was a mixing up and commingling of certain requirements of the eminent domain act with those of the levee and drainage act. For example, the verdict of the jury fixed the amounts assessed for benefits. There is no provision in the eminent domain act which authorizes any assessment for benefits. The object of that act is merely to ascertain compensation for land taken or damaged for a public purpose. The verdict of the jury shows that they assessed benefits, not only against the land of the appellant which was not taken for the improvement in question, but they assessed benefits against the 14 acres of land which were taken by the district for the improvement. In other words, appellant was required to pay benefits, not only for his own land, but for the land which had been taken from him for the purposes of

the district, and which, if properly taken, necessarily belonged to the district, and not to appellant.

Another serious error committed by the court below was in instructing the jury for the appellee that the assessment roll of the district, which had been admitted in evidence before the jury, made out a prima facie case for the district, or was prima facie evidence to sustain the assessment for benefits upon all the tracts of land in controversy, etc. The assessment roll was made under the provisions of the act of May 29, 1879, which this court has declared to be unconstitutional. It could only have been made under those provisions of the act of May 29, 1879, which provide for the making of assessments by commissioners, or under those other provisions which require the making of assessments by a jury organized as the jury is required to be organized under said act. The amounts of compensation awarded by the jury in their verdict as damages for the 14 acres of appellant's property which were taken by the district are the same as the amounts specified in the assessment roll. The effect of the instruction above referred to in regard to the assessment roll was to induce the jury to find the amount of compensation to be awarded to appellant to be such as was specified in the assessment roll, and not such as was proper according to their own judgment.

For the reasons above stated, we are of the opinion that the judgment of the county court is erroneous. Accordingly such judgment is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(217 Ill. 186)

FAIRBANKS et al. v. CARLE et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. COURTS—APPELLATE JURISDICTION—ACTION INVOLVING FREEHOLD.

Where plaintiff files a bill in aid of execution to subject real estate to the lien of a judgment, it does not involve a freehold, so as to give the Supreme Court jurisdiction on appeal, though the bill seeks to have the legal title, standing in the name of another person, declared to be in the judgment debtor.

2. APPEAL—DISMISSAL.

The Supreme Court will dismiss an appeal of its own motion, where the record shows that it should have been taken to the Appellate Court.

Appeal from Circuit Court, Piatt County; Solon Philbrick, Judge.

Bill by William R. Carle against William D. Fairbanks and others. Decree for plaintiff, and Fairbanks and certain other of the defendants appeal. Dismissed.

Charles F. Mansfield, for appellant. Fairbanks, Herrick & Herrick and Lemon & Lemon, for appellees.

CARTWRIGHT, C. J. The appellee William B. Carle filed his bill in this case in the circuit court of Platt county against appellants in aid of an execution, alleging that he had recovered a judgment against Luther M. Fairbanks, one of the defendants; that execution had been issued and returned "No property found"; that an alias execution was issued and levied upon the real estate described in the bill; that the record title to said real estate appeared to be in the defendant William D. Fairbanks, but he was not the true owner thereof; that the judgment debtor, Luther M. Fairbanks, purchased the real estate from James M. Crosby; that William D. Fairbanks paid no part of the consideration for said real estate; and that the title was made to appear in him for the purpose of defrauding the creditors of Luther M. Fairbanks. The bill made certain mortgages defendants, alleging that the liens of the mortgages executed to them by William D. Fairbanks were not liens on the premises as against complainant and were subordinate to his rights. The bill prayed that Luther M. Fairbanks be decreed to be the owner of the real estate, and the title to be in him, and that complainant be authorized to proceed against the said real estate for satisfaction of his judgment. Luther M. Fairbanks was defaulted. William D. Fairbanks answered, denying the allegations of the bill, and alleging that he paid the entire consideration for the real estate, and that the legal and equitable title thereto was in him. A mortgagee answered and filed a cross-bill to foreclose her mortgage. The cause was heard by the court, and a decree was entered finding that the allegations of the original bill relating to the judgments, the issue and return of an execution, and the issue and levy of an alias execution were true; that the record title to the real estate was in the defendant William D. Fairbanks, but that in equity it was owned jointly by William D. Fairbanks and Luther M. Fairbanks, each owning an undivided one-half interest. The court, by the decree, further found that the real estate was subject to the mortgage described in the cross-bill; that the complainant in the original bill had a lien on the undivided one-half interest of the real estate owned by Luther M. Fairbanks, subject only to the prior lien of said mortgage; and that complainant was entitled to have said undivided one-half interest of Luther M. Fairbanks sold in satisfaction of his judgment. The decree provided for foreclosure of the mortgage and a sale, and it was ordered and decreed that defendant have leave to proceed with his levy and sale under the execution, and that he have a right to redeem from any sale made under the mortgage. The defendants Luther M. Fairbanks and William D. Fairbanks prayed and perfected an appeal from that decree to this court.

The appeal will be dismissed. A bill in aid of an execution for the purpose of subjecting

real estate to the lien of a judgment and satisfying the execution does not involve a freehold. One party will not necessarily gain and the other lose a freehold estate as the result of the suit, and the only question relating to the title is whether the land is subject to the lien asserted by the complainant. *Hupp v. Hupp*, 153 Ill. 490, 39 N. E. 124; *Moshier v. Reynolds*, 155 Ill. 72, 39 N. E. 621; *Pringle v. James*, 185 Ill. 274, 58 N. E. 1055; *First Nat. Bank v. Vest*, 187 Ill. 389, 58 N. E. 229. This suit is not a contest over the title of the land by William D. Fairbanks, the holder of the record title, and Luther M. Fairbanks, or the complainant. The bill did not assert title in the complainant, or attempt to obtain a transfer of title from the defendants, or either of them, but sought to subject the lands to the lien of the complainant's judgment on the ground that Luther M. Fairbanks was in equity the owner of the premises, and complainant was entitled to have satisfaction of his judgment out of them. If the decree establishing the lien against an undivided one-half of the real estate should be enforced, it will not necessarily result in William D. Fairbanks losing, or any one else gaining, a freehold estate. Either William D. Fairbanks or Luther M. Fairbanks can pay the judgment and relieve the lands from the lien, or either may redeem after a sale. The effect of the decree is not to recover a freehold estate or transfer such an estate, and the freehold can only pass by a sale of the land on execution, a failure to redeem, and the making and delivery of a deed by the sheriff. The court could not establish the lien without determining that Luther M. Fairbanks had some title or interest in the real estate which was subject to the lien, but that was only incidental to the purpose of the suit. It makes no difference, on the question whether the freehold is involved, whether the conveyance to William D. Fairbanks was made by Luther M. Fairbanks, or by Crosby. A conveyance by a debtor, which is void as against a creditor under the statute of frauds, may be set aside; but that is not the only form of a creditors' bill to subject property to the lien of a judgment. Any property not exempt from execution, in which a judgment debtor has a property right or equitable interest, may be reached by a creditors' bill. The question in either case is whether the property is subject to the lien. If it appears from an examination of the record in a cause that an appeal should have been taken to the Appellate Court, this court will take notice of the question of jurisdiction and dismiss the appeal of its own motion. *Wright v. People*, 92 Ill. 596; *City of Virginia v. Gipps Brewing Co.*, 136 Ill. 616, 27 N. E. 196. In such case it makes no difference whether a motion to dismiss has been made or not, or what action was taken upon the motion. The appeal is dismissed.

Appeal dismissed.

(217 Ill. 288)

KRAUSE v. NOLTE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EJECTMENT—TITLE OF PLAINTIFF.

Where plaintiff in ejectment claims title in fee, he must show a fee-simple title, and not an equitable one.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 18, 56, 224.]

2. SAME.

Where, in ejectment, there is no proof of common source nor possession by plaintiff of the land in controversy, by himself or by any prior grantor upon whom he claims, he must deraign title from the government.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 17.]

3. JUDGMENT—RES JUDICATA.

Where a permanent survey of land was had under Laws 1901, p. 307, and a decree entered, such decree is not res judicata upon the question of title, but only estops the parties to the proceedings from claiming that the boundaries under the decree are not those originally established by the government surveyors.

Appeal from Circuit Court, Calhoun County; Thomas N. Mehan, Judge.

Action by Charles F. Nolte against Henry Krause. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action of ejectment, commenced by the appellee against the appellant in the circuit court of Calhoun county on September 27, 1904, to recover a certain strip of land, described in the declaration as "a strip of land off the east side of the northeast quarter of the southwest quarter about fifteen feet wide at the south end and about ten feet wide at the north end of said strip of land, in section 11, in township 13 south, range 2 west of the fourth principal meridian," etc. Plaintiff alleges in his declaration that, on October 15, 1902, he was in possession of said strip of land. The plea of not guilty was filed. Jury was waived by agreement, and the cause was tried before the court without a jury. The finding of the court was in favor of appellee, plaintiff below, and against appellant, defendant below, and that appellee was the owner in fee of the strip of land described in the declaration, and entitled to the possession thereof. Motion to set aside the finding and for a new trial was overruled, and judgment was rendered on the finding. The present appeal is prosecuted from such judgment. Appellee, Nolte, is the owner of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 11, containing 80 acres. Appellant, Krause, is the owner of the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 11. Appellee, Nolte, is also the owner of 20 acres in the N. W. corner of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 11. The farm of appellant, consisting of 80 acres, lies east of the 80-acre tract owned by appellee, and north of the 20-acre tract owned by appellee. It is claimed by the appellant that he owns up to the west line of the strip described in the declaration, and that the whole of the strip is owned by himself, while the appellee claims that the true boundary line between his farm and

that of appellant is the east line of said strip, in which case the strip would be a part of the land of appellee.

Charles J. Macauley (Thomas F. Ferns, of counsel), for appellant. T. J. Selby, for appellee.

MAGRUDER, J. (after stating the facts).

The proof shows conclusively that the appellee, plaintiff below, was never in possession of the strip of land in controversy between himself and the appellant. Not only was the appellee never in possession of the strip, but he did not show himself to be the owner of the government title to the strip in question. The first deed introduced by appellee was a warranty deed by Alanson Fuller and wife, dated September 27, 1858, to one Frederick Battles. Appellee then showed title from Battles to himself, but he did not prove title from the government to Fuller. As appellee did not show that he was ever in possession of the strip, and did not connect himself with any prior grantor who was in possession of it, it was incumbent upon him to deraign title from the government to himself. "Ordinarily the plaintiff's title is shown by proof of direct grant from the government, or by a connected chain of title back to the government or to some grantor in possession." 10 Am. & Eng. Ency. of Law (2d Ed.) p. 484; *Brandenburg v. Seigfried*, 75 Ind. 569; *Jackson Lumber Co. v. McCreary* (Ala.) 34 South. 851; *Esker v. Heffernan*, 159 Ill. 38, 41 N. E. 1113. Nor did the appellee prove that there was any common source of title under which he and appellant claimed. In an action of ejectment the plaintiff is bound to recover on the strength of his own title, and not on the weakness of that of his adversary. Claiming title in fee simple, he must show in himself a fee-simple title at law, as distinguished from an equitable title. *Whitford v. Drexel*, 118 Ill. 600, 9 N. E. 268; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863, 7 Am. St. Rep. 331; *Esker v. Heffernan*, supra. The proof in the case was clear and conclusive that the grantor of the appellant, August Krause, appellant's father, purchased the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 11 in 1856 from one Kinder, and received a deed therefor from Kinder in 1864. August Krause sold and deeded the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ to the appellant, his son, on January 4, 1898. The proof shows that August Krause and the appellant were in possession of the strip in question for more than 20 years prior to the beginning of this suit. August Krause had a fence upon the west side of the strip and on the western boundary line thereof from 1856 down to 1898, and the strip remained inclosed with appellant's land, by a fence on the west line thereof, from 1898 down to the time of the beginning of this suit. In other words, the appellant clearly established a defense to the action of appellee upon the ground of possession under the 20 years' statute of limitation.

Appellee claims, however, that he is entitled to recover by reason of a decree rendered by the circuit court of Calhoun county at the April term, 1904, in a proceeding instituted by the appellee under "An act to provide for the permanent survey of lands," approved May 10, 1901, (4 Starr & C. Ann. St. 1902, p. 1240, c. 133). The trial court permitted the appellee to introduce in evidence the proceedings instituted under the act in question, for the purpose of establishing the boundary line between the lands in question. At the October term, 1903, appellee filed a petition in the circuit court, setting up that he was the owner of the E. $\frac{1}{2}$ of said S. W. $\frac{1}{4}$, and also the 20 acres above described; that appellant was the owner of the N. $\frac{1}{2}$ of said S. E. $\frac{1}{4}$, and that one Charles Weineke was the owner in fee of the remainder of the 80-acre tract, of which the 20 acres owned by appellee was a part; that the corners and boundaries of said adjacent tracts of land were in dispute, and that he was desirous of having said corners and boundary lines permanently re-established; that he applied to Krause and Weineke to enter into a written agreement for a survey to permanently establish said line and corners between them and him of said adjacent lands, and to abide by said survey to be made by a competent surveyor, but that Krause and Weineke refused to enter into such an agreement; and the petition then prayed the court to appoint a commission of three surveyors, entirely disinterested, and asked that said commission be required to make said survey and report their proceedings, etc. On October 16, 1903, the court made an order, finding that Weineke and Krause had refused to make the agreement referred to in the petition, and that appellee had given the notice required to be given by said act of the application to the court for the appointment of a commission of surveyors to make survey of and to permanently establish said corners and boundaries; and in said order the court appointed John A. Earley, of Calhoun county, Thornton G. Capps, of Green county, and Walter C. Hansell, of Jersey county, three surveyors, to act as said commission for the purpose of surveying and permanently establishing the true corner of said section 11, and the true boundary line running south from the center of said section, and the true corner at said last-mentioned point at the south terminus of said boundary line between the landowners, Nolte, Weineke, and Krause. The order directed that the commission should proceed to make a survey and report their proceedings, accompanying their report by a plat and notes of said survey, and that the commission might administer an oath and take evidence and incorporate the same with their survey, etc. Two of the surveyors made a report, to wit, Earley and Capps, but Hansell did not make the survey nor join in the report; the sur-

vey having been made in his absence, as he was engaged in a survey elsewhere. The report was accompanied by a plat, as directed. The report found, in substance, that the eastern boundary line of the strip in question was the true boundary line between the farms. On April 13, 1904, the court entered a decree reciting that the cause came on to be heard on the report of the commission of surveyors, except Hansell, theretofore appointed by the court to survey and establish the corners and boundary lines above mentioned, and in said decree it was recited that the court had examined the report, and that no objections had been filed to the approval of the same, and that no exceptions had been taken thereto, and it was thereupon ordered and decreed that the report be approved and confirmed, and that the corners and boundary lines established in said survey and report should, unless appealed from in 30 days, be held as permanently and unalterably established according to the survey; and it was therein ordered that the costs of the proceeding be divided equally among the parties thereto.

The appellant never entered his appearance in the proceeding for the purpose of having the boundary line between the farm of himself and appellee located, and default was entered against him. It was contended by the appellee, upon the trial in the court below, that, as appellant filed no exceptions to the report of survey as made by the two surveyors, the decree of the court approving that survey and report was binding and conclusive upon appellant, and that appellant is estopped from claiming or asserting title to the land in controversy in this suit. In other words, the principal question presented by the record in this case is whether the question of title to the strip of land in controversy was passed upon and determined by the circuit court in its decree rendered at the April term, 1904, approving a surveyors' report, made by two of the commission of three surveyors, appointed by said court at the October term, 1903, thereof to make a survey and locate the boundary line between the farms of appellant and appellee. We are of opinion that the court erred in holding that the decree rendered in the proceeding for the establishment of the boundary line was conclusive upon the appellant upon the question of title to the strip. The act of May 10, 1901, is the same as the act of March 25, 1869, upon the same subject. Gross' St. Ill. 1871, pp. 726, 727. In construing the latter act, this court said in *Martz v. Williams*, 67 Ill. 306, that "it nowhere confers power on the commissioners to establish new corners or run new boundary lines, but simply to re-establish those once established by the United States." *Allmon v. Stevens*, 68 Ill. 89. In *Irvin v. Rotramel*, 68 Ill. 11, in speaking of this same act of March, 1869, it is said: "It is evident from this section, and, indeed, from the

whole tenor of the act, its object is to provide means by which lost corners may be restored and placed where they properly belong according to the original survey." What was said in the cases thus referred to in regard to the act of March, 1869, applies to the act of May 10, 1901. The object of the latter act is merely to restore and re-establish the corners and boundary lines once established by the United States. This being so, the proceeding is not one for the purpose of establishing the title of the parties to any portion or portions of the property as to which a boundary line is to be restored. Establishing title is an entirely different matter from re-establishing and restoring lost corners or disputed boundaries.

The decree in the proceeding under the act of May 10, 1901, cannot be set up as an estoppel against appellant, or as res judicata upon the question of title. "For obvious reasons, a judgment cannot be conclusive as to a matter which was not in issue in the former action, and which could not properly have been litigated therein." 24 Am. & Eng. Ency. of Law (2d Ed.) pp. 775, 776. In *Smith v. Rountree*, 185 Ill. 219, 223, 56 N. E. 1130, 1131, we said: "A judgment in a former proceeding is an estoppel only where it appears from the face of the record, or by extrinsic evidence, that the precise matter in controversy in the suit at bar was raised and determined in the proceeding which is urged as an estoppel. *Sawyer v. Nelson*, 160 Ill. 629, 43 N. E. 728. A judgment in a former proceeding between the same parties only bars subsequent action on matters actually settled by it. * * * The estoppel of a judgment extends only to the questions involved in the issue, and not to any incidental matter, though it may have arisen and been passed upon." The decree rendered by the court in the application made to the court under the act of 1901 could not have the effect of an estoppel in the present action of ejectment, unless the title to the strip here in controversy was directly in issue and determined there. That it was not in issue, and was not determined, appears from the recital of those proceedings as above made. Upon the principle that the estoppel only extends to the question directly involved in the issue, and not to incidental or collateral matters which may have arisen, the court had no jurisdiction to try the title to the strip in controversy in the proceeding to establish the corners and boundary, nor was such title tried as the decree indicates.

In *King v. Brigham*, 23 Or. 275, 31 Pac. 601, 18 L. R. A. 361, where the same contention was made as is made here, that by a decree in a former suit locating and establishing the boundary lines between the farms of the two contestants the question of title to the land between the lines claimed by the parties to that proceeding was determined, and that the plaintiff in an action brought to quiet title to the strip of land between

said lines so claimed was by said decree estopped to assert or claim title to said strip, it was said: "The controversy was as to the true location of the line, and not the title to the strip of land lying between the different lines alleged by the parties, and consequently the title to it, not being in issue, was not adjudicated, and cannot operate as an estoppel or bar to the present suit." In the same case it was said by the court, in reference to the proceeding to establish the boundary: "The object of the suit, therefore, is to ascertain the true boundary line between the contiguous estates, and not to try the question of title on either side of the boundary. It follows, then, that the statute does not undertake to transfer to the jurisdiction of equity cases of disputed boundary, which involve questions of title and belong to the common-law jurisdiction. A statute of that kind would be clearly subject to the objection of violating the constitutional right of the defendant to a trial by jury; but the statute does give jurisdiction to try cases of disputed boundary between the owners of adjoining lands arising from other causes than an equity superinduced by the act of the parties." In *Russell v. Senior*, 118 Ind. 520, 21 N. E. 292, it was said that "a landowner who submits to a survey does not by so doing lose any of his land. In submitting to a survey he does not surrender any valid title that he may have, no matter how it may have been acquired. In not objecting to a survey he does not put himself in the position of surrendering his land, or any part of it." See, also, *Cleveland v. Obenchain*, 107 Ind. 591, 8 N. E. 624. In *Riggs v. Riley*, 113 Ind. 208, 15 N. E. 253, it was held that "a survey establishing a line between adjoining landowners will not defeat a title previously perfected by adverse possession for more than 20 years, nor revive the right of the original owner. * * * All that a survey does is to establish the line, and it does not determine the title to the real estate." *Russell v. Senior*, supra. So, in the case at bar, the appellant established in the court below a title previously perfected by adverse possession for more than 20 years. Consequently the survey made by the commission of two surveyors in the former proceeding could not have the effect of defeating such title. In *Love v. Morrill*, 19 Or. 548, 24 Pac. 916, it was said: "A court of equity will not try title to land in a suit to establish boundaries. This question, being purely legal, was one for the courts of law, assisted as they are in respect to the findings of fact by a jury." In *West Hartford Eccl. Society v. First Baptist Church*, 35 Conn. 119, the Supreme Court of Connecticut, speaking of a proceeding to fix a boundary line between two adjoining proprietors, said: "The object is not to try the question of title on either side of the line, but to mark the place of the old line, where the ancient monuments are gone." In *Washington Co. v. Matteson*,

11 R. I. 554, it was said: "Law and equity do not undertake to do the same things. For instance, in an action of ejectment, the ostensible object is, not to define the boundaries of the close, but to recover possession. In doing this it may become necessary incidentally to determine the boundaries, but it is not the purpose of the suit. In equity the object of the bill is to ascertain and fix the boundaries, without reference to the possession, and without affecting any legal rights that either of the parties may have acquired. * * * We think, however, that the court lost sight of the real purpose of such acts, which is simply to restore lost bounds. * * * It may be asked, of what avail is it to do this, if no conclusion follows as to title or possession? But this is a question with which we have nothing to do, as it affects the wisdom of the law." In *Mosman v. Sanford*, 52 Conn. 23, in construing a law in substance the same as the act of May 10, 1901, it was said: "It is very clear that the statute did not intend to conclude the parties to a proceeding under it upon a question of title. * * * Its whole object is the restoration of lost boundaries."

The appellant established his defense under the statute of limitations by showing possession of the strip in question by himself and his grantors for more than 20 years. In other words, appellant occupied and claimed to own the land up to the western boundary line of the strip in question, believing such western boundary line to be the true line between his farm and that of appellee and the latter's grantors; and, although such line may not be the true one, yet, having owned and claimed the land up to it for more than 20 years, he has acquired title to such strip by adverse possession. In *Grim v. Murphy*, 110 Ill. 271, where an adjoining proprietor took possession of and improved the land up to a fence, believing it to be within the line and claiming to the fence, this court said: "If he believed the fence was within the boundary of the true line, and took possession, improved, and occupied it under that belief, then the possession would be adverse." In *Mosman v. Sanford*, supra, it was also said: "If an adjoining owner has by an encroaching adverse possession gained title to a strip of his neighbor's land, that title is just as good after the legal restoration of the lost bounds as before." The effect of the decree entered in the proceeding under the act of 1901 is simply that the lines and corners located by the commission of surveyors must be considered and taken as the government corners and lines; and any party to a suit begun for the purpose of having the question of title to the lands on either side of those lines determined will be estopped from asserting or claiming that the corners or lines so located by the commission of surveyors were not in the same place as were the lines and corners located and established by the government surveyors. This is the construction that has been put upon

similar statutes by the courts of other states.

The appellant makes other points against the validity of the decree admitted in evidence, to wit, that the court had no authority to approve a report made by two surveyors when three were appointed, and that the surveyors in their report failed to locate and establish the exterior corners and lines of section 11 before locating the interior corners and lines, as was held to be necessary in *Irvin v. Rotramel*, supra. It is, however, unnecessary to discuss or pass an opinion upon these other points thus urged by counsel. Being of the opinion that the court erred in holding that the decree in the proceeding instituted by appellee under the act of 1901 was conclusive upon the appellant as to the question of title, we hold that the judgment of the circuit court in favor of the plaintiff as the owner of the fee-simple title, and giving him the right of recovery as such owner, requires a reversal. Accordingly, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(217 Ill. 352)

CONNECTICUT MUT. LIFE INS. CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ORDINANCE.

Where an assessment ordinance for catch-basin covers describes them as of a certain weight and of the same size and pattern as those used in new work in the city of Chicago during the year 1902, the description is sufficient.

2. SAME—ENGINEER'S ESTIMATE.

Where the engineer's estimate of the cost of a local improvement gives the property owners a general idea of the cost of the substantial elements of the improvement, it is sufficiently itemized.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 793.]

3. SAME—GRADE.

An ordinance which fixes the grade of the curb at each of the streets intersecting the street to be improved, and states that the grades at the intermediate points will be a line drawn from the grade fixed at one intersection to the grade fixed at another intersection, is not defective as failing to fix the grade.

4. SAME—DESCRIPTION OF PROPERTY—AMENDMENT.

Under Local Improvement Act 1897, §§ 47, 48, 52 (Hurd's Rev. St. 1903, p. 402), where the subdivision under which certain lots were assessed has been set aside in equity, the county court has power to change the description in the assessment rolls from lots and blocks in accordance with such subdivision to acre property, and confirm the assessment under the new description, where no motion was made to refer the roll for a new assessment, and there was no objection that the assessment was excessive.

Appeal from Cook County Court; W. H. Hinebaugh, Judge.

Action by the city of Chicago against the Connecticut Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Louis M. Greeley, for appellant. Robert Redfield and Frank Johnston (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

HAND, J. This was an application in the county court of Cook county for the confirmation of a special assessment to defray the cost of improving West Fiftieth street, from South Morgan street to South Ashland avenue, in the city of Chicago. The appellant appeared and filed objections to the confirmation of the assessment as to its property, which were overruled, and the assessment was confirmed; and it has prosecuted an appeal to this court.

It is first contended that the catch-basin covers provided for by the ordinance to be put in as a part of the improvement are not sufficiently described. The ordinance, after providing for four new catch-basins, proceeds as follows: "Each of said catch-basins shall be provided with a cast iron cover, with a projecting lip to receive the water from the gutters, each of which covers shall weigh four hundred and seventy pounds, and shall be of the same size and pattern as those used in new work by the city of Chicago during the year 1902." The question here raised was considered in the case of *Lanphere v. City of Chicago*, 212 Ill. 440, 72 N. E. 426, and there decided adversely to the contention of the appellant. Under the authority of that case the description of the catch-basin covers found in the ordinance was sufficient.

It is next contended the estimate of the engineer of the cost of the improvement was not sufficiently itemized. It was in the following form:

Sandstone curbstones on limestone blocks, 7,720 lineal feet, at 75 cents.....	\$ 5,790 00
Paving with eight inches of blast furnace slag, three inches of limestone, and three inches of granite, bonded with gravel, one-half inch of granite screenings, 17,170 square yards at \$1.50.....	25,765 00
Adjustment of sewers, catch-basins, and manholes, and constructing four new catch-basins.....	1,455 00
Total.....	\$33,000 00

The estimate of the cost of the improvement made by the engineer, found in the record and incorporated in the opinion in *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097, was substantially in the same form as the engineer's estimate in this case, and the estimate was there held to be sufficient. What was said on that subject in that case was referred to with approval in *Clark v. City of Chicago*, 214 Ill. 318, 73 N. E. 358. The engineer's estimate, as itemized by him, was sufficiently specific to give the property owner a general idea of what it was estimated the substantial, component elements of the improvement would cost. That was a substantial compliance with the statute, and

sufficient. *Hulbert v. City of Chicago*, supra; *Clark v. City of Chicago*, supra.

It is further contended that the ordinance is insufficient, on the ground that it does not sufficiently establish the grade of the street, as it is said it establishes the grade at the intersecting streets, but not at the intermediate points between the intersections. The ordinance, after providing for the setting of curbstones on each side of the roadway, is as follows: "Said curbstone shall be set so that the top edge of the same shall coincide with the grade of said West Fiftieth street between said points [the east line of South Morgan street and the east curb line of South Ashland avenue], which grade is hereby established as follows, to wit: Intersection of South Ashland avenue, 15.0 feet above datum; at a line parallel with and 121 feet east of the east line of South Ashland avenue, 14.5 feet above datum; intersection of Justine street, 13.5 feet above datum; intersection of Laffin street, 13.5 feet above datum; intersection of Bishop street, 13.5 feet above datum. * * * The above heights, as fixed, shall be measured from the plane of low water in Lake Michigan of A. D. 1847, as established by the trustees of the Illinois & Michigan Canal and adopted by the late board of drainage commissioners and by the late board of public works of the city of Chicago, and now represented by the ordinance of July 11, A. D. 1898, relating to the corrected elevation of the old Lind Block benchmark, which determines the base or datum for city levels." Counsel for appellant insists that the ordinance establishes the grade of Fiftieth street only at the intersection of cross streets. We do not think that the ordinance is defective in this respect. The actual construction to be placed upon its language is that the grades at the intermediate points will be a line drawn from the grade fixed at one intersection to the grade fixed at another intersection. The ordinance must be viewed as a whole, and one part or section may be referred to for the purpose of explaining another part or section. *McChesney v. City of Chicago*, 173 Ill. 75, 50 N. E. 191. It is not necessary to set out the details of the grade of every street which is to be improved by special assessment or special taxation. "A reference to an ordinance, monument, instrument, or other fixed thing that locates and witnesses that grade will suffice." *City of Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169. While it is true that the street grade can only be established by an ordinance of the city, "reference to the established grade of a street to be improved, which has been established by another ordinance, is a sufficient specification of the grade." *Craig v. People*, 193 Ill. 199, 61 N. E. 1072; *Clafin v. City of Chicago*, 178 Ill. 549, 53 N. E. 339. The ordinance here under consideration contains such a reference to the established grade as is above referred to.

It is also urged on behalf of the appellant

that the estimate of the cost of the improvement made by the engineer was illegal in including what are called the "May street and Carpenter street returns." It appeared upon the trial, from a decree entered in a burnt records suit offered in evidence, that May and Carpenter streets, as shown upon the plat of Windett's Addition, where appellant's property was located, were closed from Fiftieth street north by such decree. Appellant called one Green, an assistant city engineer, and proposed to prove by him that he made the computations and figures for the establishment of the cost, and that such estimate included the cost of curbing the "street returns" of both May and Carpenter streets. The estimate of cost introduced in evidence was made and signed by C. D. Hill, engineer of the board of local improvements. Whether or not the trial court erred in excluding the proposed evidence of the witness Green upon this subject, it is sufficient to say that Green did testify that he did not know whether Hill, the engineer who made the estimate, included the cost of curbing and paving said "street returns" or not. There does not appear to be in the record any evidence that the estimate included items not provided for in the ordinance. The objection is therefore without force.

It is also objected that the trial court erred in recasting the assessment roll by striking out the lot and block descriptions, and assessing the aggregate of the lot and block assessment against the unsubdivided tract. By the original assessment roll, as returned into court by the superintendent of special assessments, the property of appellant was assessed as certain lots and parts of lots in certain blocks and parts of certain blocks in Windett's Addition to Chicago. In support of its objection to this mode of assessing its property, the appellant introduced in evidence the proceedings and decree rendered in said burnt records proceedings for the purpose of establishing its title. By the decree in that suit, Windett's Addition to Chicago, being a subdivision of the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, township 38 N., range 14 E. of the third P. M., was declared to be null and void and a cloud upon appellant's title. After it was thus proved that Windett's Subdivision had been set aside as null and void, the court entered an order recasting the assessment roll, and changed the description of the property of appellant as being certain lots and parts of lots and blocks in Windett's Subdivision to a description of the same which was its description as unsubdivided property, and the property of the appellant, which had been assessed as about 56 separate pieces of property in a subdivision by the original assessment roll, was reassessed by the court as a 10-acre tract, described as the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 8, etc. The amount assessed upon

this 10-acre tract, to wit, \$5,364.70, was the same as the aggregate of all the amounts assessed against the different lots and parts of lots described in the original assessment roll. The contention of the appellant is that the court should have referred the roll back to the officer who made it, with directions to him to revise the assessment as he might deem proper, in view of the changed description. It is said that, if this had been done, the amount of the assessment upon the tract may not have been the same as the aggregate amount of the sums assessed against the lots and blocks. In support of this position upon this branch of the case, appellant refers to the case of *Morrison v. City of Chicago*, 142 Ill. 660, 32 N. E. 172. That case, however, was decided before the present local improvement law was passed. Section 47 of the act of 1897, concerning local improvements, provides that, upon objection or motion for that purpose, the court may inquire "whether or not the assessment, as made and returned, is an equitable and just distribution of the cost of said improvement, first, between the public and the property; and second, among the parcels of property assessed. The court shall have the power, on such application being made, to revise and correct the assessment levied, to change or modify the distribution of the total cost between the public and property benefited, and also to change the manner of distribution among the parcels of private property, so as to produce a just and equitable assessment. * * * The court may either make such corrections or changes, or determine in general the manner in which the same shall be made, and refer the assessment roll to the person filing the same for revision and correction." *Hurd's Rev. St.* 1903, p. 402. Section 48 of the same act provides that, upon hearing of legal objections, "the court shall determine all questions relating to the sufficiency of the proceedings, the distribution of the cost of the improvement between the public and the property, and of the benefits between the different parcels of property assessed, * * * and shall thereupon enter an order in accordance with the conclusions it shall reach." Section 52 of the act also provides that the court "shall have authority to modify, alter, change, annul or confirm any assessment returned as aforesaid, in addition to the authority already conferred upon it."

Counsel for appellee insist that under these provisions of the local improvement act the court had the power to change the description of the property assessed in the manner already stated; there being no change in the amount of the assessment, the only difference being that the total amount was by the court assessed against one tract, whereas the original assessment roll apportioned that amount among different pieces of property. The appellant did not ask the court to re-refer the assessment roll,

and the objection was not made that the assessment was excessive, but the only objection urged in the trial court was that the description of the property had been improperly changed by the court. We think it clear from the sections of the local improvement act hereinbefore set out that the court had the right to change the description of the property of appellant, so that in the original assessment roll, as finally confirmed, its property should be correctly described, and that, the appellant having failed to ask the court to re-refer the roll to the superintendent to recast the assessment, and having failed to raise the question in the trial court that its property was assessed for too large an amount, the court did not err in correcting said description so that the property of the appellant might be correctly described, and after such correction confirming the assessment.

Finding no reversible error in this record, the judgment of the county court will be affirmed.

Judgment affirmed.

(217 Ill. 164.)

CHICAGO, R. I. & P. R. CO. v. PEOPLE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. TAXATION—RAILROADS—STATEMENTS OF PROPERTY—PENALTIES.

Section 49 of the revenue act (3 Starr & C. Ann. St. 1896, p. 3423, c. 120), prescribing a penalty for the failure of a railroad to file a statement with the county clerk, refers to the statement or schedule showing the property held for right of way, and the length of tracts and turnouts and tracts of land through which the road runs (which property is afterwards described as "railroad track"), which is required to be filed by section 41 of the act, and cannot be extended by implication to include the failure to report the value of the railroad track annually, or to return the lists of rolling stock required to be returned by section 44, or to the failure to make the list or schedule of personal property or real estate, which is required to be listed by section 46.

2. STATUTES—PENAL STATUTES—CONSTRUCTION.

Penal statutes are to be strictly construed, and matters and things which are not clearly included cannot be brought within the operation of such statutes by construction.

3. PLEADING—DEMURRER—WAIVER—PLEADING OVER.

Pleading over, after a demurrer to the declaration has been overruled, constitutes a waiver of the right to move in arrest on the ground specified in the demurrer; but defendant may contend on appeal that the declaration aided by verdict is not sufficient to support the judgment.

4. PENALTIES—CONSTITUTIONAL PROVISION.

Revenue Act (3 Starr & C. Ann. St. 1896, p. 3423, c. 120) § 49, prescribing a minimum penalty of \$1,000 for the failure of a railroad company to file a statement as to its property, is not repugnant to Const. art. 2, § 11, requiring all penalties to be proportionate to the nature of the offense.

5. COUNTS—GROUNDS OF JURISDICTION—CONSTITUTIONALITY OF STATUTE—QUESTIONS REVIEWABLE.

Where there is a fairly debatable question presented by the record as to the constitution-

ality of a statute, the Supreme Court may, on a direct appeal, consider and determine all questions arising on the record.

Appeal from Circuit Court, Mercer County; Emery O. Graves, Judge.

Action by the people against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jackson, Hurst & Stafford and McArthur & Cooke, for appellant. Howland J. Hamlin and William J. Graham, for the People.

BOGGS, J. In an action in debt, instituted by the appellee against the appellant company in the circuit court of Mercer county, judgment was entered against the appellant company in the sum of \$1,000 as a penalty authorized to be imposed by the concluding sentence of section 49 of chapter 120, entitled "Revenue" (3 Starr & C. Ann. St. 1896, p. 3423), for the alleged failure on the part of the appellant company to make the statement to the county clerk referred to therein. This is an appeal perfected to this court directly, for the reason, as we shall hereafter see, the decision involves the question of the constitutionality of said penal clause of said section 49.

Sections 40 to 49, inclusive, of said chapter 120, commonly called the "Revenue Act," are to be considered in the determination of the questions arising on the record. Section 40 requires every person, company, or corporation owning or operating or constructing a railroad to return sworn lists or schedules of the taxable property of such railroad. Section 41 is as follows: "They shall, in the month of May of the year 1873, and at the same time in each year thereafter when required, make out and file with the county clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way, and the length of the main and all side and second tracts and turnouts in such county, and in each city, town and village in the county, through or into which the road may run, and describing each tract of land, other than a city, town or village lot, through which the road may run, in accordance with the United States surveys, giving the width and length of the strip of land held in each tract, and the number of acres thereof. They shall also state the value of improvements and stations located on the right of way. New companies shall make such statement in May next after the location of their roads. When such statement shall have been once made, it shall not be necessary to report the description as hereinbefore required, unless directed so to do by the county board; but the company shall, during the month of May, annually, report the value of such property, by the description set forth in the next section of this act, and note all additions or changes in such right of way as

shall have occurred." Section 42 provides that the right of way, main, side, second tracts and turnouts, and improvements of railroad companies on such right of way, required by the provisions of section 41 to be particularly described, shall be deemed, for the purposes of taxation, to be real estate, and shall be denominated "railroad track," and shall be so listed and valued; and it provides further for a convenient and condensed description thereof in the assessment of such property and when same is advertised and sold for taxes. Section 43 provides that the value of such "railroad track" shall be listed and taxed in the various municipalities of the state in proportion that the length of the main track in such municipalities bears to the whole length of the road in the state, except, etc. Section 44 defines certain property of railroad companies, which shall be known, for the purposes of taxation, as "rolling stock," and requires that the person, company, or corporation owning, constructing, or operating a railroad in this state shall, in the month of May in each year, return a "list or schedule" containing a correct, detailed inventory of all property comprehended within the term "rolling stock," and also a complete enumeration of the locomotives and cars of all kinds belonging to the company. Section 45 prescribes the manner in which such "rolling stock" shall be listed and taxed in the several taxing districts. Section 46 provides that the tools and materials for repairs, and all other personal property of a railroad company, except "rolling stock," shall be "listed and assessed" in the local taxing district in which it may be on the 1st day of May of each year, and that all real estate other than that denominated "railroad track" shall be listed for taxation as lands or lots, as the case may be. Section 47 requires the county clerk to return to the local assessor a copy of the "schedule or list" of the real estate other than that known as "railroad track," and of the personal property other than that designated as "rolling stock," the same to be assessed by the assessor. Sections 48 and 49 are as follows:

"Sec. 48. At the same time that the lists or schedules are hereinbefore required to be returned to the county clerks, the person, company or corporation running, operating or constructing any railroad in this state, shall return to the Auditor of Public Accounts sworn statements or schedules, as follows: First. Of the property denominated 'railroad track,' giving the length of the main and side or second tracts and turnouts, and showing the proportions in each county, and the total in the state. Second. The 'rolling stock,' giving the length of the main track in each county, the total in this state, and the entire length of the road. Third. Showing the number of ties in track per mile, the weight of iron or steel per yard, used in main and side tracks; what joints or chairs are used in track, the ballasting of road,

whether graveled or dirt, the number and quality of buildings or other structures on 'railroad track,' the length of time iron in track has been used, and the length of time the road has been built. Fourth. A statement or schedule showing (1) the amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of the shares of stock; (4) the total amount of all indebtedness, except for current expenses for operating the road; (5) the total listed valuation of all its tangible property in this state. Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the Auditor of Public Accounts.

"Sec. 49. If any person, company, or corporation owning, operating or constructing any railroad, shall neglect to return to the county clerks the statements or schedules required to be returned to them, the property so to be returned and assessed by the assessor shall be listed and assessed as other property. In case of failure to make returns to the Auditor, as hereinbefore provided, the Auditor, with the assistance of the county clerks and assessors, when he shall require such assistance, shall ascertain the necessary facts and lay the same before the state board of equalization. In case of failure to make said statements, either to the county clerk or Auditor, such corporation, company or person shall forfeit, as a penalty, not less than \$1,000 nor more than \$10,000 for each offense, to be recovered in any proper form of action, in the name of the people of the state of Illinois, and paid into the state treasury."

The recovery of the penalty of \$1,000 awarded in the case at bar was not for the refusal of the appellant company to list or schedule its property for taxation, but for the failure to make such lists or schedules within the month of May, 1903. The proper lists or schedules were filed by it on the 8d day of June, 1903. The penalty to be inflicted is, to adopt the language of said section 49, for the "failure to make said statements, either to the county clerk or Auditor." It will be observed that the requirement that "statements" shall be made is to be found only in sections 41 and 48. Section 48 relates to statements or schedules which are to be made to the Auditor of Public Accounts. The declaration does not charge, nor does the proof relate to, any supposed failure on the part of the appellant company to make the proper statement or schedule to the Auditor, but only to an alleged failure to make such statement as the statute requires to be made to the county clerk. In each of sections 41 and 48, that which is to be made is called a "statement or schedule." In each of the sections (41 and 48) full and detailed itemized descriptions of the property to be assessed are required to be given. The instru-

ment required to be made by each of these sections partakes of the nature of a statement and list. The word "schedule" has a meaning as the equivalent to "inventory," 25 Am. & Eng. Ency. of Law (2d Ed.) 2; Standard Dict. tit. "Schedule." An inventory is a list or catalogue of property merely, without attempt to describe the same in detail. *Peet v. Dakota F. & M. Co.*, 1 S. D. 462, 47 N. W. 532; *Smith v. Com. Ins. Co.*, 49 Wis. 327, 5 N. W. 804; *Cramer v. Oppensteln*, 16 Colo. 498, 27 Pac. 713. A schedule of property for taxation is a list of assessable articles without attempt to describe the same in detail. A "statement" is defined to be "a formal, exact, detailed presentation." Standard Dict. tit. "Statement." A statement would contain all that would appear in a schedule or list, but would contain minutiae and matter of description not necessary to a schedule or inventory.

That portion of the instrument which is required to be filed by section 41, which is to set forth a detailed description of the right of way, the main, side, and second tracks of a railroad, etc., and the description of each tract of land through which the road runs, in accordance with the United States surveys, etc., is the "statement," for the failure to make which a penalty is prescribed by the proviso to section 49. This is required to be filed on the 1st day of May, 1873, by all roads then in existence, and thereafter by railroads subsequently organized and constructed, in the month of May next after the location of the new road. "Lists or schedules" of the "railroad track" are required to be filed annually thereafter, but that which is to be known as the "statement," for the failure to make which a penalty is declared, having been once made, is not again required to be made, as is expressly declared in said section 41, unless required by the county board. After such statement has been once made, the only duty thereafter devolving on the company as to the property of which a detailed description is given in the statement, and to which the statute gives the name "railroad track" (section 42), is to report the value of such property, not describing it as in the statement, but by the name "railroad track." The purpose of the penalty, so far as involved in this case, is to secure the filing of the detailed description of the property, which is afterwards to be called "railroad track," in order that such property may afterwards be legally described as "railroad track" and comprehended within the statutory meaning of those words. The penal clause of section 49 is directed only against a failure to "make said statements," and cannot be extended by implication to include the failure to report the value of said "railroad track" annually, or to return the lists or schedules of "rolling stock" required to be returned each year by section 44, or to the failure to make the list or schedule of the personal property and real estate belonging to a railroad com-

pany other than "rolling stock" and "railroad track," which is required to be listed by section 46. Section 48 requires the making of a return to the State Auditor, which, it will be observed, is a statement in detail, and not a mere schedule or list of property for taxation, and the word "statement" is used in the plural in the penal clause of the proviso to section 49 in order to include the statement required by sections 41 and 48. Penal statutes are, by well-settled principles of law, to be strictly construed, and matters and things which are not clearly included cannot be brought within the operation of such statutes by mere construction. This rule of construction is stated in the *Illinois Cyc. Digest* (vol. 8, pp. 980, 981), and in the footnotes are there collected the many decisions rendered by this court in which this doctrine of construction has been declared and applied.

The declaration contained five counts, in none of which was it charged that the appellant company had failed to comply with the statutory requirement with reference to the filing of the "statements" required by either section 41 or 48. The declaration was framed upon the theory that the report of the value of the property known as "railroad track," required by the concluding clause of section 41 to be annually made, and the "lists or schedules" of property known as "rolling stock," required to be made by the provisions of section 44, and the list of personalty and real estate other than "rolling stock" or "railroad track," required by section 46 to be made, were "statements," for the failure to file which the penalty of not less than \$1,000 nor more than \$10,000 was declared by the penal clause of section 49. As we have seen, this is an erroneous view as to the meaning of the word "statements," as used in said penal clause of section 49. The declaration, therefore, did not, in any of the counts thereof, state any cause of action whatever, and was wholly insufficient to support the judgment.

The appellant company presented a general demurrer to the declaration, but the court held that the declaration was a good and sufficient statement of a cause of action, and overruled the demurrer. For this error on the part of the trial court, the appellant company asks that the judgment be reversed. The appellee directs the attention of the court to the fact that the appellant company did not abide its demurrer, but filed the general issue and submitted the cause to a final hearing on the facts, and insists that the appellant company must be deemed to have waived the right to insist in the trial court by way of a motion in arrest of the judgment, or in this court by an assignment of error, that the trial court erred in overruling the demurrer. It is true that, having failed to abide its demurrer, the appellant company could not again urge in the trial court, by way of a motion in arrest of the judgment, that the dec-

laration was obnoxious to the demurrer. By filing the plea to the merits, the appellant company debarred itself of the right to move in arrest of judgment for the same reason raised by the demurrer, but on appeal or error the appellant company may assign as grounds for reversing the judgment, as is here done, that the allegations of the declaration, and of each count thereof, do not state a cause of action, and are insufficient to support the judgment, though aided by the verdict. *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290; *Chicago & Eastern Illinois Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515; *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680. A verdict will aid a defective statement of a cause of action, but does not cure the statement of a defective cause of action.

The appellant company also urges that the penal clause of section 49 is unconstitutional, and for that reason invalid. It is urged that the statutory penalty of not less than \$1,000, prescribed in section 49 as the minimum penalty to be inflicted, is so excessive, in view of the omission for which it is to be inflicted, that the statute should be held to contravene that portion of section 11 of article 2 of the Constitution of 1870 which declares that "all penalties shall be proportioned to the nature of the offense." As we have hereinbefore seen, the penalty prescribed by the statute is not to be inflicted because of the failure of a railroad company to file or make "lists or schedules" for the annual assessment and taxation of its property, but for the failure to make the "statements" containing the detailed description of the main, side, and second tracks and turnouts in each taxing district, and a description of each tract of land other than a city, town, or village lot, in accordance with the United States surveys, giving the width and length of each strip of land in each tract and the number of acres thereof, as required by section 41 to be made by existing roads in 1873, and by roads subsequently constructed, in the month of May next thereafter, or the "statements" giving the detailed information to the Auditor of Public Accounts, as provided in section 48. The purpose to be effected by these "statements" is to obtain the legal and proper description and full and complete information of property having very great taxable value, and which should yield large revenues to the state and to the taxing districts wherein such property is located. The very great importance of this information in detail as required, and within the time prescribed, is apparent upon but slight consideration of the subject. The amount of a penalty to be inflicted must and does largely rest in the sound discretion of the General Assembly, and it is only when the minimum penalty is flagrantly and plainly oppressive and disproportioned to the offense for which it is inflicted that the courts will interfere and refuse to enforce the enactment, 13 Am. &

Eng. Ency. of Law (2d Ed.) 60, 61. The enactment of the penal clause in question does not infringe the constitutional provision prohibiting penalties not proportioned to the offense.

Though we do not sustain the contention of the appellant company in its insistence on this point, still the demurrer to the declaration raised the point (*Shepherd v. City of Sullivan*, 166 Ill. 78, 46 N. E. 720), and the record presented a fairly debatable question as to the constitutionality of the enactment. This court, therefore, possessed jurisdiction of the appeal (*Griveau v. South Chicago City Railway Co.*, 213 Ill. 633, 78 N. E. 309), and power to consider and judicially determine all all of the questions arising on the record. The declaration stated no cause of action whatever, nor did the evidence disclose any ground for the infliction of the penalty against the appellant company. The judgment is therefore reversed.

Judgment reversed.

(217 Ill. 366)

PEOPLE ex rel. HEALY, State's Atty., v.
HUGGARD.

(Supreme Court of Illinois. Oct. 24, 1905.)

ATTORNEYS—DISBARMENT—EVIDENCE.

Where attorneys conspired to return a bill for divorce for their client on grounds which did not exist to their own knowledge, and signed, without her consent, her name to the bill and affidavit, and sought to obtain service by publication, though they knew that respondent was a resident of the state, it is ground for disbarment.

Information by the people, on the relation of John J. Healy, against Richard Huggard, for disbarment. Rule made absolute.

John J. Healy, State's Atty. (John L. Fogle, of counsel), for relator. Emil A. Meyer, for respondent.

HAND, J. This is an information filed in this court by John J. Healy, state's attorney of Cook county, upon the relation of the grievance committee of the Chicago Bar Association, for the disbarment of John Oliver Wagner and Richard Huggard. A rule to show cause was entered at the February term, 1905, and, separate answers having been filed by the respondents at the March term, upon motion of said state's attorney the rule as to John Oliver Wagner was made absolute upon the admissions of guilt contained in his answer, and as to Richard Huggard the case was referred to one of the masters in chancery of Cook county to take the evidence and report the same to this court, which has been done in compliance with such order, from which it appears: That in the month of March, 1904, one Phoebe Morrison, who resided in the city of Chicago, called upon Richard Huggard, then practicing law in said city, to consult with him in regard to obtaining a decree of di-

vorice from her husband, Jesse A. Morrison. She informed Huggard that her husband had neglected her and refused to support her, but stated to him that her husband had not been guilty of physical violence towards her, and was not addicted to the excessive use of intoxicating liquors. She also stated to Huggard that her husband then resided at Byron, Ogle county, Ill. Huggard stated his charges would be \$50; that she had good grounds for divorce, and that it would not be necessary to notify her husband personally of the commencement of the suit, but that he would publish a notice of the commencement of the suit in a newspaper in the city of Chicago which was read only by lawyers; and that her husband would not be apt to see the notice or to learn of the commencement of the suit, and she could obtain a decree without difficulty and much cheaper than though he had personal notice. Mrs. Morrison appears to have acted in the utmost good faith, and informed Huggard she wanted everything done right, so that if she obtained a decree it would be a valid and binding one, in reply to which Huggard informed her a notice to her husband through a newspaper would be all that was necessary. At that interview Mrs. Morrison had no money, but agreed to return within a few days and pay Huggard a retainer and to advance the necessary costs, when it was agreed he was to file a bill. Some two weeks later Mrs. Morrison, in company with a friend named Julia Matlack, called upon Huggard, and Mrs. Morrison paid him \$25 to apply on fees, and informed him Miss Matlack was one of her witnesses. Huggard then talked with Miss Matlack with reference to the case, and she informed him she knew Jesse A. Morrison; that he lived at Byron, Ogle county, Ill.; that he had neglected and failed to properly support and provide for his wife; but that she did not know of his having committed physical violence upon her or that he was given to the excessive use of intoxicating liquors. After the payment of the \$25 Huggard informed Mrs. Morrison it would be necessary that she pay him \$10 in addition thereto with which to pay court costs, and that upon the payment of that amount he would commence suit. A few days afterwards, at the request of Mrs. Morrison, Miss Matlack called upon Huggard and paid him \$10. Thereafter Mrs. Morrison called upon Huggard and inquired about the suit. In April a bill for divorce was filed by Huggard and Wagner in the office of the clerk of the superior court of Cook county, entitled "Phoebe Morrison v. Jesse A. Morrison," in which Jesse A. Morrison was charged with extreme and repeated cruelty, two specific instances of which were fully set out, and habitual drunkenness, and an affidavit was filed in said clerk's office purporting to be signed by Phoebe Morrison and sworn to

before John Oliver Wagner, notary public, which stated that Jesse A. Morrison was not a resident of the state of Illinois, and that the affiant had made diligent inquiry to learn his place of residence and had been unable to ascertain the same, and on April 8, 1901, Huggard and Wagner caused to be published in the Chicago Law Journal a notice to Jesse A. Morrison of the pendency of said suit, and Huggard delivered to Mrs. Morrison a copy of the paper containing such notice, and on June 7, 1904, Huggard by letter notified Mrs. Morrison to appear on the following Saturday, with her witnesses, before Judge Brentano, one of the judges of the superior court, at which time her case would be heard. Prior to the time when she was notified by Huggard to appear before Judge Brentano Mrs. Morrison had consulted another lawyer, who examined the files in the case commenced by Huggard and Wagner, and, upon ascertaining the grounds for divorce stated in the bill and that Jesse A. Morrison was being proceeded against as a nonresident, Mrs. Morrison did not appear before Judge Brentano in response to said notice, and nothing further was done in the case commenced by Huggard and Wagner.

In the answer filed by John Oliver Wagner, upon which the rule as to him was made absolute, he admitted that he signed the name of Phoebe Morrison to said bill containing the charges of extreme and repeated cruelty and habitual drunkenness, and to the affidavit of nonresidence, to which he attached his jurat as a notary public without ever having seen her, and without her having seen said bill or affidavit, and without her knowledge or consent. His testimony is found in this record, he having been called by the relators as a witness before the master, wherein he states that he relied upon the statements of Huggard when he prepared the bill charging extreme and repeated cruelty and habitual drunkenness against Jesse A. Morrison, and upon information furnished him by Huggard when he drew the affidavit, purporting to be signed by Mrs. Morrison, that Jesse A. Morrison was a nonresident of the state of Illinois, and that his residence upon due inquiry could not be ascertained, and that his wrong consisted in signing Mrs. Morrison's name to the bill and affidavit without her knowledge or consent and out of her presence. Huggard testified before the master that he informed Wagner truthfully of Mrs. Morrison's grounds for divorce, as he understood such grounds from her statements to him, and gave to Wagner a memorandum of the facts prepared by him the first time he talked with Mrs. Morrison, and that he never stated to Wagner Jesse A. Morrison was a nonresident of the state of Illinois, and that upon diligent inquiry his residence could not be ascertained. He admits, how-

ever, that all the information Wagner had with reference to the case, as Wagner never saw Mrs. Morrison until after this disbarment proceeding was commenced, Wagner obtained from him, and that he knew Jesse A. Morrison was a resident of the state of Illinois and that he was being proceeded against in said case by publication, but seeks to excuse his conduct by saying his practice had been confined mainly to the police courts, and that he supposed the law permitted service by publication in chancery cases where the defendant resided outside of the county wherein the suit was pending.

We have carefully read and considered the evidence found in this record, and are impressed therefrom with the conviction that Huggard and Wagner entered into a conspiracy to file a bill in the name of Mrs. Morrison against her husband, Jesse A. Morrison, on the ground of extreme and repeated cruelty and habitual drunkenness, when they knew such grounds did not exist, and to obtain service upon said Jesse A. Morrison in that suit by publication, although they knew he was a resident of this state, and that to effect such conspiracy they prepared a bill charging Jesse A. Morrison with extreme and repeated cruelty and habitual drunkenness, and an affidavit that he was a nonresident of this state, and signed Mrs. Morrison's name thereto without her knowledge or consent, and John Oliver Wagner attached his jurat as a notary public to such affidavit and filed said bill and affidavit in the clerk's office of the superior court of Cook county, and published notice of the pendency of such suit in the Chicago Law Journal, and furnished Mrs. Morrison with a copy of the paper containing the notice of said suit and notified her to appear in court for trial. Whether they expected to obtain a decree, or that the court, upon hearing the evidence, would dismiss the bill for want of equity, does not appear; but that they commenced and carried on said proceedings with a view to obtain from Mrs. Morrison the \$50 which she had agreed to pay Huggard for obtaining for her a divorce, and by means of such proceeding obtained from her at least \$25 of said amount, which they divided between themselves, this record clearly shows.

John Oliver Wagner has admitted his guilt in this proceeding upon the record. While Richard Huggard did not prepare the papers which were filed in court, Mrs. Morrison advised with him and he collected \$25 from her, which he divided with Wagner. The conduct of the respondents was most unprofessional and merits the strongest condemnation. The rule as to Richard Huggard will be made absolute, and an order will be entered striking his name from the roll of attorneys of this court.

Rule made absolute.

(217 Ill. 326)

CELLA et al. v. CHICAGO & W. I. R. CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EMINENT DOMAIN—APPEAL—RECORD—NECESSITY OF BILL OF EXCEPTIONS.

The ruling on a motion to dismiss a petition in condemnation proceedings can be preserved for appellate review only by bill of exceptions settled at the term when the ruling was made, or within such time thereafter as the parties may have agreed upon or as may have been allowed by the court at that term by its order of record.

2. EXCEPTIONS, BILL OF—SIGNATURE AT SUBSEQUENT TERM.

Where there is nothing to show that the parties had consented to the signing of the bill of exceptions at a subsequent term, or that the court had at a former term by its order permitted the bill to be presented and signed at such subsequent term, matters relating to questions arising prior to the submission of the case to the jury will be expunged from a bill of exceptions presented and signed at a term subsequent to that at which the ruling on such matters was made.

3. NEW TRIAL—GROUNDS—MATTERS PRIOR TO TRIAL.

Errors regarding motions upon pleadings, or other matters arising before the trial is entered upon, are not ground for motion for new trial; but such motion only reaches errors occurring during the course of the trial.

4. EMINENT DOMAIN—APPEAL—RESERVATION OF GROUNDS OF REVIEW—MOTIONS IN ARREST OF JUDGMENT.

Only such errors as appear or should appear on the face of the record can be urged in arrest of judgment, and a motion in arrest does not preserve for review a ruling denying a motion to dismiss a petition in condemnation proceedings, on the ground of want of power in the petitioner, as shown by certain ordinances and acceptances thereof introduced in support of the motion.

Appeal from Superior Court, Cook County; Axel Chytraus, Judge.

Condemnation proceedings by the Chicago & Western Indiana Railroad Company against Louis A. Cella and others. From a judgment of condemnation, defendants appeal. Affirmed.

This is a petition for condemnation, filed on May 23, 1902, in the superior court of Cook county, by the appellee railroad company against one John G. Cella, the owner of the property sought to be condemned. During the pendency of the proceeding, to wit, in September, 1903, John G. Cella died, and, his death having been suggested, the appellants, his heirs, were made parties defendant to the petition. The property sought to be condemned consists of two lots, having a frontage of 20 feet each on the east line of Third avenue in the city of Chicago, and extend eastward 100 feet to an alley, and are situated in the territory bounded on the north by Polk street, on the west by Third avenue, on the south by Twelfth street, and on the east by State street, in that city. After the jury was called into the jury box, and before the jury was examined, selected, or sworn, a motion was made by appellants, respondents below, to dismiss the petition.

Certain ordinances were introduced in evidence in support of the motion to dismiss; but the motion was overruled, and exception was taken to the action of the court in overruling it by the appellants. A jury was then called, and the trial proceeded upon the merits, for the purpose of determining the amount of compensation to be paid for the property sought to be condemned. On November 12, 1904, the jury returned its verdict, awarding as just compensation for the property in question the sum of \$60,-131.50. The respondents below entered a motion for new trial, and subsequently withdrew the same, and filed a motion in arrest of judgment and their objections to the entry of judgment on the verdict, which motion and objections were overruled, and exceptions were taken. Thereafter, on December 19, 1904, judgment of condemnation was entered, providing that, upon paying into the county treasury for the benefit of respondents the sum above named, the petitioner, the appellee herein, might forthwith enter upon the property in question. The present appeal is prosecuted from such judgment of condemnation.

R. S. Thompson, for appellants. Edgar A. Bancroft (William J. Henley, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). Appellee has filed its motion in this court to expunge from the record that part of the bill of exceptions which relates to matters preliminary to the trial by the jury. Appellee's motion to dismiss the petition for condemnation was made at the October term, 1904, of the superior court of Cook county, and was overruled on November 2, 1904; the latter day being also one of the days of the October term, 1904, of said court. No bill of exceptions was taken or filed to the overruling of the motion to dismiss at the October term, nor was any leave granted for time for settling the bill of exceptions, until December 19, 1904, being one of the days of the December term, 1904, of said court. The motion to dismiss the petition was based upon the alleged ground that the petitioner, the appellee company, had no authority to condemn the property sought to be taken. In support of the motion to dismiss, the appellants below introduced two ordinances passed by the common council of the city of Chicago, one on September 15, 1879, and the other on August 6, 1883, and also at the same time introduced an original written acceptance, dated August 14, 1883, by the appellee company of the ordinance of August 6, 1883. The effect of these ordinances, and of the written acceptance thereof by the appellee, was to restrict the right of the appellee company to condemn property within the city of Chicago. The ordinance of August 6, 1883, provided that the company should not lay down any track or tracks upon certain territory between Twelfth and Polk

streets, east of the west line of Third avenue in the city of Chicago; and it is conceded that the lots of the appellants here sought to be condemned were within said territory. When judgment of condemnation was entered on December 19, 1904, the appellants prayed an appeal to this court, which was allowed upon their filing bond in the sum of \$500 and a bill of exceptions, within 30 days from that date, to wit, December 19, 1904. The period of 30 days expired on January 19, 1905. The bill of exceptions and appeal bond were filed within the 30 days, as required. This bill of exceptions, however, not only contained the rulings of the court upon the trial of the case upon the merits, but it also contained the proceedings of the court in reference to the overruling of the motion, made at the October term, 1904, to dismiss the petition. A bill of exceptions should have been presented to the judge at the October term, 1904, in order to bring before a reviewing court the action of the trial court in reference to the motion to dismiss, which was then made; or such bill of exceptions should have been settled and allowed within such time thereafter as the parties may have agreed upon in the record or as may have been by the court at that term allowed by its order of record. *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676.

The motion made by the appellee in this court to expunge from the record that part of the bill of exceptions which relates to the action of the court in overruling the motion to dismiss the petition was reserved to the hearing of the cause, and will now be disposed of. It cannot be here contended that the motion for new trial can in any way bring up the validity of the action of the trial court in overruling the motion to dismiss the petition. A motion for new trial only brings before the reviewing court the occurrences of the trial, and presents for consideration alleged errors occurring during the course of the trial. In this case, however, the motion for new trial was withdrawn, and a motion was made in arrest of the judgment. It is well settled that motions upon pleadings, and other matters arising before the trial is actually entered upon, furnish no basis for the motion for new trial. 16 Am. & Eng. Ency. of Law (1st Ed.) p. 610. In *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732, it was held that questions arising in condemnation proceedings before the submission of the case to the jury are to be determined summarily by the court, and that the court's rulings thereon must be preserved by a bill of exceptions settled at the term when they were made, or upon time allowed by the court, and that matters relating thereto will be expunged from a bill of exceptions presented and signed at a subsequent term, although the rulings were assigned as reasons for a new trial. Upon the authority of the *Guyer Case*, supra, when the trial court overruled the

motion of appellants to dismiss the petition, based upon the showing made by the two ordinances and written acceptance above referred to, appellants should at the October term have procured a bill of exceptions to be settled and allowed by the court, showing its action upon the motion, and containing the ordinances and acceptance referred to; or, if the bill of exceptions was not presented and signed at the October term, it should have been shown that counsel consented to its being signed at a later date, or it should have been shown that the judge, by an entry of record, gave leave that it might be prepared at a later date. No such showing has been made in the present case. It follows from what has been said that all that part of the bill of exceptions in the present record which contains the proceedings upon the motion to dismiss the petition is improperly in the bill of exceptions, and must be expunged. Accordingly, the motion to expunge is allowed.

The motion in arrest of judgment is no more effective than the motion for a new trial to preserve objections or exceptions to the proceedings had at the October term, 1904, to dismiss the petition. Under a motion in arrest of judgment only such errors as appear upon the face of the record, or which should, but did not, appear on the face of the record, can be urged in arrest of the judgment. 2 Ency. of Pl. & Pr. p. 794; Wallace v. Curtiss, 36 Ill. 156. The objections made by the appellants to the action of the trial court in refusing to dismiss the petition only appear as arising from the ordinances and written acceptance introduced in support of said motion. All the preliminary proceedings had upon the motion to dismiss having been expunged from the bill of exceptions, there is no record here which shows any such defects as will sustain a motion for arrest of judgment.

No objection is made by counsel for appellants as to the action of the court upon the trial of the case upon the merits. No criticism is made upon the amount of the judgment, or upon the trial, so far as it related to the ascertainment of the amount of compensation to be paid to appellants for their property. In view of the allowance of the motion here made to expunge the part of the bill of exceptions above referred to therefrom, and inasmuch as all the assignments of error are based upon the ordinances and written acceptance introduced in support of the motion to dismiss the petition, nothing remains here for our consideration. If the trial court had no jurisdiction to entertain the present condemnation proceedings, it was because of the restrictions imposed by the ordinances in question and their acceptance by the company. The ordinances and the acceptance being out of the case by reason of the allowance of the motion to expunge, it does not here appear that there was any restriction upon the right of the company to

condemn the property in question. All the objections relating to the proceedings before the court which were preliminary to the trial by the jury having been thus eliminated from the record, there is nothing before us, and the judgment of condemnation entered by the court below must be affirmed.

Judgment affirmed.

(217 Ill. 516)

KELLYVILLE COAL CO. v. STRINE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. TRIAL—DIRECTED VERDICTS—REFUSAL—WHEN JUSTIFIED.

Any evidence tending to sustain the cause of action alleged justifies the trial court in refusing to direct a verdict for defendant.

2. APPEAL—REVIEW OF FACTS—CONCLUSIVENESS OF JUDGMENT.

A judgment of the trial court, affirmed by the Appellate Court, conclusively settles all controverted questions of fact.

3. CONTINUANCE—ABSENCE OF WITNESS—ADMISSION OF FACTS.

Refusal to grant a continuance for the absence of a witness is not prejudicial, where the other party admits the facts to which the absent witness would have testified.

4. MASTER AND SERVANT—INJURIES TO MINERS—CONTRIBUTORY NEGLIGENCE.

Under Laws 1899, pp. 315, 317, §§ 16, 18, requiring mines to be examined and dangerous working places to be marked, so as to notify men to keep out, and further requiring mine managers to provide a sufficient supply of props and timbers to secure the roof of the mine, a miner's contributory negligence in going into a room which he knows to be dangerous is no defense to an action by him for injuries, based on the mine owner's failure to comply with the statute.

5. SAME—ASSUMPTION OF RISK.

Where a mine examiner does not mark a room as dangerous, as required by Laws 1899, p. 317, § 18, a miner may assume that the examination has been made, and that it has been found unnecessary to mark the room as dangerous, although he has notice that an overhanging rock in the room is loose and dangerous.

6. MINES—WILLFUL VIOLATION OF STATUTE.

Under section 83 of the mining act of 1899 (Laws 1899, p. 324), giving a right of action for injuries caused by any willful violation of the provisions of the act, any conscious violation of the statute is a "willful" violation, although not accompanied by an evil intent.

7. MASTER AND SERVANT—PROXIMATE CAUSE—QUESTIONS FOR JURY.

Whether a mine operator's willful failure to comply with Laws 1899, pp. 315, 317, §§ 16, 18, requiring dangerous places in mines to be marked and props for the roof to be furnished, was the proximate cause of injury to a miner who had notice that the conditions where he worked were dangerous, was a question for the jury.

8. EVIDENCE—EXPERT TESTIMONY.

On an issue as to whether an injured miner might have used certain bent and broken timbers for props by sawing them off, experienced miners may testify as to whether such bent and broken timbers could be properly used for propping the roof.

9. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, an instruction that the jury may award damages, not to exceed the amount claimed in the declaration,

such as the jury may believe plaintiff has sustained by reason of his injury, is not erroneous.

10. TRIAL—INSTRUCTIONS—REQUESTS—ANTICIPATION OF DEFENSES.

Plaintiff, in framing his instructions, need only present the law applicable to his theory of the case as supported by his evidence, and need not anticipate and negative possible defenses.

11. MINES—INJURY TO MINER—INSTRUCTION.

In an action for the violation by a mine owner of Laws 1899, pp. 315, 317, §§ 18, 18, requiring dangerous rooms to be marked and props and timbers to be furnished, an instruction following the language of the statute on the duties of mine examiners is not erroneous.

Appeal from Appellate Court, Third District.

Action by Desire Strine against the Kellyville Coal Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in case under the mining statute to recover for injuries sustained by a fall of rock from the face of appellee's working place, known as room No. 11 on the third west entry off the second south main entry in mine No. 2 of appellant, on January 19, 1903, at about 10:30 o'clock a. m. The declaration alleged the injuries to have been sustained through willful failure and neglect of appellant to comply with the statute. In the trial court appellee recovered judgment for the sum of \$2,000, from which an appeal was taken to the Appellate Court, where the judgment has been affirmed. The present appeal is prosecuted from such judgment of affirmance.

The declaration consists of four counts, of which the first, second, and fourth allege that appellee required props and cap pieces to prop and support the roof of the room in which he was employed in mining coal; that he did not have any; that on January 17, 1903, and on prior days, he ordered props and cap pieces; that defendant willfully failed to deliver them; and that in consequence thereof a large rock fell from the roof of appellee's room, striking him with great force, dislocating certain vertebrae in his back and otherwise injuring him. The third count of the declaration alleges that it was the duty of the defendant to have its mine examiner inspect all places where men were expected to pass or work, to see whether there were any unsafe conditions, and, where such were found, to place a conspicuous mark as notice to all men to keep out; that there was a large, loose rock in the roof of appellee's room, which formed an unsafe condition; that on January 19, 1903, the mine examiner willfully failed to inspect the room and place a conspicuous mark thereat as notice to all men to keep out; and that by reason of such failure to mark, and while in the usual course of his employment as a miner in said room, the rock fell and struck him, dislocating certain vertebrae in his backbone and otherwise injuring him, to his damage in the sum of \$20,000.

As is said by the Appellate Court in their opinion deciding this case: "The evidence discloses that appellee had been working in appellant's mine for about five years; that some six months prior to the accident he and his stepson had turned a room known as No. 11, which at the time of the accident was 30 feet in width and 75 feet deep from the side of the entry. On Saturday afternoon, January 17, 1903, appellee fired two shots in the room, and then quit work. Over the place where the shots were fired was what is known as a 'roll,' which projected out into the room five or six feet from the face of the coal and extended clear across the room. On resuming work on Monday morning the 19th, appellee, upon sounding the roof, discovered that a bit of the rock forming the roll was loose. At about 10:30 o'clock, while appellee was on his knees, endeavoring with a pick to remove the coal under the roll, which the shots had failed to throw out, and which was about 4½ feet deep, a piece of rock about 18 inches thick fell upon and injured appellee. The evidence shows that timbers at mines are furnished only in even foot lengths, and nearly all upright timbers used at this mine are seven feet in length, while crossbars or horizontal timbers are nine feet in length. In other words, the length of the upright timbers depends upon the thickness of the vein of coal, and the length of the horizontal timbers depends upon the width of the entries and the width of the room necks. Props are used both in entries and rooms, but crossbars are used only in entries and room necks, or narrow passages. The evidence further shows that if, by reason of a horse-back or roll occurring in the roof, a little longer timber is required, it was the custom of the miners, without making a special order for a longer timber, to put a cap piece or wedge over the top of the prop, and sometimes one under the bottom also, thus lengthening the timber seven or eight inches; and, where the timber is too long, the miners themselves either dig a place in the fire clay at the bottom, or cut a piece off of the timber, so that they can use it."

Appellee's evidence tends to show that appellee and his stepson, Ernest West, about 17 years old, who were working together in the room in question (the latter being called appellee's "buddy"), "on the morning of the accident had no timbers in the room, and that they went out upon the entry, and up and down the entry for a long distance on each side of their room, and could find no timbers to prop and timber this loose rock, or the roll, in their room; that there were none either in the entry or in the room, except three crossbars or nine-foot timbers in the neck of their room, one of which had been broken, and the other two had been bent by the weight of loose slate that came down upon them, and that they had taken these timbers down and thrown them to one

side, and that the same were not fit to cut and use as short props to support this loose rock or roll in their room; * * * that they had ordered timbers from one Farley, the timberman, on the Saturday previous to the accident, but that none were delivered to them; that, if they had been furnished timbers, they could have propped the roof so as to have prevented the falling of the rock; that timbers were usually delivered to them at the side of the switch track in the neck of the room, or on the side of the entry next to the room neck." The evidence of the appellant tends to show "that, at the time of the accident, there were sufficient and suitable timbers either in the room, room neck, or in the entry adjacent thereto, to properly prop the roof."

Upon the question whether the mine examiner had made an examination of the room in question on the day of the accident before appellee entered it, the testimony of appellee tends to show "that the first thing they did, when they entered the room on the morning in question, was to look for chalk marks; that they examined both the roof and timbers, and found none of any kind, except the figures '17' on a timber about 24 feet from the face of the coal, which referred to the examination of Saturday, the 17th." The evidence of the appellant tends to show that the mine examiner "examined the room on the morning of the accident, and finding the rock loose, wrote with chalk on the face of the roll figures indicating the day of the month, and also a cross-mark, but that, owing to the dampness of the room, chalk marks would not show as distinctly as in a dry place."

H. M. Steely, for appellant. Swallow & Swallow, for appellee.

MAGRUDER, J. (after stating the facts). The first, second, and fourth counts of the declaration charge a willful failure to deliver timbers to appellee upon his order, and that such willful failure was the cause of the accident and injuries sustained by him. The evidence under these counts was conflicting. The issues under the third count were whether or not there had been a failure by the appellant company to have the room examined by its mine examiner on the night preceding the accident, and whether or not there had been a failure by said examiner to place a conspicuous mark thereat as notice to all men to keep out. The evidence upon the issues under the third count was also conflicting. There was evidence, however, tending to sustain the cause of action under all the counts, and therefore, under the repeated rulings of this court, no error was committed by the trial court in refusing to instruct the jury to find for the defendant below. The questions of fact are all settled by the judgment of the circuit court in favor of plaintiff below, and the judgment of the Appellate Court affirming the same. The

only questions, therefore, which remain for our consideration, are questions of law.

First. Before the beginning of the trial in the court below the appellant made a motion for a continuance of the cause and filed an affidavit in support thereof. The court refused to grant the continuance, and this refusal is assigned as error. Appellant proposed to show by a witness named Crayton, who was absent in Indiana on account of sickness, that he was in appellee's room in the mine shortly before the accident occurred, and discovered that the rock, which afterwards fell upon the appellee, was loose and dangerous, and called appellee's attention to it, and told him that it was dangerous, and advised him not to go under it. The declared object of the appellant was to prove by this absent witness that appellee not only had notice of the defect, but also had notice that it was a dangerous defect. The court did not err in refusing the continuance, because the testimony of the absent witness, if he had been present and testified, was immaterial in this kind of a case; and not only was this so, but the result could not have been affected by the proposed evidence of Crayton, inasmuch as appellee admitted that, before the accident, he had knowledge of the condition which Crayton was to testify to.

Section 18 of the act of April 18, 1899 (Laws 1899, p. 317), "to revise the laws in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein," provides that "a mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it, and, first, he shall see that the air current is traveling in its proper course and in proper quantity. He shall then inspect all places where men are expected to pass or to work, and observe whether there are any * * * unsafe conditions. * * * As evidence of his examination of all working places, he shall inscribe on the walls of each, with chalk, the month and the day of the month of his visit. When working places are discovered in which * * * any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager. No one shall be allowed to remain in any part of the mine, * * * nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe. The mine examiner shall make a daily record of the conditions of the mine, as he has found it, in a book kept for that purpose, which shall be preserved in the office for the information of the company, the inspector and all other persons interested, and this record shall be made each morning before the miners are permitted to descend into the mine." 4 Starr & C. Ann. St. Supp. 1902, p. 857, c. 93. Section 4 of the old mining law of 1879 required the mine to be

examined, though it did not provide for the giving of a warning by a mark at the place of danger. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2719, c. 93. Section 16, p. 315, of the mining law of 1899 provides that the mine manager shall visit and examine the various working places in the mine as often as practicable, and that "he shall always provide a sufficient supply of props, caps and timber delivered on the miners' cars at the usual place when demanded, as nearly as possible, in suitable lengths and dimensions for the securing of the roof by the miners, and it shall be the duty of the miner to properly prop and secure his place with materials provided therefor." 4 Starr & C. Ann. St. Supp. 1902, p. 855, c. 93. Section 16 of the mining law of May 28, 1879, provided that "the owner, agent or operator of every coal mine shall keep a supply of timber constantly on hand of sufficient length and dimensions to be used as props and cap pieces, and shall deliver the same as required, with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety." 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2730, c. 93.

In construing the mining laws of this state, including the sections above quoted and referred to, this court has always held that "mere contributory negligence on the part of a miner will not defeat a right of recovery, where he is injured by the willful disregard of the statute, either by an act of omission or commission on the part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine, because the owner, operator, or manager totally disregarded the statute, as in other cases of negligence, is to totally disregard the provisions of the Constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute and in no manner regard the duty of protecting the life and safety of miners." *Carterville Coal Co. v. Abbott*, 181 Ill. 495, 55 N. E. 131. If the appellee went under the overhanging piece of coal, knowing that it was loose and dangerous, all that can be said of his conduct is that he was guilty of contributory negligence. As, however, contributory negligence on the part of the injured miner is not regarded as a defense, so as to defeat a recovery in this class of cases, where there has been a willful disregard of the statute by failure on the part of the company to furnish suitable props and cap pieces when they have been demanded, or to make a suitable and proper examination and inspection when the same was necessary, then the mere fact that appellee had notice of the condition of the overhanging piece of coal was immaterial, and the refusal of the court to continue the cause in order to obtain testimony to prove such notice was not error. Indeed, appellant could not have been prejudiced in

any way by overruling the motion for a continuance, because appellee admitted that he knew the condition of the rock.

Second. Counsel for the appellant makes an attack upon the cases decided by this court which hold that contributory negligence on the part of an injured miner is no defense under the circumstances above stated, and quotes from cases decided in other states which hold to the contrary. We are not disposed to recede from the decisions of this court upon this subject, and, in view of our adherence to these decisions, much of the argument of counsel and much of his criticism upon the instructions given by the court below need no further notice. Section 33, p. 324, of the act of 1899, provides that "for any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby." 4 Starr & C. Ann. St. Supp. 1902, p. 865, c. 93. Section 14 of the act of 1879 contained a similar provision. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2728, c. 93. In *Catlett v. Young*, 143 Ill. 74, 32 N. E. 447, this court had under consideration a requirement of the act of 1879, and in connection therewith construed said section 14 as above quoted, and referred to the previous cases of *Bartlett Coal & Mining Co. v. Roach*, 68 Ill. 174, and *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; and in the *Catlett Case* it was held that the very object to be attained by the statute requiring the shaft in a coal mine and the entrance thereto to be fenced is to prevent injuries to persons employed in a coal mine, so that negligence on their part in the manner of doing their work shall not prove fatal to a recovery for an injury suffered by them, and in the case of *Catlett v. Young*, *supra*, we said that the Legislature "intended that, in case of injuries occasioned by any willful violation of the act of 1879, or by willful failure to comply with any of its provisions, the right of recovery should not depend upon the exercise of ordinary care by the person injured or the deceased, or be precluded by contributory negligence. This view of the law, as a matter of course, is based on the ground that there has been a willful failure to comply with the requirements of the statute. If the statute has been complied with, or if the injury is not occasioned by the willful violation or willful failure denounced by the statute, but by some other alleged negligence of the mine owner, and the person injured or killed fails to exercise ordinary care, then there would be no right of action."

In *Carterville Coal Co. v. Abbott*, *supra*, the question again arose, and the holding of the court was based, not only upon section 14 of the act of 1879 above quoted, but upon section 29 of article 4 of the Constitution, which is as follows: "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative

miners by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper." 1 Starr & C. Ann. St. 1896 (2d Ed.) p. 138. And in construing section 14 in connection with said constitutional provision we said (page 501 of 181 Ill., page 134 of 55 N. E.): "By this latter section, for an injury to person or property, or for loss of life, occasioned by a willful violation of any of the provisions of the act providing for the health and safety of persons employed in coal mines, the operator is made liable in damages. An enactment such as this, which is in force by the mandatory requirement of the Constitution, is of the gravest import and of the highest character, and must necessarily be construed in connection with the constitutional provision requiring the enactment. Where so large a number of persons are engaged in a productive industry as in coal mining in the state of Illinois, and where the work is of such a character that it is recognized as being attended with unusual hazards and dangers, the Constitution requires that legislation shall be had for the purpose of protecting those thus engaged from the known extraordinary hazards and dangers. In the construction and equipment of mines, therefore, the act requires the discharge of specific duties, so that the utmost safety can be extended to the miners. This requirement of the Constitution is sought to be met by this legislation, which directs the owner, operator, or manager to make provision for the safety of the miners employed within the mine. Where an owner, operator, or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein. Where such owner, operator, or manager willfully disregards a duty enjoined on him by legislation of this character, and places in danger the life and limbs of those employed therein, he cannot say that, because one enters a mine as a miner with knowledge that the owner has failed to comply with his duty, he is guilty of contributory negligence." The same doctrine has been announced in the following cases: *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621; *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45; *Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335; *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156, 63 N. E. 649; *O'Fallon Coal & Mining Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767; *Willis Coal & Mining Co. v. Grizzell*, 198 Ill. 313, 65 N. E. 74; *Donk Bros. Coal Co. v. Stroff*, 200 Ill. 483, 66 N. E. 29; *Riverton Coal Co. v. Shepherd*, 207 Ill. 395, 69 N. E. 921; *Marquette Third Vein Coal Co. v. Dielle*, 208 Ill.

116, 70 N. E. 17; *Spring Valley Coal Co. v. Patting*, 210 Ill. 343, 71 N. E. 371.

Third. When the appellee entered the mine, although he had had notice that the overhanging piece of coal was loose and dangerous, yet, seeing no mark made by the mine examiner to indicate that it was dangerous, he had a right to assume that the operator, through the mine examiner, had obeyed the statutory requirement, and made the necessary examination, and found it unnecessary to make the mark in question. In *Pawnee Coal Co. v. Royce*, 184 Ill. 402, 56 N. E. 621, we said in reference to this statute: "It is true that plaintiff's own testimony shows that an examination was made, but it is not true that with the making of that examination the duties of appellant ceased. The law goes further, and provides that 'no person shall be allowed to enter the mine until such examiner shall have reported all of the conditions safe for beginning work.' * * * Nor does it make any difference that plaintiff did not look for the record, under the facts of this case. Whether he relied on the statute or on the promise of appellant to repair, he had the right to assume that the appellant would keep its promise, and he also had the right to assume that it would comply with the statutory requirement, and was not bound to ascertain each morning whether it was doing so." In this class of cases the doctrine above announced in regard to contributory negligence also applies to assumed risk. In *Spring Valley Coal Co. v. Patting*, 210 Ill. 343, 71 N. E. 375, we said: "This court has held that contributory negligence is no defense to an action against a mine owner, if an injury results to a miner by reason of a willful violation of the mines and miners act (*Western Anthracite Coal & Coke Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335); and we think the same reasoning applies to the doctrine of assumed risk. The statute expressly requires the mine owner to furnish a sufficient light at the top and bottom of the shaft, to insure, as far as possible, the safety of persons getting on and off the cage. To excuse the mine owner from a compliance with said statute, upon proof of the fact that the miner knew the mine owner was violating the statute, would be to repeal the statute."

Fourth. A willful violation, within the meaning of the statute, signifies a conscious violation. *Marquette Coal Co. v. Dielle*, 208 Ill. 116, 70 N. E. 17. In *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45, we said: "There was no evil intent operating to induce the failure, but that element is not a necessary ingredient of willfulness, within the correct meaning of the word 'willful' as employed in this statute. * * * An act consciously omitted is willfully omitted, in the meaning of the word 'willful,' as used in these enactments of our Legislature relative to the duty of mine owners." It is, however, contended upon the part of the appellant that the negligence of

appellant, or its willful violation of the statute either as to examination or furnishing props, was not the proximate cause of the injury to appellee. Instructions given for both parties to the jury required them to believe from a preponderance of the evidence that the willful violation of the statute was the cause of the injury. Whether or not negligence of the appellant was the proximate cause of the injury was a question of fact for the jury, and they have settled it against appellant. *Missouri Malleable Iron Co. v. Dillon*, 206 Ill. 145, 69 N. E. 12, and cases there cited. The theory of appellant upon this subject seems to be this: That, although the appellant may have been guilty of a willful violation of the statute by failing to make the examination required, or to furnish the props and cap pieces demanded, yet that the negligence of appellee, in going under the rock after he had had notice that it was loose, operated as a new and independent force to break the causal connection between the original wrong and the injury; that is to say, the contention of appellant is that the alleged negligence of appellee, as above indicated, was the proximate cause of the injury, and that the willful violation of the statute by appellant was not the proximate cause. If this theory should prevail, then the rule that the defense of contributory negligence cannot be set up in actions of this kind would be rendered abortive and ineffective. The doctrine does not apply here that "the party who last has a clear opportunity to avoid the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." If the jury believed, from the evidence, that appellee would not have been injured but for the negligence of appellant in failing to make the examination and in failing to indicate the danger by a mark, then they were justified in finding that appellee's injuries were occasioned by the willful negligence of the appellant, within the meaning and intention of the statute.

Appellant claims that the material question was whether the appellee had notice of the defect or not, and his contention is that, if he received notice from any source, it made no difference whether or not the examiner made the necessary mark required by the statute or not, upon the theory that the object of making such mark was merely to give notice. This view cannot prevail, in view of the fact that the miner has a right to presume that the absence of the mark indicates an examination on the morning in question by the mine examiner and the opinion by the latter that the rock was not dangerous. The material fact is that, if the examiner had placed the required mark upon the roof of the coal room to indicate the danger, appellee would not have gone under the roof, in order to remove the coal upon the floor of the same, for the purpose of putting the prop under it. The very fact that the miner has the right under the statute to demand the props, and

the mine manager is under obligation to furnish the same, is proof that the miner regards the props as necessary. If the props are necessary, then the miner must know that there is some degree of looseness in the pieces of coal in the roof of the coal room, which requires the placing of props thereunder. It cannot be said, therefore, that, even though he has some knowledge as to the looseness of the coal, his working in the room with such knowledge is such negligence as amounts to a proximate cause of the injury, so as thereby to release the operator of liability.

Fifth. It is assigned as error by the appellant that the court below made improper rulings in regard to the admission and exclusion of evidence. The chief complaint is that the court permitted the introduction of certain expert testimony in regard to the fitness of certain timbers or crossbars to be used as props to support the loose roof of the coal room. The appellee claimed that he and his stepson, who was working with him, needed certain props and caps for the purpose of supporting the roof, and that they demanded the same, and that they were not furnished. It is contended on the part of the appellant that there were certain timbers or crossbars in the neck of the room, which could have been used by appellee and his assistant as props and cap pieces. It seemed that the neck of the room had been timbered by three crossbars, or had had three crossbars in it, and that after they had been placed there they sank down by the weight of the roof, which loosened above them and bore them down far enough to break one and bend the others. They had to be removed on that account, and were laid down upon the floor of the room in one corner, as we understand the evidence. The appellant contended that the appellee and his assistant could have made these timbers fit for props, and could have used them as such by sawing or cutting them off. The space between the roof of the room and floor was about $4\frac{1}{2}$ or 5 feet in height, whereas these timbers were some 7 or 8 feet long, or perhaps longer. Certain witnesses were asked as to the practicability of using these crossbars for the purpose of propping the roof. It is said by appellant that, after the timbers had been described as to length, size, and condition, it was a matter of common knowledge whether or not they could be cut and used, and that expert testimony upon this question was not proper, upon the alleged ground that such testimony allowed the witnesses to usurp the functions of the jury and draw conclusions which it was the province of the jury to draw from the evidence describing the timbers. In other words, it is claimed by the appellant that what was said by the witnesses upon this subject was upon a matter not within the proper domain of expert evidence. Undoubtedly it is a general rule that the opinions of witnesses are inadmissible as evidence, and that they are to testify to

facts; but the jury are to draw the inferences and form the opinions which are to govern the case. *City of Chicago v. McGiven*, 78 Ill. 347; *Hughes v. Richter*, 181 Ill. 409, 43 N. E. 1066. It is to be observed, however, that such men as usually sit upon the jury are not versed in such matters, and have no common knowledge or information concerning the hazardous employment of mining coal or the use of timbers and the methods of looking after the roof in a mine. For this reason, we are not prepared to say that experienced miners may not be allowed to give their testimony as to matters of this kind.

It has been held that miners may state in evidence what caused the cracking or settling of the walls of a mine, and whether it is safe to have only a narrow space between the tram cars and the mine walls; and it may be shown by experts that there is no method known to miners by which the danger from falling stones can be entirely obviated. 12 Am. & Eng. Enc. Law (2d Ed.) 442, and cases in notes. "A miner's evidence is admissible as to the proper method of timbering a drift, and also a shaft in a mine." Id. p. 448; *Grant v. Varney*, 21 Colo. 334, 40 Pac. 773. In the latter case it was said: "Witnesses for the plaintiff were permitted, over the defendants' objection, to state, in substance, what was the proper method of timbering a drift run in such ground as the evidence shows this one penetrated. Counsel for defendants now say that such questions permitted the witnesses to state what the jury were, as a matter of fact, to find from the evidence, and that the opinions of the witnesses were not admissible. The witnesses were not allowed to state whether or not this drift, with the timbers 15 or 16 feet from the breast, was safe. They spoke only as to the proper way to timber it. We think there was no error in this." So, in the case at bar, the witnesses were not asked as to the safety of using the timbers or crossbars in question, but simply as to whether the use of such bent and broken crossbars was a proper method of propping the roof of the mine. In *Donk Bros. Coal & Coke Co. v. Stroff*, 200 Ill. 493, 68 N. E. 29, where a witness had testified to facts intended to qualify him to give an opinion as an expert as to the timbers necessary to make the roof of a mine secure at a certain point, and he had said that there ought to have been four props on each side and a crossbar, and that there were only two props and a crossbar there, we said in that case in regard to this testimony: "We see no reason why an expert miner should not be allowed to express an opinion as to the number of props that would be required to prevent the slate in question from falling in."

Sixth. Appellant also complains that the court did not permit it to ask appellee's stepson certain questions upon his cross-examination as to a prior injury received by

appellee. There was testimony tending to show that appellee's eyesight had been affected, and that his mind was affected, and that he suffered pain when he tried to work, but that he had been sound physically and his mind had been in good condition prior to the injury received by him in appellant's mine. The stepson was asked certain questions for the purpose of showing that, several years prior to the present injury, appellee had fallen off a bridge and sustained injuries by reason of such fall, with the evident purpose of showing that the fall from the bridge, and not the accident in the mine, had caused the injuries from which he was suffering. The court refused to allow the witness to answer these questions upon cross-examination, because it was new matter that had not been gone into by the direct examination. Whether the ruling of the court in this respect was correct or not, appellant could have suffered no injury therefrom; for the reason that appellant was permitted to call out all the facts in relation to the previous injury from other witnesses, and was thereby permitted to show, or to attempt to show, to what extent, if any, the injuries of the appellee may have been caused by the fall from the bridge.

Seventh. Appellant also complains of the action of the court in the giving and refusal of instructions. Objection is made to the giving of the tenth instruction, given by the trial court for the appellee, which related to the method of estimating the amount of plaintiff's damages, and by it the jury were told that they might "give the plaintiff such damages, not to exceed the amount claimed in the declaration, as the jury may believe from the evidence he has sustained by reason of such injury." It is said that by the use of the words "not to exceed the amount claimed in the declaration" the court referred to the ad damnum mentioned in the declaration, and thereby expressly invited the jury, in case there was a verdict for the plaintiff, to award large damages. It is said that, inasmuch as the ad damnum in the declaration was \$20,000, the jury would think from this statement in the instruction that the court thought the damages ought to be large, as it specifically called the attention of the jury to the ad damnum. The true rule in regard to this subject was stated in *Central Railway Co. v. Bannister*, 195 Ill. 48, 62 N. E. 864, where it was said: "To our minds there is no objection whatever to an instruction for the plaintiff in an action at law, because it refers to the amount sued for, or limits the right of recovery to the amount claimed in the declaration, unless there is something in the instruction which tends to lead the jury to understand that they ought to or may allow the full amount so claimed." There is nothing in the language used in the tenth instruction here under consideration which tended to lead the jury to understand that they ought to allow the full amount claimed

in the declaration. Such was the character of the instruction given in *Chicago, Rock Island & Pacific Railroad Co. v. Austin*, 69 Ill. 426, referred to by counsel, and where the court told the jury "that by the statute of Illinois the plaintiff in this case can not recover more than \$5,000, and, if they believe from the evidence that the plaintiff is entitled to recover, they will render a verdict for no more than that amount." In *Muren Coal & Ice Co. v. Howell*, 204 Ill. 515, 68 N. E. 456, similar instructions were referred to, which contained the language here under consideration, or similar language thereto. But the main defect which was condemned in the instruction in the *Howell Case* was, not that it referred to the *ad damnum* mentioned in the declaration, but that the instruction failed to restrict the jury to the legal rule of damages, and permitted them to enter into an open field of investigation, rather than determine the amount of the damages from the evidence in the case. We are of the opinion that the tenth instruction in the case at bar, given for appellee, was not erroneous for the reason stated.

Eighth. Objection is also made to the third instruction, given for the appellee, upon the alleged ground that the jury were thereby told that the miner was the sole judge of the kind of timbers he should use, and upon the further ground that it ignored one of the defenses of the appellant, to the effect that there were timbers in the room and timbers out upon and along the entry, independent of the three timbers in the room neck, that could have been obtained and used as props. The instruction is not justly subject to the criticisms made upon it. In *Western Anthracite Coal Co. v. Beaver*, 192 Ill. 333, 61 N. E. 335, where the claim was made that, under the evidence, there was present in the mining room timber of sufficient length and dimensions to be used as props and cap pieces, with which the rock could have been secured, it was said: "The statute should have a reasonable and liberal construction and one which will accomplish its purpose. We are of the opinion the miner must be the one to determine the length and dimensions of the props and cap pieces which he deems necessary to properly secure the roof for his own safety. If he order 6½-foot props, the owner or operator has not complied with the statute when he has furnished props which must be spliced or sawed in two before they can be used." The language of the statute is that the mine manager shall provide "a sufficient supply of props, caps and timber delivered at the miners' cars at the usual place when demanded, as nearly as possible in suitable lengths and dimensions for the securing of the roof by the miners." It is the language of the statute itself that the timbers furnished shall be of suitable length and dimensions. The instruction, however, distinctly told the jury that they must condition their finding

upon several considerations, and also upon the belief, from the preponderance of the evidence, that the timbers in the neck of plaintiff's room were rejected timbers that had been taken down from the neck of his room, and had lain there for some time, and that they were broken, or bent, or cracked, and that they were not suitable timbers to use in plaintiff's room. In other words, the jury, by the terms of the instruction, were to determine themselves from the evidence whether the timbers in question were suitable or not.

As to the complaint that this instruction, and a number of other instructions commented upon, ignored some of the defenses of the appellant, it is sufficient to say that "the plaintiff is only obliged to present the law correctly in his instructions applicable to his theory of the case, and is not bound in every instruction to anticipate and exclude every possible defense." *Mt. Olive & Staunton Coal Co. v. Rademacher*, 190 Ill. 538, 60 N. E. 888, and cases there referred to. Several instructions were given for the appellant by the court below which present to the jury in positive and comprehensive terms the various defenses set up by the appellant. An examination of the instructions given for the appellant will show that its theories were presented to the jury in unequivocal language. The instructions, when taken together as a series, are free from prejudicial error. The ninth instruction, which is objected to, called the attention of the jury to the duty of the mine examiner to inspect plaintiff's room and observe its unsafe condition, and to place a conspicuous mark thereat as notice to all men to keep out of said room, etc. The instruction was couched in almost the exact language of the statute, and "where an instruction is given in the language of the statute it must be regarded as sufficient, because laying down the law in the words of the law itself ought not to be pronounced to be error." *Mt. Olive & Staunton Coal Co. v. Rademacher*, supra; *Donk Bros. Coal & Coke Co. v. Peton*, 192 Ill. 41, 61 N. E. 330.

Appellant complains of the refusal of some of the instructions asked by it. The substance of many of such refused instructions was embodied in instructions which were actually given for appellant. Some of these refused instructions ignored the doctrine, already announced, that contributory negligence is not a proper defense in cases of this kind under the circumstances already detailed, and for this reason these instructions were properly refused. Other objections are made to the instructions, which have been carefully considered; but we deem it unnecessary to further notice the same, as such objections are answered by the considerations already presented. The court gave for the appellant 22 instructions. Of these, 2 were modified in certain respects, but no complaint is made of such modification. These

instructions presented the case to the jury from every point of view taken by the appellant, and many of them were exceedingly favorable to the appellant. The jury were fully and liberally instructed, and the series of instructions, considered as such, contains in our opinion no reversible error.

Accordingly the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 396)

CHICAGO CITY RY. CO. v. SCHMIDT.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—REVIEW.

Where, on appeal to the Supreme Court from the Appellate Court, appellant obtains leave to file the briefs and arguments used in the Appellate Court, only those points urged in the Appellate Court will be reviewed, and not those made in a petition for rehearing in the Appellate Court; permission for leave to file having been denied.

2. CARRIERS—INJURY TO PASSENGERS—NEGLIGENCE.

Running an extra car so close to a preceding car that it could not be stopped on the slippery rails when the preceding car had stopped at a street crossing shows negligence in managing the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1204, 1211.]

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where a car had stopped to allow passengers to get off at a crossing, that a passenger stood on the rear bumper of the car, not knowing that another car was approaching from the rear, is not negligence per se.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1875-1878, 1402.]

4. SAME—INSTRUCTIONS.

In an action to recover for injuries received in a rear-end collision between street cars, an instruction directing a verdict for defendant, if the collision was caused by the unavoidable slipping of the rear car on the wet rails, or if the usual means were taken to stop it, is properly refused for failing to consider the question as to whether the motorman attempted to stop the rear car in due time.

5. TRIAL—INSTRUCTIONS.

The refusal of instructions already covered by those given is not reversible error.

Appeal from Appellate Court, First District.

Action by William F. Schmidt against the Chicago City Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

William J. Hynes, Watson J. Ferry, James W. Duncan, and C. Le Roy Brown (Mason B. Starring and W. E. Williams, of counsel), for appellant. Richolson & Levy (C. Stuart Beattie, of counsel), for appellee.

WILKIN, J. This is an appeal from a judgment of the Appellate Court for the First District, affirming a judgment of the superior court of Cook county, in favor of the appellee and against the appellant, for \$8,000 awarded as damages to him for an alleged personal injury. By leave of the court the

brief filed by the appellant company in the Appellate Court has been filed in this court, from which it appears that only two grounds of reversal were urged in that court, viz.: "(1) That the verdict is not justified by the evidence; (2) for errors in the giving to the jury of improper, and the refusal to give proper, instructions." This appeal brings before us only such errors as were urged in the Appellate Court. Central Union Building Co. v. Kolander, 212 Ill. 27, 72 N. E. 50, and authorities there cited.

The first of the above-stated grounds of reversal is evidently intended to raise the question whether there was any evidence introduced before the jury fairly tending to support plaintiff's cause of action, which question was raised in the trial court by the refusal to give a peremptory instruction to find for the defendant. This instruction was asked, and its refusal is urged as error on two grounds: First, that the evidence wholly failed to show that the plaintiff was in the exercise of reasonable care for his own safety at the time of the accident; and, second, that it fails to establish the fact of the defendant's negligence, as charged in the declaration. The several counts of the declaration charged that the plaintiff was a passenger on a car of the defendant, which was followed by another car running in the same direction; that, when the car upon which plaintiff was riding stopped at the intersection of Eighteenth and South Clark streets for the purpose of discharging passengers, the plaintiff, to make room so that they could alight, had to leave the rear platform, and he stepped around to the rear end of the car, and it was then and there the duty of the defendant to use due care about the management of its said second car, and not to run said car against and into said first car and plaintiff, yet the defendant did not regard its duty or use due care in that behalf, but, on the contrary, while the plaintiff was in the exercise of due care and caution, the defendant negligently and wrongfully, with great force and violence, ran the said second car against and into said first car, and the plaintiff, by means thereof, was injured.

The evidence shows that about the hour of 6 o'clock on the evening of the 16th of December, 1900, the plaintiff was a passenger on the street car which the appellant company was running southward on South Clark street, in the city of Chicago. He boarded the car at Van Buren street, and, the seats being occupied and the aisles crowded with passengers, he, with others, stood upon the rear platform, which was also crowded. The evidence on behalf of plaintiff is to the effect that he stood upon the platform until the car reached the crossing of Twelfth street, and then stood with his right foot on the steps of the car and his left on the corner of the bumper; his body leaning against the post of the vestibule. When the car

reached the south side of Eighteenth street it stopped to permit passengers to get off, and it became necessary for those on the platform to vacate the same in order to make room for those wishing to alight. A witness named Hamill, who was a passenger on the car and also rode on the rear platform, testified: "The car stopped at Eighteenth street to let some passengers off, and as the platform was very crowded some of us had to make way to leave these passengers off, and then the car that was following us run into us." The plaintiff testified that he stood on the rear platform from the time he got on the car because there was no room inside, and that he paid his fare to the conductor while so riding. He says: "I was standing on the platform from the first, and I remained on the platform up to Twelfth street. I then assumed the position with one foot on the step and one on the deadwood or bumper, hanging onto the rear handle. There was a vestibule on the car. The dashboard continued up to the roof. * * * The car stopped at Eighteenth street to let off passengers, and I noticed passengers coming up. The platform was pretty well filled. I then got around back of the car. The people wanted to get out, and I stepped around to make room. The car was standing still. I was just in the center of the car, and was holding onto the lower window case. I was facing directly to the car, south, watching passengers get off. When I moved around there no car was in sight." On cross-examination he further testified, speaking of his position at the time of the injury: "In my judgment I was in this position about one-half a minute. I expected, just as soon as those parties got off, to leave the center of the car and go back around to the rear of the platform again. That was my intention. For the purpose of allowing people to step off the hind step of the car I passed around and located myself in this position, looking in through the window in the center of the vestibule in the end." While standing on the bumper, as above described, another car, which the company was propelling southward along the same track, ran across the intersection of Eighteenth street and struck the one on which plaintiff was standing. The headlight of the rear car struck the right foot of the plaintiff and pushed it against a hook on the outside of the vestibule, crushing the bones and permanently injuring and disabling the foot, rendering it substantially useless.

The plaintiff was not riding on the bumper, as seems to be contended by appellant. At least, there is evidence fairly tending to prove that he got out on the rear of the car after it had stopped at Eighteenth street, and there is no dispute that the car was not moving at the time of the collision, but was standing still. If he had voluntarily taken the unusual position in which

he was injured, for the purpose of riding as a passenger, he might doubtless have been held guilty of contributory negligence per se. But that is not the case made by the evidence. There is no proof that he had reason to expect a car from the rear, and whether, in getting out of the way of the passengers desiring to get off the car, he was guilty of negligence, was a question of fact for the jury under all the facts and circumstances of the case. There was evidence fairly tending to show that the plaintiff was in the exercise of due care. The motorman on the rear car did not have a regular run, but was called an "extra," being called on only when some one regularly employed was not on duty. He had been so engaged for from four to six weeks. He testified that he saw the front car when he was at Sixteenth street, two blocks north of the place of the collision, and that plaintiff was then on the rear bumper; also that he knew that the forward car would stop at street crossings to receive and discharge passengers. He made no effort to slacken the speed of his car until he had reached a point 10 or 20 feet north of Eighteenth street, when he says he saw the front car on the south side of Eighteenth street and saw the plaintiff standing on the bumper. He then made every effort to stop the car, but the wheels slipped on the rails, which were wet, and he was unable to control it until it came in contact with the car in front. He did not claim that he sounded the gong or gave any alarm, except that he "hollered" two or three times. Conceding that he did all he could to avoid the accident after he reached the point 10 or 20 feet north of Eighteenth street, the question still remains whether he was not guilty of negligence in postponing his efforts to control the car until he reached that point; that is, whether he made timely efforts to control the car. He must be held to have known the condition of the rails and the danger of the wheels slipping. The jury also had a right, in determining the question of his negligence, to take into consideration the fact that he failed to give the usual alarm or signal. If he had rung the gong promptly upon discovering that he could not stop the car, the one in front might have moved forward or the plaintiff might have saved himself by getting off the bumper. Hallooing was not the usual or proper way of giving the alarm. Plaintiff may or may not have heard it, or, if he did, failed to understand what was said. We are of the opinion that the evidence, though conflicting, fairly tended to show that the rear car was negligently managed and that such negligence caused the injury. The trial court did not err in refusing to take the case from the jury.

Instruction No. 1, given on behalf of the plaintiff, advised the jury that the defendant

was bound, under the law, to exercise the highest degree of care and caution consistent with the practical operation of its cars to save the plaintiff from injury while he was, if he was, a passenger on said car. It is said this instruction was erroneous because the defendant was not charged by the declaration with any violation of duty to protect or guard plaintiff against injury. We do not so read the declaration. It charges that the plaintiff was a passenger upon the defendant's car, and that he was injured through the negligence of the servants of the company. It is also said that the instruction ignored the plaintiff's conduct in placing himself in the dangerous position, which fact necessarily affected the question of the defendant's duty in the premises. The plaintiff was not required to state the law of his case in a single instruction. No. 1 did not direct the jury that if they found the facts therein stated to be true they should find for the plaintiff, but simply stated the well-established rule of law as to the duty of a common carrier of passengers.

The defendant, among the many instructions asked by it, offered the sixth, as follows: "If the jury believe from the evidence that the coming together of the two cars was caused by an unavoidable slipping of the hind or following car upon a wet or slippery rail, without any negligence on the part of the employes thereof, then the jury should return a verdict of not guilty." Also the ninth, as follows: "If the jury believe from the evidence that the coming together of the two cars in question was caused by the following car becoming uncontrollable, then the jury must determine from the evidence whether or not the becoming uncontrollable of said car was due to negligence on the part of the employes in charge of it. If, after considering all the evidence, the jury believe that the employes in charge of said car undertook to stop it in the usual manner and with the usual means, and that there was no failure on their part to use the highest degree of practicable care in the operation of said car, then the jury must find the defendant not guilty. The motorman of said car was not required to do anything inconsistent with the practical or reasonable running of his car." Both of these instructions are subject to the criticism that they ignored entirely one theory of plaintiff's case; that is, that the motorman did not commence his efforts to control the car in proper time. The sixth is liable to the construction that the unavoidable slipping, if without negligence on the part of the employes, would excuse the defendant; whereas reasonable diligence by the motorman required him to act before the slipping of the wheels upon the rails. The ninth excuses the defendant if the motorman undertook to stop the car in the usual manner and with the usual means; whereas it was his duty to use unusual means

because of the unusual condition of the rails at the time.

But both these instructions were properly refused for the further reason that they were entirely covered by others given on behalf of the defendant. The sixteenth told the jury that the plaintiff could not recover unless they believed that the plaintiff had proved, by a preponderance of the evidence, first, that the plaintiff was in the exercise of ordinary care for his own safety at and just prior to the time of the accident; second, that the defendant company was guilty of negligence in the manner charged in the declaration or in some count thereof; and, third, that such negligence, if any, was the proximate, direct cause of the plaintiff's injury. By the twentieth, that if they believe from the evidence that the injury was the result of mere accident, which occurred without negligence on the part of the defendant, as charged in the declaration or in some count thereof, then they should return a verdict of not guilty. By the twenty-eighth, that "the mere fact that Schmidt was injured is not sufficient of itself to make the defendant liable, if the jury believe from the evidence that at the time of the injury the employes of the defendant were exercising the highest degree of practicable care in the operation and management of the following car in question." Several other instructions in positive and unequivocal language told the jury that the plaintiff could not recover if his injury was the result of a mere accident and not occasioned by the negligence of the employes of the defendant. Therefore to have given the sixth and ninth instructions would have been but to repeat what the jury were told by those given. No one can read the 18 lengthy instructions given by the court at the instance of the defendant, and which state the law of the case in its various phases, many of them most favorably to the defendant, and entertain the belief that the verdict of the jury was the result of misdirection by the court in its instructions.

Counsel for defendant have reargued upon this rehearing that the point of the submission by the trial court of special interrogatories without notice to it was argued in the Appellate Court. It is not, as we understand, claimed that the question was urged in the Appellate Court, except upon a petition for rehearing. It should be remembered that at the last February term the plaintiff asked leave to file defendant's argument in the Appellate Court, for the purpose of showing that the point in question was not presented in that argument. The defendant in its counter suggestions admitted the fact alleged by the plaintiff, but made a cross-motion for leave to file the petition for rehearing, thereby impliedly admitting that the question was then raised for the first time. We allowed the motion of plaintiff and denied the cross-motion, and

therefore the petition for rehearing in the Appellate Court was not and is not before us.

We have, in view of the large judgment in this case, rendering it important to the appellant, deemed it proper to consider carefully each substantial ground of reversal urged, and are convinced that no reversible errors of law were committed by the trial court in its disposition of the case. The judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

(217 Ill. 429)

BERDEL et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—DISTRIBUTION OF COST.

Local Improvement Act 1897, § 47 (4 Starr & C. Ann. St. Supp. 1902, c. 24, par. 84), invests the county court with the power to revise and correct the assessment roll and change the distribution of the total cost of an improvement between the public and the owners of the property, and its decision is conclusive.

2. SAME—ARBITRARY ASSESSMENT.

An arbitrary plan in assessing benefits to the portion of lots not actually taken for the widening of a street for a market place to an amount sufficient to equal the value of the parts of the lots taken, irrespective of the fact that the lots were differently situated, renders a reversal of the assessment necessary.

Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Petition by the city of Chicago against Charles A. Berdel and others in condemnation proceedings. Judgment for plaintiff, and certain defendants appeal. Reversed.

James Lane Allen and Wing & Wing, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

PER CURIAM. This was a petition filed by the city of Chicago in the superior court of Cook county against the appellants and other defendants, praying the court to ascertain the just compensation to be paid for private property to be taken or damaged for the widening of West Randolph street, from Halsted street to Sangamon street, a distance of three blocks, by taking 35 feet from the abutting property on each side of the street, and making it 150 feet wide, instead of 80, and to ascertain what property would be benefited by such improvement and the amount of such benefit. The appellants are the joint owners of lots 17 and 18, in block 36, in Carpenter's Addition to the city of Chicago. The lots are situated at the northwest corner of West Randolph and Halsted streets, having a frontage of 50 feet each on West Randolph street, extending 100 feet north. Lot 18 is the corner lot, and abuts 100 feet on Halsted street. West Randolph street is 80 feet in width in front of these lots, but eastward from Halsted to Desplaines street, a distance of two blocks,

it is 150 feet wide. Lot 18 is improved with a four-story and basement brick building, of about 43-foot frontage on Randolph street, and running about 60 feet north on Halsted street, where it adjoins a like four-story and basement brick building of about 40-foot frontage on Halsted street, and running about 55 feet west along the alley. Lot 17 is the inside lot west, and faces 50 feet on Randolph street by 100 feet deep, and is improved with some frame buildings, concerning the value of which there is no controversy here as to the award made. Commissioners were appointed, who made a report showing the total value of all the land taken on both sides of the street for the improvement to be \$314,103.70, that there were no damages to property not taken and no benefits to the city of Chicago, and assessing the benefits to the remainder of each piece of property equal to the value of the property taken, so that the owners were paid for their land taken in benefits to what was left. As to appellants' property, they reported the just compensation to be paid to them for the 35 feet taken from lot 17 as \$10,062.50, and assessed back upon the remaining 65 feet of the lot \$10,062.50, being the same amount for benefits to the property from the improvement. The just compensation reported to be paid appellants for 35 feet to be taken from the front of lot 18 was \$14,875, and the benefits to the remainder of the lot were assessed at the same sum, thus balancing the amount allowed as for compensation for the land taken. The appellants filed objections to the amounts allowed for the property to be taken and to the assessment of benefits to that not taken, and also objected to the report and finding of the commission that the city should not be required to pay any portion of this cost of the improvement. The objections were submitted to a jury for trial, and the testimony of a number of witnesses was heard. The verdict of the jury was that the property was not assessed more than it would be benefited, and they fixed the compensation to be paid for the portion of the lots to be taken at the amounts, respectively, fixed by the commissioners, and assessed the benefits to the parts of lots not taken in the same amounts. Judgments of condemnation and of confirmation were entered accordingly, and this appeal was prosecuted therefrom.

Section 47 of the local improvement act of 1897 (4 Starr & C. Ann. St. Supp. 1902, p. 179, c. 24, par. 84) invests the county court with power to revise and correct the assessment roll and to change and modify the distribution of the total cost of an improvement between the public and the property benefited, and provides that the determination of that court of the distribution of the cost of the improvement between the public and the property to be assessed shall be conclusive, and shall not be subject to review on appeal or writ of error. We cannot,

therefore, consider the contention of counsel for the appellants that the court erred in refusing to require the city to pay some portion of the cost of the proposed improvement.

It appeared from the testimony of all of the witnesses produced on the hearing, both those who gave testimony on the part of the appellants, as well as those for the city, that West Randolph street, from Desplaines to Halsted streets, a distance of two blocks, is of the width of 150 feet, and is occupied for the purposes of a produce or truck market, and is known as "Haymarket Square"; that the business transacted there is for that reason quite large, and that the property abutting on the square is in great demand by produce and commission men and wholesale grocerymen, and that said property has increased in value, and is now worth much more than property on West Randolph street to the east or west of the Haymarket Square; that the lots at the southwest and northwest corners, respectively, of Halsted and West Randolph streets—those on the northwest corner being the property here involved—are at the western limit of said Haymarket Square, and were and are of greater value than lots on either side of West Randolph from Halsted street to Sangamon street, the latter street being the western limit of the proposed improvement. Lot 18, which is at the northwest corner of Halsted and West Randolph streets, was estimated by the witnesses produced on behalf of the appellants at from \$1,200 to \$1,500 per front foot, and by the witnesses produced by the city at not less than \$850 per front foot. The witnesses in behalf of each of the litigants testified that the lots along West Randolph street, from Halsted to Sangamon streets, became less and less valuable as they were more remote from Haymarket Square. The witnesses for appellants valued lot 17, being the second lot from the northwest corner of Halsted and West Randolph streets, at from \$700 to \$750 per front foot, being little more than one-half of the value of the corner lot as estimated by them. The witnesses for the city estimated the value of lot 17 at from \$250 to \$300 per front foot less than lot 18.

The theory of the witnesses who testified for the city was that the produce and truck market would extend along the street as proposed to be widened, and that, as a result thereof, the property abutting thereon, as far as widened, would be benefited and increased in value, and that the remainder of each of the lots, after the 35-foot strip had been taken from the front thereof, would be of the same value as the entire lot before the street was widened; that is, that each lot would be increased in value in an amount equal to the value of the 35-foot strip to be taken from it. The jury accepted this theory as correct and applicable to each of the lots and returned their

verdict accordingly; that is, assessed back upon the remainder of each lot along each side of the street, throughout the entire length of the improvement, the amount allowed as compensation for that part of the lot taken. This theory leaves out of consideration the fact that appellants' lot 18 already fronted practically on Haymarket Square to the extent of the 35 feet at the south end of the lot, and that it already had a portion of the advantages and benefits to be derived from a frontage on the market. The arbitrary plan adopted by the jury of uniformly assessing as for benefits against the remainder of each of the lots, after 35 feet of the front thereof had been taken for the widening of the street, an amount sufficient to pay or equal the value of the part of the lot taken, manifestly operated unjustly as to appellants' lot 18, and also in a degree as to their lot 17, which was situated in such close proximity to the Haymarket as that, as the testimony of all of the witnesses tended to show, the benefits of that mart extended in a degree also to it. The lots belonging to the appellants were differently situated, with reference to the benefits to accrue from the widening of the street, from lots two and three blocks away from the western limits of the Haymarket Square, and the general plan of assessing benefits to all the parts of the lots not taken along the street for the distance of three blocks could not be applied to the appellants' lots without working an injustice to them, in that it assessed as benefits to their lots the benefits of the market already in a great degree enjoyed by them.

The judgment is palpably wrong, and is reversed, and the cause will be remanded.
Reversed and remanded.

(217 Ill. 273)

CITY OF MATTOON v. FALLER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS—NEGLIGENCE.

Evidence that a city had notice, both actual and constructive, that a sidewalk was in bad repair, and yet permitted it to remain in an unsafe condition, makes a question for the jury on the issue of the city's negligence.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1747-1750.]

2. SAME—ACTIONS—INSTRUCTIONS.

In an action against a city for injuries caused by a defective sidewalk, an instruction requiring repairs made by a city to have been "properly" made is proper.

3. SAME—QUESTION FOR JURY.

In an action for injuries caused by a defective sidewalk, where there was evidence that the injury occurred two months after repairs were made by defendant city, and that the city officers had in the meantime been twice notified that the walk had again become out of repair, the question whether the city had had a reasonable time after notice and before the injury to make further repairs was one for the jury.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 850.]

4. SAME—CONTRIBUTORY NEGLIGENCE.

A pedestrian, who uses a defective sidewalk with knowledge of its defective condition, although he might have gone by another route, is not guilty of negligence per se; but all that is necessary for such pedestrian to show, in order to exonerate himself from contributory negligence, is that he exercised ordinary care for his safety.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1679.]

Appeal from Appellate Court, Third District.

Action by Clement F. Faller against the city of Mattoon. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in case, brought to the October term, 1903, in the circuit court of Coles county by the appellee against the city of Mattoon to recover damages for a personal injury resulting from a fall upon an alleged defective sidewalk in that city. The trial resulted in verdict and judgment in favor of the appellee for \$1,000, which judgment, upon appeal to the Appellate Court, has been affirmed. The present appeal is taken from such judgment of affirmance.

Anderson Stewart, City Atty., and Bryan H. Tivnen, for appellant. Craig & Kinzel, for appellee.

MAGRUDER, J. In this case no errors are assigned on account of any ruling of the trial court in reference to the admission or exclusion of evidence. The only errors assigned relate to the giving and refusal of instructions.

First. It is assigned as error that the court below, at the close of appellee's evidence, and again at the close of all the evidence, refused to give a written instruction, asked by the appellant, requiring the jury to find the appellant not guilty. The refusal of the court to instruct the jury to find for the appellant raises the question whether or not there is any evidence tending to show appellee's right of recovery. If there was evidence tending to show such right of recovery, then the court committed no error in refusing to direct the jury to find for the defendant. *Central Railway Co. v. Knowles*, 191 Ill. 241, 60 N. E. 829; *Landgraf v. Kuh*, 188 Ill. 434, 59 N. E. 501.

The material facts of the case are substantially as follows: The appellee was a carpenter, and lived in a house in the city of Mattoon at the southeast corner of Twentieth and Moultrie streets. Twentieth street ran north and south. Moultrie street ran east and west and across Twentieth street. The next street east of Twentieth street, and parallel with it, was Nineteenth street. Plaintiff had moved into the house in which he lived four or five months prior to his injury, which occurred on February 16, 1903. The house faced north on Moultrie street, and the west side of it fronted on Twentieth street, and ran back to an alley, run-

ning east and west, south of appellee's place, and at about the middle of the block in which his house stood. The evidence is quite clear and conclusive that for some two years prior to the accident the sidewalk on the east side of Twentieth street, and on the west side of appellee's house, was in a defective condition. The testimony of appellee and his daughter, and of some four or five other witnesses, shows that this sidewalk on the east side of Twentieth street was and had been out of repair and in bad condition. It was a wooden sidewalk, and some of the sills were rotten, and some of the planks were decayed, loose, broken, and unfastened. The sidewalk was about 4 feet in width, and the planks ran east and west, except at the alley, where they ran north and south, the alley being about 12 to 16 feet in width. At the crossing of the alley the boards were turned, or "cuffed" up, and the stringers were rotten, or partly rotten, and broken. The sills and stringers under the walk were rotted out, and the main planks broken, and a part of them projected up and part down. This had been the condition of the walk for some two years. There was no sidewalk at all on Moultrie street in front of appellee's house. There was a cement sidewalk on the west side of Twentieth street. At the southwest corner of Twentieth and Moultrie streets stood an old church. The crossing from the southwest corner of Moultrie and Twentieth streets to the southeast corner of Moultrie and Twentieth streets, where the appellee's house was, was in bad condition and out of repair. On the morning of February 16, 1903, appellee had been at work at some point east and south of his home, and, having finished his work at about 10:30 in the morning, started for home. He walked up Nineteenth street east of Twentieth street, until he came to the street running east and west that crossed Twentieth street next south of his house. He then turned west from Nineteenth street to Twentieth street, and walked north on Twentieth street, on the east side thereof, to go to his home. He had in his hand, or on his shoulder, a small hand box containing some tools, weighing from 10 to 12 pounds. When he came to or near the alley in question, walking north on the east sidewalk of Twentieth street, one of the planks of the sidewalk running east and west was loose and unfastened. Appellee stepped on the east side of plank, near the center of the sidewalk, and the other side thereof flew up, and in endeavoring to step over it with his other foot he lost his balance, and got his foot caught on the edge of one of the defective planks, which was "cuffed up," at the alley crossing running north and south, and he was thrown off his balance diagonally across the sidewalk. He received severe injuries. His leg between the knee and the hip was fractured, and he was otherwise bruised and injured. He was confined to his bed for

almost four months, and since the injury has been unable to work at his former trade. There is no dispute as to the extent or seriousness of his injury.

The first question which presents itself is whether or not the appellant was guilty of such negligence as caused the injury to appellee. The evidence shows that the city had not only constructive, but actual, notice of these defects in the sidewalk. It appears from the testimony of witnesses produced by the city itself that it attempted to repair a part of the sidewalk near this alley on or about December 15, or December 20, 1902. No attempt was made to repair the whole length of the sidewalk from Moultrie street south to the next street, parallel with Moultrie street, which crossed Twentieth street, and along the west side of appellee's house. No new plank or new stringers were used in making such repairs. According to the testimony of the city, old planks were taken from some other sidewalk in the city and used to make these repairs. One of appellant's witnesses says in regard to these repairs: "We didn't put in any new boards. We had a pile of old boards we brought from somewhere else. We didn't use a single new plank." Another witness of appellant says: "In these repairs we had some boards we had gotten from old walks." Another witness still of appellant says: "We used lumber for repairing the crossing that we had taken out of other walks in town." One of appellee's witnesses says in regard to these repairs: "There were some broken boards there in the crossing that had existed pretty nearly all winter. It looked as though they had gone and nailed them down a little—some rotten boards there. They tried to fix them there—the rotten boards—and they didn't hold. They wouldn't hold." Appellee swears that in January, 1903, he called the attention of one of the aldermen of the city to the condition of the sidewalk; and one Walker, who was present when the notice was so given, confirms appellee's statement. Some week or more before the accident to appellee, a lady fell upon the sidewalk at the same place, and was helped up by appellee. Thereupon appellee notified the city superintendent of streets of the occurrence, and called his attention to the condition of the walk, and the superintendent said: "I know it. It is a bad walk, but they won't give me anything to repair it with. They give me the devil about the walk, but they don't furnish any material that I can do anything with." The evidence tends to show that the sidewalk at the alley in question was in a defective condition after the repairs were made in the middle of December, 1902, because the notices given to the alderman and the street superintendent were given in January, 1903, and a week or so before the accident occurred.

The evidence above recited tends to show that the city was guilty of negligence in permitting the sidewalk to become as defective

as it was, and in permitting it to remain defective after actual and constructive notice of its condition. Indeed, counsel for the city substantially concede that the sidewalk in question was out of repair at the time when the accident occurred. It cannot be said, therefore, that the trial court erred in refusing to take the case from the jury, inasmuch as the evidence tended to show negligence on the part of the city. The instructions given for the appellee and those given for the appellant announced the doctrine upon this branch of the case that the appellee could not recover unless the city had actual notice of the defective condition of the sidewalk, or unless the alleged defect was of such a nature and existed for such a length of time before the injury happened that the city authorities could have discovered it by the exercise of reasonable care and diligence. The instructions also announced that it was the duty of the city to use reasonable care to keep its sidewalks in a reasonably safe condition; that is to say, reasonably safe for the use of the traveling public. Such is the law as announced by this court. *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246; *City of Sterling v. Merrill*, 124 Ill. 522, 17 N. E. 6; *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *City of Decatur v. Besten*, 169 Ill. 340, 48 N. E. 186; *City of Flora v. Naney*, 186 Ill. 45, 26 N. E. 645.

One of the instructions given for the appellee is criticised upon the ground that it left it to the jury to determine from the evidence whether or not the repairs claimed to have been made by appellant were "properly" made. The objection to the use of the word "properly" is that it left too much to the conjecture of the jury as to what was proper, and that the use of that word might lead the jury to conclude that the sidewalk must be absolutely safe. There was evidence tending to show that the repairs made by the city in December, 1902, were made of old material, and were so imperfectly made as not to cure the defect in the sidewalk at the point where they were made. It was in view of this evidence that the instruction was given. Whether the use of the word "properly" was strictly and technically correct or not, the jury could not have been misled as to the obligations of the city in regard to the condition of its sidewalks, because many instructions were given for both sides which laid down the rule that the city should use reasonable care and diligence to keep its walks reasonably safe for the use of the traveling public. They could not have derived the idea from the instructions that, in requiring the city to properly repair its sidewalk, it was required to do anything more than to make such sidewalk reasonably safe for the use of the public. In *Whitney & Starrette Co. v. O'Rourke*, 172 Ill. 177, 50 N. E. 242, an instruction stated that it was the duty of a contractor, in erecting a building, to use reasonable care to keep boards

used as a covering for the sills of a building "securely fastened," and it was objected to the instruction that the words "securely fastened" had the same meaning as "absolutely safe"; but this objection was held to be without force. So, here, in requiring the city to "properly" repair its sidewalks, the requirement was, not that it should repair them so as to make them absolutely safe, but reasonably safe for the use of the traveling public.

One of the instructions given for the appellee is objected to as assuming that the walk where appellee was hurt was in a defective condition. The evidence was uncontradicted that it was in a defective condition, but the instruction is not justly subject to the criticism made upon it, because the clause referring to the defective condition of the walk is coupled with several other clauses, which follow the phrase, "if the jury believe from the evidence," showing that the jury were to find from the evidence whether or not the walk was defective, as charged by the appellee. In *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406, an instruction was objected to as assuming that the appellant was guilty of negligence, and we there said (page 625 of 141 Ill., page 409 of 31 N. E.): "The instruction does not assume that the appellant was guilty of negligence, for the qualifying words, 'if the jury believe from the evidence,' apply to the entire sentence." Counsel for appellant seem to assume that the repairs were made at so recent a period before the occurrence of the accident that the city could not have had reasonable notice of the existence of any defect existing after the making of such repairs. The evidence, however, shows—and the instructions were directed to the evidence—that the accident occurred some two months after the repairs were made, and that, after the making of the repairs, notice of the defective condition of the sidewalk was given to the officers of the city on at least two different occasions. It was for the jury to say whether or not a sufficiently reasonable time had elapsed after notice of the defect to enable the city to make such repairs as would cure it. All the instructions given told the jury that it was the duty of the city only to exercise reasonable care and diligence to keep the walk in a reasonably safe condition, and, when no time is stated in an instrument, the law implies a reasonable time. It may be said here, as was said in *Town of Wheaton v. Hadley*, 131 Ill. 640, 23 N. E. 422: "If the town had laid a new walk out of defective material, from which an injury resulted, the town would have been chargeable with notice of the defect. So in this case, if the authorities, having both actual and constructive notice of the defective condition of the walk before the repairs were made, so made the repairs that the walk was left in unsafe condition and repair because of the defective material there-

in, they would be liable for injury resulting from such defect." The instructions asked by the appellant and refused by the court either announced principles inconsistent with those here stated, or simply repeated those which were embodied in instructions given for the appellant, and therefore their refusal was not error.

Second. The next question presented by the record in the case is the question whether or not the appellee was guilty of such contributory negligence as caused the accident and the injury to him. The main defense set up by the appellant is that the appellee was guilty of contributory negligence. Such contributory negligence is said to consist in the facts, first, that the appellee knew of the defective condition of the sidewalk when he went upon it; and, second, that he might have gone to his home by another way than the one which he took to get there. The appellee might have crossed Twentieth street to the west side thereof, and then walked upon the cement sidewalk up to the southwest corner of Moultrie and Twentieth streets, and then crossed over Twentieth street on the south side of Moultrie street to his house. The evidence, however, is clear that the walk across Twentieth street from the southwest corner of that street and Moultrie street to the southeast corner of Twentieth and Moultrie streets was in bad repair and poor condition. One of the witnesses testifies that this crossing on the south side of Moultrie street was so much out of repair that some of the boards were loose and stuck up, and that the sills were rotten. Appellee might have gone from Nineteenth street, through the alley, to the rear of his house, and entered through the back yard; but the evidence tends to show that very often the alley was muddy. It is true that the appellee knew of the defective condition of the sidewalk when he went upon it. It is, however, well-settled law in this state, that, where a man knows of a defect in a sidewalk and walks thereon, his doing so with such knowledge is not negligence per se as matter of law. The fact that he goes upon the sidewalk with knowledge of the existing defect is a circumstance to be taken into consideration by the jury with all the other facts and circumstances in determining the question whether he was guilty of contributory negligence. The same is true as to the fact that he might have taken another route to reach his destination than the one which he actually pursued. The fact that it was possible for him to take such other route is merely a circumstance to be taken into consideration by the jury in determining the question of contributory negligence, and is not evidence of negligence per se as matter of law. All the law requires of a man, going upon a public sidewalk with knowledge that it is defective and with knowledge that there is another way of going, is that he shall be in the exercise of ordinary care for his own safety.

In *Village of Clayton v. Brooks*, 150 Ill. 97, 37 N. E. 574, we said: "If a person attempts to pass over a sidewalk, bridge, or other structure, knowing the same to be in a dangerous condition, and in such attempt receives injury, his knowledge of the danger will presumptively establish contributory negligence. But such presumption is not conclusive. It is disputable, and may be rebutted by evidence of the exercise of ordinary care under the circumstances of the particular case. * * * In general, the question of negligence is one of fact. * * * Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts per se constitute negligence. * * * The law is, we think, well settled that knowledge of the defect in the sidewalk by the person injured before he goes upon the same, or before the injury, does not per se establish negligence upon his part. * * * It is plain that one may exercise due care, with full knowledge of the danger to which he is exposed or to which he lawfully exposes himself. This certainly is not contributory negligence." In the same case of *Village of Clayton v. Brooks*, supra, it was said, quoting from *Shearman & Redfield on Negligence* (page 106 of 150 Ill., page 575 of 37 N. E.): "The mere fact that a traveler is familiar with the road and knows of the existence of a defect therein will not impose upon him the duty to use more than ordinary care in avoiding it. * * * Such knowledge is a circumstance, and perhaps a strong one; but it should be submitted, with the other facts of the case, to a jury for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. * * * But the mere fact that * * * he [the traveler] might have taken a nearer way is immaterial, as it is the duty of the town to repair all the streets." "The fact that a traveler on a highway perceives that an obstacle therein is dangerous to persons attempting to pass it is not conclusive that he does not use due care in making the attempt." *Village of Clayton v. Brooks*, 150 Ill. 107, 37 N. E. 576. In *City of Aurora v. Dale*, 90 Ill. 46, this court held that traveling upon a sidewalk by one having notice of dangerous defects therein does not necessarily constitute negligence. In *City of Aurora v. Hillman*, 90 Ill. 61, it was said: "Nor does the mere fact that plaintiff might have taken a better and safer sidewalk than the one he did take charge him with want of ordinary care." In *Village of Clayton v. Brooks*, supra, it was further said (page 107 of 150 Ill., page 576 of 37 N. E.): "The ultimate fact submitted to the jury in this case in respect to the matter under consideration was whether the plaintiff was guilty of contributory negligence, and the fact that she returned home over the defective sidewalk with knowledge of its unsafe condition was

a circumstance proper to be shown as tending to establish such negligence. It was an evidentiary fact, and as such was properly allowed to go to the jury, as having a tendency to prove the ultimate fact in question. It was properly submitted with all the other evidence illustrating the same question. * * * The jury, upon full consideration, have found that she exercised ordinary care, and that finding having been affirmed by the Appellate Court is conclusive upon that question of fact."

In the case at bar, the instructions given for the appellee announced to the jury the doctrine already stated; that is, that appellee was only required, under the circumstances, to exercise reasonable or ordinary care and caution, and that whether or not he was exercising such care and caution at the time of the injury was a matter for the jury to determine from all the facts and circumstances shown on the trial. The evidence of the appellee tends to show that he paid particular attention to where he was going, and that he was walking at an ordinary gait. He was asked, when upon the witness stand, what precaution he took for his own safety, and answered that he took extraordinary precaution, as any person would. Objection was made to the use of the word "extraordinary," and his answer in that respect was excluded. Thereupon he stated that he was "walking my ordinary walk; a loose board that had slipped to one side was so near the other side I did not really notice it." His evidence showed that the board which caused him to stumble could not have been easily seen, and that he was thrown off his balance, and in trying to make a long step caught his toe on the end of an upturned plank at the alley crossing, and was thus thrown down. It was for the jury to say, under this evidence, whether or not he was in the exercise of ordinary care. The evidence tended to show that he was in the exercise of ordinary care, and the judgments of the lower courts are conclusive upon that subject. In *City of Streator v. Chrisman*, 182 Ill. 215, 54 N. E. 997, it was again said: "It is contended that appellee knew of the defect in the walk, and was therefore guilty of contributory negligence in going upon it. Although a person passing along a sidewalk may know it is out of repair, he may, notwithstanding such knowledge, recover for a personal injury occasioned by the defective walk, if he uses ordinary and reasonable care. * * * Whether due care was exercised in using a sidewalk, knowing it to be out of repair, is a question of fact for the jury." *City of Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Village of Cullom v. Justice*, 161 Ill. 372, 43 N. E. 1098.

Appellant criticises one of the instructions given for the appellee, which announced the obligation of appellee to exercise ordinary care, because the instruction also announced

"that the law did not require extraordinary care of the plaintiff at the time in question." The instruction was not erroneous for the reason thus indicated. In *City of Bloomington v. Chamberlain*, 104 Ill. 268, we said: "One of the refused instructions asked by defendant was that, if plaintiff knew of the defective condition of the sidewalk, it was her duty to exercise a high degree of care while passing over it. The degree of care which the law required the plaintiff to exercise was ordinary care under all the circumstances of the case. The plaintiff's knowledge as to the condition of the sidewalk would be one of such circumstances to be considered by the jury in determining whether there had been the exercise of ordinary care. * * * We think the instruction given stated the law upon the subject sufficiently favorable for the defendant." If, as is here announced, it was not the duty of the appellee to exercise a high degree of care, or, which is the same thing, an extraordinary degree of care, then the instruction stating that the law did not require extraordinary care was not objectionable.

Counsel for appellant complain that the court modified the first instruction asked by the appellant, and gave it as so modified. The instruction, as originally asked, substantially stated to the jury that, if they believed from the evidence that for some time prior to receiving the injury the plaintiff knew of the existence of the danger, and if they believed from the evidence that he could safely have gone to his home by some other walk with safety, he did not exercise the degree of care and caution for his own safety required by the law, and that the verdict should be for the defendant. This instruction was wrong, because it told the jury in substance that appellee's knowledge of the defect when he went upon the walk, and his ability to go by some other road, were evidence, as matter of law, of a want of the degree of care and caution required by the law. The modification made by the court so changed the instruction as to tell the jury that they might take these matters into consideration in determining whether or not the appellee used ordinary care for his safety. The instruction was modified in accordance with the principles of law sustained by the foregoing authorities, and therefore the modification was proper.

Upon this branch of the case, relating to the question of contributory negligence, counsel for appellant complain of the refusal of the trial court to give certain instructions asked by them. The appellant submitted to the court 43 instructions, of which the court gave 17. The instructions which the court gave for the appellant were favorable to it, and presented to the jury clearly and forcibly appellant's view of the case. There was no material error in refusing the instructions which were refused, because those of them which did not con-

travene the rules of law already announced were substantially embodied in instructions which were given for appellant. We find no substantial error in the record which would justify us in reversing the judgment in this case. But we do not think it sufficiently clear that this appeal has been prosecuted for delay to justify us in awarding damages of 10 per cent., as requested by appellee.

Accordingly the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 30)

PITZELE et al. v. COHN et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. RECEIVERS—SALES OF PROPERTY—SALE TO CREDITOR.

A creditor, acting in good faith and with the approval of the court, may purchase from a receiver his debtor's equity of redemption at any reasonable agreed price.

2. EQUITY—MAXIMS—CLEAN HANDS.

The act of a creditor of an insolvent firm in fraudulently conspiring with the firm to defraud other creditors by buying property belonging to members of the firm and conveying it to their wives is not available to the wives to defeat foreclosure by the creditor of a mortgage given by them to secure the balance of their husbands' indebtedness to the creditor.

3. SAME.

Wrongdoing which will defeat recovery on the ground that the litigant does not come into equity with clean hands must be in regard to the matter in litigation, and does not apply to the misconduct of the complainant in other matters not immediately connected with the pending litigation.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 186.]

4. MORTGAGES—AMOUNT OF DEBT—ITEMS INCLUDED.

Where a note and mortgage given by a debtor to secure his creditor includes items of solicitor's fees incurred by the creditor in the prosecution of his claim and an item of interest on an open account, such solicitor's fees and interest should be allowed to the creditor on foreclosure of the mortgage.

Error to Appellate Court, First District.

Bill in chancery by Harris Cohn and others against Rose Pitzele and others. There was a judgment of the Appellate Court, reversing a decree dismissing the bill, and defendants bring error. Affirmed.

This was a bill in chancery, filed in the superior court of Cook county by the defendants in error against the plaintiffs in error to foreclose a trust deed in the nature of a mortgage given by the plaintiffs in error to the defendant in error Newberger, as trustee, to secure the payment of a promissory note for \$2,000 and interest, bearing date March 28, 1900, payable to the order of defendant in error Cohn. An answer and replication were filed, and the case was referred to a master, who reported, recommending a decree in favor of the defendants in error for \$2,243.54. Objections, which were renewed as exceptions, were filed to said

report by both parties, and a decree was entered dismissing the bill upon the merits. An appeal was prosecuted to the Appellate Court for the First District, where the decree of the superior court was reversed, and the cause was remanded to that court, with directions to enter a decree of foreclosure for the face of said note and interest, and a writ of error has been sued out from this court to review the decision of the Appellate Court. It appears that the plaintiffs in error Ascher and Nathan Pitzele, who are brothers, had been engaged in business as partners for many years as A. & N. Pitzele; that prior to October 15, 1898, they owned a store at South Chicago, which was in charge of Ascher Pitzele, and one at Dixon, which was in charge of Nathan Pitzele. On that day Ascher Pitzele filed in the circuit court of Lee county a bill in chancery against Nathan Pitzele, alleging, among other things, the insolvency of the firm of A. & N. Pitzele, and praying for the dissolution of the partnership, and that its affairs be wound up, its indebtedness paid, and its assets divided. Nathan Pitzele immediately entered his appearance in said cause, filed an answer in which he admitted the allegations of the bill to be true, and consented to a decree in accordance with the prayer thereof. Thereupon Charles H. Hughes was appointed receiver and took possession of the firm property, including its real estate. A. & N. Pitzele, at the time of the filing of said bill, owed H. Cohn & Son, of which firm H. Cohn was the senior member, the sum of \$2,873.78 upon open account for merchandise sold and delivered by H. Cohn & Son to said firm, and H. Cohn held the notes of A. & N. Pitzele secured by mortgages for the benefit of his firm upon real estate of A. & N. Pitzele to the amount of \$13,000. All of said indebtedness was proven up against the estate of A. & N. Pitzele by H. Cohn and H. Cohn & Son in the proceeding pending in the circuit court of Lee county, and afterwards the receiver in that proceeding paid on said claims dividends aggregating the sum of \$2,486.59. At the time Hughes was appointed receiver the firm of A. & N. Pitzele owned two pieces of real estate in South Chicago, the title of which was in the individual members of the firm, and which was conveyed by them to the receiver. The property described in this bill was incumbered by a first mortgage held by Chandler & Co. for \$8,000, and H. Cohn held thereon a second mortgage for \$5,000. Upon the other lot, which was vacant, H. Cohn held a first mortgage for \$5,500 and a second mortgage for \$1,250. Ascher Pitzele also owned a vacant lot located in South Chicago, upon which H. Cohn held a mortgage for \$1,250. In April, 1899, Charles H. Hughes, as receiver, filed a petition in the circuit court of Lee county for leave to sell, and obtained in that court an order authorizing him to sell to H. Cohn the interest of A. & N. Pitzele in said two first mentioned properties for the

sum of \$100, which sale was made and approved by the court. Subsequently the unimproved lot was sold for \$9,000, and after satisfying the two mortgages held by H. Cohn thereon, aggregating \$8,750 and interest, the balance realized from such sale was applied upon the indebtedness of A. & N. Pitzele to H. Cohn and his firm, and the lot owned by Ascher Pitzele was sold, and H. Cohn was paid the \$1,250 mortgage held thereon by him. Afterwards H. Cohn caused the premises in question to be deeded to Rose and Hannah Pitzele, the wives of Ascher and Nathan Pitzele. At the time H. Cohn deeded the premises in question to Rose and Hannah Pitzele, a loan for \$8,000 was obtained by them through Baird & Warner, which was secured by first mortgage on said real estate, and the proceeds were turned over to H. Cohn to apply upon the indebtedness of A. & N. Pitzele to him and his firm. After the application of that fund there remained due, according to the claim of H. Cohn, to him and his firm, from A. & N. Pitzele, the sum of \$2,870. That amount was satisfied by the execution of the note and trust deed for \$2,000 which forms the basis of this suit, the payment of \$500 by A. & N. Pitzele to H. Cohn in cash, and the execution and delivery to H. Cohn of the two notes of plaintiffs in error, due in 60 and 90 days from date, for the sum of \$185 each.

B. M. Shaffner, for plaintiffs in error.
Chester E. Cleveland, for defendants in error.

HAND, J. (after stating the facts). It is first contended by plaintiffs in error that the \$2,000 note secured by said trust deed sought to be foreclosed herein is without consideration, and that the execution thereof was obtained by reason of fraud and misrepresentation; it being urged in support of such contention that at the time of the execution of said note and trust deed it was represented by H. Cohn to plaintiffs in error that he had not as yet been paid by the receiver of A. & N. Pitzele the dividends due him and his firm from their estate in the hands of said receiver, and that the said note and trust deed were given to H. Cohn to secure to him and his firm the payment of said dividends, and that, as it appeared said H. Cohn and his firm had received said dividends prior to the time of the execution of said note and trust deed, the same was without consideration and was fraudulent and void. It clearly appears that H. Cohn and H. Cohn & Son had been paid their respective dividends by the receiver of A. & N. Pitzele long prior to the execution of said note and trust deed, and that said dividends were properly entered upon the books of H. Cohn & Son as credits in the account of A. & N. Pitzele, and that prior to the execution of said note and trust deed A. & N. Pitzele had received from H. Cohn & Son a statement of their account, in which it appeared they were credited with said

dividends and that said sum of \$2,870 remained due after the application of said dividends. We think, therefore, there can be no doubt that the dividends were properly credited to A. & N. Pitzele, and that they knew they had been credited therewith at the time they executed said note and trust deed. The contention, therefore, that said note and trust deed were given to secure the payment of said dividends and were obtained by fraud and misrepresentation, is not sustained by the proof.

It is next contended by the plaintiffs in error that H. Cohn & Son are indebted to A. & N. Pitzele for the value of 21 boxes of merchandise shipped just before the failure of said firm from the Dixon store to the South Chicago store and transferred by teams from South Chicago to the store of H. Cohn & Son in Chicago. There is an irreconcilable conflict in the testimony in regard to the delivery of said merchandise to H. Cohn & Son. Ascher Pitzele and a drayman, a relative of the Pitzeles, testified said merchandise was delivered. They are contradicted by H. Cohn and eight or nine other persons employed in the store of H. Cohn & Son, who testified that said merchandise was not delivered. While Ascher Pitzele is in many particulars directly corroborated by his brother, a nephew, and the drayman, and remotely by one or two other witnesses, he is contradicted by the drayman as to the number of boxes of merchandise which were delivered to H. Cohn & Son at the several times he says he delivered boxes of merchandise to H. Cohn & Son which he received at the South Chicago store, and when Ascher Pitzele was on the stand the first time he testified in detail that all of said boxes of merchandise were delivered by him and said drayman at the rear of the store of H. Cohn & Son in the city of Chicago, which they reached by an alley which ran immediately in the rear of said store. Afterward, upon his attention being challenged to the fact that the store in which H. Cohn & Son did business at the time he testified said deliveries were made had no alley in the rear thereof and that all goods at that time delivered at said store were delivered from the street in front of the store, he again went upon the witness stand and stated that he was mistaken when he testified that said boxes of merchandise were delivered at the rear of said store, and then stated they were delivered at the front of the store from the street. We do not believe that Ascher Pitzele was honestly mistaken in his testimony as to the place of the delivery of said goods, and fully indorse the remark of the Appellate Court, made while considering the testimony of said witness, that "the recital of the alleged delivery of these goods from an alley which never existed is too circumstantial to be explained away. The attempted correction is futile, and justified the master, and justifies us, in paying little heed to the

evidence of this witness." Said note and trust deed were executed long after it is claimed said 21 boxes of merchandise were delivered to H. Cohn & Son. At the time of the execution of said note and trust deed a cash payment of \$500 was made upon the indebtedness of A. & N. Pitzele to H. Cohn & Son. The account was balanced by the delivery to H. Cohn & Son of two notes aggregating the sum of \$870, signed by the plaintiffs in error, and no claim at that time was made by A. & N. Pitzele that H. Cohn had received said merchandise and that they should be credited with the value thereof, or that its value should be otherwise adjusted; and in view of these facts we are forced to the conclusion that the merchandise referred to was not delivered to H. Cohn & Son. Especially are we impressed with this view from the additional facts that, when the plaintiffs in error prepared and filed their answer in this case, they made no reference therein to the delivery of said merchandise or the failure of H. Cohn & Son to account for its value, and did not claim that the indebtedness represented by said note and trust deed had been paid and satisfied by reason of the delivery of said merchandise to H. Cohn & Son, but raised the question of the delivery of said merchandise for the first time upon the trial and after the defendants in error had closed their case in chief. In view of all the testimony we are of the opinion the Appellate Court did not err in holding that the plaintiffs in error were not entitled to credit for the value of said 21 boxes of merchandise, or any part thereof, upon said note and trust deed.

It is further contended that at the time H. Cohn purchased the equity of A. & N. Pitzele in said real estate, he and said Pitzeles had conspired with each other and with the receiver of the Pitzeles to cheat and defraud the creditors of said firm other than H. Cohn and his firm out of their just proportion of the said estate, and that as a result of such conspiracy H. Cohn and his firm received their claims against said firm in full, while the other creditors thereof received but a small percentage of their claims, and for that reason said H. Cohn did not go into the superior court with clean hands, and that court, sitting as a court of equity, properly refused to afford him relief upon said note and trust deed; and such, from the recitals contained in the decree entered in the superior court, appears to have been the view taken in that court. There is no evidence in this record which tends in any degree to show that the receiver was guilty of fraud or malfeasance in office in making a sale of the said real estate, subject to the mortgages thereon, to H. Cohn. Prior to filing the petition for the order of sale, in company with his solicitor, he went to South Chicago, viewed said real estate, and investigated the value thereof. In the

petition filed in the circuit court of Lee county, the receiver represented to the court that, from an examination of the property and from interviews had with disinterested persons who were acquainted with the value of the real estate, he was of the opinion that the equity of said estate in such real estate was of but little value; that he had been offered \$100 by one of the lienholders for a deed conveying to him the equity of A. & N. Pitzele therein, which offer he believed it was for the best interests of the estate to accept. The court, acting on such petition, ordered him to accept said offer, which he did, whereupon he reported the sale to the court, which was approved, and a deed was made, at the request of H. Cohn, to Charles A. Levy, conveying to him the interest of the estate in said real estate. No party, creditors, or other person ever questioned the validity or good faith of said sale. No fiduciary relation existed between H. Cohn or his firm and the receiver, or between H. Cohn and his firm and A. & N. Pitzele. So long as H. Cohn or his firm was not guilty of fraud, H. Cohn had the right to purchase said equities of the receiver at such prices, with the approval of the court which had jurisdiction of said real estate, as he and the receiver might mutually agree upon; and even though H. Cohn agreed with A. & N. Pitzele that after their indebtedness to him and his firm, together with all disbursements made by him for the benefit of said firm, should be repaid to him, he would account to them for any balance remaining in his hands arising from the sale of said real estate, or to convey said premises to their wives upon the payment to him of said claims and disbursements, such facts would not defeat a recovery by H. Cohn upon said note and trust deed after the arrangement had been consummated by the conveyance to Rose and Hannah Pitzele of said real estate, and the execution to H. Cohn by them of the note and trust deed for the balance of the claims of himself and his firm against said A. & N. Pitzele. And if it were conceded that the original arrangement, whereby H. Cohn, through Charles A. Levy, obtained title to said real estate at said receiver's sale, was fraudulent, as an attempt to hinder and delay the other creditors of A. & N. Pitzele in the collection of their claims, we do not think the note and trust deed now sought to be foreclosed would be so tainted with fraud that in this suit the plaintiffs in error could set up such fraud and thereby defeat the foreclosure of said trust deed. The real estate covered by the trust deed was transferred by Levy to Rose and Hannah Pitzele, and the note and trust deed in question were executed by them and their husbands to H. Cohn to secure the payment of what is conceded to be a valid debt of A. & N. Pitzele to H. Cohn and his firm, unless such indebtedness had otherwise been paid, which we have held it had not.

The consideration of said note and trust deed was therefore a valid debt of A. & N. Pitzele to H. Cohn and his firm, and was not affected by the fraud, if any, whereby H. Cohn obtained title, through Levy, to said premises at the receiver's sale, and the payment of said note and trust deed cannot be defeated by showing that H. Cohn was guilty of fraud in acquiring the title to said real estate, as the wrongdoing which will defeat a recovery on the ground that a litigant does not come into a court of equity with clean hands must be in regard to the matter in litigation, and does not apply to the misconduct of the complainant in other matters not immediately connected with the then pending litigation. In *Gulfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009, it was held a new contract founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. And in *City of Chicago v. Union Stockyards & Transit Co.*, 164 Ill. 224, 238, 45 N. E. 430, 434, 35 L. R. A. 28: The maxim that a party must come into a court of equity with clean hands "only applies to the particular transaction under consideration; for a court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters or questioning his general character for fair dealing. The wrong must have been done to the defendant himself, and must have been in regard to the matter in litigation." And in *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253, the court said: "We suppose it to be a well-settled doctrine that, if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it, or, in other words, if he is unable to support it without relying upon an unlawful agreement between himself and the defendant, he must fail. But if the parties have been engaged in business either *malum in se* or merely prohibited by law, yet if the cause of action be unconnected with the illegal act and is founded upon a distinct and collateral consideration, it will not be affected by their former unlawful conduct."

The master refused to allow an item of \$466.43 paid by H. Cohn & Son as solicitor's fees in connection with the adjustment of their claims against A. & N. Pitzele and a small amount of interest upon the merchandise account, both of which items were included in the \$2,870 found to be due H. Cohn and his firm from A. & N. Pitzele at the time said note and trust deed were executed. The action of the master in this regard was overruled by the Appellate Court, and that court held the defendants in error were entitled to recover said amounts. We think the evidence establishes the fact that at the time that H. Cohn caused the mortgaged premises to be conveyed to Rose and Hannah Pitzele it was understood and agreed that if he

would cause such premises to be conveyed to them he should be paid the balance due upon the claims due to him and due to his firm from A. & N. Pitzele, including all disbursements made by him or said firm, which would cover said solicitor's fees, and the evidence shows that A. & N. Pitzele agreed to pay H. Cohn & Son interest upon the open account. The items of solicitor's fees and the interest upon the open account having been agreed upon and having been included in the note and trust deed at the time the accounts were adjusted, we think the plaintiffs in error should be held liable for said items.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(217 Ill. 250)

COMMISSIONERS OF HIGHWAYS OF TOWN OF MCKEE et al. v. SMITH.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CERTIORARI—MATTERS IN ISSUE—JURISDICTIONAL QUESTIONS—CONCLUSIVENESS OF RECORD.

On certiorari to review the proceedings of an inferior tribunal, the only matter to be determined is whether the inferior tribunal had jurisdiction or not, or whether it exceeded its jurisdiction or otherwise proceeded in violation of law; and this matter must be determined upon the record alone, and cannot be tried upon allegations contained in the petition for the writ, or on facts not contained in the record returned.

2. SAME—RECORD—STATEMENT OF JURISDICTIONAL FACTS—CONCLUSIONS OF LAW.

The record on certiorari to review proceedings to establish a highway must state specific facts affirmatively showing the giving of required notices of the proceedings, and it is insufficient that it contain a statement of a mere conclusion of law to the effect that due notice was given.

3. HIGHWAYS—ESTABLISHMENT—JURISDICTION OF COMMISSIONERS—NOTICE.

Section 33 of the roads and bridges act (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3566, c. 121, par. 83), requires the highway commissioners to give 10 days' notice of the time and place when and where they will meet to examine the route of the road, and to hear reasons for or against the altering or laying out of the same. Section 34 authorizes the commissioners to adjourn their meeting by public announcement and by the posting of notice. *Held* that, where the commissioners fail to post any notices of their adjourned meeting, they have no jurisdiction to proceed to establish a highway, although they have given due notice of the first meeting.

4. SAME—OBJECTIONS TO JURISDICTION—WAIVER.

Roads and Bridges Act, § 41 (3 Starr & C. Ann. St. 1896 [2d Ed.] p. 3569, c. 121, par. 41), provides that, in case damages are not agreed upon by the landowner, the commissioner of highways shall certify that they are about to establish a road, and shall present such certificate to some justice of the peace, who shall issue summons against the landowner concerned, etc. *Held*, in proceedings to assess damages for laying out a road, that a landowner, who made a special appearance before a justice in order to present a motion to dismiss, did not, by generally appearing after his motion was overruled, waive any objection to the jurisdiction of the highway commissioners to establish the road.

Error to Circuit Court, Adams County; Albert Akers, Judge.

Certiorari by Elmer C. Smith against the commissioners of highways of the town of McKee and another, to review proceedings for the establishment of a highway. There was an order quashing the proceedings, and defendants appeal. Affirmed.

This is a writ of certiorari in the circuit court of Adams county, issued upon the petition of the defendant in error, Elmer C. Smith, against the commissioners of highways of the town of McKee and Frederick Kaylor, a justice of the peace, commanding them to certify and bring up to the circuit court of Adams county the record and all the proceedings in and about the establishment of a certain public highway. The return to the writ showed a petition for the road, notice given, upon the filing of said petition, for meeting to hear reasons for and against its prayer on September 12, 1903, affidavit of posting notice, survey of the proposed road, final order laying out the road, certificate filed with the justice for the assessment of damages, docket entries of the justice, verdict of the jury, and judgment of the justice for damages awarded, etc. The circuit court entered an order quashing the proceedings, and holding them invalid and wholly without effect for establishing a public highway, and ordering that the petitioner recover from the defendants his costs. This writ of error is sued out for the purpose of reversing said order or judgment of the circuit court.

F. J. Penick, W. I. Manny, and S. A. Hubbard, for plaintiff in error. Vandeventer & Woods and James L. Staker, for defendant in error.

MAGRUDER, J. (after stating the facts). When the return is made upon the issuance of the common-law writ of certiorari, it is the duty of the superior tribunal, which in this case was the circuit court, to try the case upon the record alone. The record, as it is returned in obedience to the writ, must be inspected, and the only matter to be determined is whether the inferior tribunal had jurisdiction or not, or whether it exceeded its jurisdiction, or otherwise proceeded in violation of law. The matter cannot be tried upon the allegations contained in the petition for the writ or on facts not contained in the record returned. Commissioners of Highways v. Supervisors of Carthage, 27 Ill. 140; Whittaker v. Village of Venice, 150 Ill. 195, 37 N. E. 240; Troxell v. Dick, 216 Ill. 98, 74 N. E. 694. In *McManus v. McDonough*, 107 Ill. 95, it was said: "In a proceeding of this character, the trial must be had on the record of the proceedings as returned, and oral evidence cannot be heard to aid or contradict the record."

The proceedings, as returned in obedience

to the writ, show the original petition to the commissioners of highways of the town of McKee, praying them to proceed to lay out the road in question and cause it to be opened according to law. The petition is dated July 27, 1903, purports to be signed by petitioners, who are two-thirds of the landowners residing in the town within two miles of the route indicated, and describes the route and course of the road, which was to be of the width of 40 feet. The petition also stated the names of the owners of lands over which the road was to pass, mentioning, among other landowners, the defendant in error, Elmer C. Smith. The proceedings show a notice, signed by the three commissioners of highways of said town of McKee, dated September 1, 1903, reciting that a petition had been presented to the commissioners to lay out a public road, giving its direction and course and the names of the landowners over whose land the road was to pass, and reciting that the commissioners thereby gave notice that they had "fixed on the 12th day of September, 1903, at the hour of 10 o'clock in the forenoon of said day, at the beginning point of said proposed road as above described, as the time and place they will meet and examine the route of said road, and to hear reasons for and against the laying out of the same, when and where all persons interested can be heard." There was an affidavit attached to this notice, signed and sworn to by one of the commissioners, saying that he posted up exact copies of the notice in five of the most public places in said township of McKee on September 2, 1903, naming such places. The minutes of the proceedings of the commissioners show that they met on September 1, 1903, at the town hall of McKee township, and fixed upon September 12th, 10 o'clock a. m. as the time, and the east end of the road as described in the petition as the place, to meet to hear reasons for and against the laying out of the proposed road, and ordered notices posted accordingly. The proceedings also show that on September 12, 1903, two of the commissioners only (the third being absent) met at 10 o'clock at the east end of the road described in the petition, pursuant to notice, to hear reasons for and against the laying out of the proposed highway. The absent commissioner agreed to the time and place of holding the meeting and was notified of the same. At the meeting of September 12, 1903, the commissioners viewed the route proposed, heard reasons for and against the road, and adjourned to meet September 17, 1903, at 2 o'clock p. m. in the postoffice at Haselwood. The proceedings show that, on September 17, 1903, the commissioners of highways met in the storeroom at Haselwood postoffice, in said town, pursuant to adjournment, the three commissioners being present, and that they made an order granting the prayer of the petition for the new road, and agreed upon filing a certificate with the

justice of the peace to have the damages assessed in favor of the claimants over whose lands the proposed road would run, and also agreed upon having the route surveyed, and adjourned their meeting to meet again at the east end of the proposed road, as described in the petition, to have the proposed route surveyed and negotiate with defendant in error and other heirs of the Smith estate on the amount of damages. On September 30, 1903, the commissioners of highways met on the route of the proposed road, as described in the petition, to have the same surveyed and to negotiate with Elmer C. Smith and other Smith heirs on the amount of damages claimed, at which meeting the three commissioners of highways, the deputy county surveyor, and Elmer C. Smith, the defendant in error, were present, with others; and the survey was made, after negotiations with Elmer C. Smith and others as to the route on which they preferred the road to run, discussing the amount of damage said Elmer C. Smith and other Smith heirs would claim on the different routes mentioned. On November 3, 1903, at Haselwood, two of the commissioners of highways being present and the other being notified of the meeting, the commissioners agreed on November 9th, 10 o'clock, at Haselwood, to pass on final order in road case, and ordered notices posted according to law. On November 9, 1903, at Haselwood, the three commissioners met pursuant to notices and heard reasons for and against the proposed road, and signed final order for public highway, as described in the order and survey of the deputy county surveyor. On November 9, 1903, the commissioners entered a final order, reciting that on September 1, 1903, they received a petition in writing for the laying out of said road; that they fixed on September 12, 1903, at 10 o'clock, as the time when, and the beginning of the road as the place where, they should meet to examine the route of said proposed road and hear reasons for and against the laying out of the same, and gave 10 days' notice of the time and place of said meeting by posting notices thereof in five of the most public places in said town in the vicinity of said proposed road; and also making the following recital: "Having met at the time and place appointed, we did adjourn said meeting after due notice until the 17th day of September, A. D. 1903, at the hour of 10 o'clock in the forenoon of said day, the same being within 10 days from the time of the first meeting, to meet again at Haselwood, in said town of McKee, and having met at the time and place appointed for such adjourned meeting at the time last aforesaid, and having examined the route of said proposed road in said petition described, and having heard such reasons as were offered for or against the laying out of said proposed road, were of the opinion that the laying out of said proposed road was necessary and proper, and that the public in-

terest would be promoted thereby;" and after stating that a survey and plat of said road had been made and duly reported, etc., and that they had ascertained the aggregate amount of damages, to which the owners of the lands over which said proposed road was to pass were entitled, and said damages had been definitely fixed by the verdict of a jury impaneled and sworn for that purpose, and that, on the 9th of November, 1903, at 10 o'clock a. m., at Haselwood, they held a meeting and determined on the laying out of said proposed road, of which meeting they gave public notice by causing three notices to be posted in public places in said town five days prior thereto, etc., it was therefore ordered and determined that said road be and was thereby laid out, describing the direction of the road. The proceedings as returned also show a certificate, dated September 24, 1903, signed by the three commissioners, to Frederick Kaylor, justice of the peace, asking for a jury to assess the damages. The various proceedings, taken before the justice in the matter of assessing the damages, are set forth. Summons to appear before the justice was served on Elmer C. Smith on October 10, 1903. The jury returned their verdict on October 31, 1903, assessing the damages to the different property owners, and, among others, damages to the amount of \$23.33 to Elmer C. Smith, the defendant in error. The entries upon the justice's docket show that on October 10, 1903, the defendant in error entered a special appearance for the purpose of making a motion, and not a general appearance. On October 30, 1903, the parties appeared for trial after a continuance, and an attorney specially appeared for defendant in error and others, and moved to quash the writ and the return, and moved to dismiss the case at the cost of the commissioners, which motion was overruled. Thereupon a jury of six jurors was impaneled, an attorney appearing generally for Elmer C. Smith, and Elmer C. Smith, the defendant in error, also appearing personally for himself. On the same day, October 30, 1903, the court rendered judgment upon the verdict of the jury, and it is recited in said judgment as follows: "Jury appeared and are duly sworn, and having heard the evidence offered, including the testimony of Elmer C. Smith and others, and arguments of J. L. Staker for Elmer C. Smith and others as claimants, and S. A. Hubbard for commissioners, the jury retired and returned their verdict in writing," etc.

The objection, urged in the circuit court to the proceedings of the commissioners of highways in laying out the public road involved in this case, is that the commissioners never posted a notice of the adjourned meeting which they held to decide upon granting the petition, and that for this reason they were without jurisdiction to proceed. Section 83 of the roads and bridges act provides that, "whenever the commissioners shall receive any such petition, they shall fix upon

a time when and place where they will meet to examine the route of such road, and to hear reasons for or against the altering, widening, vacating or laying out the same; and they shall give at least ten days' notice of the time and place of such meeting by posting up notices in five of the most public places in the township, in the vicinity of the road to be widened, altered, vacated or laid out." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3566 c. 121, par. 33. It is not claimed that the requirements of section 33 were not fully met. The notice therein required of the time and place to examine the route of the road named in the petition and to hear reasons for or against laying out the same was duly given, and notices were posted in five of the most public places in the township as the law required. The time fixed in the notice was September 12, 1903, and the place was "the beginning point of said proposed road." The commissioners met on September 12, 1903, at the beginning point of the proposed road; but they did not then and there decide upon granting the prayer of the petition. The prayer of the petition for laying out the road was granted on September 17, 1903, not at the beginning of the said proposed road, but at Haselwood, in the town of McKee. The proceedings show that the commissioners adjourned on September 12, 1903, to meet September 17, 1903, in the post-office at Haselwood; but they do not show, nor does the record returned anywhere show, that any notice was posted in regard to the adjourned meeting to be held on September 17, 1903.

Section 84 of the roads and bridges act provides that "the commissioners may, by public announcement, and by the posting of a notice at the time and place named for the first meeting, adjourn the meeting from time to time, but not for a longer period than 10 days in all; and shall, at the first or such adjourned meeting, within said 10 days, decide and publicly announce whether they will grant or refuse the prayer of the petition, and shall indorse upon or annex to the petition a brief memorandum of such decision, to be signed by the commissioners." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3566, c. 121, par. 34. It is claimed by counsel for plaintiffs in error that the failure to post the notice, as required by section 34, ousted the jurisdiction of the commissioners to act. They had jurisdiction in pursuance of proper notice when they first met on September 12, 1903, at the beginning point of the proposed road; but, when they adjourned their meeting, they adjourned to a different place from where they held the first meeting, and that place was Haselwood. The notices first given gave them jurisdiction to act on September 12th, and at the beginning point of the new road. Could they have jurisdiction to act at another place after an adjournment, when no notice was posted, as required by section 84, either of the time to which the

adjournment was taken or of the place where the adjourned meeting was to be held? It is certainly true, so far as the record shows, that no notice was ever posted of any meeting to be held at Haselwood on September 17, 1903. In *Hamilton v. Commissioners of Highways*, 203 Ill. 269, 67 N. E. 792, where, in a case of this kind, the statute required the justice of the peace before whom the damages were assessed to continue the hearing for a period not exceeding 12 days, where service was made upon any one of the owners by posting notices, and it appeared that the justice, instead of continuing the case according to the requirement of the statute, proceeded with the trial and rendered final judgment, it was said (page 271 of 203 Ill., page 793 of 61 N. E.): "The notices required to be given by the statute in proceedings of this character are jurisdictional, and unless they have been given in proper time and in a proper manner, before the hearing, the commissioners and the justice of the peace are not authorized to act. *Commissioners of Highways v. Harper*, 38 Ill. 103; *Frizell v. Rogers*, 82 Ill. 109."

It is true that in *Wright v. Commissioners of Highways*, 145 Ill. 48, 83 N. E. 876, the commissioners of highways met at the residence of the town clerk to consider the petition for a highway, and thereupon adjourned, and public announcement was made by the chairman of the board of the adjournment, and notice was posted, but at Sugar Grove schoolhouse, about a mile and a half from where the town clerk, Wilson, resided; and it was there insisted that, as the notice was not posted at the place of meeting, the commissioners lost jurisdiction to proceed at the meeting of March 2d, and we said in that case (page 54 of 145 Ill., page 877 of 83 N. E.): "Wilson, where the first meeting was held, did not reside on any public road, while the schoolhouse, where the notice was posted, was located where two public roads cross, and hence was a more public place for a notice to be posted than the residence of Wilson, and no doubt for this reason the notice was posted at that place. Strictly the statute required the notice to be posted at the place where the commissioners met, but the failure to conform to the letter of the statute was a mere irregularity, which did no harm and did not affect the jurisdiction of the commissioners." Counsel for plaintiffs in error rely upon the case of *Wright v. Commissioners of Highways*, supra, as holding that the failure to post the notice of the time and place of the adjourned meeting was a mere irregularity. But it is to be observed that in the *Wright Case* a notice of the adjourned meeting was posted, but not at the place named for the first meeting. In the case at bar, however, no notice of the time and place of the adjourned meeting was posted at all, either at the place of the first meeting, which was the beginning of the proposed road, or at Haselwood, where the adjourned

meeting was to take place. It would seem that the commissioners would have no authority to act, unless they proceeded in strict conformity with the requirement of the statute, and, inasmuch as their adjourned meeting was held at a place as to which no notice whatever was posted, they were without jurisdiction.

In the final order establishing the road the commissioners say: "We did adjourn said meeting after due notice until the 17th day of September, A. D. 1903." But the recital that due notice was given is not sufficient in a case of this kind. The facts as to the posting of the notice must be recited in the order declaring the road a public highway. Such recital is a mere conclusion of law. Facts must be stated, from which the court is able to see that this conclusion is true. A quasi judicial tribunal of inferior jurisdiction should recite the facts, or preserve the facts themselves, upon which its jurisdiction depends. The record must show affirmatively that the notice provided for in the statute has been given, so that the court may be able to see either from the facts themselves, or specific recitals of those facts, that due notice was given. *Shinkle v. Magill*, 58 Ill. 422; *Commissioners of Highways v. Harper*, 38 Ill. 103; *Frizell v. Rogers*, 82 Ill. 109; *Johnson v. Stephenson*, 39 Ill. App. 88; *Imhoff v. Commissioners of Highways*, 89 Ill. App. 66; *Hamilton v. Commissioners of Highways*, 203 Ill. 269, 67 N. E. 792; *Troxell v. Dick*, 216 Ill. 98, 74 N. E. 694. The provisions of the statute upon this subject are mandatory, and not directory. *Shinkle v. Magill*, supra.

It is said, however, by the plaintiffs in error, that defendant in error, Elmer C. Smith, appeared before the justice of the peace when damages were assessed, and introduced proof upon the trial on the question of damages, and that thereby he waived any right to object to the jurisdiction. The proceeding before the justice was a proceeding to condemn the right of way for the road over the land of defendant in error, and was before a judicial tribunal. The defendant in error entered a special appearance before the justice, and not a general appearance, for the purpose of making a motion to dismiss the proceeding. This motion was overruled, and the proceedings show that he afterwards appeared by attorney and introduced evidence upon the trial of the case. His appearance before the justice was a waiver of any objection to the jurisdiction of the justice over his person, and was a waiver of any objections that he might have made to the service of notice or summons upon him, so far as the condemnation proceeding was concerned. But it is well settled that jurisdiction over the subject-matter cannot be conferred upon a court by consent of parties, nor can want of it be waived. *Leigh v. Mason*, 1 Scam. 249; *Beesman v. City of Peoria*, 16 Ill. 484; *Peak v. People*,

71 Ill. 278. The statute provides that, in case damages are not agreed upon with the landowner, the commissioners of highways shall make a certificate that they are about to establish a public road, describing the road and the land over which it is to be established, and naming the owners of the land, etc., and shall present such certificate to some justice of the peace of the county, who, on receipt of the same, shall within five days issue a summons against the land owners concerned, etc. The power of the justice of the peace to proceed in the matter by the issuance of a summons is derived from the certificate filed with him by the commissioners of highways as required by section 41 of the roads and bridges act. 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 3569, c. 121, par. 41. The filing of the certificate of the commissioners with the justice is necessary to give the justice jurisdiction over the subject-matter. If that certificate were not filed with the justice, he would have no jurisdiction to proceed to hear testimony and render judgment for the amount of the damages, even though he did issue a summons and get personal service upon the land owners. The commissioners of highways had no authority to present the certificate in question to the justice of the peace, unless they themselves had jurisdiction to proceed with the matter of establishing the highway. Without the posting of notices as the statute requires, the commissioners of highways had no power to proceed, and therefore no power to present the certificate to the justice of the peace. We are therefore of the opinion that, while the appearance of the defendant in error before the justice may have been a waiver of his right to object to the jurisdiction over himself, it could not operate as a waiver of any valid objection which might exist to the jurisdic-

tion of the justice over the subject-matter.

Counsel for plaintiffs in error insist that this question was decided by the Supreme Court of Minnesota in *Kieckenapp v. Supervisors of the Town of Wheeling*, 64 Minn. 547, 67 N. W. 662, in accordance with their view; that is to say, that the appearance before the justice in the matter of assessing damages is a waiver of any objection to the jurisdiction. We have examined the Minnesota case referred to by counsel. It does not clearly appear from the recital of the facts in that case whether or not the Minnesota statute in regard to highways is similar in all respects to our own; but, whether this be so or not, it appears in that case that the property owner was verbally notified of the meeting of the supervisors to consider the petition for the laying out of the road, and that he attended such meeting. There the landowner not only took part in the proceeding for the award of damages, but he appeared at and attended the meeting to consider the petition for the laying out of the road. No such facts appear in the record in this case. It is not shown that the defendant in error appeared at the original meeting on September 12, 1903, at the beginning point of the proposed road, or that he appeared at the adjourned meeting on September 17, 1903, at Haselwood. Consequently the Minnesota case is not on all fours with the case at bar.

We are of the opinion that the highway commissioners were without jurisdiction to proceed with the laying out of the road by reason of the failure to post the notice, as required by section 34 of the roads and bridges act, and by reason of the facts and circumstances already stated. Consequently the judgment of the circuit court quashing the proceedings was correct, and is affirmed.

Judgment affirmed.

(182 N. Y. 482)

DUBUC v. LAZELL, DALLEY & CO.

(Court of Appeals of New York. Oct. 24, 1903.)

1. STIPULATION — ESTOPPEL TO ATTACK — LACHES.

At the trial of a civil action it was stipulated in open court that the verdict might be received by the clerk in the absence of the justice and entered on the minutes with the same effect as if the justice were present. Two hours after the justice had left the courtroom, without adjourning the court, the jury returned a verdict for plaintiff, which was received in the presence of the attorneys without objection. Counsel for defendant moved for a new trial without making any objections to the reception of the verdict, and did not attack the judgment on such ground until affirmance by the Appellate Division and an appeal pending in the Court of Appeals, when he moved in the Special Term to set aside the judgment. *Held*, that it was too late at that time to repudiate the stipulation.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Stipulations, §§ 66-73.]

2. TRIAL—VERDICT—RECEPTION—ABSENCE OF JUDGE.

The absence of a trial judge at the time a verdict was received by the clerk under stipulation of the parties was an irregularity which the parties could and did waive by such stipulation, so that there existed at the time a constitutional court authorized to receive a verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 60-64.]

3. SAME—VALIDITY OF JUDGMENT.

Judgment entered on a verdict is valid, though it was received by the clerk under a stipulation of the parties in the absence of the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 60-64.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Stanislas Dubuc against Lazell, Dalley & Co. From an order of the Appellate Division (94 N. Y. Supp. 1144, 105 App. Div. 533), affirming an order of the Special Term setting aside a judgment, plaintiff appeals. Reversed.

This action was tried in the city of New York in May, 1904. At the conclusion of the charge to the jury, the justice presiding at the trial intimated to counsel that he desired to leave for his home in Hudson. It was thereupon stipulated in open court by counsel for both parties that the verdict should be received by the clerk in the absence of the court and entered upon the minutes with the same force and effect as though the court were present. The justice left the courtroom about 3 o'clock in the afternoon without adjourning court, and about two hours later the jury returned a verdict, which was received by the clerk in the presence of the attorneys for both parties without objection. The verdict was in favor of the plaintiff for \$8,000. Four days thereafter the usual motion for a new trial was made by counsel for the defendant, but on that motion counsel took no objection to the reception of the verdict by the clerk as stipulated. An appeal was taken to the Appellate Division, where the judg-

ment was affirmed, and the case is now before this court. Pending this last appeal, and after the defendant had received an adverse decision at the Appellate Division, his counsel made a motion at the Special Term to set aside the judgment entered upon the verdict, on the ground that the reception of the verdict by the clerk in the absence of the trial justice invalidated the judgment based thereon. The Special Term granted the motion, and its decision was affirmed in the Appellate Division by a divided court. An appeal to this court has been allowed upon the following certified questions: "(1) Did there exist a constitutional court at the time when the verdict was received? (2) Did the verdict as received operate as an estoppel upon the defendant from questioning the same, and did the consent of the parties render the verdict valid? (3) If not appearing by the record upon appeal from the judgment that a justice of the Supreme Court was not present when the verdict was received, can a party thereafter object to such verdict under the circumstances of this case? And is the court obliged to vacate the judgment upon the fact appearing aliunde? (4) Is the judgment entered upon the verdict as received a valid judgment?"

Lyman E. Warren, for appellant. George H. Fletcher, for respondent.

WERNER, J. (after stating the facts). Defendant's counsel admits that he stipulated in open court that the verdict of the jury might be received by the clerk with the same force and effect as if the presiding justice were present. He does not claim that this stipulation was entered into through mistake or inadvertence, nor has he ever asked to be relieved from it. Four days after the verdict was rendered he made a motion for a new trial, without even alluding to any objection to the manner in which the verdict was received. That motion having been denied, he took an appeal to the Appellate Division, and in that court, although he urged every other objection to the validity of the judgment, he was silent as to his stipulation. Not until his appeal had resulted in an adverse decision, and he had taken his final appeal to this court, did he make the motion which eventuated in the order we are now asked to review. It is obvious that, if such a stipulation may be repudiated under such circumstances, it must be because of the inherent illegality of the proceedings taken under the stipulation. That seems to be the ground taken by defendant's counsel and subscribed to by the courts below. We entertain a different view. We think the stipulation was one which counsel had a right to make; but, even if there were doubt upon that subject, we think defendant's counsel is estopped by his conduct and laches from repudiating his stipulation at this late day. Parties by their stipulations may in many ways make

the law for any legal proceedings to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contract than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal. And all such stipulations, not unreasonable, not against good morals, or sound public policy, have been and will be enforced; and, generally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of litigation, are enforced by the courts." This was the language of Judge Earl in writing for this court in *Matter of N. Y., L. & W. R. R. Co.*, 98 N. Y. 447, 453, where many authorities are cited. "In civil cases a party may stipulate away his rights, questions of jurisdiction, as well as others, and he may do this by express agreement, by acts inconsistent with the objection, or by his silence and omission to present the proper objections when he ought to object." *Cowenhoven v. Ball*, 118 N. Y. 231, 236, 23 N. E. 470; *Vose v. Cockcroft*, 44 N. Y. 415.

The learned counsel for the respondent, while recognizing the force of this rule, contends that it has no application to this case, for the reason that the presence of the trial judge at the time of the reception of the verdict was necessary in order to constitute a valid court. In support of this contention he invokes the well-established principle that mere consent cannot create a court nor endow it with jurisdiction. The answer to this argument is that in the case at bar there was a validly constituted court having jurisdiction of the subject-matter and of the parties. The absence of the trial judge when the verdict was received was, at most, an irregularity which the parties could and did waive, and, while it would undoubtedly have been competent for the court to have relieved the defendant from the effect of his stipulation and waiver upon good cause shown, that could only have been properly done if the defendant had moved promptly. In recent years it has been common practice to permit the rendition of sealed verdicts in the absence of the judge or justice presiding at the trial. It has never been claimed that the absence of the judge or justice in such cases has the effect of destroying the autonomy of the court or rendering its judgments void, and we do not perceive how the absence of the justice under the facts disclosed by this record could have had any such effect. In criminal trials the rule is undoubtedly different. *Cancemi v. People*, 18 N. Y. 128. In the case at bar, however, we have simply a civil and private controversy, embracing no element of public interest or policy that rendered the presence of the justice essential to the

ministerial act of receiving a verdict, where the parties without coercion or mistake had stipulated that they, together with the clerk, would receive the verdict in the absence of the justice. The law applicable to this case is well expressed by Judge Cooley in his work on *Constitutional Limitations* (5th Ed., pp. 504, 505), where he says: "When it is once made to appear that a court has jurisdiction of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in its application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case; and if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed by removing the case for review to an appellate court, if such there be."

Defendant's counsel is doubtless correct in saying that the consent of parties cannot empower the court to delegate to the clerk any judicial functions. But there was no attempt to do any such thing in the case at bar. It is always the duty of the clerk to receive the verdict of a jury, and, while that is usually done in the presence of the presiding judge, the latter exercises no strictly judicial function at such a time, except the physical act of presiding, unless some motion is made or the verdict as rendered needs correction. There is no claim here that the verdict was not regular, and we hold that in receiving it the clerk was not invested with any judicial function. We are aware that in some cases the lower courts of this state seem to have adopted the contrary view. *French v. Merrill*, 27 App. Div. 612, 50 N. Y. Supp. 776; *Morris v. Harburger*, 100 App. Div. 357, 91 N. Y. Supp. 409; *Ingersoll v. Town of Lansing*, 51 Hun, 101, 5 N. Y. Supp. 288. When these cases are examined, however, it will be found that while the opinions upon which they rest seem to be at variance with the views here expressed, each is based upon special and peculiar circumstances which were in and of themselves quite sufficient to warrant the decisions made. In *French v. Merrill* the defendant, against whom a verdict had been rendered, died within two days thereafter and before judgment had been entered. The cause of action was one that did not survive. The executrix moved promptly to have the verdict set aside. It was granted for reasons that become obvious upon the mere statement of the case. In *Morris v. Har-*

burger the presiding judge directed that in his absence the clerk should receive the verdict. The parties did not consent to the arrangement and moved promptly for a new trial upon that ground. In *Ingersoll v. Town of Lansing* the presiding justice left the court on Friday and did not return until the following Tuesday. Under the circumstances it was held that the jury might have been coerced into agreeing so as not to be kept together for four days. A motion to set aside the verdict was made promptly, and in that case Judge Martin expressly refused to hold that it was not competent for parties under any circumstances to make a binding stipulation that a verdict should be received in the absence of the judge. In deciding this question upon the particular facts of this case, we do not wish to be understood as approving a practice that is concededly irregular, although at times desirable and even necessary. We simply hold that the judgment herein, entered upon the verdict received under the circumstances disclosed on this appeal, is not void because the verdict was received in the absence of the presiding justice.

The order should be reversed, with costs, and motion denied, with \$10 costs. The first and fourth certified questions are answered in the affirmative. The second and third are not answered.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. O'BRIEN, J., absent.

Order reversed, etc.

(182 N. Y. 326)

STEINHARDT et al. v. BINGHAM et al.
(Court of Appeals of New York. Oct. 3, 1905.)

1. SALES—CONSTRUCTION OF CONTRACT—NOTICE OF SHIPMENT—TIME.

A contract for the sale of grain provided that the seller should give notice to the buyers of the steamer's name and the quantity loaded within five days of the date of the bill of lading. It appeared that the grain was purchased for the purpose of selling it in a foreign port, to which it might be shipped from any one of several domestic ports at the option of the shippers, so that it was necessary for the buyers to notify their consignees to enable them to prepare to receive the cargo. *Held*, that time was of the essence of the contract, so that a compliance by the seller with the provision as to notice of the shipment was a condition precedent to his right to demand acceptance of the cargo.

2. SAME.

A contract for the sale of grain provided that the seller should give notice to the buyers of the steamer's name and the quantity loaded within five days of the date of the bill of lading. It appeared that the grain was purchased for the purpose of selling it in a foreign port, to which it might be shipped from any one of several domestic ports at the option of the shippers, so that it was necessary for the buyers to notify their consignees to enable them to prepare to receive the cargo. *Held*, that, in the absence of any provision as to the character of

the notice of the shipment to be given by the seller, actual notice was necessary, and notice by a letter mailed within five days from the time of shipment, but not received by the buyers until after five days, was not a sufficient compliance with the contract.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Emanuel Steinhardt and others against David Bingham and others. From a judgment of the Appellate Division (85 N. Y. Supp. 1044, 90 App. Div. 149), affirming a judgment for defendants, plaintiffs appeal. *Affirmed*.

A. Blumenstiel, for appellants. Jacob F. Miller, for respondents.

HAIGHT, J. This action was brought to recover damages resulting to the plaintiffs from the failure of the defendants to accept a cargo of corn shipped to them. On the 22d day of January, 1897, the plaintiffs entered into two contracts with the defendants, by which they agreed to ship 15,000 quarters of No. 2 corn from any Atlantic or Gulf ports, at seller's option, to the defendants at Liverpool by first-class steamer. Each contract contained the provision: "The sellers shall furnish to buyers steamer's name and quantity loaded within five days of the date of bill of lading." The cargo in question was shipped at New Orleans by steamship Tampican on the 24th day of April, 1897, and on the 27th day of April thereafter the plaintiffs wrote the defendants at New York, giving an account of the shipment and inclosing the bill of lading, and stating that they had drawn on them at sight for the amount due thereon. It appears that this letter did not arrive within the five days from the date of the bill of lading, and upon receiving notice of the arrival of the draft the defendants wired the plaintiffs, declining to accept the cargo. The defendants had ordered the cargo for the purpose of selling in Liverpool, and it was necessary for them to know the name of the steamer and the amount of the cargo, so that they could give notice to their agent or purchaser in Liverpool a sufficient time in advance so that he could be ready to receive and take care of the cargo. It is therefore apparent that the time of the giving of the notice of the shipment was of the essence of the contract, and that this provision should have been complied with by the plaintiffs as a condition precedent to their right to demand of the defendants an acceptance of the cargo.

We are thus brought to a consideration of the question as to whether the letter mailed on the 27th day of April at New Orleans was a compliance with the provision of the contract. It was mailed within five days of the issuing of the bill of lading, but it did not arrive in New York until after the expiration of the five days. Had it arrived in New York and been received by the defendants within the five days, it would doubtless have been a sufficient notice. The contract, as we have seen, is silent as to the character of the notice

that should be given. The general rule of law is that where any statute or the terms of any contract require notice to be given, and there is nothing in the context of the statute or the contract to show that any other notice was intended, a personal or actual notice must be given. But when it is apparent from the context of the statute or contract, or the circumstances surrounding the case were such as to show that a personal notice was not intended, a notice by mail may be given. *Beakes v. Da Cunha*, 126 N. Y. 293, 27 N. E. 251. By referring to the contract we see that the shipments may be made at the option of the plaintiffs from any Atlantic or Gulf ports. They may therefore be made from Boston, New York, or other nearby ports. They are required to be made by first-class steamers. A notice must be given to the defendants in New York within five days after shipment. The steamer may then be five days on its way to Liverpool. The defendants are then required to give timely notice to their consignees at Liverpool, so that they may be prepared to receive and care for the corn upon its arrival. If the plaintiffs may wait until the expiration of the five days and then give the notice by mail, which may postpone the actual notice to the defendants for two or three days longer, they may be unable to give the notice required by their consignees and themselves be placed in default upon the contract by reasons of such delay. We therefore think that, under the circumstances of this case, actual notice within five days was contemplated by the parties to the contract, and that therefore the non-suit was properly granted by the trial court.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, VANN, and WERNER, JJ., concur.

Judgment affirmed.

(182 N. Y. 330)

WRIGHT v. HART.

(Court of Appeals of New York. Oct. 3, 1905.)

CONSTITUTIONAL LAW—EQUAL PROTECTION AND DUE PROCESS—SALES IN BULK.

Laws 1902, p. 1249, c. 528, providing that a sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent as against the creditors of the seller, unless at least five days before sale a full and detailed inventory is made, and the purchaser makes explicit inquiry of the seller as to the names of creditors, and notifies them, etc., is in conflict with Const. art. 1, §§ 1, 6, and Const. U. S. Amend. 14, § 1, guarantying the equal protection of the laws and forbidding deprivation of property without due process of law.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 688, 826.]

Cullen, C. J., and O'Brien and Vann, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Edmund Wright, as trustee in bankruptcy of W. C. Loftus & Co., against Edward Hart. From an order of the Appellate Division (93 N. Y. S. 60, 103 App. Div. 218), affirming an interlocutory judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

In November, 1903, a corporation known as W. C. Loftus & Co., engaged in the retail clothing and tailoring business in the city of New York, sold to the defendant its entire stock, fixtures, and lease for a consideration of \$22,953.86. Within a few days thereafter a petition in involuntary bankruptcy proceedings was filed against it, and the plaintiff was elected trustee thereunder. At the time of the sale referred to chapter 528, p. 1249, of the Laws of 1902 was in force, and it provided that:

"Section 1. A sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full and detailed inventory showing the quantity, and, so far as possible with the exercise of reasonable diligence, the cost price to the seller of each article to be included in the sale, and unless such purchaser shall at least five days before the sale, in good faith make full explicit inquiry of the seller as to the name and place of residence or place of business of each and every creditor of the seller and the amount owing each creditor, and unless the purchaser shall at least five days before the sale in good faith notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of such proposed sale and of the stated cost price of merchandise to be sold and of the price proposed to be paid therefor by the purchaser. The seller shall at least five days before such sales file a truthful answer in writing of each and all of said inquiries."

The plaintiff, as trustee in bankruptcy of the selling corporation, has brought this action to set aside the sale on the ground that it was made without complying with any of the provisions of the statute. The purchasing defendant interposes the demurrer that the complaint does not state facts sufficient to constitute a cause of action because the statute is unconstitutional. This claim of unconstitutionality is based (1) upon article 1, § 1, of our state Constitution, which provides that "no member of this state shall be * * * deprived of any rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers";

(2) upon article 1, § 6, of our state Constitution, which provides that no person shall "be deprived of life, liberty or property without due process of law"; and (3) upon section 1 of the fourteenth amendment to the federal Constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Louis Marshall and Samuel P. Goldman, for appellant. Abram I. Elkus and Joseph M. Proskauer, for respondent.

WERNER, J. (after stating the facts). Before proceeding to a critical view of the challenged statute, it may be profitable to make a few pertinent, though trite, observations on the nature, construction, and effect of written constitutions. A written constitution is the fundamental expression of the sovereign will. Under our form of government that sovereign will resides in the people. A written constitution is not only the direct and basic expression of the sovereign will, but is the absolute rule of action and decision for all departments and offices of government in respect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it. It is true, as was said by Judge Cooley, that "the weaknesses of a written constitution are that it establishes iron rules which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules." The logical corollary of the proposition that the Constitution is the supreme law of the land is that the power to legislate is a purely delegated one, derived from the Constitution and controlled by it. In the case at bar we are concerned with no quibbles of verbiage or technicalities of construction, but with the broad question whether an act of our Legislature is repugnant to the "iron rule" of our federal and state Constitutions that no citizen shall be deprived of "life, liberty or property," or be denied the "equal protection of the laws."

In the course of judicial interpretation, the words "liberty" and "property," as used in the Constitutions, have naturally and properly been given their most comprehensive signification, so that they embrace every form and phase of individual right that is not necessarily taken away by some valid law for the general good. "The term 'liberty,' as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration; but it is deemed to em-

brace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare." *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 84. "All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the Legislature of the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection." *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. "'Liberty' * * * includes the right to acquire property, and that means and includes the right to make and enforce contracts." *State v. Loomis*, 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832. The right to use, buy, and sell property is protected by the Constitution, and "when the law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the constitutional provision intended expressly to shield personal rights from the exercise of arbitrary power." *Wynehamer v. People*, 13 N. Y. 378, 398; *People ex rel. Manh. S. Instn. v. Otis*, 90 N. Y. 48.

Let us now analyze the statute under scrutiny. Every sale (a) "of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or (b) the sale of an entire stock of merchandise in bulk, shall be fraudulent and void as against the creditors of the seller, unless (1) the seller and purchaser shall at least five days before the sale, (2) make a full and detailed inventory, (3) showing the quantity, and, so far as possible with the exercise of reasonable diligence, (4) the cost price to the seller of each article to be included in the sale, and unless (5) such purchaser shall at least five days before the sale in good faith make full, explicit inquiry of the seller as to the (6) name and place of residence or place of business of each and every creditor of the seller, and (7) the amount owing each creditor, and unless (8) the purchaser shall at least five days before the sale in good faith (9) notify or cause to be notified personally or by registered mail each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge of such proposed sale, and (10) of the stated cost price of merchandise to be sold, and (11) of the price to be paid therefor by the purchaser. (12) The seller shall at least five days before such sale file a truthful answer in writing of each and all of said inquiries."

No one will have the temerity to suggest that this drastic and cumbersome statute is not in restraint of the rights of "liberty" and "property," as those terms have been judicially declared to have been used in the federal and state Constitutions.

It is contended, however, that the restraint which it imposes upon these rights is justifiable under that shibboleth of Legislatures and courts known as the "police power." Far be it from us to deny the existence of that power or to attempt to define its extent. It will be our effort, rather, to show that the statute under consideration is in some particulars so thoroughly unrelated to the probable object of its enactment, and in others so cumbersome, burdensome, unreasonable, and unworkable, as to violate every one of the constitutional provisions under which it is challenged. The rights of "liberty" and "property," as we have seen, are sacred and substantial rights guaranteed by the federal and state Constitutions. Any law that interferes with the right to make and enforce contracts affects both the liberty and property of the citizen. The right to sell and purchase merchandise in bulk is no less under the protection of the Constitution than the right to sell and buy in the smallest possible quantities. Any legislative interference with either of these rights, that is clearly forbidden as to the other, can only be justified on the ground of public necessity, which is but another way of saying that it is for the general welfare. Such interference should not only be based upon public necessity, but it should be conservative, reasonable, and well adapted to the end sought to be attained. Until the 11th day of April, 1902, it was just as lawful in this state to sell any portion of a stock of merchandise, or the whole of such a stock in bulk, as to sell the same goods piece by piece at retail. By the statute which went into operation on that day, the sale of any stock of merchandise in bulk, or of any considerable portion thereof, was made unlawful as against the creditors of the seller, unless both seller and purchaser should do many things that were clearly and substantially restrictive of the right of contract as it had theretofore been enjoyed in respect of such property. This criticism of the statute is sought to be answered by the plea that the law was designed to correct a great public evil; that it was aimed at a class of merchants who have engaged in the fraudulent practice of obtaining merchandise on credit, for the purpose of making hasty and secret sales thereof in bulk and then decamping with, or otherwise disposing of, the proceeds at the expense of their creditors. It may be conceded that this was the ostensible purpose of the statute, and that the evil complained of was one of substantial reality and magnitude, for which an efficacious remedy was much to be desired. But that does not meet the argument against the constitutionality of the statute.

The question still remains whether the Legislature has not overstepped the limits of its power, by practically placing an embargo upon all sales of merchandise in bulk, under the guise of a statute ostensibly designed to prevent frauds in such sales. Beginning with the title of the statute, we observe that its object is "to regulate the sale of merchandise in bulk." If we give to the term "merchandise" its ordinary business signification, there is no escape from the conclusion that the statute applies to merchants alone, as distinguished from manufacturers, farmers, bankers, the members of the several professions, mechanics, etc. Under this construction of the law the merchant is prohibited from doing that which is permitted to all other men. Merchants comprise a comparatively small number of the community at large, and therefore this would seem to be class legislation, which denies to those affected by it the equal protection of the laws guaranteed by the fourteenth amendment to the federal Constitution. If the term "merchandise" is given a somewhat more liberal interpretation, so as to include finished manufactured products, and the stocks of jobbers and wholesale merchants, the statute is still open to the criticism that it denies the equal protection of the laws to all citizens, because it imposes upon certain classes, such as manufacturers, jobbers, and wholesale merchants, burdens that are destructive of their legitimate business. It is common knowledge that in this age of large enterprises many merchants purchase the whole products of mills and factories. In the case of the jobber or the wholesale merchant these products are again sold in bulk, or in large, but varying, quantities. If the manufacturer, jobber, or wholesale merchant sell their entire stocks in bulk, the statute applies, without regard to the question whether the sale is according to long-established custom, or in the regular course of trade. If there is a sale in bulk of less than the whole, then the validity of the sale is made dependent to some extent upon the question whether it is in the ordinary course of trade in the regular and usual prosecution of the seller's business. What is the ordinary course of trade in the regular and usual prosecution of such a seller's business? The manufacturer may dispose of his entire output to a single purchaser during a single year or a series of years. Again, he may dispose of it in parcels to several purchasers. And yet again, he may be compelled to rely upon a general market, with purchasers from different quarters in varying quantities. On the 1st of January of a given year he may know to a certainty just how much he will produce and just where it will go. At the beginning of the next year he may not know what the morrow will bring forth. This is as true of the jobber and the wholesale merchant as of the manufacturer. And what is the net result?

In the years when there is a single sale of the whole output, the statute applies, without regard to the ordinary course of trade or the regular and usual prosecution of the seller's business. In other years, when the sales, although in bulk, are in smaller quantities, the application of the statute depends, not upon the honesty of the transaction, but upon the shadowy question whether it is in the ordinary course of trade in the regular and usual conduct of the seller's business. And all this is as applicable to the purchaser as to the seller, although the former may have not the remotest knowledge of the manner in which the business of the latter is carried on. There are other and more serious constitutional objections to this statute in so far as it may affect the manufacturer, the jobber, and the wholesale merchant; but, as these objections militate against the statute in its relation to all classes of men, we shall consider them in their general bearing upon the "liberty" and "property" clauses of the two Constitutions.

The statute, as we have seen, discriminates between sales of entire stocks in bulk and sales of portions of such stocks. But it does not differentiate between sales that are honestly made and sales that are made with intent to defraud. The sale of an entire stock is declared to be fraudulent and void as against the seller's creditors, no matter how solvent he may be, unless all the petty and harassing details of the statute are observed. The sale of a lesser quantity, however, is interdicted by no such sweeping fiat so long as it is made in the ordinary course of trade in the regular and usual conduct of the seller's business, although made with a fraudulent intent. But this is not all. Both seller and purchaser shall, at least five days before the sale, make a full and detailed inventory. One inventory is not enough. There must be two, or at least one joined in by both. And they must be made, not when the sale has been consummated, but five days before. Could anything be devised that would more effectually paralyze sales of merchandise in bulk? Some simple illustrations will clearly outline the pernicious possibilities of this unique provision. A. is the owner of a stock of goods, which he is willing to sell and which B. is ready to purchase at a price agreed upon. Each may think he is making a good bargain. A. is anxious to sell at once, so that he may use the proceeds in making another purchase of advantage. B. wants to close the sale at once, because he has an immediate and profitable market for the goods. If either has to wait five days or longer, and particularly for the purpose of making an inventory, involving great labor and expense, he may prefer to drop the whole matter. Suppose, however, that the work of taking an inventory is commenced, and during its progress the market price rises or falls, or that either the seller or the purchaser discovers that he has made a poor bargain, be-

cause the inventory discloses a greater or less value than was in the minds of the parties when the price was fixed. In such a case either the party may refuse to go on with the inventory or to file it if it is finished, and the result is that the person who may feel aggrieved has no remedy, because the statute imposes no penalty for failure to complete or file an inventory, and there can be no valid sale until both of these things are done.

And what must such an inventory contain? First, the quantity. That is usually and of itself entirely sufficient in the case of a sale in bulk. Second, the cost price to the seller of each article to be included in the sale, although the purchaser, one of the parties who must file an inventory, may have no means of knowing anything about the cost price to the seller. It is true that the latter feature of the inventory is only made necessary in so far as it is possible with the exercise of reasonable diligence. But the seller may have full knowledge on the subject, which he may decide not to disclose. The purchaser may know nothing about it, but his bargain can be annihilated by the seller's refusal to exercise the "due diligence" by which the information could be disclosed. Then, again, a purchaser may have a market for goods which he is willing to purchase at a specified price. This market he would lose if compelled to file a long and detailed inventory containing the cost price to the seller. And the inventory must be filed. While the statute does not designate the place of filing, it would be of no value unless in some place where the inventory would become public property. Such an inventory, moreover, is not only unnecessarily burdensome, but practically prohibitory of such sales. Not only the quantity of the goods sold, but the cost price of each article, must be given in detail. This requires a disclosure of the very secrets that make sales in bulk a business possibility, and entails upon the prospective contractors many details that in a given case may require weeks or months, and that neither may care to go into. In the case of a sale of the whole or any part of the stock of a great department store, for instance, the cost price to the seller of every paper of pins or fine tooth comb would have to be inventoried, although the producing cause of the sale might be based upon considerations that would utterly fail if such infinitesimal matters had to be taken into account.

The next requirement of the statute has to do with the purchaser alone. At least five days before the sale he must make full, explicit inquiry of the seller as to the name and place of residence or business of each of the seller's creditors, and of the amount owing to him, and, having done this, he must then notify or cause to be notified each of such creditors, personally or by registered letter, of the proposed sale and the stated cost price of the merchandise, as well as the price to be

paid by the purchaser. In other words, the purchaser, who is under no legal or moral obligation to the seller's creditors, is not only required to obtain from the seller all these details concerning his creditors, but he must send to each one, no matter how great their number or how remote their places of residence or business, all the detailed information that is to be included in the inventory. Thus the inventory may have to be duplicated by the hundreds or thousands and sent to creditors scattered over all portions of the globe. It is true that this obligation rests upon the purchaser only to the extent that it can be fulfilled in the exercise of reasonable diligence; but this qualification emphasizes, rather than mitigates, the arbitrary command of the statute. And, finally, the seller shall, at least five days before such sale, file a truthful answer in writing to each and all of said inquiries. There is no intimation as to the place of filing, or as to what will happen if there is no filing. Neither are we informed as to the effect upon the purchaser of the seller's failure to tell the truth or to file his written answers. In the midst of such a mass of detail it is refreshing to feel that this trifle is left to the imagination.

Let us again emphasize the assertion that we do not question the power of the Legislature to enact reasonable laws for the prevention of fraud and the protection of creditors. That this right falls within the general scope of the police power no one will deny. But the police power only begins where the Constitution ends. Broad and comprehensive as the police power concededly is, and incapable of precise definition or exact demarcation as we know it to be, it is never difficult to determine that its limits have been transcended when it is clear that the sacred domain of the Constitution has been trespassed upon. And when the exercise of the police power clearly infringes upon vested constitutional rights, courts should not concern themselves with the probable purposes for which it is exercised, or the evils which it was designed to correct. First the Constitution, and then the police power. The statute under consideration sweeps away the constitutional rights of liberty and property of a limited class of our citizens who are entitled to the equal protection of the laws with all other citizens. It invades the right of liberty because it arbitrarily and unnecessarily denies the right of a specified class of citizens to contract for, bargain, and sell a particular kind of property. It violates the Constitution in prohibiting all sales of merchandise in bulk, whether honest or dishonest, except upon conditions that are harsh, drastic, unreasonable, and unnecessary, in so far as they do not tend to effectuate the objects for which such a statute may properly be enacted. It ignores the constitutional guaranty relating to property rights, because it so restricts

the right of contract as to deprive property of its characteristics as such.

It is urged, however, that the impositions of this statute are more nominal than real, since a seller has only to pay his debts in order to make his sale valid. The argument, so far from supporting the statute, really serves to disclose one of its most sweeping and unreasonable features. If the statute affected none but insolvent sellers, or related merely to debts due, or gave to purchase-price creditors an equitable lien for their respective shares of the proceeds of a proposed sale, or if, instead of interdicting in advance a sale in bulk, it had made some reasonable provision for impounding the proceeds of sale until the seller's legal obligations could be judicially ascertained, there might be some force in the suggestion. But what is the fact? The act embraces all sales of entire stocks of merchandise in bulk. It covers every sale of any part of a stock not made in the ordinary course of trade in the regular and usual prosecution of the seller's business. It requires notice to be given to all the seller's creditors, whether their debts are due or not, that a sale is contemplated. It requires this notice to be given five days in advance of a sale. It requires observance of every one of its details or payment of every creditor. What is the practical effect? A seller who is abundantly able to pay his debts is compelled by law to do so before he can dispose of a part of his possessions. He must pay his debts, whether they are due or not. He must pay them, whether they are in dispute or not. He must pay creditors who have no legal, equitable, or moral claim upon the particular property or its proceeds. And if he depends upon the proceeds of the particular sale to pay his debts, he must pay them at least five days before he gets the money. Thus an intending seller is under the necessity of practically obtaining the consent of his creditors before he can make a sale. He must pay a claim that may be in dispute, right or wrong, and he must take what equitably belongs to the creditor for purchase price and pay it to general creditors, or he can be "held up." This may not be a literal taking of property without due process of law, but it is an annihilation of its value and a destruction of its attributes, so that, while the owner is permitted to retain his property in name, he is deprived of its essence and substance. *Wynehamer v. People*, supra.

It is said, also, that similar statutes, some of them much more drastic, have been adopted in 20 different states or jurisdictions. Twenty wrongs can never make one right. There is, moreover, a singular, not to say suspicious, coincidence in the time and substance of all this legislation. We are indebted to our Brother BARTLETT for the suggestion that more than half of these

statutes were enacted in 1903 and 1904; and nearly all of them since 1900. Statutes that are passed pro bono publico rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from organized crusades upon Legislatures by the advocates and supporters of special classes. This statute "is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class; the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the Legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors." *Peckham, J., in People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465.

If we have succeeded in making our position plain, it will be unnecessary to answer in detail that portion of Judge VANN'S very learned and able opinion in which he illustrates the manifold purposes for which the police power has been exercised by Legislatures and upheld by courts. The existence of the power is not denied. Its limits cannot be accurately demarked. The well-beaten paths which it has pursued time out of mind contain no guideboard to the new and untrodden field sought to be explored by this particular phase of paternal legislation. Therefore old cases and old laws are of little help, except as they expound general principles applicable to special conditions. In its final analysis the question is one of power in this particular case. We think that power has been transcended. "To justify the state in interposing its authority in behalf of the public it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Colon v. Liak*, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609; *Lawton v. Steele*, 152 U. S. 133, 137, 14 Sup. Ct. 499, 38 L. Ed. 335. It cannot be reiterated too often that the police power must be exercised within its proper sphere and by appropriate methods. Whenever a statute arbitrarily strikes down private rights, invades personal freedom, or confiscates or destroys private property, it is repugnant to the Constitution, and should not be permitted to stand, no matter how laudable its purpose or beneficial its effect.

Owing to the length of this opinion, we refrain from discussing the cases decided in other states upon similar statutes, except to say that those which have been up-

held in Massachusetts, Connecticut, Tennessee, and Washington are far less drastic than our own, in that they either except from their operation all sales by executors, administrators, receivers, etc., or provide that sales of merchandise in bulk shall only be presumptively void if the statutory requirements are not observed, or, as in Connecticut, that one day after the sale there shall be filed a descriptive writing duly signed and acknowledged. In Ohio and Utah, where such legislation was condemned by the courts, it was in some respects even more far-reaching and burdensome than here.

The judgment of the Special Term and Appellate Division should be reversed, and judgment ordered sustaining defendant's demurrer, with costs in all the courts. Question certified answered in the negative.

HAIGHT, J. I concur in the opinion of WERNER, J. He has called attention to the defects in the statute in not specifying the place where the inquiries shall be filed. But in addition thereto the notice to creditors provided for means nonresident as well as resident creditors. The notice to creditors must be served either personally or by registered mail at least five days before the sale. The notice would be of no benefit, unless it was received before the sale was completed and in time for the creditor to take action in reference thereto. The statute has, therefore, fixed the period of five days. If the notice is served personally, it must be five days before sale. If by registered mail, the statute doubtless means the same thing; that is, the notice should be received at least five days before the sale. In other words, if the service is by registered mail, the posting must take place a sufficient time in advance so that the creditor may receive it at least five days before the sale is completed. *Steinhardt v. Bingham*, 182 N. Y. 326, 75 N. E. 403. In case of creditors so far removed as to be beyond the reach of the registered mail, personal service only would answer the requirements of the statute. Such a notice in many cases might be impossible, or, if it could be given, it might involve, not only so much time, but so much expense, as to render the purchase profitless and operate to defeat the sale. In case the sale is very large, as, for instance, that of a large department store, weeks must elapse after the parties have made their agreement before they can complete the same. An inventory of every article must be made and the cost price of each article must be stated. This necessarily would consume considerable time. The inventory, no matter how extensive or bulky, must be duplicated for each creditor; for the statute could only be complied with by the serving of a copy of such inventory upon each creditor, containing the cost price of each article and the amount to be paid under the proposed agreement of purchase. This must be served per-

sonally or by registered mail five days before the sale. Again, what is the necessity of such a notice? It can have but one purpose. It gives to every creditor an inventory of every article proposed to be sold, the cost price thereof, and the amount that the purchaser proposed to pay, so that any creditor or a combination of creditors may step in within the five days allowed by the statute and bid a greater sum for the goods offered, and thus defeat the sale contemplated and avoid the contract made between the seller and the purchaser, although they both may have acted in good faith and without any intention of defrauding creditors. It is doubtless true that there have been many sales of the goods of merchants made for the purpose of defrauding creditors, and that a statute imposing reasonable restrictions upon such sales ought to be enacted. But I think that the statute under consideration imposes an unnecessary and an unreasonable restriction upon the power of persons to contract, and that merchants could not in many instances comply with its requirements, and that it in effect prohibits parties from contracting for the purchase and sale of a stock of goods, even though both parties act in the best of faith and without any intention of defrauding creditors.

VANN, J. (dissenting). The only question presented by this appeal is whether the statute regulating the sale of merchandise in bulk (Laws 1902, p. 1249, c. 528) violates any provision of the state or federal Constitution. The object of the act was to suppress a widespread evil, well known to current history and condemned by repeated adjudications in this court and in all the leading courts of this state from time out of mind. That evil is the tendency and practice of merchants who are heavily in debt to make secret sales of their merchandise in bulk for the purpose of defrauding creditors. Common observation shows that, when a dealer has reached a point in his business career where he cannot go on owing to the claims of creditors, the temptation is strong and the practice common of making a fraudulent sale. Fraud works in secret, and the bargain is closed and the purchaser in possession before the creditors know anything about it. The evil is difficult for the courts to handle, because the evidence to uncover the furtive scheme must, as a rule, be drawn from hostile witnesses, usually relatives or intimate friends of the seller, who took part in the fraud and shared in the plunder. All those who have had to do with the investigation of such transactions realize how well these frauds are protected by the forms of law and how frequently they are defended by perjury. The form of the fraud varies with the skill of the perpetrator and his advisers, but the unvarying purpose is to enable the debtor to hold and enjoy property which equitably belongs to his creditors. Inadequacy of consideration, absconding with

the proceeds of the sale, and the preference of fictitious claims are familiar methods. Many other means of holding on to property and concealing the facts are resorted to, and it is not uncommon to see a dealer in possession of all that he had before he failed, and, acting under another name, carrying on the same business with the same stock, all unpaid for, in unblushing defiance of his creditors. Whatever the method of committing the fraud, its success depends on secrecy and perjury.

When a merchant owes more than he can pay he has no substantial equity in his stock of goods, and the claims of his creditors are superior to his own. The courts may not only prevent him from parting with his property, but may seize and sell it and apply the proceeds upon his debts. If an execution issued against his property is returned unsatisfied, he may be compelled to disclose under oath all his business transactions, tell what he has done with his estate, both real and personal, and the proceeds thereof, and, if he still holds any property in the name of some one else, to divulge all the facts relating thereto. Code Civ. Proc. §§ 2432, 2463. He may be imprisoned on civil process and punished criminally for making a fraudulent disposition of his property, and any person who is a party or privy to the fraud may be punished in the same way. Code Civ. Proc. § 549; Pen. Code, § 586. Interference with his liberty and property by such methods has never been successfully questioned as a violation of fundamental rights. Many restraints upon freedom of contract, some of which reach back to our colonial history, have passed without challenge, or, if challenged, have uniformly been sustained as valid. The statute of frauds, the act to prevent fraudulent conveyances, insolvent laws, the recording act, the prohibition of usury, lien laws, regulations in relation to chattel mortgages, conditional sales, and preferences by corporations and in general assignments show in how many ways and in what varied forms the Legislature may properly restrain freedom of action in commercial transactions in order to promote the general welfare. Originally all parol contracts for the sale of personal property were valid, and it was unnecessary to make delivery or payment wholly or in part. The recording act was unknown, and transfers in writing, whether absolute or conditional, did not have to be filed. Now, however, many statutes require business to be transacted in a certain way and that constructive notice should be given in order to protect creditors and innocent purchasers. Such interference with liberty and such limitations upon the use of property, although arbitrary and inconvenient, have always been regarded as valid, in order to prevent fraud and promote justice. While commerce is hampered to a limited extent in some ways, it is protected and promoted to a much greater extent in other ways. The inconvenience of the

restraint is less than the evil done away with.

The statute now before us was passed for the same general purpose as the most of those mentioned. It is aimed at the same evil, which is admitted to be both serious and common. It does not prohibit a sale of any kind, but it provides safeguards against secrecy, which is the bulwark of fraud. It simply requires that notice of what is to be done should be given in advance, personally or by mail, to those directly interested, who are frequently made the victims of fraudulent sales. It regulates two kinds of sales: (1) A sale of any portion of a stock of merchandise, other than in the ordinary course of trade in the regular and usual prosecution of the seller's business. (2) The sale of an entire stock of merchandise in bulk. We now have to deal with the latter only. Such a sale is declared fraudulent and void, not absolutely, but as against the creditors of the seller, unless the statute is complied with. If the seller pays his debts, the sale stands, even if not made as required by the statute; but otherwise it falls unless at least five days before the date thereof both seller and purchaser unite in making a full and detailed inventory, showing the quantity and, so far as reasonable diligence will permit, the cost price of each article. This burden is cast upon both seller and purchaser; but a further burden is placed on the purchaser, who is required at least five days before the sale in good faith to make full and explicit inquiry of the seller as to his creditors and the amount owing to each, and to notify them personally or by mail of the proposed sale, the cost price of the stock to be sold, and the price proposed to be paid. At least five days before the sale the seller is commanded to file—where is not specified, but presumptively in the office where a chattel mortgage given by him should be filed—a truthful answer in writing to each inquiry made of him by the purchaser as above required. Except as thus specified, the rules of evidence and the presumptions of law are left unchanged. A recent amendment provides that a sale "will be presumed to be fraudulent and void as against the creditors of the seller" unless the statute is complied with, while the act governing the case now before us makes such a sale absolutely void as to creditors. Laws 1904, p. 1385, c. 569.

The statute is confined to merchants and dealers, as is apparent from the use of the expressions "a stock of merchandise" and "the cost price to the seller." No sale is forbidden, but certain sales are regulated, in order to prevent fraud. No restraint is placed upon sales made in the ordinary course of business, whether at wholesale or retail; for the statute applies only to unusual and extraordinary sales. There is no attempt to regulate sales generally, but merely those which experience shows are so frequently made a cover for fraud. There is no interference with the ordinary business of

merchants, but when they sell their entire stock and go out of business, or sell any substantial portion thereof in an irregular and unusual way, notice to creditors is required, so that they can protect themselves against fraud. No protection is afforded to strangers, but simply to those who have a strong equitable right to see that the sale is for a fair price and free from fraud. If the merchant pays his debts, there can be no attack upon the sale, however made. The act is less drastic than one imposing a lien upon goods sold until the purchase price is paid, with the right to discharge the lien by sales in the ordinary course of business, which is clearly within the power of the Legislature. The requirement of notice is less burdensome than the imposition of a lien. While the statute in question disturbs freedom of contract, so does fixing the price of elevating grain (*People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77), the prohibition of options to buy or sell grain at a future time (*Booth v. Illinois*, 194 U. S. 425, 22 Sup. Ct. 425, 46 L. Ed. 623), and the annulment of all contracts for the sale of corporate stocks for future delivery or on margin (*Otis v. Parker*, 187 U. S. 606, 23 Sup. Ct. 168, 47 L. Ed. 323). It interferes with the use of property; but so does a limitation upon the height of buildings (*People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862), the requirement that tenement houses shall be furnished with water (*Health Dept. of New York v. Rector, etc., Trinity Church*, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579), forbidding the sale of stamped bottles (*People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668), or of lottery tickets issued in a state where lotteries are lawful (*People v. Noelke*, 94 N. Y. 137, 46 Am. Rep. 123), or of game purchased in another state as lawful merchandise and brought into this state (*People v. Bootman*, 180 N. Y. 1, 72 N. E. 505). It interferes with liberty; but so does the act "to regulate barbering on Sunday" (*People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; *Petit v. Minnesota*, 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716), the statute making it a misdemeanor to exhibit a child as a dancer in order to earn a living (*People v. Ewer*, 141 N. Y. 129, 36 N. E. 4, 25 L. R. A. 794, 38 Am. St. Rep. 788), the exclusion of children not vaccinated from school (*Matter of Viemeister*, 179 N. Y. 235, 72 N. E. 107, 103 Am. St. Rep. 859), and the compulsory vaccination of all the inhabitants of a community (*Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643).

Twenty states, as well as the federal government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California: Civ. Code, § 3440, as amended March 10, 1903 (St. 1903,

p. 111, c. 100). Colorado: Sess. Laws 1903, p. 225, c. 110. Connecticut: Pub. Acts 1903, p. 49, c. 72. Delaware: Laws 1903, p. 748, c. 387. District of Columbia: 33 Stat. 555, c. 1809; Acts 58th Cong. April 28, 1904. Georgia: Laws 1903, p. 92, No. 457. Idaho: Laws 1903, p. 11, H. B. 18. Indiana: Acts 1903, p. 278, c. 153. Kentucky: Acts 1904, p. 72, c. 22. Louisiana: Acts 1896, p. 137, No. 94. Maryland: Laws 1900, p. 907, c. 579. Massachusetts: Acts and Resolves 1903, p. 389, c. 415. Minnesota: Gen. Laws 1899, p. 357, c. 291. Ohio: Laws 1902, p. 96, H. B. 334. Oklahoma: Sess. Laws 1903, p. 249, c. 30. Oregon: B. & C. Comp. p. 1479, c. 7. Tennessee: Acts 1901, p. 234, c. 133. Utah: Laws 1901, p. 67, c. 67. Virginia: Act approved January 2, 1904; Acts 1902-04, p. 884, c. 554 [Va. Code 1904, p. 1217, § 2460a]. Washington: Laws 1901, p. 222, c. 109. Wisconsin: Laws 1901, p. 684, c. 463. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee, and Washington. *J. P. Squires & Co. v. Tellier*, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322; *Walp v. Moor*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 71 S. W. 50, 97 Am. St. Rep. 851; *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889. An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland. *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 892; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661. On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (*Miller v. Crawford*, 70 Ohio, 207, 71 N. E. 631), and a similar act met the same fate in Utah, where a violation of the statute was made a crime (*Block v. Schwartz*, 27 Utah, 387, 76 Pac. 22). The weight of authority, thus far announced, is in favor of the validity of such legislation. The general grounds upon which it has been sustained are well illustrated by the following extract from the opinion of the Supreme Court of Massachusetts: "A purchaser, to be safe, has only to see that the vendor's creditors are provided for. The vendor may sell freely, without regard to the statute, if he pays his debts. The Legislature, when contemplating this legislation, had occasion to consider and balance against each other the general right of property owners to make contracts and dispose of their property and the general right of creditors to be paid and to have reasonable opportunities secured to them for the collection of their debts. That this is within a class of legislation for which there is constitutional authority is too plain for question. The object of it is like that of our numerous statutory provisions which authorize attachments on mesne process and establish courts with all the necessary machinery for the collection of debts. The statute requires of the vendor nothing that

cannot be done with reasonable effort. If he is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it." *J. P. Squires & Co. v. Tellier*, 185 Mass. 18, 20.

The question before us is one of power, not of policy. Courts may pass upon the power of the Legislature, but not upon its policy. Statutes, whether wise or unwise, are equally binding upon us, provided no provision of either Constitution is molested. According to the general rule, unless there is a plain conflict between a statute and the Constitution, the statute stands, for every presumption is in its favor. The respect due to a co-ordinate branch of the government will not permit mere judicial doubt to undermine a statute, for there must be clear judicial conviction that it violates the Constitution before the courts can set it aside. The Legislature, with all the power of legislation there is, may pass any law upon any subject, unless it is expressly or impliedly forbidden by the supreme law of the state or of the United States. There is a power beneath the Constitution, but not superior to it, unwritten, not fully defined, necessary, resting on the sovereignty of the state, which exists because the state cannot exist without it, and which must be considered in connection with the Constitution. That power, known as the "police power," aims to promote the public welfare by compulsion and restraint, and it is under the exclusive control of the Legislature. The executive department can exert it only as authorized by the Legislature. The courts can neither exercise it, nor prevent its exercise, but they can determine whether a statute is a constitutional use of the power. We cannot overturn a statute because we do not like it; for our likes and dislikes affect us as citizens, not as judges. We greatly prefer the amended act to the original, because, although effective, it is not so harsh; but that has nothing to do with the validity of either.

Starting always with the presumption that the statute, although challenged, is valid, we study it in connection with the Constitution, to see whether there is such a conflict as to divest the Legislature of jurisdiction. If purporting to be passed in the exercise of the police power, we endeavor to see, first, whether there was an evil to be remedied, and, second, whether the remedy prescribed is "calculated, intended, convenient, or appropriate" to suppress it, and not designed to trespass upon personal rights "under the guise of a police regulation." If "the act has a fair, just, and reasonable relation to the general welfare," it may so regulate "the conduct of an individual and the use of prop-

erty" as to "interfere to some extent with the freedom of the one and the enjoyment of the other." If it violates no express command of the Constitution, and tends "in a degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, as those words have been used and construed in many cases heretofore decided," and is not passed "ostensibly in favor of the promotion of some such object, while really it is an evasion thereof and for a distinct and totally different purpose," it comes within the jurisdiction of the Legislature, and the courts are bound to sustain it. The police power cannot be arbitrarily exercised, so as to deprive the citizen of his liberty or property; "but a statute does not work such a deprivation, in the constitutional sense, simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters indifferent, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted." Liberty under the Constitution does not mean natural liberty, or the right to act as one pleases, subject only to the laws of nature; for society cannot exist on that basis. Constitutional liberty is the right to act without restraint upon person or property, except such as is necessary or expedient for the general advantage of the public. *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *People v. Arensberg*, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460; *Health Dept. of New York v. Rector, etc., Trinity Church*, 145 N. Y. 32, 39 N. E. 833, 45 Am. St. Rep. 579; *Slaughter House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Gas Co. v. Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516.

The legislation under consideration was intended to suppress a deep-seated evil, common in sales of a certain kind. The existence of the evil is admitted, and the right of the Legislature to provide a remedy is also admitted; but it is insisted that the remedy provided is so unreasonable that it violates the primary guaranties of the Constitution. The same claim was made when a maximum price was fixed for doing a certain kind of work; but it was rejected, because the work was done in a business affected with a public interest. *People v. Budd*, supra. The same position was taken when one state absolutely prohibited sales on margin and another options to buy or sell at a future time, contracts which were previously valid;

but both provisions were sustained by the Supreme Court of the United States, because they tended to prevent gambling. *Booth v. Illinois*, supra, and *Otis v. Parker*, supra. While many contracts of the kind prohibited were free from wrong, as so many were made for the purpose of gambling, all were swept away, the good and the bad alike. Is gambling a worse evil than fraud? Does it affect commerce more seriously? Is freedom of contract interfered with more by requiring notice to creditors before certain sales are made than by forbidding certain other sales altogether? The statute is intended to interfere only with those who buy and sell in bad faith toward the creditors of the vendor. It doubtless interferes with some who act in good faith, but so do the other statutes referred to. In order to prevent injustice and fraud, legislation for time out of mind has placed some restraint upon commercial transactions, and where the Legislature has jurisdiction to act the method of suppressing the evil is wholly within its sound discretion.

The right to pass laws to prevent fraud being conceded, what principle is to guide us in drawing a line to separate the act before us from those considered in the cases cited? How can we declare this statute void and the others valid? It has no ulterior purpose. No attempt is made to protect some favored interest from injurious competition. Its object is not, as in the *Gillson Case*, to interfere with a lawful business, but to prevent one man from keeping property which equitably belongs to others. It seeks to maintain justice, which is one of the leading features of the public welfare. The protection of creditors has always been a primary function in the administration of justice. Why should the Constitution require courts to be maintained to punish fraud and yet deprive the Legislature of power to prevent fraud by requiring notice to a class apt to be defrauded? As it is known that dishonest merchants abuse freedom of contract by secretly selling out in such a way as to defeat the claims of creditors, may not the Legislature surround the right with some safeguards, such as an inventory and notice thereof? When the end sought is within the domain of legislation, and the form of the remedy proposed is fairly adapted to that end, the courts have no power to interfere. When jurisdiction exists, the details are within the exclusive control of the Legislature. While a merchant, owing debts, has an absolute constitutional right to sell his stock of goods, he may properly be required to do something for the protection of his creditors, and what he shall do is for the Legislature to prescribe. With power to act upon the subject, it may pass a foolish statute or a wise one; and we cannot overturn the one unless we can the other. It is only when there is a want of power to legislate that the courts can declare a statute void.

It is insisted, and the argument is not with-

out force, that while the provisions of the act, so far as they relate to the vendor, may be valid, the restraint upon the purchaser is so severe as to impinge on the right of liberty and property. What is required of the purchaser? To some extent he must look after the interests of creditors, if there are any. He must either see that they are paid or notify them in advance of what is to be sold, the price paid and to be paid, and must ask the seller who his creditors are. If there are no creditors, the statute does not apply. If the inquiry, when carefully made, discloses no creditors, and the purchaser knows of none, he may buy in safety without the inconvenience of inventory or notice. If there are creditors, the risk is in proportion to the amount of their claims, and, whether it is large or small, they have rights which need protection from a sale made in bad faith; and it is at such sales that the statute strikes. The purchaser may be buying property in which the seller has less real interest than his creditors, and it is reasonable to charge both seller and purchaser with the exercise of some care toward them, in the interest of justice and the general welfare. The inconvenience to purchasers is an evil, as it hampers commerce to some extent; but the injury to commerce from fraudulent sales is a much greater evil, so that on the whole commerce is not harmed, but helped. The Legislature had the right to balance these evils, and to promote the common good by trying to do away with the greater. The everyday business of the seller and buyer is not touched, for that is outside of the statute; but when an extraordinary sale is made, such as can occur but few times in the life of a merchant, certain conditions and restraints are imposed, not to hamper business, but to prevent secret sales in bulk of property usually bought on credit and generally unpaid for when the sale is made. The remedy provided tends to furnish the protection needed by creditors, without any interference whatever with ordinary business, and without disturbing freedom of contract in the rare and irregular cases to which the act applies any more than was within the power of the Legislature according to the principles laid down by repeated adjudications in this court and in the Supreme Court of the United States. Purchasers who complain of the act as a violation of their constitutional rights are themselves protected by legislation equally drastic; for they could not purchase in safety, were it not for the acts in relation to chattel mortgages and conditional sales. They might purchase and pay in good faith, and yet have the property taken away from them under a lien they knew nothing about and which they could not discover. As the Legislature passed these acts, it can repeal them; and in that event purchasers, however careful, might not get a good title, while now, even with the act under consideration in full force, they can get a good title if they only

take pains. They cannot, therefore, consistently object to such a statute. They cannot in fairness assert that interference with an unlimited right of contract is constitutional when it operates in their favor, but unconstitutional when it operates in favor of creditors and against themselves.

It is also claimed that an unreasonable burden is imposed upon a limited class of debtors for the benefit of a limited class, consisting of their creditors. A statute which is uniform in its effect upon all persons to whom it applies is not invalid because it applies to a limited number. This act applies to all the people of the state who carry on a certain kind of business, which presents special temptations and opportunities for the commission of fraud. The classification is not arbitrary, but is founded on a "reasonable and just difference between the persons affected and all others." The difference is seen in the nature of a business conducted largely on credit, which, as shown by the records of our courts, furnishes peculiar facilities for the perpetration of a characteristic fraud. As was said by Mr. Justice Brewer in a late case: "It is within the undoubted power of the government to restrain some individuals from all contracts as well as all individuals from some contracts" (*Frisbie v. U. S.*, 157 U. S. 160, 165, 15 Sup. Ct. 586, 588, 39 L. Ed. 657); and by Mr. Justice Field in an earlier case: "Special burdens are often necessary for general benefits. * * * Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions" (*Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 360, 28 L. Ed. 923). "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions." *Soon Hing v. Crowley*, 113 U. S. 703, 709, 5 Sup. Ct. 730, 733, 28 L. Ed. 1145. The Constitution means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989; *Moore v. Missouri*, 159 U. S. 673, 678, 16 Sup. Ct. 179, 181, 40 L. Ed. 531.

I close my review by repeating as applicable generally to the case before us the words of the Supreme Court of the United States in a decision of great importance: "The power which the Legislature has to promote the general welfare is very great, and the discretion which that department

of the government has in the employment of means to that end is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property, * * * yet in many cases of mere administration the responsibility is purely political; no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of public opinion or by means of the suffrage." *Powell v. Penn.*, 127 U. S. 678, 685, 8 Sup. Ct. 992, 996, 32 L. Ed. 253, citing *Yick Wo v. Hopkins*, 118 U. S. 370, 6 Sup. Ct. 1064, 30 L. Ed. 220.

The judgment should be affirmed, with costs, and the question certified answered in the affirmative.

CULLEN, C. J. (dissenting). I concur entirely in the opinion of my Brother VANN, but as the point has now been raised that the statute before us makes unlawful discrimination between sales of one kind of personal property and sales of other personal property, of sales by persons engaged in one character of business and those in another, and therefore violates the provision of the federal Constitution guarantying equal protection of the laws, I desire to add a word. Of course, absolutely arbitrary selection by the Legislature in imposing a tax or in creating a crime cannot be justified, and for this reason we refused to uphold the imposition of a transfer tax in the *Pell Case*, 171 N. Y. 48, 63 N. E. 789, 57 L. R. A. 540, 89 Am. St. Rep. 791. But if there be difference in circumstance which bears some reasonable relation to the classification made by a statute, then that statute must be upheld, however greatly we may doubt its wisdom. Ever since we adopted the law merchant there has been a difference in the title acquired by a bona fide purchaser to different kinds of personal property. The purchaser of a watch or of a bond and mortgage must abide the title of his vendor, though he purchases in the best of faith for a full consideration. But the purchaser of a railroad bond or a promissory note, if he acts in good faith, acquires title to the security, even though he buys from a thief. The practical difference between the business of a merchant and that of a farmer is very apparent. A merchant obtains credit on the capital which he has in his business; that is to say, the excess in value of his stock in trade over his debts. He cannot secure his creditors by a mortgage on his goods, for a chattel mortgage on a fluctuating stock is void as against a purchaser, and to uphold such a mortgage would destroy the very object for which the goods are sold to a merchant, to wit, for sale to his customers. The case of a farmer is radically different. His capital is principally represented by his land, his stock, his implements, which are the subject of mortgage or lien, and any credit extended to him is accorded far more to his fixed capital than to his expected crops. It is unnecessary, however,

to pursue the discussion. Every business man will appreciate a score of distinctions between the way business is carried on by the one class and by the other. The doctrine contended for, that legislation must be exactly uniform, would be fatal to a large part of the statutory law of this state, which has never been challenged and under which the community has lived for many years. Take as a single example the transfer tax law. Religious corporations are exempt from the tax, other charitable corporations not, as we have held. But, more than that, a legacy or devise to a bishop is exempt; but there is no exemption in favor of any other minister or clergyman. Our law abounds in similar distinctions, many of which we may think without justification; but the power of the Legislature to make those distinctions has not been challenged. Without continuing the argument, however, it seems to me that the recent action of this court in the race course gambling cases is conclusive. We have twice upheld, by a unanimous court, the validity of legislation which makes pool selling on horse races outside of the track a felony punishable by imprisonment in state's prison for not more than two years, while the same act, if committed on the race grounds, is not a crime at all, but subjects the offender only to repayment of the money he has received on the bet. Be the distinction little or great between the conduct of business by merchants engaged in selling goods and that carried on by other owners of personal property, who, to use the judicial expression of the day, will have the temerity to deny that such difference is infinitely greater than that which obtains, either in moral obliquity or in injury to the community, between selling pools inside the fence which surrounds a race track and selling pools outside that fence?

GRAY and BARTLETT, JJ., concur with WERNER and HAIGHT, JJ. CULLEN, C. J. (in memorandum), and O'BRIEN, J., concur with VANN, J.

Judgment reversed, etc.

(182 N. Y. 442)

IN RE SOCIAL DEMOCRATIC PARTY.

(Court of Appeals of New York. Oct. 3, 1905.)

1. ELECTIONS—NOMINATIONS—OBJECTIONS TO CERTIFICATE.

Laws 1896, p. 922, c. 909, § 56, as amended by Laws 1898, p. 963, c. 335, and Laws 1901, p. 1669, c. 654, providing that where a dispute as to a political party or other name designated in a certificate of nomination filed under that section or section 57 has been determined by the officer with whom the certificate is filed, the Supreme Court, or any justice thereof within his district, or county judge within his county, shall have summary jurisdiction, on the complaint of any person, to review the acts of such officer and make such order as justice may require, authorizes such proceeding by any citizen who has instituted the same by filing objections to the certificate.

2. SAME—WHO MAY OBJECT—JURISDICTION.

Where a voter has filed objections to a party name used in a certificate of nomination filed with the Secretary of State, and his objection has been overruled, and he has obtained an order from a justice of the Supreme Court to show cause why such determination should not be overruled, another justice of the Supreme Court has no jurisdiction to grant the person who has made no objections to the certificate another order requiring the Secretary of State, at a date earlier than that fixed in the first order, to show cause why the determination should not be reviewed, and an order by the latter judge overruling the objections is void.

3. SAME—USE OF PARTY NAME.

Under Election Law, Laws 1901, p. 1669, c. 654, § 56, prohibiting any political party from selecting the same or substantially the same name previously adopted by another party, where the state branch of the Socialist Party, refusing to adopt the name adopted by its national convention in 1900 and by which it is known throughout the United States, made nominations under the name of the "Social Democratic Party," it thereby adopted a name substantially the same as that of the Democratic Party, and, in the absence of a national party maintaining the name "Social Democratic Party," the use of such name is unauthorized and should be amended in conformance with the name of the national party of which it is a branch.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of objections to the original certificates of nomination of the Social Democratic Party of candidates to be voted for at the election of November 8, 1904. From an order of the Appellate Division (93 N. Y. Supp. 1023, 105 App. Div. 243), which affirmed an order of Special Term denying an application of John S. McEwan for review of the determination of the Secretary of the State overruling objection to the original certificate of nomination by the Social Democratic Party, he appeals. Reversed.

David B. Hill and Nelle F. Towner, for appellant. Morris Hillquit, for respondent.

HAIGHT, J. On the 5th day of October, 1904, there was filed in the office of the Secretary of State a certificate of nomination by the Social Democratic Party, so called, of candidates for presidential electors, for Governor, and for other state officers, to be voted for at the general election to be held November 8, 1904. On the same day John S. McEwan, a citizen of the United States and of the state of New York, residing in the city of Albany, and a duly qualified elector, filed objections to said certificate with the Secretary of State, in which he objected to the use of the word "Democratic" as part of the party name in such certificate. Thereupon a hearing was had by the Secretary of State and the objection of McEwan was overruled. Immediately thereafter and upon the same day McEwan applied to Mr. Justice Betts for an order to show cause why the proceedings before the Secretary of State should not be reviewed, and thereupon an order to show cause was made by

such justice, returnable before him on the 22d day of October, 1904. Meanwhile one James O'Neill, who had filed no objection whatever to the certificate of nomination before the Secretary of State, obtained from Justice Cochrane an order to show cause why the proceedings before the Secretary of State should not be reviewed, returnable before Justice Howard on the 20th day of October, 1904. Upon the return of such order to show cause Justice Howard made an order sustaining the decision of the Secretary of State and overruling the objections of McEwan, bearing date the 21st day of October, which order was produced before Justice Betts on the following day, when the order to show cause procured by McEwan was returnable before him, and thereupon he denied the motion to review the determination of the Secretary of State "solely on the ground that there has been a decision by a justice of this court on said determination of the Secretary of the State on the complaint of James O'Neill."

The Democratic Party has been known and recognized as one of the great political parties of the country for upwards of 75 years, and during that time it has annually made nominations for such offices as were to be filled by the electors. On the 29th day of September, 1904, it had caused a certificate of nomination for presidential electors, Governor, and other state officers to be filed in the office of the Secretary of State, to be voted for at the next November election, and the objector to the certificate filed by the Social Democratic Party, so called, alleges that such name will deceive Democratic and independent voters, and cause many of them to believe that in voting for the candidates of the Social Democratic Party, so called, they will be voting for the regular candidates of the Democratic Party. In the month of June, 1897, a national party of Socialists was organized at a convention held in the city of Chicago, which assumed the name of "Social Democracy of America." At another convention held in June, 1898, in Chicago, the name was changed to "Social Democratic Party of America." In the summer of 1900 the Social Democratic Party of America and several other socialistic organizations of the United States, among them a large faction of the then existing Socialist Labor Party, united into one party under the name "Social Democratic Party," and as such made nominations in the state of New York for presidential electors, Governor, and other state officers to be voted for at the following November election. Such nominations were made pursuant to the provisions of section 57 of the Election Law, by procuring a requisite number of signers to the certificate of nomination, which was filed in the office of the Secretary of State on the 29th day of September, 1900. This latter name ap-

pears to have been retained by the party in the state of New York until May, 1904, at which time the "Socialist Party of the United States," of which the New York organization was an integral part, met in convention in the city of Chicago and made nominations for President and Vice President, to be supported at the ensuing election of that year. At that convention the name of the "Socialist Party" was adopted, as appears from the platform or resolutions adopted by it. We thus have the organization in this state incorporating in its name the word "Democratic," while the organization as it exists in the United States, as represented by its national convention, is known simply as the "Socialist Party."

Inasmuch as the election of 1904 has passed, the questions involved in these proceedings have become academic. But in view of their public importance and their liability to arise again upon the filing of certificates of nominations for other elections, we have thought best to entertain the appeal and to consider the questions. The first question pertains to the practice adopted by the justice before whom the proceedings were reviewed. Upon this subject the statute is exceedingly meager. While the draftsman thereof may be an expert practitioner, we are unable to escape the conviction that the simple remedy of review by certiorari would have been more easily understood by the bench and bar. It provides that "if there be a division within a party, and two or more factions claim the same, or substantially the same device or name, the officer aforesaid shall decide between such conflicting claims, giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities. Any question arising with reference to any device, or to the political party or other name designated in any certificate of nomination filed pursuant to the provisions of this section, or of section 57 of this article, or with reference to the construction, validity or legality of any such certificate, shall be determined in the first instance by the officer with whom such certificate of nomination is filed. Such decision shall be in writing, and a copy thereof shall be sent forthwith by mail by such officer to the committee, if any, named upon the face of such certificate and also to each candidate nominated by any certificate, and also to each candidate nominated by any certificate of nomination affected by such decision. The Supreme Court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction upon complaint of any citizen, to review the determination and acts of such officer, and to make such order in the premises as justice may require, but the final order must be made on or before the last day fixed for filing certificates of nomination to fill vacancies with such

officer as provided in subdivision one of section sixty-six of this article. Such a complaint shall be heard upon notice to such officer as the said court or justice or judge thereof shall direct." Laws 1896, p. 922, c. 909, § 56, as amended by Laws 1898, p. 983, c. 335, and Laws 1901, p. 1669, c. 654, known as the "Election Law."

By other provisions of the statute the certificate of nominations for presidential electors, Governor, and other state officers, is required to be filed with the Secretary of State. That officer was therefore required to determine in the first instance any question arising with reference to any party name designated in any certificate of nomination. The proceeding authorized by the statute is, under the provisions of the Code of Civil Procedure, a special proceeding. In order to institute such proceeding before the Secretary of State a question must arise calling for his determination and such question arises only by some objection filed with him raising a question with reference to the validity of the certificate. In the case under consideration the objection was filed by McEwan, and that act we must regard as a commencement of the special proceeding. Upon the hearing that followed, the Secretary of State, as we have seen, overruled the objection and held the certificate valid. Then under the provisions of the statute a right of review was given by the Supreme Court, or any justice thereof within the judicial district, or by any county judge, upon the complaint of any citizen. It is quite possible that the word "citizen" should be limited to that of a qualified elector residing within the state or county or district for which the officer was to be chosen, and that the same qualifications were intended to relate also to the person filing the objection. But McEwan, as we have seen, was both a citizen and an elector. He was the person who instituted the proceeding, and also the person who had the right to review an adverse determination of the question by the Secretary of State. Under the provision of the statute it is claimed a review may be had upon the complaint of any citizen, but this must be understood as referring to any citizen who had instituted the proceeding by filing objections with the Secretary of State. To hold otherwise would practically nullify the statute. For if a person instituting the proceedings can be shut out of the right to review an adverse decision by a stranger who had not filed any objection to the certificate, and who interposed by motion before another court or judge at an earlier date without notice to the person instituting the proceedings, then the decision of an officer with whom the certificate of nomination was required to be filed may, by the consent of the moving party, be sustained, and the beneficial purposes of the statute evaded and annulled. It is said that the provisions of the statute may be evaded by a person who is friendly to the

party filing the certificate by his making objections thereto and then, by failure to present valid reasons to the officer, procure a decision overruling his objection, and thus deprive the representatives of other parties who may wish to file objections and review the proceedings of their right to do so. But no such attempt to evade the statute has thus far been brought to our attention. Any citizen and elector may doubtless file objections before the officer with whom the certificate is filed, who may doubtless consolidate them and hear all of the objections together and make his determination thereon; and, if any question arises as to the collusion of any persons or parties, the courts will doubtless find a way to dispose of their proceedings when the question arises. It is sufficient to now state that the review instituted by O'Neil before Justice Howard was without authority, and that justice acquired no jurisdiction to review the proceeding. The proceeding, as we have seen, was then pending before Justice Betts, regularly instituted by the person who had interposed the objection to the certificate. Justice Betts had thereby acquired jurisdiction, and it became his duty to determine the matter upon the merits.

Section 56 of the election law, to which we have already referred, contains provisions for party nominations of candidates for public office to be made by a convention or a duly authorized committee of such convention of a political party which at the last preceding general election at which a Governor was elected had cast 10,000 votes or upwards. It contains provisions for the making of party certificates of nominations, of filing the same with the Secretary of State, and provides that it shall also designate, in not more than five words, the name of the political party which the convention or committee making the nomination represents; and they also shall select some simple device or emblem to distinguish or designate the candidates of the party, which device shall in no case be used by any other party or independent body. If the certificate of nomination of two or more different political parties or independent bodies shall designate the same, or substantially the same, device or emblem or party name, the officer with whom the certificates of nomination are filed shall decide which of said political parties or independent bodies is entitled to the use of such device or emblem or party name, being governed so far as may be in his decision by priority of designation in the case of the device or emblem and of use in the case of party name. Then follow provisions with reference to the review of the determination of the Secretary of State, to which we have already alluded. Section 57 of the law contains provisions for the making of independent nominations of candidates for public office for the state, upon the subscrib-

ing of the certificate provided for by 6,000 or more voters, which certificate must designate in not more than five words the political party or other name which the signers shall select, "which name shall not include the name of any organized political party." They also are required to select an emblem. It will thus be observed that the provisions of section 56 pertain to nominations by the conventions of existing political parties or by committees duly chosen by such conventions, and that the provisions of section 57 pertain to the making of independent nominations based upon the requisite number of signatures of voters. Under the former section the political party is prohibited from selecting "the same or substantially the same name" that has been previously adopted by another political party, while under the provisions of the latter section in making an independent nomination the statute absolutely prohibits the selecting of a name which will include the name of any existing organized political party.

The provisions of this statute we had under consideration in *Matter of Greene*, 150 N. Y. 566, 44 N. E. 1124. In that case the question arose over a certificate of nomination filed in the name of the "National Democratic Party." The Appellate Division held that the name chosen was not substantially the same as that of the Democratic Party. The case was argued before us and had to be decided the next day, in order to be within the time required by the statute. We affirmed the determination of the Appellate Division, but without opinion and without adopting the opinion below. In that case the name had been adopted by a national convention which had named candidates for President and Vice President of the United States. In this state presidential electors had been nominated under the same name. While conceding for the purpose of the case that the Legislature had the power to compel a change of the name of a political organization in a presidential election, we entertained the view that it was not intended so to do in such an election; that the common speech of the people, the speeches made during the campaign, the discussions in the newspapers, the banners, signs, and transparencies, would serve to so completely identify the party name with the persons nominated for President and Vice President as to leave little chance for deception. The party in this state but adopted the name by which the party was known and designated throughout the United States, and the nominations for local candidates would follow those named for presidential electors upon the official ballot in the same column. In that case we were not prepared to hold that the name was invalid which was recognized as valid in every other state in the Union. Had the certificate of nomination been cou-

fined to state and local offices, we might have found that the name was so nearly the same as that of the older party that it was liable to deceive, and consequently might have reached a different result.

In the case before us, as we have seen, the name "Social Democratic Party" was adopted in national convention in the city of Chicago in 1900, at which the nominations for President and Vice President were made. But at the national convention of the same party in 1904 the word "Democratic" was eliminated from the name of the party and the nomination was made under the name of the "Socialist Party." The local branch of the party in this state, however, refused to adopt the name by which the party was known throughout the United States and which had been adopted by its national convention, and insisted on making its nomination under the name of the "Social Democratic Party." The political speeches and discussions in the press, with the banners, signs, and transparencies which might be made and displayed throughout the campaign on behalf of the Socialist Party would not serve to identify the Social Democratic Party with the candidates for President and Vice President among the illiterate voters with the same force and effect as if the national party and the local party maintained the same name. The reasons, therefore, for our decision of the case in *Matter of Greene*, supra, do not apply to this case. In 1900 the Socialist Party in this state made its nominations pursuant to the provisions of section 57 of the election law. By that statute it was prohibited from including in its name the name of the Democratic Party. Had it made its nominations in 1904 under the provisions of that section, clearly the name adopted would have been unauthorized. It, however, made its nominations in that year under section 56, which prohibited it from adopting a name substantially the same as that of the Democratic Party. It added thereto the word "Social" only, and in view of the purpose and intent of the statute, and in the absence of a national party maintaining that name, we think it should be held that the name used was unauthorized and that it should be amended by conforming it to that of the national party, of which the local party is a branch.

The order and determination should therefore be reversed, and the objection interposed by the appellant should be sustained, with costs in all courts.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, and WERNER, JJ., concur. VANN, J., not voting.

Order reversed, etc.

(217 Ill. 15)

ALTON LIGHT & TRACTION CO. v. OLIVER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—STREET RAILWAYS—SPEED OF CAR.

Where the seats, aisles, and platform of a street car are crowded, the railway company should so regulate the speed as to use the highest degree of care for the safety of passengers consistent with the practical operation of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1204.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Whether it was negligence to board a car in its crowded condition, when urged by the conductor to "Crowd on! This is the last car for the city"—is a question of fact for the jury.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1357.]

3. TRIAL—DIRECTING VERDICT.

An instruction directing a verdict for defendant, if plaintiff had failed to prove certain allegations by a preponderance of the evidence, is properly refused, where a material allegation of negligence charged, and which the evidence tended to prove, has been omitted.

Appeal from Appellate Court, Fourth District.

Action by Frank Oliver against the Alton Light & Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Levi Davis, for appellant. David E. Keefe, for appellee.

BOGGS, J. The appellee, a boy of about the age of 16 years, was awarded judgment in the sum of \$6,500 against the appellant company for damages occasioned by personal injuries through the alleged negligence of the appellant company, and the judgment was affirmed by the Appellate Court for the Fourth District. This appeal seeks the reversal of the judgment of affirmance.

The declaration contained two counts, and we think the testimony so far tended to prove the allegations of each of them that the court did not err in refusing to grant the motion entered by the appellant company for a peremptory verdict in its favor.

The appellant company is a common carrier of passengers for hire, and on September 7, 1903, was operating cars on its line for the transportation of passengers from Rock Springs Park to the city of Alton. It was Labor Day, and the labor organizations had a picnic at the park. The appellee was in attendance, and about 9:30 o'clock p. m. became a passenger on one of appellant's cars to be transported to his home in the city of Alton. The evidence tended to show the following state of facts: The seats were all occupied when appellee entered the car. That the car was kept standing at the park entrance for some five minutes or more, and that the conductor kept calling out: "Crowd

on! This is the last car for the city." That, when the car left the park, the seats were all occupied, and the aisles and platforms were crowded. That the appellee was crowded out onto the steps of the front platform. That two boys were seated on the step on which the appellee was also standing. That he paid his fare and was entitled to and asked for a transfer to another line. The evidence tended to show that while on the trip to the city, and while the car was going up a grade, the motoneer turned on all the electrical power that the motor would permit, and that, while the car was in rapid motion, the conductor crowded out onto the front platform and cried out, "Transfers!" That appellee, who had been holding onto the handle of the car, released one hand to take a transfer ticket from the conductor. That at this moment the car gave a lurch and threw other passengers, who also stood on the platform, against the appellee (as charged in the first count) and knocked him from the car, or the lurching and rapid motion of the car threw him therefrom (as charged in the second count), and that he fell with his left foot under the car, across the rail, and the wheel of the car passed over his left foot, rendering amputation necessary, and his left leg was amputated a few inches below the knee.

The servants of the appellant company invited passengers to occupy the car beyond its capacity, and knowingly permitted, if they did not induce, passengers to stand on the platforms and steps of the car. In such case the carrier assumes the duty of exercising, for the protection and safety of the passengers, that degree of care that is demanded by the circumstances. *North Chicago Street Railroad Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793. The obligation of a common carrier, which rested on the appellant company, was to do all that human care, vigilance, and foresight could reasonably do, consistent with the mode of conveyance and the practical operation of the road, to convey appellee and the other passengers in safety to his and their destination. Slight care and foresight only was necessary to arouse apprehension that the passengers on the platform and steps of the car would be endangered by any excessive speed, and that speed even more moderate than the usual rate of speed was the more prudent and safe course for the safety of such passengers. It was the duty of the appellant company to regulate the speed of its car in view of the fact that it had encouraged its patrons to overcrowd the aisles, platforms, and steps. The high degree of care which the law enjoined upon it for the safety of its passengers should have been the paramount consideration. The practical operation of the car did not require that a rapid rate of speed should be employed. Whether it was negligence on the part of the appellee, as a passenger, to stand on the steps or plat-

form of the car, was a question of fact for the decision of the jury (*North Chicago Street Railroad Co. v. Polkey*, supra), and not of law to be determined by the court. The cause was properly submitted to the jury.

It is complained that the court gave instructions Nos. 3a and 4. These instructions are as follows: "(3a) The court instructs the jury that the acts of negligence charged against the defendant in plaintiff's declaration are negligence in permitting its cars, on which the plaintiff rode, to be overcrowded, and negligence in running its car, on which the plaintiff rode, at an excessive rate of speed. (4) The court instructs the jury that if you believe, from the preponderance of the evidence in this case, that the plaintiff, Frank Oliver, on the 7th day of September, 1903, became a passenger on one of defendant's cars, and that, while he was a passenger of such car, he, while exercising due care for his own safety, was injured by the negligence of the defendant, as charged in plaintiff's declaration, or some count thereof, then in law the defendant is liable for such injury, and the jury should so find by their verdict." Counsel says that No. 4, standing by itself, was not objectionable, but that, considered in connection with No. 3a, it was seriously hurtful to the appellant company. Counsel insists that instruction 3a applies to both counts of the declaration, and does not state fully the essential elements of the negligence charged in either count; that the jury were likely to understand from instruction 4, considered in connection with instruction 3a, that proof that the car was overcrowded merely would sustain the issue made under the first count. Both counts of the declaration charged that the company was guilty of negligence in causing and permitting the car to be overcrowded. The first count charged that the motion of the car forced the other passengers against the appellee, and thus pushed him from the car. The second count charged like negligence in overcrowding the car, and that the motion of the car, the speed being rapid and dangerous, threw the appellee from the car. The overcrowding of the car and the motion or movement of the car were elements of negligence in both counts, and the manner in which the motion operated to throw the appellee from his place on the steps was stated differently in the two counts. The first count was based upon the theory that the appellant company induced and permitted the car, the platforms, and the steps thereof to be so crowded with passengers that the movement or motion of the car at an ordinary rate of speed was dangerous to passengers, and that therefore the appellant company failed in its duty towards its passengers by attempting to run the car, so overcrowded, in the same manner and with the same speed and motion as would have been employed had it contained no more passengers than it was intended to accommodate

and convey in safety. The second count charged the same negligence as to the overcrowding of the car, and alleged in addition that the company negligently propelled its car at even a greater than the ordinary rate of speed. Instruction No. 3a, therefore, though not carefully drawn, did not misdirect the jury as to the issues.

Instruction No. 8, asked by the appellant company and refused, would have advised the jury that, if they believed from the evidence that it was not proved that a crowd of persons on a car pushed and forced the appellee from the car, they should return a verdict of not guilty. This instruction, if given, would have ignored and denied recovery if the appellee was thrown from the steps of the car by the rapid and excessive rate of speed thereof, as charged in the second count of the declaration. There was, as we have seen, evidence tending to support the negligence charged in the second count, and instruction No. 8 was therefore properly refused. Other instructions given for the appellant advised the jury that they should not return a verdict for the appellee unless he had proved his case by a preponderance of the evidence.

The eleventh instruction asked by the appellant company and refused sought to have the court direct the jury that, if the car was crowded at the time the appellee entered the same to become a passenger, then the appellee could not recover. It may be doubted whether there was proof on which to base this instruction; but, aside from that, in view of the fact that the conductor invited persons to become passengers after the car had become crowded, the court could not say as a matter of law, as the instruction asked him to do, that there could be no recovery. It was a question of fact whether appellee would under such circumstances have been guilty of negligence in going upon the car.

The judgment should not be reversed because the court refused to give instruction No. 14 asked by the appellant company. Instructions Nos. 5 and 6, which were given in the same behalf, correctly advised the jury as to the matters properly intended to be given by instruction No. 14. In addition to that, instruction No. 14, if given, would have advised the jury (to quote therefrom) "that the mere fact that the car was overcrowded, if proven, is not proof of negligence on the part of the defendant," and it was so framed as to authorize a verdict for the appellant company without consideration of the allegation of negligence in moving the car at a rapid and dangerous rate of speed, and the proof in support of that charge of negligence.

The record is free from error reversible in character, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 40)

H. O. STONE & CO. v. MULVAINÉ.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EVIDENCE—PAROL—WRITTEN CONTRACT.

Parol evidence is admissible to explain ambiguous and incomplete provisions of a written contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1678, 2085.]

2. INDEMNITY—PAYMENT—ACTION TO RECOVER BACK.

Plaintiff, a real estate agent, on negotiating a loan, gave his check to the mortgagee to indemnify him against mechanics' liens, because of repairs to the building covered by the mortgage caused by a fire. The mortgagor had assigned to the plaintiff the insurance policies to protect him. Thereafter plaintiff failed to collect on such policies. *Held*, in an action to recover the amount of the check because of such failure, that, the transaction as to the policy being in no way connected with defendant, evidence thereof was inadmissible.

Appeal from Appellate Court, First District.

Action by H. O. Stone & Co. against Phineas I. Mulvaine. On the death of defendant, Carolina Mulvaine was substituted. Judgment for defendant was affirmed by the Appellate Court, and plaintiffs appeal. Affirmed.

This was an action of assumpsit, commenced by H. O. Stone & Co. against Phineas I. Mulvaine in the circuit court of Cook county, to recover the amount of a check for \$1,400.18, bearing date November 8, 1895. The declaration consisted of the common counts, and the general issue and notice of set-off were filed. Mulvaine died subsequent to the commencement of the suit, and his executrix was substituted in his stead as defendant. A jury was waived, and a trial was had before the court, which resulted in a finding and judgment in favor of the defendant, from which judgment the plaintiffs prosecuted an appeal to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court. Numerous propositions were submitted by the plaintiffs, which the court was asked to hold as the law governing the case, some of which were marked "Held" and others "Refused."

In the year 1893 the plaintiffs, who were loan brokers, received an application for a loan of \$20,000 from Mrs. Sobra upon property located on Michigan avenue, in the city of Chicago. They submitted the loan to Mulvaine, who accepted the same. Before the loan was made the premises were injured by fire, and he declined to make the loan, unless he was protected in some way from mechanics' liens incurred for repairs upon the premises. Thereupon the plaintiffs signed and delivered to him the following letter:

"May 15, 1893.

"Dr. Phineas I. Mulvaine, 4022 Grand Boul., City—Dear Sir: In relation to the liability of mechanics' liens upon the premises 2021 Michigan avenue in consequence of repairs now going on, we give you this letter to say that we will indemnify you against any losses arising out of such liens, if any are filed on account of the construction now going forward.

"Yours truly, H. O. Stone & Co."

Mrs. Sobra did not pay for the repairs or pay the loan. A bill was filed in the circuit court to enforce a mechanic's lien for the said repairs by Samuel Smith, and Mrs. Sobra, W. Koeppe (another lienholder), and Mulvaine were made defendants. Koeppe and Mulvaine filed cross-bills, and Smith's claim for \$295.74, Koeppe's for \$946.21, and Mulvaine's for \$23,604.56 were established, and the premises were ordered sold by the master to satisfy said indebtedness. The master advertised a sale for November 8, 1895. The morning of the sale Mulvaine and Mr. Conover, his attorney, called at the office of H. O. Stone & Co., where they met Mr. McKinney, the manager of H. O. Stone & Co.'s loan department. Conover testified that he said to McKinney, in substance, that the amount of the mechanics' liens upon the Sobra property had been established; that there was to be a master's sale of the property, and that Mulvaine thought the time had come when the matter should be settled; that if H. O. Stone & Co. would pay immediately the amount of the mechanics' liens, which, with costs, aggregated the sum of \$1,400.13, Mulvaine would bid the property in for the full amount of the decree, and, if the property was redeemed, he would repay the amount of the liens, etc., with interest, to H. O. Stone & Co.; and that, if they did not advance that amount, he would bid the property in for the amount of his mortgage and hold them for the amount of said liens, in which case, if the property was redeemed, they would not get their money back. McKinney, after conferring with his principals, said the property was valuable, that he thought it would be redeemed, and that H. O. Stone & Co. would do as suggested. McKinney went to the bank to obtain a certified check for the amount of the mechanics' liens, and Conover returned to his office and dictated the following paper:

"Chicago, Nov. 8, 1895.

"Received this day by the undersigned, Phineas I. Mulvaine, from H. O. Stone & Co., the sum of fourteen hundred and 13/100 dollars (\$1,400.13), the amount required to pay the mechanic's lien claims of Samuel Smith and William Koeppe, together with the costs incurred in the foreclosing thereof, in accordance with a certain decree entered October 5, 1895, by the circuit court of Cook county in the case of Samuel Smith v. Marie L. Sobra et al., Gen. No. 124,243. In consid-

eration whereof, the undersigned hereby agrees that, in case the premises involved in said suit shall be redeemed from the sale of the master in chancery made under said decree in accordance with the law, then the undersigned will repay to H. O. Stone & Co. said sum of money, together with interest thereon at the same rate to which he will be entitled under the certificate of sale in said suit."

—which was signed by Mulvaine. McKinney, Mulvaine, and Conover met at the real estate board, where the master's sale was to take place. McKinney had a certified check for the amount of the mechanics' liens with him, payable to the order of the master, which he delivered to Conover, and Conover delivered to him said paper. Mulvaine bid the property in for the amount of the decree, and delivered to the master the H. O. Stone & Co. check and his check for the balance of the bid, after deducting the amount of the decree in his favor. The master, upon his return to his office, discovered that the sale had only been advertised three weeks, when the decree provided it should be advertised four weeks. He notified the parties of that fact and that the sale was invalid, and he advertised the property for resale December 8, 1895, and returned to Mulvaine the amount of his check and the H. O. Stone & Co. check, which check had gone to his credit in his bank. McKinney, on learning the sale had fallen through, sent Mulvaine the following letters:

"11/13/95.

"Dr. P. I. Mulvaine, 4022 Grand Boul., City—Dear Sir: We understand the foreclosure in the Madame Sobra case has to be readvertised. We wish to have you return to us the amount which we paid to the master. We are informed by Mr. Dicker that the amount was turned over to you.

"Yours truly, H. O. Stone & Co
"Dictated by F. W. McKinney."

"11/15/95.

"Dr. P. I. Mulvaine, 4022 Grand Boul., City—Dear Sir: Please call and see the writer, and he will explain why we wish to have the funds which you received from the master in chancery returned to us and paid back to cancel the liens in another way. Please call and see the writer to-morrow morning, if possible, and arrange the matter.

"Yours truly, H. O. Stone & Co
"Dictated by F. W. McKinney."

Mulvaine did not reply, in writing, to either of said letters, but after the receipt of the second letter called in person at the office of H. O. Stone & Co. McKinney testified when Mulvaine called he had with him the following conversation: "I told Dr. Mulvaine we had been advised that the check should be drawn to the order of the master when the amount was determined, and which amount had been determined, and that I understood that it had not been so

applied, and that we wished the money returned to us, so that we could pay it in cancellation of the mechanic's lien claims enumerated in the bill. I stated to him that the check had been paid to the master for that purpose. That was brought out when I explained to him what I had written him in the second letter—that it was not for the need of the money. I had to make some apologies about asking him to return the money, that I did not distrust him, but wanted to give my personal attention to the application of the money. He said then he had received the money from Mr. Dicker. He said that it was not necessary, owing to the short length of time it would be required, and that he would protect our interests and see that it was properly applied—see that this fund was properly applied to protect our interests. That was about the ending of any conversation I had with the doctor about the money involved."

Mulvaine attended the second sale and bid the property in for the amount of the decree, \$25,632.62. No redemption was had from that sale, and the master after the expiration of 15 months made a deed to Mulvaine. At the time H. O. Stone & Co. gave to Mulvaine the letter agreeing to indemnify him from loss by reason of mechanics' liens. Mrs. Sobra assigned one of the insurance policies upon said property to H. O. Stone & Co. to secure them against loss by reason of their having signed the letter agreeing to protect Mulvaine from mechanics' liens, and when the policy was paid the money was placed in escrow in the First National Bank of Chicago. After the sale H. O. Stone & Co. requested the bank to pay to them the amount of said check and interest, and upon the objection of Mrs. Sobra they declined so to do and filed a bill of interpleader. The trial court in that proceeding held said mechanics' liens were satisfied by a sale of the property, and H. O. Stone & Co. were defeated, and the decree was affirmed by the Appellate Court.

Kremer & Greenfield, for appellants. John Schwender (Lawrence P. Conover, of counsel), for appellee.

HAND, J. (after stating the facts). It is first contended the circuit court erred in admitting parol proof of the arrangement between H. O. Stone & Co. and Mulvaine, whereby it was agreed that Mulvaine should bid at the master's sale the full amount of the decree, as it is said the effect thereof was to change the written contract signed by Mulvaine on November 8, 1895. We do not agree with such contention for two reasons: First, while the contract is incomplete, we think it shows upon its face, and without the aid of parol evidence, that Mulvaine was not to repay said sum of \$1,400.13 to H. O. Stone & Co. unless the premises were redeemed from a sale for the full amount of the decree. For Mulvaine to have agreed to

pay back the amount of said check, on redemption, unless he bid the full amount of the decree, would have been for him to have agreed to waive the guaranty of H. O. Stone & Co. which he held to protect him against said mechanics' liens. This he clearly did not intend to do, and, as such premises were not redeemed, Mulvaine was not, by the express terms of the agreement, bound to repay to H. O. Stone & Co. said sum of money. And, secondly, the effect of said evidence was not to change said contract, but to make clear the provisions thereof, which is always permissible where a contract is uncertain, ambiguous, or incomplete. *Ruff v. Jarrett*, 94 Ill. 475; *Bradshaw v. Combs*, 102 Ill. 428; *Razor v. Razor*, 142 Ill. 375, 31 N. E. 678; *Vail v. Northwestern Mutual Life Ins. Co.*, 192 Ill. 567, 61 N. E. 651; *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359.

It is said, however, that, conceding the contract expressly provides that Mulvaine agreed to repay to said H. O. Stone & Co. the amount of said check only in case of a redemption from a sale for the full amount of the decree, that part of the contract was changed at the time McKinney had the interview with Mulvaine after the first sale and when he was requested to return the amount of said check to H. O. Stone & Co. We do not so understand that conversation. Mulvaine insisted on retaining the money, and said he would protect the interest of H. O. Stone & Co. and see that the money was properly applied. We think he meant thereby that he would apply the money according to the arrangement made with McKinney at the office of H. O. Stone & Co. on the 8th of November, 1895, when he and Conover had the first interview with McKinney; that is, he would apply it by bidding in the property at the full amount of the decree. We are unable to understand why Mulvaine should agree to use this money in payment of said mechanics' liens prior to the sale of the property, and also agree to repay the amount of said liens to H. O. Stone & Co. in case the property should be redeemed, the effect of which would be that Mulvaine would pay said sum twice. At the time the contract was made and the check delivered McKinney anticipated the property would be redeemed, and that H. O. Stone & Co., when it was redeemed, would get back their money, and perhaps lost sight of the fact that a sale of the property for the full amount of the decree would satisfy the mechanics' liens. Mulvaine declined to give up the money after the first sale fell through, but insisted on applying the fund as it had been agreed it should be applied at the time the check was delivered, and he so applied it at the time of the second sale.

It is said the court erred in refusing to permit H. O. Stone & Co. to prove that they were unable to reimburse themselves for the money advanced to Mulvaine in satisfaction of said mechanics' liens out of the insurance money which was held in escrow by the bank

We think there was no error in the action of the court in declining to admit such proof. Mulvaine was in no way a party to that transaction, and was not responsible for the loss of the security of H. O. Stone & Co. Mulvaine purchased the property for the full amount of said decree, in accordance with his arrangement with McKinney. Had the property been redeemed, then he would have been bound to return to H. O. Stone & Co. the amount of said check, with interest, and that was the extent of his undertaking. The property was not redeemed, and he was in no way responsible to H. O. Stone & Co. by reason of the fact that the effect of the contract made by them with him, when carried out by the purchase of said premises for the full amount of the decree, was to release the claim of H. O. Stone & Co. upon the fund held by the bank.

Finding no reversible error in this record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 21)

CRANE v. STAFFORD et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INFANTS—IMPEACHMENT OF DECREES.

Equity may entertain a bill by an infant to impeach a decree for errors of law apparent on the face of the record, and will not require the infant to apply for rehearing, or to file a bill for review or sue out a writ of error.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 314.]

2. SAME—DECREE SUBJECT TO IMPEACHMENT.

A decree declaring lands not subject to partition and ordering a sale and division of the proceeds is a final decree, within the rule permitting infants to maintain a bill to impeach a decree for error apparent on the record, either during minority or within the period allowed after majority to sue out a writ of error.

3. EQUITY—PRACTICE—REVIEW OF ERRORS.

Alleged errors of law in a proceeding culminating in a decree cannot be revised on mere motion, entered after the close of the term at which the decree was rendered.

4. INFANTS—GUARDIAN AD LITEM—NOTICE OF PROCEEDINGS.

A guardian ad litem is entitled to notice as to the time of taking testimony before a master.

5. SAME—APPOINTMENT.

While a guardian ad litem should be appointed by a formal order, yet the absence of such order is not fatal to his appointment, where the fact of appointment appears by recitals or reference in the record.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Infants, § 219.]

6. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED PERSONS.

Complainant, in a proceeding against heirs for partition, is not a competent witness to establish the fact of her marriage to the deceased landowner.

7. EQUITY—PROCEEDINGS BEFORE MASTER—EVIDENCE.

Ex parte affidavits are not competent evidence in proceedings before a master in chancery.

8. PARTITION—PROCEEDINGS—APPOINTMENT OF COMMISSIONERS.

Under Hurd's Rev. St. 1903, c. 106, § 16, requiring the court, when it orders the partition of any premises, to appoint three commissioners to make such partition, the appointment of three commissioners is essential to a valid partition, whether the proceeding is under the statute or by bill in chancery.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Partition, §§ 200, 255.]

9. SAME—CURE OF ERRORS.

Under Hurd's Rev. St. 1903, c. 106, § 16, requiring the court, when it orders the partition of any premises, to appoint three commissioners to make such partition, the approval of a report signed by only two commissioners and by a third person, who is not appointed as a commissioner, does not, on direct attack, cure the error in failing to appoint the three commissioners required by the statute.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Partition, § 257.]

10. SAME—MATTERS IN ISSUE—CLAIMS AGAINST ESTATE.

In proceedings to partition the estate of a decedent, claims against his estate cannot be allowed and ordered paid out of the proceeds of sale.

Error to Circuit Court, Pike County; Harry Higbee, Judge.

Bill by Ross N. Crane, an infant, etc., against Nettie L. Stafford and others. There was a decree dismissing the bill, and plaintiff brings error. Reversed.

The plaintiff in error filed his bill in chancery in the circuit court of Pike county, the allegations whereof were in substance as follows: That one Eli R. Crane, a resident of Pike county, departed this life on the 10th day of August, 1890, leaving Mary N. Crane, his widow, and two minor sons, Charles Crane and Ross N. Crane (the plaintiff in error); that said Eli R. Crane died seised of the title to certain tracts of land in said Pike county, described in the bill; that the same descended to the same Charles Crane and said plaintiff in error, sons of said deceased, in equal parts, subject to the dower interest of the said widow; that said Charles Crane died in February, 1901, not having reached the age of 21 years, was unmarried, and left no child or descendants of a child, and that the interest of the said Charles in said lands of which his father died seised descended to plaintiff in error and his mother, Mary Crane, as the only legal heirs of said Charles; that on the 22d day of February, 1902, one Nettie L. Stafford filed a bill in chancery in the circuit court of Pike county for a decree making partition of said interest in said lands of which said Charles Crane died seised, to which bill she made said Mary N. Crane and the plaintiff in error parties defendant, and also made one Alonzo Leonard, as mortgagee, a party; that the said Nettie L. Stafford, in said bill for partition, alleged that on the 20th day of October, 1899, she was lawfully married to said Charles Crane, deceased, and that the said Charles Crane died seised of certain lands described in the bill, which came to him by inheritance as the

son of said Eli Crane; that said Charles Crane left no child or descendants of a child; that the said Nettie L. Crane, his widow, under the laws of inheritance of the state of Illinois became entitled, under the statute of descent, to an undivided one-half interest in the land which the said Charles Crane owned at the time of his death, and that the remaining interest in said lands was owned by the said Mary Crane and Ross N. Crane, the plaintiff in error, as tenants in common with said Nettie L. Stafford; that said Leonard had or claimed some interest in said lands as mortgagee, as to which, or the extent thereof, the complainant was not advised; that she was not advised whether said Ross N. Crane, the plaintiff in error, was an adult or a minor, and prayed that a guardian ad litem should be appointed for him if a minor, and that a decree should be entered allotting and partitioning to the said Nettie L. Stafford and the other said tenants in common in said lands their interests in severalty, and that the lands be sold and the proceeds divided, if partition could not be made without manifest injury, etc.; that such proceedings were had under her bill as that on the 30th day of April, 1903, a decree was entered ordering the sale of the lands in default of partition, in pursuance of the prayer of the bill, etc. The plaintiff in error in his bill further alleged: That said Charles Crane was never married to the said Nettie L. Stafford, and she did not, upon the death of said Charles Crane, succeed to any interest whatever in the lands belonging to the said Charles Crane, but that the plaintiff in error and his mother, Mary Crane, were the only heirs of said Charles Crane, and became by inheritance the owners of his land. That during the time of the pendency of the said partition suit the plaintiff in error was an infant and is still an infant, being under the age of 15 years. That manifest error, apparent upon the face of the record, intervened in the proceeding which resulted in the decree, in this: That, though there is in the record a formal answer signed by one Hugh Johnson as guardian ad litem for the plaintiff in error, there is no record of any appointment of any one as guardian ad litem for him in the cause; that it appears from the report of the master in chancery that the plaintiff in error was represented by the said Hugh Johnson as his guardian ad litem at the time of the taking of the evidence before said master, but that plaintiff in error, on information, states that said Hugh Johnson was not present at the taking of such evidence before the master, and that the plaintiff in error was not represented by any one before the master, when evidence was being taken; that said report of the master shows that said Nettie L. Stafford, the complainant in said cause, was sworn and testified in said cause, when the plaintiff in error is reliably informed that the said Nettie L. Stafford was not in Pittsfield, Pike county, Ill., at the date of said hearing,

April 28, 1903, and that at the time of this hearing said Nettie L. Stafford was in Fresno county, state of California; that she has never been personally present in said court or before the said master in chancery since the commencement of said suit, but that her ex parte affidavit was handed to the said master in chancery and incorporated by him as her evidence in his report; that the report made by the master in chancery aforesaid contains an ex parte affidavit subscribed to by one Mrs. C. E. Gray, also an ex parte affidavit sworn to by one A. M. Drew, and also an affidavit by one George Rodden; that said affidavits were not the depositions of any of the parties named, to wit, Nettie L. Stafford, Mrs. C. E. Gray, A. M. Drew, and George Rodden, and the said affidavits were taken without any notice whatever to plaintiff in error, and without any consent by him or by any one for him; that said affidavits were used for the purpose of proving the alleged marriage between the said Nettie L. Stafford and Charles Crane; that the said Charles Crane was not married to the said Nettie L. Stafford, and that the marriage is not proven by the said ex parte affidavits; that the said Nettie L. Stafford has resided in the state of California for many years; that she has not been in Illinois for more than 10 years previous to the commencement of this suit; that she was not with said Charles Crane at the time of his death, and that the said Charles Crane did not tell his mother or plaintiff in error of the said marriage, if any such existed; that said decree so entered on April 30, 1903, ordered that D. C. Graham and Harry White be appointed commissioners to make partition of said premises and assign dower therein; that the report of the commissioners that partition and assignment of dower could not be made is signed by the said two commissioners named in the decree and also by one A. C. Greathouse, who was not named in said decree; that it appears from the report of the master that evidence was heard in support of the claims of certain persons that said deceased, Charles Crane, was indebted to them, and the master found the deceased was indebted to said parties in the sum of \$62; and that the decree provided that said sum should be paid out of the proceeds of the sale of the land to A. G. Crawford as attorney for said claimants. The bill contained other matters, which are not necessary here to be mentioned, and prayed that the proceedings and decree in partition should be set aside, that the sale of the land be enjoined, etc. The court sustained a demurrer to the bill filed by the plaintiff in error, and decreed that it be dismissed at his cost, and he has sued out this writ of error to reverse that decree.

Edward Doocy, B. T. Bradburn, and Henry Bush, for plaintiff in error. Edward Yates, for defendants in error.

BOGGS, J. (after stating the facts). This is not a bill for review, nor a petition for rehearing, but is an original bill in equity in behalf of a minor defendant to the decree entered in the case of Nettie L. Stafford against the plaintiff in error and his mother, Mary Crane, and another, to impeach that decree for errors of law apparent on the face of the record. That courts of equity in this state will entertain such bills in behalf of infants without requiring them to apply for a rehearing, or to file a bill for review or sue out a writ of error, was declared in the early case of *Loyd v. Malone*, 23 Ill. 41, 76 Am. Dec. 179, and reiterated in many subsequent decisions, among others, *Gooch v. Green*, 102 Ill. 507, *Hess v. Voss*, 52 Ill. 472, *Lloyd v. Kirkwood*, 112 Ill. 329, *Haines v. Hewitt*, 129 Ill. 347, 21 N. E. 930, *Coffin v. Argo*, 134 Ill. 276, 24 N. E. 1068, and *Clark v. Shawen*, 190 Ill. 47, 60 N. E. 116. Such a bill may be filed at any time during minority, or within the period allowed after majority for the prosecution of a writ of error. *Haines v. Hewitt*, supra. The same relief could not, as counsel for defendants in error suggests, be obtained by motion. The decree that partition of the lands could not be made, and ordering that the master should make sale of the lands and distribute the proceeds, was a final, appealable decree in the case. *Rhodes v. Rhodes*, 172 Ill. 187, 50 N. E. 170. It was entered April 30, 1903; and, though the cause was continued until the next term of this court, it remained on the docket only for orders relative to the execution of the decree. As to matters sought to be remedied by this bill, the decree that partition could not be made, and ordering that the lands should be sold, became a final decree at the expiration of the term of court at which it was rendered. *Jackson v. Jackson*, 144 Ill. 274, 33 N. E. 51, 36 Am. St. Rep. 427. The bill was filed in vacation, following the term at which the decree was rendered. Alleged errors of law in a proceeding culminating in a decree cannot be examined and revised on mere motion entered after the close of the term at which the decree was entered. *Jacquemart v. Erb*, 53 Ill. 291; *Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, 65 N. E. 636. We think the bill should not have been held obnoxious to the demurrer.

It was necessary that in the proceeding sought to be impeached the court should have appointed some proper person to represent the plaintiff in error as his guardian ad litem. This is usually, and more properly, done by a formal order. Still the omission of a formal order might not constitute fatal error. That a guardian ad litem was appointed may appear by recitals, or by reference in other portions of the record. *Tibbs v. Allen*, 27 Ill. 119. It is the duty of a guardian ad litem to be present when testimony is taken before a master in support of the cause of the adverse party, and he is entitled to notice that such evidence is

to be taken. *Turner v. Jenkins*, 79 Ill. 228. The bill under consideration alleged, on information of the plaintiff in error, that no one was present representing him as his guardian ad litem. The report of the master, as is conceded by the bill, recites that Hugh Thompson was present at the taking of testimony in the capacity of guardian ad litem for the plaintiff in error.

The bill alleges that the master in chancery received and considered as competent testimony against the plaintiff in error an ex parte affidavit made by said Nettie L. Stafford, and also like affidavits of three other persons appear in the master's report of the proof taken; that such ex parte affidavits were taken without notice or with the consent of the plaintiff in error or of any one acting for him; and that such affidavits were used before the master for the purpose of proving that the marriage relation had existed between the said Nettie L. Stafford and said Charles Crane. It is needless to remark that affidavits of this character were not competent to be received in evidence or considered by the master. Nettie L. Stafford was endeavoring to establish that she had become the wife of Charles Crane, in order that she might be deemed one of his heirs. The plaintiff in error, who was conceded to be an heir of said Charles, was defending in that capacity, and the alleged heirship of Nettie L. was in issue. She was not competent to testify to any facts tending to establish that the marriage relation existed between herself and the said Charles Crane. *Laurence v. Laurence*, 164 Ill. 367, 45 N. E. 1071. Clearly the decree should not be permitted to stand, if based on the testimony of an incompetent witness and on the mere ex parte affidavits of other witnesses.

It is apparent on the face of the record, as disclosed by this bill, that the court, in appointing but two commissioners to make partition of the lands, failed to comply with the plain requirement of section 16 of chapter 106 of Hurd's Revised Statutes of 1903, that the court, when it orders the partition of any premises made under the provisions of the act, shall appoint three commissioners to make such partition. This requirement as to the appointment of commissioners is essential, whether the proceeding for partition is under the statute or by bill in chancery. *Coffin v. Argo*, supra. The bill avers that one A. C. Greathouse acted as a member of the commission, and that the report was signed by the two commissioners named in the decree and by Greathouse. This report was approved by the court. In *Sullivan v. Sullivan*, 42 Ill. 315, it appeared that the oath of the commissioners, and their report, bore date three days previous to the decree by which they were appointed, and we said that the basis of authority of commissioners is their appointment by decree of the court, and that it is only after appointment and after they have taken the oath re-

quired by the statute that authority is possessed to act as commissioners, and held that, whether the approval by the court of the report made by the commissioners prior to their appointment constituted grounds of collateral attack (which we did not decide), it was clear that such action of the court would be regarded as error in a direct proceeding for a reversal of the decree. The plaintiff in error, because of his infancy, may by the bill here under consideration avail himself of any error apparent on the face of the record sought to be impeached which could be availed of on writ of error.

The allegations of the bill also disclosed another error apparent on the face of the record. The bill alleged that the master reported that the deceased, Charles Crane, was indebted on open account to certain named persons in the total sum of \$62, and that an order was incorporated in the decree that said sum should be paid out of the proceeds of the sale of the land to A. G. Crawford, the attorney for said alleged creditors of the deceased, in satisfaction of their claims. Such claims are properly cognizable in a court of probate having jurisdiction of the matter of the administration of the estate of the deceased; but it was erroneous to allow them to be presented before the master in chancery, and to decree that they be paid by that official out of the proceeds of the sale of the land.

The bill is inartificially drawn, and some of the allegations of fact are mingled with what is merely argument; but the demurrer, though purporting to be both general and special, makes no specific complaint other than as to alleged defects of the bill in matters of substance. The bill, taken, as it is, to be true as to all pertinent allegations, discloses errors apparent on the face of the record, and our procedure in equity permits the plaintiff in error, because of his disability of infancy, to impeach the record by bill in equity, if such errors are found to exist on inspection of the record.

The decree must therefore be, and is, reversed, and the cause will be remanded for further proceedings consistent with the views here expressed.

Reversed and remanded.

(217 Ill. 61)

GRAND PACIFIC HOTEL CO. v. PINKERTON et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—PRESERVATION OF ERRORS—PROPOSITIONS OF LAW.

Where there is a trial before the court without a jury, the parties should present propositions of law to the trial court, as provided for in section 42 of the practice act (Hurd's Rev. St. 1903, p. 1405), in order to present a question of law for the Supreme Court.

2. SAME—EXCEPTION TO FINAL JUDGMENT—NECESSITY.

While a ruling upon the admission or exclusion of evidence preserved by bill of excep-

tions need not be further preserved by an exception to the final judgment of the court, yet such an exception is necessary in order to present the questions whether the evidence in a suit tried by the court without a jury supports the judgment and whether proper rules of law were applied by the court.

3. SAME—BILL OF EXCEPTIONS—MATTERS TO BE SHOWN.

The making of a motion for a new trial and the taking of exceptions to the overruling of such motion and to the final judgment are matters which must be preserved for review by bill of exceptions, and a mere recital of the same by the clerk in the record is insufficient.

4. SAME—HARMLESS ERROR—ENTRY OF JUDGMENT.

Where plaintiff's counsel stated in court that the suit was dismissed as to a certain defendant, and thereafter the suit was tried by both parties as if it were pending solely against the other defendant, error in entering judgment against the latter defendant only, without entering a formal dismissal as to the former defendant, is harmless.

5. SAME—ADMISSION OF EVIDENCE.

A judgment in an action tried by the court without a jury will not be reversed because of the admission of incompetent evidence, where there is sufficient competent evidence to sustain the court's finding.

6. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—EVIDENCE.

Evidence that a party had been manager of a hotel, and was then employed as assistant manager without any apparent restriction of authority, and at the time in question was in the private office of the hotel, giving orders to clerks, drawing checks, etc., shows apparent authority in such party to make a contract for services connected with the hotel.

7. TRIAL—TRIAL BY COURT—PROPOSITIONS OF LAW.

The submission of propositions of fact is not contemplated by section 42 of the practice act (Hurd's Rev. St. 1903, p. 1405), authorizing submission of propositions of law in cases tried by the court without a jury.

8. JUDGMENTS—ARREST—MATTERS IN RECORD.

A motion in arrest of judgment should be based upon matters appearing on the face of the record itself, and not upon extrinsic matters.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 467.]

9. DISMISSAL AND NONSUIT—REINSTATEMENT OF CASE—WAIVER OF EXCEPTIONS.

Where an order dismissing the case is set aside and the case is reinstated, defendant, by appearing and taking part in all subsequent proceedings to final judgment on the merits, waives his right to except to the order of reinstatement.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dismissal and Nonsuit, § 191.]

Appeal from Appellate Court, First District.

Action by William A. Pinkerton and Robert A. Pinkerton, doing business as Pinkerton National Detective Agency, against the Grand Pacific Hotel Company and another. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant hotel company appeals. Affirmed.

This is an action in assumpsit, brought on May 24, 1899, by William A. Pinkerton, and Robert A. Pinkerton, partners doing business as Pinkerton National Detective Agency, against the Grand Pacific Hotel Company and Albert E. Glennie, to recover for services

performed by the plaintiffs as detectives. The declaration consisted of the common counts only. A plea of non-assumpsit was filed by the Grand Pacific Hotel Company on July 5, 1899, with an affidavit of merits by H. F. Rohde, secretary of the Grand Pacific Hotel Company, and a plea of nonassumpsit was filed on the same day by Albert E. Glennie, together with an affidavit of merits, made by said Glennie. A jury was waived, and the cause was tried by agreement before one of the judges of the superior court of Cook county without a jury. Final judgment was rendered by the superior court of Cook county in favor of the appellees, plaintiffs below, and against the appellant company, for the sum of \$1,109.70 as damages, together with the costs and charges. An appeal was taken to the Appellate Court, and the Appellate Court has affirmed the judgment of the superior court, from which judgment of affirmance the present appeal is prosecuted.

It seems that articles in the Grand Pacific Hotel were discovered to be missing from time to time, and it was suspected by some of the parties in the hotel, or in charge of the hotel, that thieves were at work in the hotel. Accordingly the services of the appellees were solicited for the purpose of discovering, if possible, what parties were guilty of the suspected thefts. A contract or arrangement was made by a representative of the appellees at the Grand Pacific Hotel with Glennie on January 31, 1899, for the doing of the work in question by the appellees. The services were performed by the appellees, under the arrangement so made, between January and April, 1899.

The cause was reached for trial on the calendar of Judge Kavanagh, one of the judges of the superior court, on May 21, 1901, and, a jury having been waived by agreement, the cause was submitted to the court, evidence was heard, arguments were made, and the cause was taken under advisement. While the case was thus held under advisement by Judge Kavanagh, and before its decision, it was by some accident placed upon the calendar of Judge Stein, another one of the judges of the superior court of Cook county, and having been called for trial by him on October 4, 1902, was dismissed at plaintiffs' costs for want of prosecution, and judgment entered in favor of the defendants for costs. On November 29, 1902, after the appellees discovered that the cause had been dismissed, they made a motion to amend the record and set aside and vacate the order of dismissal and judgment for costs, which had been entered on October 4, 1902, and this motion was continued until the December term, 1902, of said court. It appears that no entry was made by the clerk showing that the cause was submitted by agreement to the court for trial and that it was taken under advisement by the court. The object of amending the record was to show the facts in this regard. Accordingly, on December 11, 1902, upon the motion of appellees, the rec-

ord was amended to show the proceedings before Judge Kavanagh on May 21, 1901, as above stated, and thereupon appellees entered their motion to set aside and vacate the order of dismissal and judgment for costs, entered on October 4, 1902, which motion was continued to the January term, 1903, of said court. The order of December 11, 1902, amending the record, recites that on December 10, 1902, the cause came on to be heard upon motion, all parties being present and duly notified, and it was moved that the record be amended, so as to show the amended record of the proceedings theretofore had, "which were omitted from said record through error and mispraisal," and that there were exhibited to the court certain memoranda and notes of testimony taken in shorthand and afterwards transcribed, and that it appeared to the court that on May 21, 1901, said cause was reached for trial before Judge Kavanagh, a jury waived, and cause submitted by agreement to the court, and evidence heard and arguments made, and the cause taken under advisement, and that thereafter, at the same term, briefs and authorities were submitted to the court and a certain written account of the evidence in the case, and that the transcribed shorthand notes of the evidence, being the verbatim testimony of each witness, and the memoranda submitted by the respective parties to the judge for his consideration, were used by him in the consideration of the case, and that the court inspected said evidence and the proofs so submitted, and thereupon it was ordered and adjudged, in said order so entered on December 11, 1902, that the record was thereby amended and corrected to show the corrected proceedings above set forth, and that said motion be sustained, and that the said order amending the proceedings be entered as of May 21, 1901, so as to show that a jury was waived by the express agreement of the parties and that the cause was fully tried and submitted as in said memoranda and this order described, and that the other proceedings, as shown by said memoranda, exhibits, and shorthand notes of testimony, be spread upon the records of the court, and be extended as of May 21, 1901. Subsequently, on June 20, 1903, the following order was entered: "On motion of plaintiff's attorney it is ordered that the order of dismissal and judgment for costs, entered herein of record on the 4th day of October, A. D. 1902, be, and is hereby, set aside and vacated, and said cause reinstated and replaced upon the several dockets of this court."

On June 22, 1903, the appellant, the Grand Pacific Hotel Company, by leave of court filed a written motion to strike the testimony of the appellees from the case and find the issues for defendant, upon the grounds that appellees had produced no testimony pertinent or competent to maintain said cause of action, and that all of the testimony offered by them was incompetent and immaterial,

and did not tend to prove their cause of action; that the only testimony offered by them consisted of the testimony of alleged agents of appellant, and that they did not produce any competent evidence to prove that Albert E. Glennie was the manager, agent, or employé of the hotel company, with authority to make any contract with appellees on its behalf; and that no evidence was offered sufficient to sustain any finding against the hotel company. On July 3, 1903, an order was entered by the court overruling said motion to strike the testimony of appellees from the case. On July 25, 1903, a judgment was entered in favor of appellees against both defendants, the Grand Pacific Hotel Company and Albert E. Glennie, for \$1,109.70 and costs, reciting that on the agreement of the parties "now here made in open court this cause is submitted to the court for trial without a jury, and the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff," etc., to which the defendants excepted and entered their motion for a new trial, which motion was overruled and a new trial was denied; and the judgment also shows upon its face that the defendants entered their exceptions, and prayed an appeal to the Appellate Court, which was allowed upon their filing their appeal bond in the sum of \$2,000 within 60 days from July 25, 1903, and their bill of exceptions within 60 days from said date. On August 1, 1903, the appellant, the Grand Pacific Hotel Company, entered its motion to set aside and vacate the judgment of July 25, 1903, which motion was continued for hearing until the August term, 1903, of said court. On September 22, 1903, it was ordered that the time for filing a bill of exceptions be extended 10 days.

On September 26, 1903, a second judgment was entered in favor of appellees against the Grand Pacific Hotel Company for \$1,109.70 and costs, to which the appellant company excepted and prayed an appeal to the Appellate Court, which was allowed upon its filing an appeal bond in the sum of \$2,000 and its bill of exceptions within 10 days from September 26, 1903. The judgment of September 26, 1903, recited as follows: "On the agreement of the parties to this suit now here made in open court, it is ordered that the order of judgment, heretofore entered herein on July 25, A. D. 1903, for the sum of \$1,109.70, and the appeal order of the same date, be, and is hereby, set aside and vacated and said cause reinstated, and on like agreement of the parties hereto this cause is submitted to the court for trial without a jury to try the issues as to the defendant Grand Pacific Hotel Company only. And the court now here, after hearing all the evidence adduced, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiffs and assesses the plaintiffs' damages," etc., at the sum

above named. The judgment shows upon its face that appellant, the hotel company, entered a motion for a new trial, which was overruled, and new trial denied, and exception taken, and that said hotel company entered its motion in arrest of judgment, which motion was also overruled and denied, and to which the hotel company, the appellant here, excepted. On September 30, 1903, the appellant, the Grand Pacific Hotel Company, tendered its bill of exceptions bearing date September 30, 1903, which was signed and sealed by Judge Marcus Kavanagh. This bill of exceptions shows that the cause came on for hearing on May 21, 1901, before said judge "without a jury, a jury being expressly waived," and, after setting forth the testimony of the witnesses in favor of the plaintiffs and the defendant, the Grand Pacific Hotel Company, also sets forth that on September 26, 1903, the appellant filed a motion to set aside the finding and to arrest the judgment for certain reasons accompanying the motion, which motion, as therein shown, was overruled, and exception was taken thereto. The bill of exceptions also shows that on October 4, 1902, an order was entered by Judge Stein dismissing the cause for want of prosecution, but does not show that any exception was taken to said order. The bill of exceptions also recites the motion of November 29, 1902, as above set forth, and the order of December 11, 1902, and that said motion and order were objected to, and that the court overruled the objections, and that the defendant excepted thereto. The bill of exceptions also sets up the order of June 20, 1903, as above set forth, and that the defendant objected to the same, and that the court overruled the objection, and that defendant excepted. It also sets forth the motion of the appellant, made on the 22d day of June, 1903, as above set forth, and the overruling of the same, and the exceptions of the hotel company thereto. The bill of exceptions also sets forth that on September 26, 1903, counsel for the hotel company asked the court to certify the following special findings, to wit, that the hotel company was a corporation for pecuniary profit under the laws of Illinois; that on and prior to May 17, 1898, Frederick Sontag was president of the the appellant company; that at a meeting on that day section 5 of article 6 of the by-laws of said corporation was repealed; that on or before May 17, 1898, Frederick Sontag was president of appellant company, and by virtue of said amendment to the by-laws became on May 17, 1898, the sole manager of the business and affairs of the hotel company and continued thereafter to be; that after May 17, 1898, Glennie was employed in and about the hotel, but had no authority as such employé under the by-laws to sign checks or make contracts; that appellees were notified in September, 1898, that Glennie had ceased to be manager of the said business; that neither Sontag, the president, nor any of the

officers of the hotel, had any knowledge of the employment by Glennie of the Pinkerton detectives on January 21, 1898, until after the bill for their services was sent to the hotel, and until after Glennie had paid thereon \$350; and that, when said claim was presented to the hotel company, it was repudiated and payment refused. The court refused to make said special findings requested by the defendant, or to make any findings after the trial and after the finding by the court, to which refusal of the court the defendant then and there excepted. On October 1, 1903, an appeal bond was filed by the hotel company and a surety, dated September 29, 1903, in the sum of \$2,000, reciting the judgment of September 26, 1903, and an appeal therefrom.

On January 25, 1904, more than three months after the appeal bond was filed, a third judgment was entered in the case in favor of the appellees and against the appellant company for \$1,109.70, and costs as before, which judgment shows upon its face that the hotel company excepted thereto and prayed an appeal to the Appellate Court, which was allowed upon its filing a bond in the sum of \$2,000 and its bill of exceptions within 10 days from January 25, 1904. The judgment of the latter date recites that the cause came on to be heard on motion of the hotel company to set aside the order entered on September 26, 1903, and enter in lieu thereof a corrected and amended order in form and substance as the same should have been entered on September 26, 1903, and that the court, having examined, inspected, and considered the bill of exceptions approved and signed on September 30, 1903, and having heard the arguments of counsel, and being fully advised, found that the order entered by the clerk on September 26, 1903, was incorrect, and was not in fact the order directed by the court to be entered by the clerk on said last-named date, and that the court, being so informed and advised "from inspection and consideration of said minute of said clerk and of the said bill of exceptions, orders that the said order entered on said 26th day of September, A. D. 1903, be, and the same is hereby, set aside and vacated; and thereupon, and in consideration of the premises, and for the purpose of having a just and correct record of the proceedings and order of this court had on said 26th day of September, A. D. 1903, appear upon the records thereof, the court now directs the clerk to enter in said cause the following order," and then follows an order or judgment for the sum above named, which recites that by agreement of the parties to the suit then and there made in open court it was ordered that the order of judgment entered on July 25, 1903, for \$1,109.70, and the appeal order of the same date should be set aside and vacated, and that "thereupon the court, upon consideration of the trial and hearing and stipulation theretofore had, found the issues for

the plaintiff and against the Grand Pacific Hotel Company, and against the objection of the defendant and its exception thereto, and assessed the plaintiff's damages at \$1,109.70, to which said defendant, the hotel company, excepted, and thereupon the defendant the Grand Pacific Hotel Company moved to set aside the finding and for a new trial, which motion was overruled and a new trial denied," to which, as shown by the face of the judgment, the hotel company excepted and entered its motion in arrest of judgment, which was also overruled and denied, and exception thereto taken by the hotel company; and it was also further ordered that the corrected and amended order, so directed to be entered, should be so entered nunc pro tunc as of September 26, 1903, to which, as shown upon the face of the judgment, the appellees excepted, and were given 10 days within which to file their bill of exceptions. And thereupon, on January 26, 1904, a bill of exceptions, signed and sealed by Judge Kavanagh, was filed, wherein it is recited that on January 25, 1904, the cause came on to be heard upon motion of the hotel company to amend the record and vacate the judgment order of September 26, 1903, and enter in lieu thereof an order nunc pro tunc as of the latter date, and that the appellees in open court appeared and specially objected to the motion of the hotel company on the ground the court was without jurisdiction to entertain the same, which objection was overruled, and the court proceeded to entertain said motion, to which the appellees then and there excepted, and that thereupon the hotel company to sustain the motion presented to the court for inspection the bill of exceptions theretofore signed as above set forth, and a certain page of the minutes of the minute clerk of Judge Kavanagh, dated Saturday, September 26, 1903, to the inspection and consideration of which bill of exceptions and page of the minute book by the court the appellees objected; but the court overruled the objection and inspected the same, to which appellees duly excepted. Said page of the minute book was as follows:

"Saturday, Sep. 26, 1903.

190138 8340 Pinkerton G. P. H. Co.
by agt ord of July and appl entd July 25,
1903, vac ct to try the iss as to deft G. P. H.
Co. only findg iss Plff and das \$1109.70 & Ex.
by said def. Mo. N. T. Df Overlft & ex. mo. in
arrt of judg overlft & ex. & judg \$1109.70 on
findg & ex appl Bd \$2000 & B. of X 10 dya."

Said last-named bill of exceptions shows that the foregoing was all the evidence introduced upon said motion of January 25, 1904, and that the appellees objected to the granting of the motion, and to the entry of the order on said last named date, but the court overruled the objection and entered the order nunc pro tunc as of September 26, 1903.

Francis A. Riddle, for appellant. Jacob J. Kern, John A. Brown, and D. W. Munn (Lloyd Charles Whitman, of counsel), for appellees.

MAGRUDER, J. (after stating the facts). This is an action of assumpsit, brought originally by the appellees against the appellant, the Grand Pacific Hotel Company, and one Albert E. Glennie, to recover for services rendered by appellees to the appellant. There does not seem to be any difference, or at least any contention, between the parties as to the amount of the judgment. The main contention on the part of the appellant is that the appellees were employed by Albert E. Glennie, and not by the Grand Pacific Hotel Company, and that the contract or arrangement made with them on January 31, 1899, was made by Glennie in his own behalf as an individual, and not by the hotel company. The appellees, however, contend that Glennie was the manager of the hotel, and in making the contract represented the appellant company, and that the latter is liable to them for the amount of their claim. The question of fact in the case is whether or not, when the contract was made, Glennie was the manager of the company and made the contract for the company, or whether he made it for himself individually. This question of fact was stoutly contested, and the evidence is conflicting in reference to it. The cause in the court below was tried before the court without a jury; trial by jury having been waived by agreement of parties. The trial court found in favor of appellees upon this question of fact, and rendered judgment against the appellant. The Appellate Court has affirmed the judgment of the trial court. No propositions of law seem to have been submitted to the court by either party. We have held that, where there is a trial before the court without a jury, in order to present a question of law to this court, the parties should present propositions of law to the trial court, as provided for in section 42 of the practice act (Hurd's Rev. St. 1903, p. 1405), and we have said: "We cannot consider any of the questions of fact, because they are all settled by the judgment of the Appellate Court. We cannot consider the questions of law suggested by counsel, because the trial in this case took place before the court without a jury, and no written propositions to be held as law in the decision of the case were submitted to the trial judge in accordance with section 42 of the practice act." *Northern Benevolent & Mutual Aid Ass'n v. Hall*, 118 Ill. 169, 8 N. E. 764; *First Nat. Bank of Michigan City v. Haskell*, 124 Ill. 587, 17 N. E. 59; *Keating v. Springer*, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175; *Dwelling House Ins. Co. v. Butterly*, 133 Ill. 534, 24 N. E. 873.

First, The bill of exceptions in the case at bar contains no exception to the final judgment of the court, and there were no propositions of law submitted; "so that we cannot review the question whether the judgment is supported by the evidence or whether proper rules of law were applied by the court."

Cincinnati, Indianapolis & Western Railway Co. v. People, 205 Ill. 538, 69 N. E. 40. But while this is so, yet if the bill of exceptions shows that the appellant excepted to the ruling of the court in admitting the testimony of witnesses, such a ruling is properly preserved for review, when presented by a bill of exceptions. *Cincinnati, Indianapolis & Western Railway Co. v. People*, supra. Here the representative of appellees, who made the contract with Glennie on January 31, 1899, states that Glennie told him that he was the manager of the hotel. Other witnesses testified that, when they went to the hotel, Glennie told them that he was the manager of the hotel. This testimony was objected to by the appellant, and, the objection being overruled, exception was taken to the ruling of the court. It is true, as a general proposition, that "an agency cannot be proven by the mere statement of the alleged agent." *Rawson v. Curtiss*, 19 Ill. 458; *Maxey v. Heckethorn*, 44 Ill. 437; *Whiteside v. Margarel*, 51 Ill. 507. But we regard it as immaterial in the present case whether or not this class of testimony was competent or was properly admitted, for the reason that there was other evidence tending to show that Glennie had authority to represent the appellant company. We have held that, where a cause is tried before the court without a jury and there is enough other testimony of unquestioned competency sufficient to sustain the finding of the court, it will not be disturbed, notwithstanding the fact that incompetent evidence has been received, because the same harmful and erroneous effect does not follow as when the admission of such evidence is before a jury. *Schroeder v. Harvey*, 75 Ill. 638; *Pardridge v. Ryan*, 134 Ill. 247, 25 N. E. 627; *Palmer v. Meriden Britannia Co.*, 188 Ill. 508, 59 N. E. 247; *Iroquois Furnace Co. v. Elphicke*, 200 Ill. 411, 65 N. E. 784. Here it appeared from the evidence that Glennie had been manager of the hotel up to a late period in 1898, and although, after May, 1898, the by-laws of the hotel company were so changed as to make the president the manager, yet after their change Glennie was still retained in the hotel as a sort of assistant manager under the president. The proof tends to show that prior to January 31, 1899, when the present contract was made, there had been transactions between the appellees and Glennie as manager of the hotel. When the contract was made, he was in the hotel giving orders, drawing checks, and acting as one having authority to represent the hotel. He sat at the desk in the private office of the hotel. He drew checks, he gave orders to the employés of the hotel, and in every way appeared to one having business with the hotel company as being authorized to act for the latter. He called clerks employed in the hotel into its private office and gave them orders. It appears from the testimony introduced by the appellant itself that the

president of the hotel company engaged Glennie to render it services at the hotel, and to assist the president in his management, and to exercise superintendence, and that his position continued to the end of 1899. These and other circumstances which might be mentioned show that there was other testimony, independently of the statement of witnesses who heard Glennie say that he was manager, tending to establish the conclusion that he had the authority to contract with the appellees in reference to the matter here in controversy.

It is true that the hotel company moved the court to strike the testimony of the appellees from the files and to find the issues for the defendant for certain reasons which bear upon questions of fact only, as is shown in the statement preceding this opinion. Where the appellant submits to the trial court, to be marked as "Held" or "Refused," a proposition that the finding should be for the defendant, such submission is in the nature of a demurrer to the evidence, and preserves for the court of review the question of law whether the evidence tends to show a right to recover. *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 289, 43 Am. St. Rep. 247; *Smith v. Billings*, 169 Ill. 294, 48 N. E. 683; *Hogan v. Stophlet*, 179 Ill. 150, 53 N. E. 604, 44 L. R. A. 809. We are of the opinion that the evidence does tend to show a right to recover on the part of the appellees, and therefore there was no error committed by the trial court in overruling the motion to strike the testimony of the appellees from the case and find the issues for the appellant. It is true, also, that the appellant asked the court to make certain special findings of fact, which are set forth in the statement preceding this opinion, and that the court refused to make such findings. There was no error in this action of the court. We have held that the practice act, which authorizes, in cases tried without a jury, propositions of law to be submitted to be held or refused, does not provide that propositions of fact may be so submitted, and that such propositions of fact should be refused by the court. *Field v. Crawford*, 146 Ill. 136, 34 N. E. 481. In *First Nat. Bank v. Northwestern Nat. Bank*, supra, we said (page 301 of 152 Ill., page 739 of 38 N. E. [26 L. R. A. 289, 43 Am. St. Rep. 247]): "The statute does not contemplate that, under the cloak of written propositions of law, a party litigant shall have the right to call upon the court to find in his or its favor, seriatim, all the special or particular facts involved in the evidence; and, dehors the statute, it is not a common-law function of a judge, in a common-law action, to make special findings of fact." See, also, *Smith v. Billings*, 169 Ill. 294, 48 N. E. 683; *Order of Foresters v. Schweitzer*, 171 Ill. 325, 49 N. E. 506.

Second. The record in the present case shows that no exception was taken to the finding or judgment of the trial court and

preserved by a bill of exceptions. It is true that, in entering up the judgment, the clerk puts a recital in the body of the judgment that the finding and judgment of the court and the overruling of a motion for new trial were excepted to. But such recital, inserted by the clerk in the record immediately following the judgment, to the effect that such exception was taken, cannot be regarded as a part of the record. Where such an exception is taken, it can only be made a part of the record by embodying it in the bill of exceptions, and here it is not embodied in the bill of exceptions. We have held in a number of cases that we cannot consider assignments of error which question the finding and judgment of the lower court in cases tried without a jury, as authorized by section 60 of the practice act (*Hurd's Rev. St. 1903*, p. 1408), unless exceptions thereto have been duly taken and preserved by a bill of exceptions, and that a recital to that effect by the clerk in the record is not sufficient. *Martin v. Foulke*, 114 Ill. 206, 29 N. E. 683; *Gould v. Howe*, 127 Ill. 251, 19 N. E. 714; *East St. Louis Street Railroad Co. v. Cauley*, 148 Ill. 490, 36 N. E. 106; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493, 18 N. E. 752; *Bailey v. Smith*, 168 Ill. 84, 48 N. E. 75. In the case at bar the finding and judgment are not mentioned in the bill of exceptions. It follows that there is no question of law or fact before this court for review under appellant's assignment of errors, except so far as is hereinafter stated. Where the bill of exceptions in a case fails to show that any motion was made for a new trial, and that an exception was taken to the action of the court in overruling the motion, no reversal of the judgment can be had. It is not sufficient that the transcript of the record, as made up by the clerk, shows that such motion was made and overruled, and that an exception was taken. *James v. Dexter*, 113 Ill. 654; *Sands v. Kagey*, 150 Ill. 109, 36 N. E. 956; *Bailey v. Smith*, 168 Ill. 84, 48 N. E. 75; *Union Ins. Co. v. Crosby*, 172 Ill. 337, 50 N. E. 200.

It is, however, claimed on the part of the appellant that here the suit was against two defendants, to wit, the Grand Pacific Hotel Company and Albert E. Glennie, and that the judgment below was against the Grand Pacific Hotel Company, the present appellant, alone, and that the suit was not dismissed as to Albert E. Glennie. Hence it is claimed that the judgment is erroneous, inasmuch as it should have been against both defendants or none, whether the liability was joint, or joint and several. It is undoubtedly the general rule that, where two defendants are sued jointly and served with process, it is error to render final judgment against one of them without disposing of the case as to the other. *Russell v. Hogan*, 1 Scam. 552; *Dow v. Rattle*, 12 Ill. 373; *Briggs v. Adams*, 81 Ill. 486; *Barbour v. White*, 37 Ill. 164; *Felsenthal v. Durand*, 86 Ill. 230; *Potter v. Grombeck*, 117 Ill. 404, 7 N. E. 586. In *Felsenthal v. Du-*

rand, *supra*, it was held that "in actions on contracts against several, where all are served with process, the judgment must be against all or none, unless some of the defendants make a personal defense, as, infancy, lunacy, bankruptcy, and the like." The judgment in this case is said to be erroneous because, as is claimed by the appellant, there was no dismissal of the suit as to Glennie, and judgment was rendered, without disposing of the suit as to Glennie, against the Grand Pacific Hotel Company alone. It is furthermore contended that the rule that an exception to the finding and judgment must be preserved by a bill of exceptions has no application in the present case upon the ground that the defect in the judgment, as above indicated, appears upon the face of the record. The rule undoubtedly is that, where there are errors of law which appear on the face of the record as properly made up by the clerk, it is unnecessary that an exception to the finding and judgment of the court should be preserved in the bill of exceptions. Where error appears upon the face of the judgment itself, no exception to the judgment is necessary to be preserved by a bill of exceptions. *People v. Chicago & Northwestern Railway Co.*, 200 Ill. 289, 65 N. E. 675; *McCheaney v. City of Chicago*, 151 Ill. 307, 37 N. E. 872; *Jones v. Village of Milford*, 208 Ill. 621, 70 N. E. 598; *Wiggins Ferry Co. v. People*, 101 Ill. 446. The record has been said to consist, in a suit at law, of the process, sheriff's return, the declaration, pleas, demurrer, if there is any, and any judgment upon demurrer or other judgment, interlocutory or final. *Van Cott v. Sprague*, 5 Ill. App. 99. The claim here is that, according to the showing of the record, Glennie was served with process, as well as the Grand Pacific Hotel Company, and filed a plea, and that the record, consisting of the process, the pleadings, and the judgment, shows that the judgment was defective by reason of having been rendered against the appellant alone, without a dismissal of the suit as to Glennie.

The law upon this subject, as contended for by the appellant, may be admitted to be correct; but we do not consider that the showing of the record is such as appellant claims it to be. It is conceded that, if the suit was actually dismissed as to Glennie, the judgment was properly rendered against the appellant alone. Here the suit could be properly dismissed as to Glennie and retained as to the appellant, because Glennie was really and in fact an unnecessary party, under the theory upon which the case was tried in behalf of the appellees. If Glennie was the manager of the hotel company, and had authority to make the contract with appellees as the representative of the appellant, then the appellant was liable because of the act of Glennie as its agent, and Glennie was an unnecessary party to the suit. The rule that, in order to recover in an action ex

contractu, a cause of action must be established against all of the defendants, and that a dismissal or discontinuance as to one codefendant effects a discontinuance as to the entire action, so as to make a judgment against the remaining defendant or defendants erroneous, is subject to certain exceptions. One of these exceptions is that, whenever a defendant gives in evidence matter which is in bar to the action against himself only, and of which the other defendant cannot take advantage, judgment may be for such defendant, and against the other. The most common illustration of this exception is where a defense is interposed which is personal to the defendant who makes it, such as infancy, coverture, lunacy, bankruptcy, and the like. Another exception is where one is joined as a defendant in the action who is an unnecessary or improper party. *Mayer v. Brensinger*, 180 Ill. 110, 54 N. E. 159, 72 Am. St. Rep. 196, and cases there cited.

The question then arises whether or not the suit was actually dismissed as to Glennie, or whether there was an agreement or understanding between the parties that it should be treated as a suit against the appellant alone. The judgment of September 26, 1903, recites that on "agreement of the parties hereto this cause is submitted to the court for trial without a jury to try the issues as to the defendant Grand Pacific Hotel Company only." If this recital is true, then by agreement between the parties the suit was tried as a suit against the appellant alone.

It is further claimed, however, on the part of the appellant, that a new judgment was entered on January 25, 1904, modifying and amending the judgment of September 26, 1903. The only substantial difference between the judgment of September 26, 1903, and that of January 25, 1904, is that this recital as to the agreement of the parties is left out in the latter judgment. Both judgments are against the appellant alone, and both judgments are for the same amount. Applying the rule that, where a defect appears on the face of the judgment itself, it may be assigned as error in the reviewing court, the question arises whether the judgment of January 25, 1904, was correct in its amendment of the judgment of September 26, 1903, in leaving out a recital of the agreement already mentioned. The judgment of January 25, 1904, recites that the action of the court in amending the judgment of September 26, 1903, is based upon an inspection by the court of the bill of exceptions, filed on September 30, 1903, and of a minute made by the clerk upon his minute book. The bill of exceptions and the minute upon the minute book of the clerk do not justify the amendment of the judgment of September 26, 1903, in the respect indicated. The bill of exceptions shows that, when the trial commenced, the attorney of the Grand Pacific

Hotel Company announced that the question was "the amount of service that was rendered," and the attorney of the appellees made the following announcement: "We will dismiss the case without prejudice as to Glennie and proceed as to the Grand Pacific Hotel Company." This announcement of counsel for the appellees amounted substantially to a dismissal of the cause, although the clerk and the court failed to enter a formal order of dismissal in accordance with the announcement. Subsequently, however, the case was tried as though the only defendant interested was the appellant company. When the testimony on the part of the defense was closed, the recitation in the bill of exceptions is, "The defendant here rested," showing that only one defendant was regarded as having introduced testimony. The bill of exceptions shows that, on September 26, 1903, appellant made a motion to set aside the finding of the court and to arrest judgment, and its motion was entitled as follows: "William A. Pinkerton and Robert A. Pinkerton, Doing Business under the Style of Pinkerton National Detective Agency, Plaintiffs, v. Grand Pacific Hotel Company, Defendant," showing that the appellant regarded the suit as a suit against the hotel company alone. Again, on June 22, 1903, the appellant made a motion to strike the testimony of the plaintiffs from the case and to find the issues for the defendant, and entitled the motion in the same way above indicated; that is, as being a suit against the Grand Pacific Hotel Company alone.

Again, on December 22, 1902, the appellees filed a bill in the superior court against the Grand Pacific Hotel Company alone, as defendant, setting up the facts as to the dismissal of the suit at law for want of prosecution on October 4, 1902, and the other facts as to the submission of the cause for trial to the court without a jury, and its being taken under advisement, etc., and praying that the court of chancery, to whom the bill was addressed, should set aside and vacate the said judgment of dismissal, so entered on October 4, 1902. This bill was demurred to, and the demurrer was sustained, and the bill was dismissed. The motion in arrest of judgment made by the Grand Pacific Hotel Company set out this bill, and the demurrer, and the decree of the court sustaining the demurrer and dismissing the bill, and urged it as *res judicata*, claiming that the question as to whether the order of dismissal of the suit for want of prosecution should be set aside had been passed upon and decided by the chancery court, and therefore that the law court had no jurisdiction to set aside that order. The general rule is that a plea of former adjudication must show that the two actions were between the same parties. 9 Ency. of Pl. & Pr. p. 626. The judgment against one of the obligors in a joint and several bond is no

bar to an action against the other obligor, and, where a plea of former judgment contains an averment that it is between the same parties, a judgment against one of the parties is no bar to an action against the others. *Shuster v. Perkins*, 47 N. C. 217. If, as is now claimed by the appellant, the suit was a suit against the Grand Pacific Hotel Company and Glennie at the time the motion in arrest of judgment was made, then the decree in the chancery suit could not be set up as a former adjudication, or as *res judicata*, because the chancery suit was between appellees and the Grand Pacific Hotel Company alone. By seeking to use the decree in a suit, where appellant alone was a party defendant, as a former adjudication or *res judicata*, the appellant admitted that the pending suit at law was against the appellant alone. It is not to be presumed that counsel for appellant would set up in a suit at law against two defendants a decree in chancery which had been rendered in a chancery suit where only one of such defendants was a party. Without going further into detail, the case was tried all the way through upon the theory that it was a suit against the Grand Pacific Hotel Company alone.

Again, the action of the court in amending the judgment of September 26, 1903, was based upon a minute made by the clerk in his minute book. When that minute, as it appears in the record, is examined, it shows that the entry there made was as follows: "By agreement, order of July, and appeal entered July 25, 1903, vacated; court to try the issues as to defendant Grand Pacific Hotel Company only." This minute of the clerk was a minute that the agreement made was to try the suit against the Grand Pacific Hotel Company only. It follows that the judgment of January 25, 1904, shows upon its face, that it was based upon a bill of exceptions and upon a minute of the clerk, both of which, when examined, establish the recital made in the judgment of September 26, 1903, as a correct and true recital.

For the foregoing reasons, we are of the opinion that this cause, under the facts, should be treated as a suit against the Grand Pacific Hotel Company alone. It would surely be unjust to make the appellees suffer for the neglect of the court officials to properly enter an order dismissing the suit, when as a matter of fact the attorneys of the appellees ordered it to be dismissed.

Third. It is claimed on the part of the appellant that the court below erred in overruling its motion in arrest of judgment. This motion in arrest of judgment was made on September 26, 1903, and appears in the bill of exceptions, dated September 30, 1903. As a motion in arrest of judgment it was properly overruled by the court, because it was not based upon anything that appeared upon the face of the record. A judgment is never arrested, except for some intrinsic

cause apparent upon the face of the record. *Evans v. Lohr*, 2 Scam. 511. In *Jones v. People*, 53 Ill. 386, we said: "On the point that the court erred in refusing to arrest the judgment, it will be remembered that such a motion is never proper or allowable, except for some intrinsic defect in the record." Here the reasons assigned for the motion in arrest of judgment were that a bill in chancery had been filed in an equity court, asking that the order dismissing the cause be set aside, and that the bill had been demurred to, and the demurrer to it had been sustained, and the bill dismissed for want of equity. The facts thus set up in support of the motion in arrest appeared dehors the present record, and no defect appearing upon the record of the present suit was set up as a reason in support of the motion in arrest.

If the motion be regarded as a motion for a new trial, improperly called a motion in arrest of judgment, there was still no error in overruling it. It simply challenged the action of the court in entering the order of December 11, 1902, amending the record, and in entering the order of June 20, 1903, setting aside the former order of October 4, 1902, dismissing the cause. In entering the two orders in question, the court considered and tried questions of fact dehors the record. It was therefore necessary for the appellant, if it wished to bring for review before this court the action of the court in entering those two orders, to take exceptions at the times when they were entered, and preserve those exceptions by a bill of exceptions. This was not done. "A motion for a new trial is designed to bring in review before the trial court the occurrences of the trial, and to present for consideration alleged errors during the course of the trial. *Alford v. Dannenberg*, 177 Ill. 331, 52 N. E. 485. Motions upon the pleadings and other matters arising before the trial is actually entered upon furnish no basis for the motion for a new trial. * * * A new trial will not be granted on account of errors or defects in the pleadings. Errors in rulings on demurrers and motions relating to the pleadings may be reviewed on exceptions without a motion for a new trial. Such errors of law are not grounds for a new trial." *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, 196 Ill. 370, 63 N. E. 732; 14 Ency. of Pl. & Pr. 827-829; 16 Am. & Eng. Ency. of Law (2d Ed.) 610, 611. A bill of exceptions should be presented and signed at the term at which judgment is rendered, except in cases where counsel consent, or the judge, by an entry on the record, directs that it may be prepared in vacation and signed nunc pro tunc. The questions arising in a suit before the submission of the cause to the jury, or, in case of a waiver of a jury, before the hearing by the court, are to be determined summarily by the court, and the court's rulings thereon

must be preserved by a bill of exceptions, settled at the term when they were made, or upon time allowed by the court, and matters relating thereto will be expunged from the bill of exceptions, presented and signed at a subsequent term, although the rulings were assigned as reasons for a new trial and the motion for new trial was continued to such term. *Guyer v. Davenport, Rock Island & Northwestern Railway Co.*, supra. So, in the case at bar, the order entered by the court on December 11, 1902, amending the record by showing certain proceedings which had been omitted through "error and mispraisal," was based upon matters of fact outside of the record brought to the attention of the court, and, if the appellant desired a review of the action of the court in entering that order, it should have excepted at the time it was so entered, and preserved its exceptions by a bill of exceptions, settled at the term at which that order was entered, or within a time then allowed by the court for that purpose. The same is true as to the order of June 20, 1903. This course was not pursued by the appellant, and therefore the matters relating to the entry of those orders have been improperly embodied in the bill of exceptions, presented and signed at a subsequent term, to wit, on September 30, 1903.

In addition to what has been said above, after this cause was reinstated, the appellant appeared and took part in the proceedings, as appears from the recitation of facts already made. It thereby waived its right to except to the order of the court reinstating the cause. After the cause was reinstated the appellant should not have appeared at all, or, at most, should have confined itself to the resistance of any action proposed by the appellees. *Prall v. Hunt*, 41 Ill. App. 140. In *Herrington v. McCollum*, 73 Ill. 476, where a cause which had been dismissed was reinstated, and the parties appeared at all subsequent proceedings, and followed the case to the Supreme Court, and made no objection that the case was reinstated without notice until after the case was remanded from the Supreme Court, it was held the right to raise that objection was waived; and it was there said (page 479): "The court unquestionably had jurisdiction of the subject-matter of litigation, and it has never been questioned that parties may so far control jurisdiction over their own persons, in such a case, as to confer upon the court the right to proceed, by voluntarily entering an appearance. The defendants, to avail of the right to question the jurisdiction of the court when the case was reinstated, should either have not appeared at all or limited their appearance to the objection against the jurisdiction of the court."

For the reasons above stated, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 47)

ELGIN, A. & S. TRACTION CO. v. WILSON.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—COLLISION—INJURY TO PASSENGER.

In an action against a carrier for injuries to a passenger, evidence of collision between trains, without any contributory negligence on the part of the passenger, authorizes recovery.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1287.]

2. SAME—NEGLIGENCE.

Where the evidence showed that a passenger was injured by the failure of a railroad company to keep a main-track switch locked or guarded, so as to prevent it from being improperly thrown, whether this was actionable negligence is a question for the jury.

3. SAME—TORT OF THIRD PERSON.

That a passenger was injured by the tort of a third person does not relieve the carrier from liability for its failure to use due care which gave an opportunity to such person to commit the act.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1125.]

4. SAME—EVIDENCE.

In an action for injuries to a passenger, where it is alleged that the train was running at a dangerous speed, the condition of the cars after the collision may be shown.

5. DAMAGES—PLEADING—VARIANCE.

Proof that one of plaintiff's legs was broken and an elbow injured is no variance from an allegation that divers bones of her body were broken.

6. EVIDENCE—OPINION OF EXPERT.

It is not proper to permit a medical expert to give an opinion based on the testimony as he has construed it from having heard it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2367.]

7. DAMAGES—FRIGHT.

Where plaintiff claims that neurasthenia was brought about by injuries received in a collision, and defendant's witnesses testified that it might have been occasioned by other causes, plaintiff, on cross-examination, may show that it might have been caused by sudden fright and terror, where she was physically injured at the time of such fright.

8. TRIAL—ARGUMENT OF COUNSEL.

Where, in an action for a collision caused by an unguarded switch, there was evidence that the switchman was watching a ball game, and the boy who threw the switch testified that it was not locked, an argument by plaintiff's counsel, based on the alleged negligence of the defendant, was proper.

9. SAME—TAKING PLEADINGS TO JURY ROOM.

It is not reversible error to allow the jury to take the pleadings to the jury room.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 734.]

10. APPEAL—ESTOPPEL TO ALLEGE ERROR.

Any error in allowing the jury to take the declaration, containing counts to which demurrers had been sustained, to the jury room, is not ground for reversal, where appellant's counsel declined appellee's offer to remove the objectionable count.

Appeal from Appellate Court, Second District.

Action by Natalie Wilson against the Elgin, Aurora & Southern Traction Company. Judg-

ment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Hopkins & Scott and John A. Russell, for appellant. Walter E. Healy and Murphy & Alschuler, for appellee.

BOGGS, J. A judgment in the sum of \$3,000, entered in the circuit court of Kane county in favor of the appellee and against the appellant company for damages arising from a personal injury, was affirmed in the Appellate Court for the Second District. This is an appeal from the judgment of affirmance.

The trial court did not err in refusing to direct a peremptory verdict for the appellant company.

On August 2, 1902, a game of baseball was being played in the park along the line of the appellant company's railroad, about two and one-half miles from the city of Elgin, and about the same distance from the city of Dundee. The company maintained a switch at the park, and had transported a number of passengers from Elgin and Dundee to witness the game. The cars on which such passengers had been carried were run in upon the switch, there to remain until after the game, then to be used for the reception and return of the patrons of the game to their homes. The regular half-hourly service of other cars of the company was maintained along the main track to Carpentersville. One George L. March, an employé of the appellant company, was in charge of the switch on that day. After all of the cars that were used in conveying patrons of the ball game had arrived and had been placed on the switch, March closed the switch, leaving the main line open for the use of cars passing to and fro thereon. The switch was opened and closed by means of an iron arm or lever, and was moved by lifting up the lever from the ground and throwing it over in the opposite direction. The lever was not locked, but could be moved, and the switch opened, by any one. After throwing the lever so as to close the switch and leave the main track open for the passage of cars in the regular service of the company, the switch tender, March, left the switch and went into the park, where the game of ball was in progress. The park was inclosed with a tight plank fence about eight feet in height. A number of boys were playing near about the switch. One of them, Frank Lieb, about half an hour after March had left the switch, lifted up the arm or lever by which the switch was opened and closed, and threw it over, and this moved the rails of the switch track so that the switch, at its south end, connected with the track of the main line. A car which the appellant company was operating from Elgin to Carpentersville, and upon which appellee was riding as a passenger, which was moving at a high rate of speed on the main track, ran in upon the switch and collided with the empty cars standing thereon, and the appellee received

the injuries for which she brought this action. The declaration contained six counts, and, among other alleged acts of negligence, relied upon the failure of the company to have the switch lever locked, and also a failure to have the same guarded, as grounds of actionable negligence. The testimony of the boy, Frank Lieb, showed that the appliance for moving the switch was not protected by a lock or otherwise, and could be moved by any one. Other testimony disclosed that the switch tender in charge of the switch had gone from his post into the park, where the game of ball was being played, and was there when the collision occurred.

Whether the failure to have the switch appliances provided with locks of some character, or, in the absence of such lock, to have a guard to watch and see that the switch was not improperly thrown or turned, constituted actionable negligence, was properly submitted by the court to the jury under instructions advising the jury that it was the duty of the appellant company, as the carrier of passengers, to do all that human care, vigilance, and foresight could reasonably do for the protection of its passengers that was consistent with the mode of conveyance it was engaged in providing and the practical operation of its road and of its business as a carrier of passengers. The appellant company is a common carrier of passengers for hire. The appellee became a passenger on one of its cars. The rule of liability is that applicable to the relation of carrier and passenger. Proof that the appellee was a passenger, that the car in which she was riding collided with another car, and that she was injured, no negligence appearing on her part, made a prima facie case of negligent failure on the part of the appellant to discharge the duty it owed to her, and entitled her to recover damages for the injuries sustained by her, unless the appellant company, by proof, should acquit itself of the presumption that the collision was in some way occasioned by its failure to discharge its duty as a public carrier to the appellee, as its passenger. *Galena & Chicago Union Railroad Co. v. Yarwood*, 15 Ill. 468; *Id.*, 17 Ill. 509, 65 Am. Dec. 682; *Pittsburgh Cincinnati & St. Louis Railway Co. v. Thompson*, 56 Ill. 138; *Peoria, Pekin & Jacksonville Railroad Co. v. Reynolds*, 88 Ill. 418; *Eagle Packet Co. v. Defries*, 94 Ill. 598, 34 Am. Rep. 245; *North Chicago Street Railway Co. v. Cotton*, 140 Ill. 483, 29 N. E. 899; *New York, Chicago & St. Louis Railroad Co. v. Blumenthal*, 160 Ill. 40, 43 N. E. 809. The same doctrine or rule is announced by Mr. Thompson in his work on Negligence. 3 Thompson on Negligence, 2758, 2761. The doctrine to be deduced from the above cases is that, when one becomes a passenger on a car of a common carrier to be transported from one station on its line to another, and has paid a consideration therefor, the contract on the part of the carrier is to provide safe and sound cars, track, and necessary appliances

to carry the passenger to his or her destination without injury. Where such a passenger is injured by a collision, proof of the relation of passenger and carrier, of the collision and the injury, if no contributing negligence on the part of the passenger appears, makes a prima facie case for the resulting damages, and casts upon the common carrier the onus of proving that the injury resulted from inevitable accident or from some cause against which human prudence and foresight could not have provided. The mischievous act of the boy, Lieb, contributed to the injury in the case at bar. The failure of the company to provide some means for locking the switch arm or lever, or to have some one to prevent the disarrangement of an appliance so easily rendered dangerous to its passengers, was justly regarded by the court as a failure on its part to perform its obligation and duty to those who had entrusted themselves to its care as a public carrier. That a collision was caused by the tortious act of a stranger could have no effect to relieve the common carrier from responsibility to an injured passenger, if the failure of the carrier to do that which human foresight and forethought would have suggested presented the opportunity for the commission of the tortious act.

The court did not err in its rulings as to the admissibility of proof as to the condition of the car in which the appellee had been riding and of the car with which it collided after the accident. Whether the car upon which the appellee was riding as a passenger was moving at a very rapid, or at a moderate, rate of speed, was a contested question of fact. One charge of negligence in the declaration was that the car was being driven at a dangerous rate of speed and that the collision was the result thereof. The manner in which these cars were driven together and broken and damaged, as shown by the proof, tended to support the view of the appellee that the car in which she was riding was moving at a very great rate of speed.

Witnesses for the appellee were permitted, over the objection of the appellant company, to state that the switch in question could be seen from the front platform of a car approaching from the south a distance of 300 feet. It is urged that there was no attempt to show that the size and speed of the car from which the witnesses made their observations, the physical conditions of the track, and the surroundings of the right of way, were the same as at the time of the accident, and that for such reason it was error to admit the proof complained of. We have examined the record, and think it was shown that the essential conditions were the same when the experiments were made and when the accident occurred.

But, aside from that, if error in this respect occurred it would not justify a rever-

sal of the judgment. The appellee, in part, relied on the charge that the displacement of the switch was visible to the motorneer at such a distance therefrom that, had he been watching the track, as it was his duty to do, instead of trying to see the ball game, as she insisted the proof showed he was doing, he would have discovered that the switch had been turned in time to have stopped the car and averted the accident. The evidence under consideration was directed to this issue, and this only. As we have seen, the appellee was entitled to recover unless the appellant company should, by proof, overcome the presumption which arose against it. This it ineffectually attempted to do by showing that the switch was turned by the boy, Lieb; for the proof introduced on its part for this purpose indisputably established that the real cause of the injury was the failure of the employé, which the company had placed there in charge of the switch, to remain at his post and see that the switch was not tampered with, or the failure of the appellant company to provide a lock for the switch arm or lever, in consequence whereof a dangerous appliance of the company's road was left unprotected against the pranks of mischievous boys. This state of case, aside from the alleged negligent failure of the motorneer to observe the displacement of the switch, demanded a verdict and judgment for the appellee.

The declaration alleged that the appellee "was greatly bruised, hurt, and wounded, and divers bones of her body were there and then broken, and she became sick," etc. The proof showed a fracture of the tibia of the left leg and an injury to the right elbow, and we are urged to reverse the judgment on the ground that there is a clear distinction between the body and the limbs of the body, and consequently there is a variance between the allegations of the pleading and the proof. One definition given by Mr. Webster of the word "body" is "the entire physical part of a man." This meaning is properly to be given the word as employed in the declaration, and it was not essential there should be greater particularization as to the bones that were broken.

It is complained that Dr. Strum, a witness for the appellee, was allowed to state his opinion as a medical expert, not based on a hypothetical state of facts, but, in part, upon the testimony of the appellee as a witness, as the doctor heard and construed her testimony. A physician or a surgeon who has treated a patient may express an opinion as to the physical condition of such patient, based on information gained while so administering professionally for the affliction, or a physician may testify as an expert from information obtained from a physical examination of the person who is the subject of the inquiry. If the opinion of a physician is desired on the case made

or claimed to be made by the testimony produced on the hearing, he should not be permitted to state his opinion based on the conclusion arrived at by himself as to the case made by the evidence as he heard it and gave it weight. The proper course is to state hypothetically the case which the party producing the witness thinks has been proved, and to ask an opinion based on such hypothetical case. The jury, who are the judges as to what has been proven, may then apply the opinion of the expert, if in their judgment the state of case on which it was based has been proven. To permit the expert to base an opinion on the testimony as he construes and has weighed it would be to permit him to exercise the functions of the jury, and, in a sense, decide the whole issues for them. *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Grand Lodge v. Wieting*, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123.

But the rule is that a court of review will not consider any other ground of objection than that urged in the court below. 3 Ency. of Pl. & Pr. 223. Dr. Strum testified that he had made two examinations of the person of the appellee, and that he was present and heard her testify as a witness. He was then asked the following question, to which objection was made, as shown below: "In view of that, and in view of the examination you have made, and also in view of the symptoms you have discovered by means of your examination, what relation, would you say, does her present condition bear to the injuries mentioned? (Objected to on the ground that the question is not predicated on the testimony in the case.)" The ground or grounds of this objection are not entirely clear. The ground intended to be advanced may have been that it was improper to base an opinion on anything save the testimony heard by the expert, and was improper because it asked for an opinion based also, in part, on the personal examination of the appellee. It may have been on the ground that it was improper because it was not predicated on all of the testimony in the case relative to the physical condition of the appellee. Giving to the objection either of these meanings, if either ground of objection had been sustained, the correct rule would not have been applied.

The testimony in behalf of the appellee tended to show she suffered from neurasthenia as a result of the collision. Physicians introduced by the appellant company gave testimony tending to show that neurasthenia with which the appellee suffered might have been occasioned by various specified causes other than the physical injuries suffered by the appellee. On cross-examination the counsel for appellee were permitted to ask if neurasthenia could not be produced by great and sudden fright, and the witnesses answered that it could be so produced. It is urged that fright alone cannot sustain a recovery of

damages. The doctrine seems to be that liability cannot exist if predicated on fright or terror, unaccompanied by contemporaneous physical injury. *Braun v. Craven*, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199; 8 Am. & Eng. Ency. of Law (2d Ed.) 685; 13 Cyc. 42, 43. Here the appellee received physical injuries contemporaneous with the alleged fright or terror.

The contention that counsel for the appellee were permitted to indulge in improper argument is without merit. The specific ground of this complaint is that counsel insisted, in argument to the jury, on recovery on the ground the appellant company had negligently failed to lock the switch or negligently failed to watch and guard the switch. This argument is denounced as improper, on the assertion there was no proof to sustain either of the alleged delinquencies. It appeared from the testimony of the boy, Lieb, that the switch arm or lever was not locked, and from other testimony in the case that the employé of the company in charge of the switch was within the inclosure of the park when the boy turned the switch.

Demurrer was sustained to the third and fourth counts of the declaration, and it is complained that the court permitted the entire declaration containing said third and fourth counts to be taken by the jury when they retired to consider of their verdict. The practice of permitting the pleadings in civil actions to be taken by the jury in their retirement is not to be commended. Counsel may procure the court, in the instructions, to state the issues to the jury, and that course should be resorted to. It is not, however, error of reversible character to send the pleadings to the jury; but counts in the declaration to which demurrers have been sustained should not accompany the other pleadings. When the appellant company's counsel objected to the declaration going to the jury, counsel for the appellee stated to the court and to counsel for the appellant that, if counsel for the appellant would state that they desired the counts to which demurrers had been sustained to be removed from the declaration, it would be done. Counsel for the appellant replied that they simply wanted the record to show they had objected, and that the objection had been overruled, and that they had excepted. It is manifest counsel for the appellant were not endeavoring to prevent erroneous action that would prejudice the cause of their client, but were only seeking to inject error into the record. They could have voluntarily avoided the error, but declined, in order that, in the event of an unfavorable verdict, they might obtain a reversal upon merely technical grounds. We will not entertain the objection.

We do not think that instructions Nos. 1 and 2 authorized the jury to return a verdict for the appellee on ground of recovery not charged in the declaration, as counsel for the appellant urge. These instructions ad-

vised the jury as to the degree of care required of the appellant as a public carrier, and directed them, in instruction No. 1, that "if, from the evidence, the jury believe that the company failed to exercise toward the said plaintiff, at the time in question," such degree of care, and that she was injured thereby, she could recover, and, by the second instruction, that she could recover if the jury "found, from the evidence, the defendant did not exercise" the specified degree of care. The jury were restricted to grounds of recovery disclosed by the evidence. It is not contended that the court permitted evidence to be produced that was not applicable to the issues made by the pleadings; hence the instructions did not authorize a verdict for appellee, except upon the issues under the pleadings.

Instructions Nos. 17, 18, and 19, asked by the appellant, were properly refused. Nos. 17 and 18 declared there could be no recovery if the accident and injury could not have occurred if the switch had not been turned or misplaced by the boy, Lieb. If, as we have seen, the appellant company owed it to the appellee as a legal duty, as a public carrier, to lock or guard the switch, and failed to discharge that duty, the right of recovery existed, notwithstanding the tortious act of Lieb intervened to occasion the collision. No. 19 was properly refused, for the reason it required only the exercise of reasonable care on the part of the appellant company in the management of the road and the management of the car in the transfer of the appellee to her destination.

The judgment must be, and is, affirmed.
Judgment affirmed.

(217 Ill. 58)

MASONIC FRATERNITY TEMPLE ASS'N v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. COURTS—APPELLATE JURISDICTION—CONSTITUTIONAL QUESTION.

An allegation, in a bill for an injunction, that a certain ordinance is unreasonable, unjust, and oppressive, does not raise a constitutional question, so as to give the Supreme Court jurisdiction on appeal.

2. APPEAL—REVIEW—CONSTITUTIONAL QUESTION.

A constitutional question will not be reviewed, unless raised in the court below and the ruling thereon assigned for error.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1037.]

3. COURTS—APPELLATE JURISDICTION—CONSTITUTIONAL QUESTION.

An assignment of error on a refusal of the trial court to allow an amendment to a bill raising a constitutional question does not present a constitutional question, authorizing the Supreme Court to take jurisdiction of an appeal from an order dismissing the bill.

Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Bill by the Masonic Fraternity Temple

Association against the city of Chicago and others. Decree for defendants, and plaintiff errs. Dismissed.

Judah, Willard & Wolf and Allen G. Mills, for plaintiff in error. John W. Beckwith and William H. Sexton (Edgar Bronson Tolman, Corp. Counsel, of counsel), for defendants in error.

RICKS, J. This was a bill for injunction, filed by the Masonic Fraternity Temple Association, as complainant, charging that the city of Chicago and George Williams, its commissioner of buildings, and Francis O'Neill, the chief of police, had forcibly and without right closed certain lodge and meeting halls in its building, known as the "Masonic Temple," and refused complainant and its tenants the right to use them for the purposes for which they were constructed and had theretofore been used, and alleging that the defendants claimed the right to do so under and by virtue of a city ordinance of the city of Chicago, because of an alleged violation of the city ordinances in the matter of stairway accommodations in the buildings. Upon notice given to the defendants a hearing was had and a temporary injunction issued. Thereafter, and on November 21, 1904, the city council amended the building ordinances in relation to buildings used for the purposes of assemblages of persons, etc. Complainant thereupon filed its supplemental bill, setting forth the facts of the passage of the amended ordinance. The city thereupon filed its answer to the original bill and supplemental bill, and entered its motion for the dissolution of the temporary injunction. After the argument of the motion, the complainant presented and asked leave to file an amendment to its supplemental bill, which was denied. The allegations of the supplemental bill are that the requirements of the ordinance passed "on the 21st day of November, 1904, are unjust, unreasonable, and oppressive, in so far as the same are applicable to said building owned by your petitioner." The court, after denying leave to file the amended or supplemental bill, entered its decree finding that there was no equity in the original and supplemental bills, and that neither was susceptible of amendment so as to entitle the complainant to the relief prayed for, and sustained the motion to dissolve the temporary injunction, and dismissed the bills for want of equity, and this writ of error is prosecuted from that decree.

It does not appear from the pleadings that the construction of the Constitution was involved, and no constitutional question is raised by the assignment of errors attached to the record, and upon examination of the record we are unable to find any ground upon which we are authorized to assume jurisdiction of this appeal. The bill simply alleges that the ordinance is "unjust, unreasonable, and oppressive," and, as was said in *Wood v.*

City of Chicago, 205 Ill. 70, 68 N. E. 712, "the controversy relates only to the validity of the ordinance. * * * It is not claimed that any franchise or freehold is involved in the appeal. We are authorized to take jurisdiction of an appeal from the circuit court where the validity of a statute is involved; but an ordinance is not a statute, and we have no jurisdiction of this appeal under that provision. While an ordinance is a law of the municipality which ordains and enforces it, it is purely local, for the regulation of affairs within such municipality, and is distinguished from general laws and statutes. It is true that the enforcement of an ordinance may involve a construction of the Constitution, and we may be authorized to assume jurisdiction of an appeal upon that ground." The construction of the Constitution cannot in such case be involved without an allegation in the bill in some manner raising the question, nor can the question be raised in this court, unless there is such an assignment of errors attached to the record. *Griveau v. South Chicago Street Railway Co.*, 213 Ill. 633, 73 N. E. 309. While the proposed amendment to the supplemental bill does set out that the ordinance is in violation of the Constitution of the United States and the Constitution of the state of Illinois, yet it is manifest a constitutional question could not be raised on the refusal of the court to grant such an amendment, as the refusal of the court to allow the amendment would merely raise a question of practice or proceeding, which would not be affected by the contents of the proposed amendment, and would not confer jurisdiction on this court.

We are satisfied that this case does not come within any provision of the statute authorizing a direct appeal or writ of error to this court. The writ of error is therefore dismissed.

Writ dismissed.

(217 Ill. 84)

SCHAEFFER v. BURNETT.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—ASSIGNMENT OF ERRORS.

The assignment of errors and cross-errors, on appeal from the Appellate Court, must be written upon and attached to the record after it is made up for presentation to the Supreme Court, and forms the issues upon which the case is to be heard.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3039.]

2. SAME—NECESSITY.

Though the error insisted upon on appeal from the Appellate Court is the quashing of a writ of certiorari, which error appears in the record from the judgments of both the circuit and appellate courts, it is necessary for appellant, in order to avail himself of it, to formally assign errors.

3. SAME—SUFFICIENCY.

An assignment of errors embodied in the petition or written motion filed in the Appellate Court for an appeal to the Supreme Court is an insufficient assignment of errors.

Appeal from Appellate Court, Third District.

Action by Emma W. Schaeffer against James Burnett. From a judgment of the Appellate Court sustaining a judgment quashing a writ of certiorari, plaintiff appeals. Dismissed.

W. E. Byers, for appellant. A. M. Barnett and M. P. Rice, for appellee.

PER CURIAM. This is an appeal from the Appellate Court, sustaining a judgment of the circuit court of Fulton county, wherein a petition for a statutory writ of certiorari to the probate court of said county was asked, directing that court to send up a transcript of the proceedings of a certain cause in said court, wherein appellant was plaintiff and appellee defendant, and the writ quashed.

Appellee has raised the question that no errors are assigned of record upon the transcript of the Appellate Court filed herein; also, that the abstract of the record of the Appellate Court does not present any errors. Upon looking into the transcript of the record as presented from the Appellate Court, we find that a petition or written motion for an appeal to the Supreme Court was filed in the Appellate Court, and in that petition or motion, and as a basis for it, is an assignment of certain errors, which appear in the motion or petition, upon which the appellant relies. The errors, being in the transcript as presented from the Appellate Court, are not properly assigned, as errors cannot be embodied in the transcript of the proceedings of the Appellate Court. The assignment of errors and cross-errors must be written upon and attached to the record after made up for presentation to this court, and forms the issues upon which the case is heard and judgment rendered. The cause stands in this court in the same condition as would a cause in the circuit court without a declaration. *Davis v. Lang*, 153 Ill. 175, 38 N. E. 635. Here there was no attempt, as we think, to assign errors upon the record of the Appellate Court, and we do not feel warranted in holding that the reasons assigned or grounds of this motion made in the Appellate Court for an appeal can stand in this court as an assignment of errors. The omission to assign errors in this court leaves the court without authority to proceed. *Metropolitan Life Ins. Co. v. People*, 205 Ill. 870, 68 N. E. 1050, and cases therein cited. Appellant's attention had been called by appellee to the condition of the record as it exists, and appellant could have availed herself by simply entering a motion to be permitted to assign errors, and, not having done so before the case was submitted for final consideration, is now too late.

Appellant, in her reply brief, takes the position that, as the error insisted upon is the quashing of the writ, and as that error appears in the record from the judgments of

both the circuit and appellate courts, it is not necessary, in order to avail herself of it, to formally assign errors. All errors must be manifested by and appear in the record; otherwise, an appellate court could not review them, and such court is only authorized to review the errors that are pointed out and insisted upon under the assignment of errors required by the rules of practice. Appellant's position is not tenable, and her appeal must be dismissed for want of assignment of errors.

Other irregularities of minor importance are pointed out as appearing in appellant's brief and abstract; but, finding, as we do, there is nothing upon which to base a judgment, we deem it unnecessary to discuss the questions raised, and the appeal is therefore dismissed.

Appeal dismissed.

(217 Ill. 87)

CHICAGO & A. RY. CO. v. WALTERS.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

In an action by a brakeman, injured while coupling a car, a refusal to allow him to state whether he signaled the engineer, who was under his control, to stop or go slower, when he found he had to use his hand on the coupler, was harmless error, where there is evidence showing that he did not do so.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4194-4196.]

2. SAME.

Error in not sustaining objection to a question asking for conclusion is harmless, where the witness did not give his conclusion in his answer to the question.

3. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

In order to charge a railroad company with notice of a defective car, it is not necessary that such notice be given to the particular official designated by its rules.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 251.]

4. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a brakeman, in making a coupling, is required to act promptly under circumstances which he did not anticipate, that he might have adopted a safer course than the one he followed does not make the question whether his act was negligent one for the court, where there is evidence that he believed he had time to act as he attempted to do.

5. APPEAL—INSTRUCTIONS—HARMLESS ERROR.

Where, in an action by a brakeman for injuries in making a coupling, he testified that he knew of the defect in the coupling before the injury occurred, an instruction as to the law applicable, if the defect was not discoverable by plaintiff, though erroneous, is harmless error.

Appeal from Appellate Court, Third District.

Action by William T. Walters against the Chicago & Alton Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

De Mange & Hoblit (F. S. Winston, of counsel), for appellant. Louis Fitzhenry and Barry & Morrissey, for appellee.

CARTWRIGHT, C. J. Appellee recovered a judgment in the circuit court of McLean county against appellant for \$4,000 damages for the loss of a hand while coupling cars as a brakeman. The Appellate Court for the Third District affirmed the judgment. Appellant complains of alleged erroneous rulings of the trial court on the admission of evidence, the refusal to direct a verdict of not guilty at the close of all the evidence, the giving of instructions requested by appellee, and the refusal of instructions asked by appellant. The grounds of liability alleged in the declaration were, first, that the defendant, being engaged in interstate traffic, failed to equip a certain caboose with an automatic coupler, which would couple it automatically by impact with other cars, as required by the act of Congress; and, second, that, having attempted to equip the caboose with an automatic coupler, the defendant permitted it to be and remain in a dangerous and unsafe condition, which was known to the defendant and unknown to plaintiff, and thereby his hand was crushed between the drawbars of the engine and caboose while attempting to couple them together in the exercise of ordinary care for his own safety.

Plaintiff was a freight brakeman for defendant, and was called out at Brighton Park on the night of January 3, 1908, to assist in taking a train to Bloomington. He went to the engine house, and got the engine, and started with it to couple on the caboose. He had entire control of the engine, which was moved by the engineer in accordance with his signals. The engine and caboose were both equipped with Janney couplers, which would couple automatically by impact, provided the knuckle on either coupler was open, but would not couple in that way unless one or the other was open. When closed, the knuckle was kept closed by an iron lock pin inserted through it. The knuckle was to be opened by hand, and in order to open it the lock pin must be lifted out of the coupling. There was a device for lifting the lock pin from the side of the caboose without going between the cars, consisting of a lifting lever extending horizontally above the floor to the outside of the caboose, where it turned at a right angle to form a crank or handle; but there was no device or appliance for opening the knuckle. It was the duty of the plaintiff to see that the knuckle upon the engine or caboose was open when they came together, and on this occasion they were both closed. In the ordinary use of the coupling, he would lift the pin out by means of the lever from the side of the caboose and then open the knuckle with his hand. It was about midnight, and plaintiff stood upon the footboard of the tender and signaled the engineer to back the locomotive slowly toward the caboose. It was dark, and plaintiff had a lantern to enable him to see. He attempted to open the

knuckle of the coupler on the engine, but the water had splashed upon it and frozen it fast. The engine was backing very slowly, not faster than a man would ordinarily walk, and in the judgment of the engineer not more than one mile an hour. Plaintiff, finding he could not open the knuckle on the engine, jumped off and ran ahead to open the knuckle on the caboose. He tried to work the lever and raise the pin; but the lever was bent, so as to strike the brake rod, and he was unable to lift the pin sufficiently to allow the knuckle to open. The lever had been bent and unfit for use for about two weeks, and its condition had been reported to a car repairer at Bloomington three or four days before the accident. Plaintiff, being unable to raise the pin with the lever, reached in with his left hand to the coupler and lifted the pin, and at the same time opened the knuckle with his right hand, when the couplers came together and his hand was crushed.

In entering the employ of defendant, plaintiff by his written application agreed to study the rules of the company and obey them, and stated that he understood in coupling cars the rules required him to use a coupling stick. The rules printed in the time-card in force strictly prohibited coupling by hand in all cases where a stick could be used in guiding the link or shackle, and all brakemen were required to provide themselves with a stick for that purpose; and the rules stated that going between the cars while in motion was a violation of duty. Plaintiff in his testimony narrated the circumstances of the accident substantially as above stated, which was all the evidence on the subject. On his cross-examination he was asked whether, when he found he could not open the knuckle on the engine, he gave the engineer any signal to go slower or stop. The court sustained an objection to the question, and therein erred. Plaintiff testified that he had entire control of the movements of the engine, and the question was legitimate and proper cross-examination. It was pertinent for the purpose of showing to the jury that the injury to the plaintiff resulted from his own failure to signal the engineer to go slower or stop until the coupler was prepared for the coupling. The other evidence, however, showed that plaintiff gave no signal to the engineer, but permitted the engine, which was under his control, to move forward toward the caboose until the accident occurred, and the fact was not controverted. The ruling, although erroneous, did no harm.

On the cross-examination of a witness for the plaintiff, he was asked whether a coupler in which the lever would not lift the pin out of the coupling would couple automatically by impact. The court overruled an objection of defendant to the question. The objection should have been sustained, for the reason that the question called for a conclusion by

the witness as to the ultimate fact which the jury were impaneled to try, and which was in issue under the first count of the declaration. The ruling, although wrong, is not ground for reversal, for the reason that the witness did not undertake to answer the question and give his conclusion, but merely stated in his answer facts which were proper to go to the jury to enable them to decide the issue.

At the close of the evidence the defendant asked the court to direct a verdict of not guilty, and the court denied the motion. It is insisted that the court erred, for the reason that there was no evidence fairly tending to sustain plaintiff's averment that he was in the exercise of ordinary care for his own safety, and that the evidence clearly showed that the accident happened by reason of his negligence. There was evidence tending to show that the caboose was used in interstate traffic. The coupler was one that would couple cars automatically by impact, if the coupler on one or the other of the cars was prepared for coupling by raising the lock pin out of the coupling by means of the lever and opening the knuckle by the hand. This might be done while the cars were standing still or before they were brought together; but there was evidence tending to prove that, in the ordinary operation of switching and coupling cars together, there was a necessity to go between the ends of the cars to open the knuckle. A brakeman could prepare one or the other of the couplers by opening the knuckle, and then be out of the way when they came together; but in our opinion the trial court would not have been justified in directing a verdict on the ground that the coupler was as a matter of law one that would couple automatically by impact. Whether that is so or not, the lifting lever by which the pin was raised from the outside of the car was out of repair, and had been for two weeks, and the defendant had disregarded its duty to the plaintiff in respect to it. It is said that the defendant had no actual notice of the condition of the lever, because notice was given to one of the car repairers at Bloomington, while the rules required that notice be given to an official or employé mentioned in such rules. The court so instructed the jury, but the instruction should not have been given. The lever had been out of condition for two weeks, and it was not necessary that notice of its condition should be given to some particular official. It was the duty of the defendant to make proper inspection and repair, and this duty was a positive one owing by the defendant to the plaintiff. It made no difference by whom or what method the defendant provided by its rules for the performance of its duty, and there was no room for doubt that it had been derelict.

The serious controverted question in the case was whether the accident was due to negligence on the part of plaintiff. The

approaching locomotive was under his control, and he gave the engineer no other signal than the one to back slowly. His act was a dangerous one, which might have been performed by a safe method by stopping the engine until the knuckle was opened. He had full knowledge of the condition of the lever, and knew the rate of speed at which the engine was backing under his direction. On the other hand, there was evidence proper to be considered by the jury tending to show that the plaintiff had reasonable ground to believe that he had time to raise the pin and open the knuckle in safety. It was in the nighttime, and he knew nothing about the condition of the lever until he attempted to use it. He was then confronted with a situation which he had no reason to anticipate, and there was not much time for reflection and deliberation. Immediate action was required, and, while he undoubtedly might have adopted a different and safe course in making the coupling, the question whether a brakeman of ordinary care and prudence would have done as he did was, in our opinion, proper to be submitted to the jury under all the evidence. Whether the verdict of the jury was sustained by a preponderance of the evidence was a question for the trial court on a motion for a new trial, and for the Appellate Court on appeal. The question on which side the preponderance of the evidence was could not properly be determined by the court on a motion to direct a verdict.

The court gave at the instance of the plaintiff instructions numbered 1 and 6. In the first of these instructions the jury were told that, if the condition of the coupling apparatus and the effect thereof were not discoverable by the use of ordinary care, the plaintiff could not be held to have assumed the risk of the defective condition; and by the sixth they were told that if the apparatus was out of repair, and its effect on the lever and knuckle was not discoverable by ordinary care, the rule of defendant requiring the examination of machinery, cars, etc., by employes would have no application to the case. The instructions were not based on any evidence or fitted to the facts of the case. Plaintiff testified that he discovered the condition of the lifting rod and its effect upon the apparatus and the lifting of the lock pin, both by sight and his attempt to use it before the accident happened. The question what the law would be, if the case had been different and the defect had not been discoverable by the use of ordinary care, was entirely foreign to the case, and could not aid the jury in deciding it. The only object of instructions is to enable the jury to apply the law to the evidence, and the practice of advising them as to what the law would be in some other case or applied to some other state of facts is bad. We cannot see, however, that the giving of these instructions worked any injury to the defendant, for the reason that there was no contradiction of

plaintiff's evidence that he knew exactly what the condition of the lever was and what the effect of such condition upon the apparatus was. The jury could not possibly have concluded that plaintiff did not discover the condition of the lever and its effect, and therefore could not have applied the rules given by the court applicable to such facts.

The court refused several instructions asked by the defendant, but it is not necessary to repeat them. Everything contained in them which was correct as a proposition of law was contained in other instructions which were given.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 94)

PEOPLE ex rel. DENEEN v. MATTHEWS.
(Supreme Court of Illinois. Oct. 24, 1906.)

1. ATTORNEY—DISBARMENT—EVIDENCE.

The truth of the charge contained in an information for the disbarment of an attorney must be established by clear evidence.

2. SAME—INFORMATION.

The charges against an attorney in an information for disbarment must give the time and place and allege the acts of misconduct with reasonable certainty.

3. SAME—EVIDENCE—SUFFICIENCY.

On trial of an information against an attorney for disbarment, proof of other acts of misconduct not charged in the information will not justify disbarment, where those alleged are not proven.

Information by the people, on the relation of Charles S. Deneen, for the disbarment of Webb P. Matthews. Rule discharged.

Charles S. Deneen (Ben M. Smith and John L. Fogle, of counsel), for the relator. E. M. Ashcraft, Jr. (E. M. Ashcraft, of counsel), for respondent.

PER CURIAM. This is an original proceeding by which it is sought to have the name of Webb P. Matthews, an attorney of this bar, stricken from the roll. The information charges two offenses which the evidence tends to prove: First, that respondent colluded with one Mary Manupelli, a married woman, for the purpose of practicing a fraud upon the courts of Cook county by representing to them that she had, in the month of September, 1903, been a resident of this state for one whole year next preceding that time, the fact being that she had only been a resident of the state since April, 1903; second, that during the months of June, July, and August, 1903, he falsely and fraudulently pretended to her that he had filed a bill for divorce for her against her husband in some one of the courts of Cook county, when in fact such a bill had not been filed by him.

According to the testimony of Mary Manupelli, she called at the office of the respondent in June, 1903. He was then employed by the Spencer Collection Agency, and officed

in one of the suite of rooms occupied by that organization in the city of Chicago. She went there in response to an advertisement, questionable in character, inserted in a daily newspaper in the city of Chicago by the Spencer Agency. She there had a conversation with respondent in which she told him that she had been married in 1897, and, in substance, that her husband had deserted her more than two years prior to that time, and had since persisted in such desertion, and that she had been living in one of the New England states until in April, 1903, when she came to Chicago, where she resided with her mother, who had moved to Chicago from the East in September, 1902. He informed her that she could not obtain a divorce in this state until she had been here 13 months, but suggested to her that, as her mother had come in September preceding, "perhaps I could make it from September, as though you came here from September," and advised her that on that basis he could obtain a divorce for her in September of that year, 1903. Thereupon negotiations were had between them in regard to the expense of obtaining a divorce, and he agreed with her that for the sum of \$38, to be paid to him by her, he would obtain a divorce for her and pay the costs of the proceeding. Of this sum \$15 was to be paid at once, and was to be used to pay the fee of the printer for publishing the notice, and the remainder was to be paid on the morning the case was called for trial in court. A few days after that the \$15 was paid and Mrs. Manupelli signed a bill for divorce which the respondent had prepared, which was not entitled as of any term of court, and in which it was represented that she had been an actual resident of the state of Illinois for more than a year preceding the filing of the bill. To this an affidavit of the truthfulness of the statements contained in the bill was attached, which she also signed, but no oath was administered. This bill never was filed. She advised Matthews that her mother had always been very much dissatisfied with her marriage and was exceedingly anxious that she should obtain a divorce, and that for the purpose of satisfying her mother that the suit was pending she desired a copy of the advertisement, by which she designated the notice to a nonresident defendant which it was necessary to publish in the case; and she further says, "I did tell him that I wanted to tell them at home that I had brought suit, so they would know that I was really anxious to get a divorce," and Matthews told her that he would institute the suit at once and send her a copy of the advertisement, that the case would come up in September, and that she would not need to come to the office again for three months. Mary Manupelli had no money or property, and obtained this \$15 from her mother. Shortly afterwards, before the expiration of the three months, not having received a copy

of the publication notice, she called at his office and asked him to let her have "the advertisement," and told him that the reason she wanted it was that they would not believe at home that she had given him the \$15 and instituted the suit. He assured her that the notice had been published, and directed her to go to the office of the Law Bulletin to obtain it. She went there, but was unable to find the notice. On the 30th of September he wrote her a letter asking her to call and see him with reference to her divorce case. She went to the office, and he then asked her for the balance of the \$38. She told him that the money was not to be paid until the morning of the trial, and that her family wouldn't let her have the money because she had not received the paper containing the advertisement. He again assured her, "It is all right; it has been advertised." She left the office without making any definite arrangement about the payment of the balance.

It also appears from the testimony of this witness and from that of Nathan E. Kemmelhor, who is described as her second cousin and a married man, that they together went to the office of Matthews in July or August. Kemmelhor had been acquainted with Mrs. Manupelli's husband, and had known them both in the East. When they reached the office, Kemmelhor asked when "the divorce would take place," and was told by Matthews that it was liable to be in a week or 10 days. Kemmelhor suggested he would attend the trial, if he could be of any use as a witness, and said he was familiar with the circumstances, and Matthews told him he would let him know in a week or two when he should appear. It is shown by the testimony of Kemmelhor alone that on this occasion he spoke privately to Matthews and asked him how about the 13 months that the complainant had to be here before she could apply for a divorce. Matthews answered that he had it all arranged, and said: "You leave it all to me." Kemmelhor desired to talk to him in reference to what his testimony would be, and Matthews responded: "When the time will come, we will find out what will be the best." Kemmelhor also inquired whether he had sufficient proof, and Matthews replied: "Yes; I have got a whole bunch of it." Kemmelhor and Mrs. Manupelli went together on three or four different occasions to see Matthews in regard to this suit, and were assured on each occasion it was pending. About three weeks after the occasion on which Kemmelhor had been told that he would be notified in a week or 10 days, he testifies that he called at Matthews' office alone and inquired why he had not received notice. Matthews replied: "Well, I am expecting it every day." Kemmelhor asked what the number of the case was, and, upon respondent's failing to give the number, Kemmelhor inquired whether the suit had been entered. Respondent told him that it had

been commenced in the circuit court. Kemmelhor left and went to the circuit court, as he expresses it, and was unable to find any trace of the case, and then went "to the superior court" and made search with like result. He then, on the succeeding day, called on Matthews and told him that he had been to the circuit court and could not find the case. Matthews then said: "Well, it is in the superior court." Kemmelhor replied that he had looked in both courts and could not find it in either. Matthews responded that he had advertised the case in the Chicago Legal News the last two weeks of July or the first two weeks in August. Kemmelhor called at the office of that newspaper, and was advised there that no such publication had been made in its columns. Thereupon, a day or two later, he again called at Matthews' office and demanded of the latter the \$15 that had been paid to him and some papers connected with the matter that had been left with him by Mrs. Manupelli. Matthews declined to surrender the papers or refund the \$15, but a few days later mailed the papers to his client, and still retained the money. Kemmelhor then advised her to make complaint to the Chicago Bar Association. When she did so, she made a statement, substantially as hereinabove set out, to the relators in this cause, who composed a committee known as the grievance committee of that association. Thereupon this proceeding was instituted by them.

Respondent, learning that the information herein had been filed, called upon Mrs. Manupelli at the place of business of Charles Scribner's Sons in Chicago, where she was employed. According to the testimony of both, he asked her why she had made the complaint to the grievance committee. She replied, because she wanted her \$15 back. He said that, if she had called at the office, he would have given her the money back. After some further discussion he gave her \$30 in two payments, \$15 of which was the money she had already paid him, and, as to the purpose for which the other \$15 was paid, he and she differ. She expressed regret that a suit fraught with unpleasant consequences for Matthews had been begun, and he tried to induce her to go again before the grievance committee and state that the complaints she had made were untrue. She expressed a willingness, as she now says, to make such statement, provided she would not become involved in trouble herself, and swears that the second \$15 was to pay her expenses to Milwaukee, where she was to see Kemmelhor and endeavor to induce him to keep away from Chicago, so that his testimony could not be taken in this proceeding, while respondent testifies that she utterly refused to go before the committee again, but said that Kemmelhor was in St. Louis, and that, if Matthews would give her Kemmelhor's car fare, she would send it to him and have him come to Chicago and go before relators and

tell them to abandon the matter. Shortly after this payment was made, and on March 9, 1904, some one telephoned to her and said: "Mr. Fogle [a member of the grievance committee] wants to see you." She responded: "Please drop this case." He directed her to appear again before the grievance committee. She did so. When she reached the committee room, Fogle, Whitman, and O'Connell, three members of the grievance committee, and Matthews, were there. The latter remained while she made her statement. She at this time assured these members of the grievance committee that when she called on Matthews in the first instance she told him that she came to Chicago in September, 1902, and that she never made any different statement to him until the time at which he paid her back the \$15. On this occasion, however, she adhered to her original statement to the effect that Matthews told her that the suit had been brought, a notice published, and that the case would be reached in September. She also assured the committee that she had purposely deceived them, on the occasion of making the first statement, for the purpose of getting her \$15 back, and testified in this case that she did not know the proceeding she set in motion might have such serious results for Mr. Matthews, but that she supposed the association would compel him to refund the \$15 and that would be the end of the matter. While she was making the second statement to the committee, and while Matthews was still present, she was asked: "How much money has Mr. Matthews paid you?" and answered: "Only \$15," and says she made this answer because Matthews had warned her not to tell the committee about the payment of the remaining \$15.

While she was testifying in this case in reference to this latter \$15, the following colloquy occurred on cross-examination: "Q. Were you paid for coming up here today? A. Paid for coming up here? Q. Yes. A. By whom? Q. Didn't you get fees for coming up? A. Fees? Q. Yes. A. From whom? Q. From anybody. A. No, sir. Q. Nobody paid you or promised you anything? A. No, sir. I begged before the association to please drop this matter. Q. I am not asking you anything now. You have been talking enough and fast enough. Madam, when nobody is asking you anything, it might be well if you would keep still, I think. A. To whom will I pay the \$15 I have taken from Mr. Matthews? Mr. Fogle: I have nothing to do with that matter, Mrs. Manupelli. The Witness: To show you gentlemen that I am sorry, and that I would have gone out of town today, and I would have done so, if I could— Mr. Ashcraft: She is not on the witness stand now, Mr. Reporter. Mr. Fogle: Certainly she is. You said you wanted everything that occurred. The Witness: I was willing to go out of town, but, gentlemen, I cannot help it now. (The witness at this point offered \$15 in currency to respondent,

Matthews.) Now, Mr. Matthews, I don't want it, and I hope you will keep it. I have told the truth now, for lies kind of get me in trouble. I got it from Mr. Matthews, and I will give it back to Mr. Matthews. Mr. Ashcraft: Let's see how much there is. The Witness: There is five, ten, fifteen. (Counting money.) I would have gone out of town, if I could; but I have come up here now to hand this to you. Mr. Ashcraft: She returns the \$15, which is accepted by Mr. Ashcraft and put away. The Witness: Just to show you, gentlemen, that I would have gone out of town."

Respondent testified that, when Mrs. Manupelli first called on him, she told him that she had been in Chicago since September, 1902 that he advised her that her bill could not be filed until she had been an actual resident of the state for one year, and that she explained to him that her relatives were bothering her and tantalizing her and quarreling with her because she, a Jewess, had married a man who was an Italian and a Catholic, and that she would have no peace with them until she could get a divorce, and that she said to him, "Can't you do something for me so that I can tell my parents that I have made application, and that I intend to get a divorce?" and that he assured her that he sympathized with her, and would draw a bill for her, if she would pay him \$15 for that service, and that she could sign it and tell her mother that the proceeding was under way and refer the mother to him, and that, in accordance with this arrangement, the bill was drawn and signed and the \$15 paid. He admits that he made the statements to Kemmelhor which that gentleman avers were made to him, but testifies that he made them in the interest of his client and for the purpose of conveying to Kemmelhor the impression which he understood she desired her relatives to have, viz., that a suit was pending and swears that he did not in fact agree or intend to file the bill until the expiration of a year from September 1, 1902. He is corroborated to some extent by Henry J. Kramer, president of the Spencer Collection Agency, who testifies that he was present during Mrs. Manupelli's first conversation with Matthews, and that she stated that she had been in Illinois eight or nine months, and that Matthews told her that she could not apply for a divorce until she had been here a year and also by Charles J. Kramer, secretary and treasurer of the collection agency, who swears that he was at the place of business of Charles Scribner's Sons in February, 1904, at the time of the first interview between Matthews and Mrs. Manupelli after the filing of the information and that at that time he heard Matthews say: "I am sorry you got me into trouble; you know you have not told the truth," and that she replied, "I am sorry I ever did it; I don't want to put you to any trouble; I don't want to prosecute the matter; all I want is my money back,"

and that she further said that she had told the grievance committee some things that were not true, and that she was ready to go over there and make a clean breast of it and get out of it as best she could, but did not want to do anything unless Mr. Kemmelhor would come back and arrange the matter, and that if his expenses, which would be about \$15, were paid, she would bring him back. Respondent is further corroborated by Margaret E. Sutton, an employé in the office of the Spencer Collection Agency, who testifies that in the latter part of August or the first of September, 1903, she heard a part of a conversation between Matthews and Mrs. Manupelli, in which he said: "Well, when you pay the balance of the money, I will start your suit, and I won't start it before;" that some time about a week later Mrs. Manupelli was again at the office and inquired when the bill would be filed, and respondent again told her that he would not file the bill until he received the balance of the money, which tends to show that she knew, despite the assurances given Kemmelhor in her presence, that the suit had not been instituted. To some extent the evidence of the witness Sutton loses its force, however, from the fact that on cross-examination she could not tell certainly whether Mrs. Manupelli inquired when the bill would be filed, or whether she inquired when the case would come up, and the witness then stated that Matthews might have replied that it would not come up or that it would not be tried until he got the balance of the money.

A careful consideration of the testimony leaves us unable to say that the charges set forth in the information filed against the respondent have been sustained by the character of proof required to justify the legal conclusion of guilt. The punishment to be inflicted by disbarment of an attorney is the destruction of his professional life. Only clear and satisfactory proof can justify a decision from which would flow consequences of such grave nature. In *People ex rel. v. Harvey*, 41 Ill. 277, we said that to justify the infliction of such heavy punishment as disbarment "the case must be clear and free from doubt, not only as to the act charged, but as to the motive." In *People ex rel. v. Barker*, 56 Ill. 299, wherein a judgment of disbarment was asked, it was said that the law undoubtedly requires "evidence of clear and positive character * * * to establish a charge so grave in its nature." We find nothing in the record which will warrant us in attaching greater credence to the testimony of Mrs. Manupelli than to that of the respondent. His testimony is corroborated to an extent equal to that of hers. That he is guilty of the charges specifically set forth in the information upon which he is being tried is not shown by evidence which is clear and positive and free from reasonable doubt. We regard his conduct in entering into an arrangement with her to deceive her parents and friends in

reference to the pendency of the divorce proceeding, in paying her \$30 in furtherance of a plan to get this case disposed of without a trial, and in suffering her to make an uncontradicted statement to the grievance committee in his presence to the effect that he had paid her but \$15, as most reprehensible and unworthy any member of the honorable profession to which he belongs; but his disbarment is not sought on either of these grounds.

The General Assembly, by section 8 of chapter 13 (1 Starr & C. Ann. St. 1896, p. 492), entitled "Attorneys," provided that before the name of an attorney should be stricken from the rolls he should be notified distinctly of the grounds of complaint or the charges exhibited against him, and should have notice and reasonable time in which to make his defense thereto. Rule 40 of this court provides that an information for the disbarment of an attorney shall make clear and specific charges, giving time, place, and acts of misconduct with reasonable certainty. In *People ex rel. v. Allison*, 68 Ill. 151, we held, on an information against an attorney at law, he can only be tried on the charges contained in the information. The evidence being insufficient to legally establish the truth of the charges alleged against the respondent, the rule to show cause why he should not be disbarred must be discharged.

Rule discharged.

(217 Ill. 105)

SCHAEPPi v. BARTHOLOMAE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MORTGAGES—FORECLOSURE SALE—MERGER.

Where a trust deed is foreclosed and a sale had, the trust deed is merged in the decree, and the purchaser acquires only such an interest as he is entitled to under the statute, without reference to the trust deed.

2. SAME—RIGHTS OF PURCHASER—RENTS AND PROFITS.

On foreclosure sale, the purchaser is not entitled to the rents and profits during the period of redemption, though there is an express provision to that effect in the trust deed.

3. SAME—RECEIVER—DEFICIENCY.

Where, after foreclosure sale, there is a deficiency, the court may appoint a receiver to collect the rents during the redemption period and apply them on the deficiency.

4. SAME—RIGHTS OF PURCHASER.

The only right of a purchaser at a foreclosure sale, if there is no redemption, is to receive a deed after the expiration of the redemption period.

Appeal from Appellate Court, First District.

Bill by Paul Schaeppi against George Bartholomae. Decree for defendant was affirmed by the Appellate Court, and plaintiff appeals. Reversed.

The appellant filed a bill in chancery in the superior court of Cook county to foreclose a trust deed in the nature of a mortgage upon premises situated in said county, known as Nos. 870 and 872 West North ave-

nue, Chicago. John H. Glade filed a cross-bill to foreclose a trust deed held by him upon No. 870 West North avenue, and Phillip Bartholomae filed a cross-bill to foreclose a trust deed held by him upon No. 872 West North avenue. It was held by the court that the trust deeds of Glade and Bartholomae, respectively, were superior liens to that of the appellant, and a decree of foreclosure and sale was entered directing that said premises be sold by a master, and that he first pay the Glade trust deed from the amount received from the sale of the premises covered thereby, and apply the overplus, if any, upon the trust deed of appellant, and that he first pay the Bartholomae trust deed from the amount realized from the sale of the premises covered thereby, and that he apply the overplus, if any, upon the trust deed of appellant. On May 3, 1902, the premises covered by the Glade trust deed were sold to Glade, and the premises covered by the Bartholomae trust deed were sold to the executor of Bartholomae. On the 14th day of the same month the master reported the sales, and that there was a deficiency remaining unpaid on the Glade trust deed of \$1,006.88 and on the Bartholomae trust deed of \$540.92, for which amounts deficiency decrees were rendered. After the filing of the original and cross bills, a receiver was appointed, who took possession of the premises and remained in possession until the time of redemption had expired and deeds were made. On the 6th of August, 1903, the receiver filed a report, in which he showed he had collected rent to the amount of \$855.14 on No. 870 West North avenue, which he had paid to Glade to apply upon the deficiency decree rendered in his favor, and had collected rent to the amount of \$726.90 on No. 872 West North avenue; that he had paid to Henry Bartholomae, Jr., executor of Phillip Bartholomae, the sum of \$574.67 in full of the deficiency decree, including interest, rendered upon the Bartholomae trust deed, and that he had paid to the appellant, to apply upon the decree in his favor, the sum of \$152.23. The certificate of purchase upon the Bartholomae trust deed had been assigned by the executor to George Bartholomae, and he had received a master's deed conveying to him No. 872 West North avenue. George Bartholomae filed objections to the approval of the receiver's report, and took the position that he, as the owner of No. 872 West North avenue, was entitled to be paid by the receiver said sum of \$726.90, by virtue of the following provision found in the Bartholomae trust deed: "The grantors waive all rights to the possession of and income from the said premises pending such foreclosure proceedings and until the period of redemption from any sale thereunder expires, and agree that a receiver shall be appointed to take possession or charge of said premises and collect such income, and the same, less receivership expenses, pay to the

person entitled to a deed under the certificate of sale, or in reduction of the redemption money, if said premises be redeemed," which provision was set out in full in the decree of foreclosure and sale; and Henry Bartholomae, Jr., upon the hearing of objections to the master's report, by his solicitor in open court waived any right to the said sum of \$726.90, or any part thereof, as executor of Phillip Bartholomae, deceased, and averred the same belonged to the said George Bartholomae, as the owner of No. 872 West North avenue, under the provisions of the Bartholomae trust deed. It also appeared that, although the report recited payment to said executor of said sum of \$574.67, the executor had not received said sum, but that the same had been tendered to him by the receiver. The superior court sustained the objections of George Bartholomae to the receiver's report, and ordered the receiver to pay said sum of \$726.90 to George Bartholomae as the person entitled to receive the same under and by virtue of the provisions with reference to rent contained in the Bartholomae trust deed. Paul Schaeppi prosecuted an appeal from the order of the superior court sustaining exceptions to said receiver's report to the Appellate Court for the First District, where the order of the superior court was affirmed; and, a certificate of importance having been granted, he has prosecuted a further appeal to this court.

Fred H. Atwood, Frank B. Pease, Wm. S. Corbin, and Chas. O. Loucks, for appellant. Edward C. Nichols, for receiver. William W. Case, for appellee.

HAND, J. (after stating the facts). The appellant, Paul Schaeppi, has assigned as error, and Emil R. Haase, the receiver, has assigned as cross-error, the action of the superior and appellate courts in refusing to approve said receiver's report, and the only question discussed in this court is the legality of the order of the superior court directing the receiver to pay said sum of \$152.23 to George Bartholomae, instead of to appellant, Schaeppi.

The sole objects of the several trust deeds sought to be foreclosed in this proceeding were to secure the payment of the several sums of money mentioned therein, and, in case of foreclosure and sale during the time of redemption, the grantor in the trust deeds was entitled to the possession of the premises and to receive the rents, issues and profits thereof. If, however, the premises were inadequate security, the person liable to pay the indebtedness insolvent, the person in possession of the premises committing waste, or other equitable grounds were shown, and any part of the decree of foreclosure was not satisfied by the sale, the court in which the foreclosure suit was pending might, through a receiver and not otherwise, appropriate the rents, issues, and profits arising from the premises during the period of redemption for the pur-

pose of paying the portion of the indebtedness which was not satisfied by a sale of the premises. The result of the foreclosure proceedings was to merge said trust deeds into the decree, and the purchaser at the foreclosure sale held under the decree, and not under the trust deeds, and after a sale such purchaser was entitled only to such rights as were conferred upon him by the statute, which were (1) a right to a certificate of purchase; (2) a right to a deed of the premises at the expiration of 15 months from the date of sale, in case no redemption of the premises was made; and (3) in case of redemption to receive back the purchase money, with interest, and any taxes he had paid upon the property during the period of redemption.

It is urged, however, that by virtue of the provision found in the Bartholomae trust deed the person entitled to a deed under the foreclosure sale, in case no redemption took place, was expressly granted the rents during the period of redemption, and that, no redemption having taken place and a deed having been made to George Bartholomae, he was entitled to the rents arising from said premises during the period of redemption. We cannot accede to this contention. The provision with reference to rent, found in the trust deed, was a covenant between the grantor in the deed and the cestui que trust, and prior to the foreclosure sale was merged in the decree of foreclosure (Davis v. Dale, 150 Ill. 289, 87 N. E. 215; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; Haigh v. Carroll, 209 Ill. 578, 71 N. E. 317); and the purchaser at said sale took title under the decree, and he can claim no right by virtue of said provision found in the trust deed with reference to rent. In Davis v. Dale, supra, the trust deed provided that the grantors should pay the taxes and assessments levied upon the property described in the trust deed, and should not suffer the premises, or any part thereof, to be sold or forfeited for any tax or assessment, and that, upon default in the performance of any of the covenants of the trust deed, the trustee, or any person appointed by the court, might take possession of the premises, collect the rents, issues, and profits, and apply the same toward the payment of taxes, etc. A bill was filed to foreclose the trust deed, and a decree of foreclosure and sale was made, and the premises were sold by the master to the complainant for the full amount of the decree. A receiver had been appointed upon the filing of the bill, who remained in possession of the premises during the period of redemption, and, upon his final report coming in, he was ordered by the court to pay the taxes upon said premises which had accrued during the period of redemption, under the provisions of said trust deed, out of the rent in his hands which had been earned during that period. That decree, upon appeal to the Appellate Court for the First District, was reversed, and upon a further appeal to this court the judgment of the Appellate Court was af-

firmed; and it was held that the only object of the appointment of the receiver was to preserve the security and to collect and apply the rents and profits to the payment of the indebtedness secured by the trust deed, and that, the indebtedness having been satisfied by a sale of the premises, there was no occasion for the continuance of the receivership; but, as the grantor was entitled to the rents and profits arising from the premises during the period of redemption, the receiver would be treated as having been in possession of the premises for his benefit. It was, however, urged that the complainant, who was the purchaser at the foreclosure sale, was entitled to have the taxes which had accrued during the period of redemption paid out of the rents earned during that period by virtue of the provisions of the trust deed. In reply to that contention the court (on page 248 of 150 Ill., page 216 of 87 N. E.) said: "The contention of counsel for appellant that in some way the purchaser at the master's sale acquired equities, under the clauses and covenants of the trust deed, for the payment of taxes by the grantor, is equally untenable. By virtue of the lien created the mortgagee or cestui que trust had the right to have the security foreclosed, and the property sold, and the proceeds applied in payment of the secured debt. But when this has been done, and the lien enforced by a sale of the property, and the proceeds applied, the mortgage or trust deed has expended its force, and the property is no longer subject to its provisions." Ogle v. Koerner, 140 Ill. 170, 29 N. E. 563; Seligman v. Laubheimer, 58 Ill. 124. Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or cestui que trust or not. By becoming the purchaser a new relation created by the statute exists, in no wise dependent upon any privity of contract between the purchaser and mortgagor." In Lightcap v. Bradley, supra, the court held that, upon the foreclosure of a trust deed in the nature of a mortgage, all the rights and liabilities growing out of the trust deed are merged in the decree, and that upon a sale of the premises under the decree the only interests of the purchaser at the sale are those rights which are evidenced by the certificate of purchase. In Haigh v. Carroll, supra, a trust deed was foreclosed upon a leasehold interest. One of the complainants purchased the premises at the foreclosure sale for the entire amount of the decree. A receiver had been appointed, who remained in possession of the premises during the period of redemption. He paid out of the rents collected by him from the property something like \$7,000 for ground rent, taxes, insurance, etc. The trust deed provided that any rents that might be collected, less a commission of 5 per cent. for collecting, after the foreclosure sale and before the time of redemption had expired, should be paid to the purchaser of the premises at the foreclosure sale. On a

contest over the approval of the master's report, it was held that, notwithstanding said provision in the trust deed, the rents did not pass to the purchaser at the foreclosure sale, but that they belonged to the owner of the equity of redemption; that all the complainants were entitled to was to have their debt paid; and that all the purchaser was entitled to were such rights as he acquired by the certificate issued to him upon the sale.

It could there have been urged, as it is urged here, that by virtue of the provisions of the trust deed the purchaser should receive the rents during the period of redemption, as he must be held to have bid more for the premises than he would have bid but for such provision, and that he should be protected in his bid by being decreed the rents collected during the period of redemption. It is, however, clear that whatever rights the purchaser obtained at the foreclosure sale were represented by the certificate of purchase, and that the rents did not pass to him by virtue of said certificate; that his rights as such purchaser were created by the statute, and were in no wise affected by the provisions of the trust deed, which were merged in the decree of foreclosure. In the Haigh Case (on page 581 of 209 Ill., page 319 of 71 N. E.) it was said: "Reliance is placed upon that provision of the trust deed to the effect that during the period of redemption the rents of the mortgaged premises shall be paid to the purchaser at the foreclosure sale. So far as that provision is concerned, the sale satisfies the mortgage and renders all its provisions inoperative. They were effective only for the purpose of securing satisfaction of the mortgage debt. When that purpose was accomplished, their force was entirely spent." And again: "The rights of the complainants under the trust deed were at an end, and, as the purchasers had no right to the possession or rents until the certificate of purchase had ripened into a deed, it is apparent that no right existed by which either the complainants or the purchasers could control the money arising from rent during the redemption period."

The debt secured by the Bartholomae trust deed, with the exception of \$540.92, was satisfied by a sale of the premises. That amount, with interest, out of the rents in his hands arising from the premises, was tendered to the executor of Phillip Bartholomae by the receiver, which paid the Bartholomae foreclosure decree and was a satisfaction of that indebtedness. The holder of such indebtedness, having received payment thereof, must be satisfied, and the purchaser of the premises covered by the Bartholomae trust deed, no redemption having taken place, having received a deed for the premises, has received all that under the statute he is entitled to, and must also be satisfied. The balance remaining in the hands of the receiver, to wit, \$152.23, under the decree, is overplus, and should be paid to the appellant as the holder of the junior incumbrance.

The judgment of the Appellate Court and the order of the superior court will be reversed, and the cause will be remanded to the superior court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(217 Ill. 115)

NATIONAL FIRE INS. CO. v. THREE STATES LUMBER CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INSURANCE—CHARACTER OF INSURED'S TITLE—SOLE OWNERSHIP—CONTRACTS OF SALE.

The fact that the owner of property has contracted to sell the same does not render his ownership thereof other than sole and unconditional, within the meaning of a fire policy covering the property, where the contract has not been performed at the time of the loss.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 799.]

2. VENDOR AND PURCHASER—POSSESSION OF VENDEE—CHARACTER OF POSSESSION.

One in possession of land under a contract for personal services to be rendered in cutting timber and manufacturing lumber for the owner, and entitling the person in possession to a conveyance on certain conditions of the land remaining unsold when all the timber is manufactured, is in possession as agent or representative of the owner, and not as vendee.

Appeal from Appellate Court, Fourth District.

Action by the Three States Lumber Company against the National Fire Insurance Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action of assumpsit, begun in the circuit court of Alexander county on January 28, 1903, and brought on an insurance policy, issued by appellant to appellee, bearing date July 5, 1902, insuring the property therein mentioned, being a sawmill plant situated in Mississippi county, Ark. Of the amount insured, part was upon the iron-clad metal-roof mill buildings, and a part on the machinery of all kinds, and a part on the engine and boilers. The declaration set out the policy in *hac verba*. The first plea was the plea of the general issue. The second and third pleas were pleas of cancellation of the policy. The fourth plea was that the interest of the insured was other than the sole and unconditional ownership of the property. Issue was taken upon the general issue and upon the second and third pleas, after demurrers thereto had been sustained and the pleas had been amended. After demurrers and amendments, issue was also taken upon the fourth plea. A jury was waived, and the cause was tried before the court without a jury by agreement. The mill property was burned on September 6, 1902, and, some of the companies declining to pay, suits were brought on the policies at Cairo. There were nine policies, aggregating \$14,500. Appellee, whose headquarters were in Cairo, Ill., applied to one Brown, an insurance broker living there, for insur-

ance on said sawmill plant, and Brown requested one Fisher, an insurance broker at Memphis, to place the insurance, and he procured the policies from the agency of one Doltroff at Wynne, Ark. The findings of the court below were against appellant, and on March 14, 1904, judgment was rendered in favor of the appellee, and against the appellant, for \$2,118.86. An appeal was taken from this judgment to the Appellate Court for the Fourth District, and the latter court has affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance.

Before the issuance of said policy, and on December 17, 1898, a contract was executed between appellee, a corporation organized under the laws of Wisconsin, its successors or assigns, as parties of the first part, and one A. B. Wolverton of Luxora, Ark., as party of the second part. Said contract of December 17, 1898, recites that appellee "is now the owner and is in possession of the hereinafter described land and timber situated in Mississippi county, state of Arkansas." By the terms thereof "the said A. B. Wolverton agrees that he will manufacture into lumber for the said Three States Lumber Company, its successors or assigns, all of the merchantable timber now lying, standing, or being on the following described lands, and will deliver the same to said * * * company * * * as directed, f. o. b. barge Mississippi river." Here follows a description of the lands. It is therein agreed "that the said A. B. Wolverton will at all times follow the instructions and directions of said Three States Lumber Company, its successors or assigns, or their authorized agents, both in the cutting of said timber and in the manufacture of all lumber to be delivered under the terms of this contract, and said A. B. Wolverton will continue to follow such instructions and directions so long as this contract shall remain in full force and effect. It is particularly understood and agreed that the title to all land and timber heretofore described is and shall remain in said * * * company, * * * and the title and possession of all lumber manufactured under this agreement remains in said * * * company, * * * free from all liens, claims, demands, and incumbrances of any nature whatsoever." Said company, its successors or assigns, therein "agree to purchase a suitable sawmill and other equipment, including steel tram and logging road, rolling stock for use on said tram and logging road, log wagons, teams, etc., all of said property to be purchased for the account of said Three States Lumber Company, its successors or assigns, and to be used by said A. B. Wolverton in the manufacture and delivery of all merchantable timber heretofore described." It is further agreed that "the title and possession to all such property and material is and shall remain in the said Three States Lumber Company, its successors or assigns,

and by it entered upon its books for record under name of 'Wolverton Lumber Account.' " It is further agreed "that the said * * * company * * * may sell any parcel or parcels of land, on which all merchantable timber shall have been removed under the terms of this contract, and the proceeds of such sale or sales will be entered upon its books and placed to the credit of 'Wolverton Lumber Account.'" The said company "agrees to make to said A. B. Wolverton a monthly advance for the payment of all labor and operating expenses, not to exceed \$5 per thousand feet; said advance to be made on estimate on all lumber manufactured and in pile on millyard, according to the terms of contract, which shall have been manufactured during the preceding months, and said estimate to be made by said Three States Lumber Company * * * or its authorized agents and entered upon its books in 'Wolverton Lumber Account.'" It is further agreed that, should the said Wolverton, "in case of death, disability, or otherwise, fail or neglect to comply with the terms of this agreement, or refuse or delay the cutting of said timber heretofore described, or the manufacture of the same into lumber, then the said A. B. Wolverton agrees that the said Three States Lumber Company, its successors or assigns, may, upon written or verbal notice to him or his legal representatives, enter upon and take possession of all improvements of any and all nature whatsoever, and that they may make such arrangements as they may consider necessary to continue the cutting and manufacture of said timber, and said A. B. Wolverton or legal representatives do relinquish any and all claims they may have had under this agreement to the cutting and manufacture of said timber, and this agreement is canceled, except as to any manufactured lumber then on millyard, which shall be settled for according to the terms of this contract, and any balance which may be found due A. B. Wolverton or his legal representatives shall be placed to the credit of 'Wolverton Lumber Account' on books of said Three States Lumber Company, its successors or assigns." It is further agreed that the said Wolverton "will not manufacture any lumber for any other persons or person during the continuance of this contract, except by written consent of said Three States Lumber Company, its successors or assigns." It is therein further agreed that Wolverton "will cut or cause to be cut 10,000,000 feet of lumber each year during the continuance of this contract, until all of said merchantable timber heretofore described shall have been manufactured and delivered to said Three States Lumber Company, its successors or assigns, unless he shall be prevented by fires, floods, or other causes over which he has no control." It is therein further agreed that the appellee, its successors or assigns, "will buy from time to time, as they may elect, addi-

tional timber, bought with knowledge and consent of said A. B. Wolverton, and all such timber so bought is to be manufactured for and delivered to said Three States Lumber Company, its successors or assigns, according to and under the terms of this contract." It is furthermore therein agreed that "when all of the terms of this contract shall have been fully complied with, and all of the merchantable timber heretofore described shall have been manufactured into lumber for and delivered to said * * * company * * * as agreed herein, 'together with any additional timber that may have been purchased under the terms of this contract,' then the said * * * company * * * agrees to quitclaim to said A. B. Wolverton all land remaining unsold under this contract, and will further give to said A. B. Wolverton title to all improvements and personal property that have been purchased by it and remain upon said land, provided there is on its books to the credit of 'Wolverton Lumber Account' a sufficient sum to pay for all land, timber, personal property, and improvements at cost of the same, together with all expenses, interest, taxes and assessments thereon; and further provided that such credit shall first be applied on an indebtedness, now owing the said * * * company * * * from said A. B. Wolverton, now amounting to \$28,339.29, resulting from his 'Marked Tree Plant,' and balance of credit to be applied under this contract, if sufficient remains to balance account, otherwise to be held by said Three States Lumber Company, its successors or assigns, and applied by them pro rata as they may elect, under the terms of this agreement." The agreement then contains provisions for stacking and piling all lumber manufactured under the contract above high water, etc., so as to guard against injury to it by fires or floods, and to prevent its being carried away or destroyed thereby; and Wolverton therein agrees that he will carefully watch said lumber from all waste, fires, overflows, freshets, or damages of every kind from the time it is stacked until removed by the company, and that all dimensions of stock manufactured under the contract will be piled separately and put up clear, each corresponding width by itself, and that all cottonwood lumber will be measured and inspected, log run, mill culls, and all worthless boards to be thrown out and retained by Wolverton.

Miles Frederick Gilbert (M. M. Crane, of counsel), for appellant. Lansden & Leek and David S. Lansden, for appellee.

MAGRUDER, J. (after stating the facts). In this case, three defenses were set up in the trial court, and argued and discussed in that court and in the Appellate Court. One of these defenses was that there was a cancellation of the policy by the company before the fire under the following provision in the policy, to wit: "This policy shall

be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation." Whether the company gave such notice, and whether it was received by the appellee, were questions of fact, which are settled by the judgments of the circuit and appellate courts. The defense, based upon an alleged cancellation of the policy, has been abandoned by the appellant company in this court, and no considerations in support of it are presented in the argument of counsel for the appellant.

The second defense made upon the trial below was that the interest of the insured at the date of the policy was other than an unconditional and sole ownership. The policy contains the following provision, to wit: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership, * * * or if any change other than by the death of the insured takes place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise." It was contended by the appellant in the lower courts that the interest of the appellee, as the insured party, in the property insured, was other than unconditional and sole ownership, by reason of the contract made by appellee with A. B. Wolverton on December 17, 1898, as such contract is set forth in the statement preceding this opinion. The appellant upon the trial below submitted to the trial court, to be held as law in the decision of the case, certain propositions to the effect that the interest of the appellee was not, at the time of the destruction of the property by fire, that of sole and unconditional ownership, and that the execution of the agreement of December 17, 1898, between appellee and Wolverton, together with the alleged placing of Wolverton in possession of the insured premises, was an act which so changed the status of ownership as to be in violation of the clause of the policy as to unconditional and sole ownership. These propositions were marked "Refused" by the trial court, and their refusal presents the only question which is now urged upon our attention. That question is whether or not the interest of the insured in the premises was other than an unconditional and sole ownership thereof by virtue of the provisions of such contract.

First. It is insisted by the appellant that the contract of December 17, 1898, is a conditional sale of the property mentioned, and possesses all the characteristics of a bond for a deed and all the objectionable features of an incumbrance, and that it made the ownership conditional, inasmuch as, when the condition therein specified should be per-

formed, appellee agreed to "quitclaim" to Wolverton "all land" remaining. If it be assumed, as is contended by appellant, that the agreement in question is a contract by the appellee for the sale of land to the appellant, it does not follow, for that reason, that the interest of the appellee in the property insured is other than unconditional and sole ownership. This precise question was decided by this court in *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314, where it was held that the execution and delivery of a bond for a deed, even though accompanied by a part payment of the purchase money, was not a sale within the meaning of an insurance policy, requiring the consent of the company to any sale of the property, since the maker of a bond for a deed retains both the legal and equitable title until the obligee has performed the conditions which entitle him to demand a conveyance. Where there is a written contract for the sale of land, the vendor retains the legal title. *Langlois v. Stewart*, 156 Ill. 609, 47 N. E. 177. As was said in *Langlois v. Stewart*, supra: "A bond for a deed is only an agreement to make title in the future, and so long as it remains executory the title is vested in the original owner." The rule in this state is that the vendor is trustee of the title for the benefit of the vendee. *Sutherland v. Goodnow*, 108 Ill. 523, 48 Am. Rep. 560; *Fuller v. Bradley*, 160 Ill. 51, 43 N. E. 732; *Phenix Ins. Co. v. Caldwell*, supra. If, therefore, the agreement here under consideration is a contract for the sale of land by the appellee to Wolverton, the legal title to the property remained in appellee as vendor, and was held by appellee as trustee for the benefit of Wolverton.

In addition to this, the contract of December 17, 1898, expressly provides that "the title to all land and timber heretofore described is, and shall remain, in said Three States Lumber Company, its successors or assigns, and the title and possession of all lumber manufactured under this agreement remains in said Three States Lumber Company, its successors or assigns, free from all liens, claims, demands, and incumbrances of any nature whatsoever." The agreement also provides, as to the property to be purchased in the future by the company, that "the title and possession to all such property and material is and shall remain in the said Three States Lumber Company, its successors or assigns." The agreement also provides that said company, its successors or assigns, "may sell any parcel or parcels of land, on which all merchantable timber shall have been removed under the terms of this contract," and the company only agrees to quitclaim to Wolverton "all land remaining unsold under this contract" when its terms have been fully complied with, and all of the merchantable timber therein described shall have been manufactured into lumber and delivered to the company as agreed

therein, together with any additional timber that may be purchased under the terms of the contract. The provisions that the title and possession were to remain in the company and that the company was to have the right to sell any portion of the land from which the timber should be cut off indicate that the unconditional and sole ownership of the property remained in the company, so far as the legal title was concerned.

Second. It cannot be said that, under the terms of this contract, the equitable title was thereby invested in Wolverton. A mere contract to convey at a future time upon the performance of certain acts by the purchaser does not create an equitable title. "It is but an agreement that may ripen into an equitable title. When the purchaser performs all acts necessary to entitle him to a deed, then, and not till then, he has an equitable title, and may compel a conveyance." *Chappell v. McKnight*, 108 Ill. 570; *Walters v. Walters*, 132 Ill. 467, 23 N. E. 1120. This question has arisen in connection with the subject of a widow's dower. It is held that a widow may have dower in the equitable estate of her husband in real property; but it has also been held that, where there is a contract for the sale of land, a husband, who is the vendee in such contract, has no such equitable interest in the property, as will entitle his wife to an inchoate right of dower therein, until he has made all the payments for purchase money, as required by the contract, so that nothing remains to be done except the execution of a deed to him. *Greenbaum v. Austrian*, 70 Ill. 591; *Walters v. Walters*, supra. Before the purchaser under a contract of sale has performed all the conditions required of him by the contract, he does not really have an equitable title to the property described in the contract. In the case at bar, the proof shows that, in view of the quantity of land from which timber was to be cut by the terms of the contract, and in view of the amount of timber which it was possible to cut therefrom per day, it would take some 12 years or more before Wolverton could comply with all the terms of the contract. He was not entitled to a quitclaim deed of the part of the property remaining unsold until all the terms of the contract had been fully complied with, and all of the merchantable timber described thereon had been manufactured into lumber and delivered to the appellee. As this period had not arrived at the time the property was destroyed by fire on September 6, 1902, he had no equitable title to the property.

Third. In addition to this, the contract shows that the interest of Wolverton to be acquired by the terms of the contract in the property was remote and contingent. Not only was the timber to be cut from the land and manufactured into lumber and delivered to the appellee, but certain advances that had been made or were to be made, and certain indebtedness due from Wolverton to the appellee, were to be paid off. All this work had to

be done, and these advances and indebtedness had to be paid, before the appellee would be obliged to convey to Wolverton the land remaining unsold and the improvements remaining on the unsold land. This feature of the contract brings the case within the doctrine announced in *Security Ins. Co. v. Kuhn*, 297 Ill. 166, 89 N. E. 822, which was an action in assumpsit on an insurance policy containing a provision that it should be void "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple," and where the defense was that the interest in the plaintiff in the property insured was not that of unconditional and sole ownership, and the ground on which the building was situated was not owned by him in fee simple; and it was there held that the widow, suing upon the policy, who took an equitable life estate as devisee and the legal title as executrix and trustee, had a fee-simple title within the meaning of the policy, and it was there further held that—as to the interest of the plaintiff, which was limited upon her death or the uncertain event of her remarriage, and to dubious and uncertain persons who should be living and able to take the property at her death, so that it could not be known who, if any, would be the surviving child or children, or the issue or descendant of any such child, to receive the future contingent interest, no one having a present vested estate or insurable interest except the plaintiff—"in the action at law she must be regarded as the sole and unconditional owner in fee simple, although the property in her hands or the proceeds of the insurance are impressed with a trust which a court of equity will compel her to execute."

Fourth. It is said, however, by the appellant, that Wolverton was put into possession of the property, and that the possession did not remain with appellee as vendor. It is sought to distinguish the case of *Phenix Ins. Co. v. Caldwell*, supra, from the case at bar, upon the alleged ground that in the former case the vendee under the contract of sale was not put into possession of the property, whereas here it is said that the vendee had the possession. A careful examination of the contract will show that really the possession remained with appellee, the owner of the property. Wolverton's possession was not that of owner or purchaser. Appellee put him in possession of the mill, in order that he might manufacture into lumber the timber furnished to him by the appellee. He was merely the agent or representative of the appellee in the management of the property for the purpose of manufacturing the timber into lumber. The contract not only provides in express terms that the title of the property then on hand and to be subsequently purchased should remain in appellee, but also that the possession of the same should remain in appellee. The latter also was given the right to sell any and all of the land whenever the timber

should be removed from it. As to Wolverton, the contract was a personal one; that is to say, a contract for his personal services. He was to perform the duty of manufacturing the timber into lumber. That duty he was obliged to perform, not as the owner or purchaser of the property, but as the representative of the appellee.

Fifth. It cannot be said that there was any change of the interest of the appellee in the property after the issuance of the policy of insurance. The policy bears date July 5, 1902. When it was issued, the contract with Wolverton already existed, it having been executed on December 17, 1898. Therefore the interests both of the appellee and of Wolverton under the contract existed when the policy was issued. It is not shown, by any testimony in the record to which our attention has been called, that any written application was made by appellee for the policy of insurance upon which this suit is brought. Consequently appellee made no representations as to the nature or character of its interest in the property when the policy was issued to it; nor does it appear that any inquiry was made by the appellant, or its agents, of appellee as to the nature of the latter's interest in the property. Consequently there could have been no misrepresentation on the part of appellee as to the extent or character of its interest.

The third defense made below, that appellee concealed the existence of the contract with Wolverton at the time of the issuance of the policy, becomes immaterial, because, in the view here taken, appellee's interest under the contract was not less than unconditional and sole ownership of the property. In *Manchester Fire Assurance Co. v. Abrams*, 89 Fed. 932, 32 C. C. A. 426, it was said by the United States Circuit Court of Appeals of the Ninth Circuit: "Sound reason, as well as the weight of authority, inclines us to the view that, where the assured has an insurable interest in the property, and in good faith applies for insurance upon the same, and makes no actual misrepresentation or concealment of his interest therein, and the insurance company refrains from making inquiry concerning his interest, and issues a policy to him, and accepts and retains his premium, the company must be presumed to have knowledge of the condition of his title, and to assure the property with such knowledge. * * * In the case at bar there can be no question that the defendant in error insured the property in good faith as his own. He was asked no questions concerning his title. The condition in the policy, which it is claimed renders it void, was one of the numerous printed conditions which the policy contained when it was delivered to him. The law does not favor forfeiture. The contract issued and prepared by the insurance company is made for its own protection, and must be construed most strongly against it." See, also, *Philadelphia Tool Co. v. British American Assurance Co.*

132 Pa. 236, 19 Atl. 77, 19 Am. St. Rep. 596; *Western Assurance Co. v. Mason*, 5 Ill. App. 141; *Miotke v. Milwaukee Mutual Ins. Co.*, 113 Mich. 166, 71 N. W. 463; *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302, 25 Am. Rep. 388. As, therefore, appellee, under the contract with Wolverton, retained the legal and equitable title and the possession of the property, its interest was not thereunder less than a sole and unconditional ownership.

Counsel for appellant substantially admit that, if the case of *Phenix Ins. Co. v. Caldwell*, supra, is to stand as the law of this court, the decision there made disposes of the defense here set up; but counsel strenuously urge that the decision in the *Caldwell* Case is not in harmony with many decisions in other states upon this point, and that it ought to be overruled. After a careful consideration of the able argument of counsel, we see no reason for changing or retreating from the views expressed in the *Caldwell* Case.

For the reasons above stated, the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

(217 Ill. 128)

WHEELER v. CHICAGO TITLE & TRUST CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. GARNISHMENT — EXECUTORS — PREMATURE ISSUANCE.

Hurd's Rev. St. 1899, p. 936, c. 63, provides that administrators and executors may be summoned as garnishees. Administration Act (Hurd's Rev. St. 1899, pp. 104, 105, c. 8) §§ 4, 6, 7, provide that the power of an executor before probating the will shall extend to the burial of the testator, the payment of necessary funeral expenses, and taking care of the estate, and require the executor, before entering upon his duties, to subscribe a certain oath and enter into a bond. Hurd's Rev. St. 1899, p. 1746, c. 143, makes a will available as such only when admitted to probate. *Held*, that executors or administrators are not subject to garnishment until the will is probated and letters testamentary are issued, and it is immaterial that the debt is owing absolutely and the garnishee has legally qualified as executor at the time of filing his answer.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 119.]

2. GARNISHMENT — PLEADINGS — ANSWER OF GARNISHEE.

Formal pleadings are not required in garnishment proceedings, and the garnishee may in his answer allege facts showing that the proceedings are premature.

3. SAME — NATURE OF REMEDY — CONSTRUCTION OF STATUTE.

While the garnishment statute is to be liberally construed for the advancement of the remedy, such remedy is purely legal, and every case must be brought within the scope of the statute, and, whatever the effect may be, the words of the statute must control.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Garnishment, § 1.]

4. EXECUTORS — POWERS BEFORE PROBATE.

Hurd's Rev. St. 1899, p. 104, c. 8, § 4, providing that the power of the executor over the testator's estate before the probate of the will and obtaining of letters testamentary shall extend to the burial of testator, the payment of necessary funeral expenses, and the taking care of the estate, has modified the common-law powers of executors before the probating of the will, by restricting them to the exercise of the functions specified.

Appeal from Appellate Court, First District.

Garnishment suit by Charles G. Wheeler, for the use of Henry K. Elkins' executors, against the Chicago Title & Trust Company, individually and as the executor of Sarah J. Wheeler, deceased. From a judgment of the Appellate Court reversing a judgment for plaintiff, plaintiff appeals. Affirmed.

Morton D. Hull, for appellant. Eugene H. Garnett (Gwynn Garnett, of counsel), for appellee.

CARTWRIGHT, C. J. In December, 1901, Henry K. Elkins recovered a judgment against Charles Gilbert Wheeler. Elkins died, and Kate Elkins Daniels is the surviving executrix of his will. On January 10, 1902, Sarah J. Wheeler, wife of Charles Gilbert Wheeler, the judgment debtor, died leaving a will by which she gave to him a money legacy of \$8,000 and appointed the Chicago Title & Trust Company executor. On January 17, 1902, Charles Gilbert Wheeler assigned said legacy to said trust company to secure a loan of \$1,500. On January 22, 1902, the executors of the will of Henry K. Elkins commenced this garnishment suit in the circuit court of Cook county against said trust company, in its own right and as executor of said will, and the writ was served the same day. On January 23, 1902, the trust company filed in the probate court of Cook county its petition for the probate of the will of Sarah J. Wheeler and for letters testamentary thereon. On February 25, 1902, the will was admitted to probate, and on the same day Wheeler assigned his legacy to Augustus W. Wheeler, subject to the previous assignment to the trust company. On February 26, 1902, letters were issued to the trust company as executor, and neither of the assignments was filed for record in the probate court until that day. On April 5, 1902, the trust company filed two answers, one in its own right and the other as executor. In the answer as executor it admitted the giving of the legacy by the testatrix to Charles Gilbert Wheeler, but alleged that it was not executor at the time of the service of the writ. There was a hearing, at which the only defense made was that the trust company was not executor when the suit was begun, and therefore the suit was premature. The court discharged the trust company in its individual capacity, but found against it as executor, and continued the cause until an order of distribution should be entered in the probate court. Subsequent-

ly, upon a partial order of distribution in the probate court, judgment was entered by the circuit court against the trust company, garnishee, as executor, to be paid in due course of administration. The trust company sued out a writ of error from the Appellate Court for the First District, and that court reversed the judgment. From the judgment of the Appellate Court the case is brought here by appeal.

The only question to be determined is whether the act in relation to the garnishment of administrators and executors, in force July 1, 1897, authorizes the commencement of a garnishment suit against an executor before the probate of the will and the issuing of letters testamentary. That statute recognizes the rule that general statutes relating to garnishment are not applicable to executors until a decree for payment or distribution has been made, and provides that they may be summoned as garnishees, but that final judgment shall not be rendered until an order for distribution has been made. The evident purpose of the statute is to change the former rule that an executor or administrator was not subject to garnishment until the payment of a claim or legacy had been ordered by the probate court, so that he became personally liable for the payment, and to subject executors and administrators to proceedings by garnishment before a final decree of distribution, and before the share of any heir or distributee or the amount of a claim or share has been finally or definitely ascertained. The statute is as follows: "That hereafter it shall be lawful to summon administrators and executors as garnishees, and they may be garnisheed with respect to any moneys, goods, chattels, lands, tenements or other estates belonging to any devisee or legatee under any will, or belonging to any heir or distributee of any estate; but no final judgment shall be rendered against such administrator or executor until after an order of distribution has been made by the county court, out of which his letters testamentary or of administration issued. No assignment, transfer, or other disposition, by an heir, legatee or devisee of his distributive share, legacy or devise in the hands of any administrator or executor shall operate to defeat the garnishment of the same unless the said assignment, transfer, or other disposition is reduced to writing and filed in the office of the clerk of the county court, out of which such letters testamentary or of administration were issued before the service of process of garnishment upon such administrator or executor." Hurd's Rev. St. 1899, p. 936, c. 63.

We are of the opinion that the act only authorizes a proceeding against a qualified executor, who is authorized by law to exercise the powers of an executor and to perform the duties imposed upon him by the will. At common law it was considered that the title of the executor was derived solely

from the will, and that the probate was only evidence of its genuineness, and therefore an executor could, before probate, exercise all the powers of an executor which did not require him to make proof of his letters. He could bring a suit and proceed with it up to filing a declaration, but could not file a declaration, because proof of his letters was then necessary. His title and interest and right of possession as executor vested at the death of the testator. That rule has been changed by our statute, and it is only by relation that the grant of letters testamentary confers title upon the executor and validates his acts from the testator's death. Section 4 of the administration act provides that the power of the executor over the testator's estate before the probating of the will and obtaining letters testamentary shall extend to the burial of the testator, the necessary funeral expenses, and the taking care of the estate. By sections 6 and 7 he is required, before entering upon his duties as executor, to subscribe a certain oath and enter into a bond, and the letters testamentary issued to him authorize him as executor to perform all the duties enjoined upon him by the will and all other acts required of him by law. Hurd's Rev. St. 1899, pp. 104, 105, c. 3. The statutes have modified the common law by restricting the powers of an executor before probate of the will to the burial of the testator, the payment of funeral expenses, and such acts as are necessary to preserve the estate. If the will is probated, the grant of letters relates back to the date of the testator's death and validates all acts of the executor which are otherwise lawful and proper. *Globe Accident Ins. Co. v. Gerlach*, 163 Ill. 625, 45 N. E. 563, 54 Am. St. Rep. 486; 11 Am. & Eng. Ency. of Law (2d Ed.) 907. It is true that the acts specified in the statute may be performed by a person before probate, for the reason that he has been named in a will as executor, and they are validated by the subsequent grant of letters; but it is also true that if the will is rejected when presented for probate, and he is never legally an executor, his acts are equally valid, and he is not liable as an executor of his own wrong, unless upon refusal to deliver up the estate to the person authorized by law to receive the same. Under our statute a will only becomes available in law as such when admitted to probate (Hurd's Rev. St. 1899, p. 1748, c. 148), and we think the act of 1897 was not intended to apply to one who has merely been named as executor in a will and who has not qualified as such executor.

The remedy by garnishment is remedial in its nature, and the statute is to be liberally construed for the advancement of the remedy. *Hannibal & St. Joseph Railroad Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581. It is therefore urged by counsel that the statute should be construed to include an executor before probate, for the reason that after a testator's death and before probate a legacy

may be assigned or transferred and the remedy of the creditor be lost. That fact is worthy of consideration, but it must also be remembered that such a construction would render it impossible for one receiving a bona fide assignment or transfer of a legacy for a valuable consideration, and which ought to be sustained, to protect himself by filing a written assignment or transfer in the office of the clerk from which the letters testamentary were issued. The statute provides that no assignment, transfer, or other disposition shall operate to defeat the garnishment, unless reduced to writing and filed in the office of the clerk of the court out of which the letters testamentary or of administration were issued, before the service of process of garnishment upon the administrator or executor; and this seems to contemplate that the service of process upon the executor shall be after the letters testamentary are issued. The remedy by garnishment is purely legal, and every case must be brought within the scope of the statute, and whatever the effect may be the words of the statute must control. It is also the rule that the issue in a garnishment suit is whether the garnishee is indebted to the judgment debtor at the time of the answer, and, if the indebtedness is owing without uncertainty or contingency at the date of the answer, the debt is subject to garnishment. When the answer was filed in this case, the trust company was executor, legally entitled to the possession of the estate, and the legacy was not subject to any uncertainty or contingency; but if it was not executor, within the meaning of the statute, when the suit was commenced, the suit could not be maintained. No formal pleadings are required in garnishment, and it was proper to set up the facts showing that the suit was premature in the answer of the garnishee.

In our opinion the judgment of the Appellate Court reversing the judgment of the circuit court was correct. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 140)

ILLINOIS CENT. R. CO. v. JENNINGS.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS — PASSENGERS — SHIPPERS OF STOCK.

A shipper of stock, who by his contract of shipment is entitled to free transportation, but is required to ride in the caboose when the train is in motion, is a passenger, but must ride in the caboose.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 980, 1253.]

2. SAME—AUTHORITY OF CONDUCTOR—WAIVER OF CONTRACT PROVISIONS.

Where a contract for the shipment of stock entitled the shipper to free transportation in the caboose, the conductor of the train had no implied authority, irrespective of circumstances, to invite the shipper to ride on the engine.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1357, 1360.]

3. SAME—WAIVER OF CONTRACT—QUESTION FOR JURY.

Where a conductor had no express authority to waive a provision of a shipper's contract requiring him to ride in the caboose, or to invite persons to ride on the engine, the question whether the conductor's invitation to a shipper to ride on the engine was a waiver of the provision of the contract requiring him to ride in the caboose was one of fact for the jury.

4. SAME—ESTABLISHMENT OF WAIVER.

In order to establish a waiver by a conductor of a provision in a contract for the shipment of stock requiring the shipper to ride in the caboose, the shipper must affirmatively show, in the absence of evidence of express authority on the part of the conductor to waive such provision, that such action was within the apparent scope of the conductor's authority, and that the shipper did not know or have reasonable ground to believe that the conductor was exceeding his authority.

Appeal from Appellate Court, Fourth District.

Action by Frank E. Jennings against the Illinois Central Railroad Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Reversed.

W. W. Barr and R. J. Stephens (J. M. Dickinson, of counsel), for appellant. W. F. Bundy and Frank F. Noleman (O. E. Jennings, of counsel), for appellee.

CARTWRIGHT, C. J. This suit was brought by appellee in the circuit court of Marion county against appellant to recover damages for personal injuries suffered in falling from an engine. The jury returned a verdict of guilty, and assessed the appellee's damages at \$5,000. Judgment was entered on the verdict, and on appeal to the Appellate Court for the Fourth District the judgment was affirmed.

The amended declaration contained three counts, which averred that plaintiff was engaged in the business of buying, selling, and shipping live stock; that on November 20, 1900, he shipped a car load of cattle on defendant's railroad from Centralia to Assumption, Ill.; that it was necessary for him to accompany the cattle for the purpose of watching over and caring for them; that the defendant, in consideration thereof and the payment of freight, issued to him a drover's pass, which entitled him to ride on the freight train; that he was invited and directed by the conductor to ride on the locomotive engine; and that, while so riding on the engine and exercising due care and caution for his own safety, he lost his balance, was thrown and fell from the engine cab through an open window, and was injured. The ground for charging defendant with liability, which was alleged in the first count, was that, while the train was stopped about two miles south of the station at Pana for the purpose of supplying the locomotive with water from a tank, plaintiff was invited by defendant's conductor in charge of the train to ride to the city of Pana upon the

engine; that it was nighttime and there were no lights upon the engine, and plaintiff was unfamiliar with the construction of the interior of the cab; and that, in endeavoring to secure a safe place upon the seat at the side of the engine, he was thrown out of the cab window by reason of the window being left open through carelessness and negligence of defendant's servants. In the second count it was charged that the conductor carelessly and negligently invited, ordered, and directed the plaintiff to take a place upon the engine; that the place in the engine where he was ordered to ride was extremely hazardous, upon a seat at one side of the cab by an open window; that he was unfamiliar with the position, and the cab was not well lighted; and that by reason of the darkness and the motion of the engine and the open window he lost his balance, was thrown, and fell out. The third count charged as negligence that the conductor notified and directed plaintiff to ride upon the engine; that, relying upon the invitation, he left the caboose and mounted the engine, taking a position in the gangway; that while standing in the gangway between the engine and tender the fireman, willfully and wantonly disregarding his safety, ordered him to a seat on the side of the cab; that the cab was not well lighted; and that in endeavoring to take his seat he fell and was thrown off upon the track.

It was proved at the trial that plaintiff was a stockman and shipped a car of cattle, as alleged in the declaration, in pursuance of a shipping contract signed by him, which provided that the car containing his stock should be in his charge while in transit; that he should feed, water, and take care of the stock at regular stopping stations and while the train was not in motion; and that he should be entitled to free transportation, and should, while the train was in motion, ride in the caboose. There were from 26 to 29 cars in the train, and plaintiff's stock was next the engine. It was dark and stormy, and about 12 o'clock in the night the train stopped about 2 miles south of Pana near a water tank. The engine was detached from the train, and was run forward to the tank and supplied with water, and then returned and attached to the train. Plaintiff had been riding in the caboose, and when the train stopped he got off and followed the conductor to the front car to look at his cattle. When the train was ready to start the conductor told him to get on the engine and ride to Pana. He did so, and stood on the gangway in front of the door of the firebox. The fireman could not do his work while the plaintiff was standing there, and when the fireman proceeded to put coal on the fire he told plaintiff to go in and sit on his seat. The fireman's seat ran along the left-hand side of the cab and was about 25 inches above the floor. There was an arm rest running along the window about 13 or

14 inches above the seat and 3 or 4 inches above the window sill. There was a double window on that side, and one part of it was open. The conductor was on the engineer's side of the cab, and the train was running very slowly, at 4 to 6 miles an hour. Plaintiff attempted to take the seat as directed, and in some unexplained manner fell out of the window, about 150 feet from the tank. According to his testimony, he took something to be a step or steps, and there was evidence tending to show that in attempting to get up on the seat he stepped on it and tried to sit on the arm rest along the window and fell out. There were two small lamps in the cab with painted sides, so as to throw light on the steam gauge and water glass. Too much light in the engine would interfere with the engineer and fireman in looking outside and tend to prevent keeping a proper lookout, so that the cab was necessarily somewhat dark. There was no evidence tending to prove any fault or defect in the engine or the management of it, or in the track, the rate of speed, or otherwise. One side window was usually kept open for ventilation and lookout purposes, and the arm rest, which was good protection, was 13 or 14 inches above the seat, so that there was no negligence in the window being open. When plaintiff was standing on the gangway in front of the firebox, the fireman could not perform his duties, so that it was necessary the plaintiff should take some other position in order that the train might be kept in motion. The fireman made no pretense of authority over the plaintiff, and directed him to a place which was apparently safer than the one he occupied. About a quarter of a mile from the tank the absence of the plaintiff was noticed, and it was thought that perhaps he had got off for some purpose. When the storm was over, the men went back and found him lying by the track with his leg broken.

The only questions in the case were whether the invitation or direction of the conductor to ride on the locomotive engine was negligent and improper, whether it had the effect of waiving the condition of the contract that plaintiff should ride in the caboose, and whether plaintiff was guilty of negligence by complying with the invitation or order in attempting to ride on the engine. The contract, which was signed by the defendant's agent and by the plaintiff, provided that he should be entitled to free transportation, and should, while the train was in motion, ride in the caboose of the train conveying his stock. Plaintiff was a passenger (*Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901); but the contract that he should ride in the caboose while the train was in motion was valid and binding upon the parties (3 *Thompson on Negligence*, § 2911), and the defendant was entitled to the benefit of it, unless the conductor had power to waive the condition and did so. A prin-

principal is liable for the acts of his agent within the scope of the agent's authority, either express or implied; but beyond the scope of his authority or duty a conductor or other agent cannot bind his principal. There was no evidence tending to prove that the conductor, as between the defendant and himself, was authorized to waive the benefit of the contract; but if, under all the circumstances, the act of the conductor was within the apparent scope of his authority, and plaintiff did not know of any limitation upon such authority, the defendant would be bound. It rested upon the plaintiff to affirmatively show that it was within the apparent scope of the authority of the conductor to waive the benefit of the contract, and that he did not know or have reasonable grounds to believe that the conductor was exceeding his authority. If the act was within the apparent scope of the authority of the conductor, plaintiff was not bound as a matter of law to stop and inquire as to such authority; but if he knew, or ought to have known, that the conductor was exceeding his authority, the invitation or order would not amount to a waiver. These questions were to be determined from all the facts and circumstances proved on the trial. The court took the questions from the jury by two instructions, which assumed to state as a matter of law that the conductor was authorized to abrogate the contract between the plaintiff and the defendant and waive the condition inserted in it for the benefit of the defendant. The first instruction, given at the request of the plaintiff, advised the jury that, although the contract contained the provision that plaintiff should, while the train was in motion, ride in the caboose, yet if he was invited by the conductor to leave the caboose in which he was riding, and to ride upon the engine for the purpose of looking after his stock, the provision in the contract would not prevent a recovery in the case. The third instruction, given at the instance of plaintiff, was as follows: "If the jury believe, from a preponderance of the evidence, that the conductor in charge of the train in question invited or requested the plaintiff to leave the caboose and go forward and ride on the engine, such action would bind the defendant company, and would have the effect of waiving the provision of the contract in evidence in regard to riding on the caboose while the train was in motion."

The question what acts are within the scope of the authority of an agent is ordinarily one of fact. If the authority is conferred by a writing, it may be construed by the court as a matter of law, and perhaps, where the authority is established by usage so common and general as to be known to every one, a court would not err in stating to the jury that an act was within the scope of such authority. Doubtless as to many acts the authority of a conductor in the management of a train and dealing with the traveling public is so well established that there could be no

dispute as to their being within the scope of his authority, but certainly the invitation or order of the conductor in this case was not of that character. No one would say that conductors have a general authority to allow passengers to ride on engines or other parts of trains not designated for the reception or accommodation of passengers, or that under ordinary circumstances it would be supposed that they have such power. It is said in 3 Thompson on Negligence, § 2943, that the presence of a passenger on an engine will constitute negligence as a matter of law, for the reason that the engine is not designed for carrying passengers, and is so obviously dangerous that his presence there will preclude him from damages, either with or without the invitation of the conductor or engineer. In 4 Elliott on Railroads, § 1632, it is said that under ordinary circumstances an employé has no implied authority to receive passengers on an engine, and that such an act as riding on an engine is so obviously dangerous that, except in case of an emergency a passenger cannot do so, even with the consent of the conductor, and hold the company liable.

There may be exceptional circumstances or an emergency under which, as a matter of fact, a shipper in charge of his stock may suppose that the conductor, or even an engineer or other employé, has authority to permit him to ride upon an engine. The case of *Lake Shore & Michigan Southern Railroad Co. v. Brown*, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, was of that character. Brown, a stockman, shipped a carload of hogs to the Union Stockyards in Chicago and rode in a caboose to the railroad company's yards at that city. There was a custom to pass shippers of live stock from that point to the stockyards without pay, but there was no evidence of any contract as to how Brown was to be carried. The caboose was detached from the train and put on another train, and a switch engine was attached to the car containing Brown's stock to take it to the stockyards. Brown had a right to accompany his stock and to be carried by the railroad company, and was compelled to ride upon the switch engine, as directed by the engineer. Through negligence in making a running switch he was thrown off and received injuries from which he died. The question was left to the jury to say, as a matter of fact, whether, under the instructions, Brown was rightfully on the engine; and it was held, under the circumstances of the case, that he might have supposed that those in charge of the engine and car of stock had authority to direct him to ride upon the engine, and that it would not be proper for the court to instruct the jury as a matter of law that he was wrongfully there. In that case there was no contract as to the place where the shipper should ride and no caboose in which he could ride, and the question of authority was treated as one of fact. It was

held that, if those in charge of the car invited the shipper to ride upon the engine, they must operate the train with due regard to his safety and were responsible for their negligence in making a flying switch. This case is entirely unlike that one, for the reasons that there was a caboose in which plaintiff had a right to ride, a contract by which he was to ride in the caboose, and no negligence, either alleged or proved, in the management or operation of the train. It is clear that the law lays down no rule that under the circumstances of this case the conductor had a right to waive the stipulations of the contract, and therefore the court misdirected the jury as to the law.

The second instruction, given at the request of the plaintiff, recited the ordinary duties of carriers of passengers and was not applicable to the case. It ignored the contract and the entire question of the authority of the conductor to invite or direct the plaintiff to ride on the engine.

The judgments of the Appellate Court and circuit court are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(217 Ill. 148)

SCHOLTEN v. BARBER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EVIDENCE—PRESUMPTIONS—EXISTENCE OF COMMON LAW IN ANOTHER STATE.

In the absence of pleading and proof to the contrary, the common law as to mortgages will be presumed to be in force in another state.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Common Law, § 14; vol. 20, Cent. Dig. Evidence, § 101.]

2. VENDOR AND PURCHASER—LIABILITIES OF PURCHASER—INCUMBRANCES ON PROPERTY.

A purchaser of land is not liable for an incumbrance thereon, unless he either expressly or impliedly agrees to pay the same.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 726.]

3. SAME.

A purchaser of land who assumes payment of an incumbrance thereon becomes the principal debtor, and the original mortgagor is a surety as to the purchaser; but the mortgagee, unless he agrees to the substitution, may sue the mortgagor alone, or may accept the purchaser's assumption of the debt and bring his action against him.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 756.]

4. SAME.

A quitclaim deed made no reference to the incumbrance on land. At the maturity of a mortgage thereon the grantee in such deed signed new interest notes. Held, that the grantee did not become the principal debtor in such sense as to relieve the mortgagor from liability for a deficiency remaining after sale on foreclosure.

5. COVENANTS—RUNNING WITH LAND—AGREEMENT TO PAY INCUMBRANCE.

A promise of a grantee in a deed to pay an incumbrance on the land is not a covenant running with the land.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, § 65.]

Appeal from Appellate Court, Fourth District.

Action by Rosa Barber against Mary A. Scholten. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

R. M. Nichols, George C. Rebhan, and Franklin A. McConaughy, for appellant. Wise & McNulty, for appellee.

CARTWRIGHT, C. J. On January 17, 1894, the appellant, Mary A. Scholten, of the city of St. Louis, in the state of Missouri, executed her promissory note to George N. Cooper, of said city, for \$5,000, payable five years after date, and secured the same by a trust deed upon certain real estate in said city. She afterwards conveyed the property to Charles Dexter, and in the conveyance he assumed the payment of the incumbrance. The note was assigned by Cooper to Rosa Barber, the appellee. There were several subsequent conveyances of the property by quitclaim deeds containing no assumption of the mortgage debt, ending with a deed of that character from G. L. Martin to W. H. Millam. The indebtedness secured by the trust deed drew interest at 8 per cent., and at the maturity of the note it was reduced to 6 per cent., and notes were given for interest at that rate for the next three years, signed in the name of W. H. Millam, by the J. T. Donovan Real Estate Company, as agent. The following indorsement was also placed upon the principal note: "The time of payment of this note is hereby extended for three years, from 1—17—'99, at 6 per cent., provided interest is paid semi-annually in accordance with notes hereto attached—the name of W. H. Millam. J. T. Donovan Real Estate Co., by J. M. Donovan, V. Pres." The interest notes so given were paid, with the exception of the last one. The trust deed was foreclosed, and the proceeds were indorsed on the principal note, leaving a balance due, for which this suit was brought by appellee in the circuit court of St. Clair county against the appellant. On the trial the court directed a verdict in favor of the plaintiff for the amount due on the note, and, judgment having been entered on the verdict, an appeal was taken to the Appellate Court for the Fourth District, where the judgment was affirmed.

The defense which was set up by special plea was that under this state of facts defendant was discharged from all liability by the law of the state of Missouri, where the note was made and was payable. The argument against the ruling of the court presented here is that Millam assumed the payment of the amount due on the trust deed, and thereby became the principal debtor to the plaintiff, and defendant, the maker of the note, became surety for Millam; that the plaintiff extended the time of payment to Millam, as principal debtor, without the knowledge or consent of the defendant; and that being a

mere surety she was released from all liability. In this state the rule is that, as between the mortgagor and his grantee who assumes the payment of the incumbrance, the grantee becomes principal debtor and the mortgagor becomes his surety. But the mortgagee is in nowise affected by the agreement to which he is not a party. He may disregard it, and bring his action against the original debtor only, or he may accept the promise made for his benefit, and, treating it as an additional remedy, bring his action against the grantee. If the agreement is accepted by the mortgagee, each party to it is an original promisor for the payment of the incumbrance; but the contract rights of the mortgagee cannot be changed by any arrangement between the mortgagor and his grantee, unless the mortgagee agrees to such change. *Flagg v. Geltmacher*, 98 Ill. 293; *Fish v. Glover*, 154 Ill. 86, 39 N. E. 1081; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975.

On a question of this character we assume that the common law is in force in another state unless the contrary is shown by averment and proof. *Crouch v. Hall*, 15 Ill. 263; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302. The special plea alleged that, in consideration that Millam assumed the payment of the note, the time of payment thereof was extended, and that by the law of the state of Missouri the effect of such extension was to release the defendant from all obligation to pay the note. The evidence as to the law of Missouri was that, where a grantee receives a conveyance and in the deed the grantee assumes and agrees to pay an existing incumbrance, the contract of the mortgagor or maker of the note secured by the incumbrance is changed to that of surety, and the grantee becomes the primary debtor, and that the extension of the obligation by the holder of it without the consent of the surety releases the surety. That evidence did not tend to prove that the law of Missouri, as applicable to this case, is different in any respect from the law of this state, for the reason that in the deed to Millam he did not assume or agree to pay the incumbrance. In the deed of the defendant to Dexter the grantee assumed the payment of the amount due on the trust deed, but the subsequent quitclaim deeds contained no assumption of it. The mere purchase of land does not render the purchaser liable for an incumbrance upon it, and an obligation on his part to pay it can only arise from his contract either express or implied by law from the circumstances. *Crawford v. Nimmmons*, 180 Ill. 143, 54 N. E. 209; 20 Am. & Eng. Ency. of Law (2d Ed.) 986. There was no agreement by Millam to pay the amount of the incumbrance when the indorsement was made on the note or at any other time. Whatever legal effect could be given to the indorsement signed by the Donovan Real Estate Company, or to the interest notes executed by the same company

as agent, there was no agreement on the part of Millam to pay the principal note. Plaintiff could not have maintained an action against Millam for the amount of such note, and, as he never assumed or agreed to pay it, the defendant never became and could not become his surety.

The court refused to admit in evidence a copy of one of the quitclaim deeds in the chain of conveyances to Millam, for want of sufficient evidence upon which to introduce such copy. The question whether the ruling was correct is immaterial. The promise of Dexter to pay the incumbrance was not a covenant running with the land, and, if the deed had been admitted, so as to show the legal title in Millam, the rights of the parties would not have been affected in any way. There was no evidence tending to prove a defense to the note, and the court was right in directing a verdict for the amount due on the note.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 189)

BURRALL v. AMERICAN TELEPHONE & TELEGRAPH CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

APPEAL—DISMISSAL—FAILURE TO ASSIGN ERROR.

An appeal will be dismissed, where the abstract and the record fail to show any assignment of errors.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 3086-3089.]

Appeal from Circuit Court, Henry County; Emery C. Graves, Judge.

Bill by Anna C. Burrall against the American Telephone & Telegraph Company. From a decree of dismissal, complainant appeals. Dismissed.

Sturgeon, Stelck & Sturgeon, for appellant. Adair Pleasants, for appellee.

PER CURIAM. This was a bill filed by appellant in the circuit court of Henry county, praying for an injunction against further trespassing by appellee and to prohibit the appellee from maintaining upon the appellant's property the use of its telephone lines and poles as constructed there by it, and praying for an accounting for damages, rents, and profits, etc., and asking for general relief. The bill was dismissed by the chancellor, upon a hearing, for want of equity, and this appeal is prosecuted to this court.

The abstract fails to show any assignment of errors, and upon an examination of the record itself we are unable to find any errors assigned. The assignment of errors stands in the place of the declaration in a suit at law, or the bill itself in a chancery proceeding. The appeal is therefore dismissed.

Appeal dismissed.

(217 Ill. 152)

LEIGHTON & HOWARD STEEL CO. v. SNELL.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where there is any evidence to sustain the verdict, the Supreme Court will not consider whether the answer to a special interrogatory, which was in accord with the general verdict, was against the weight of the evidence.

2. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The question whether a molder's helper used ordinary care in repairing certain machinery was a question for the jury, where the evidence showed he had had but two weeks' experience and was ordered to make the repairs, but was not warned of any danger connected therewith.

3. SAME—FELLOW SERVANT.

Where the evidence showed that molders were authorized to direct their helpers in the work, the question whether a molder's helper, in repairing a jib crane, was a fellow servant of the molder, was a question for the jury.

4. SAME—EVIDENCE.

Evidence that molders in directing their helpers uniformly followed a certain course of action tends to show approval by the master of such conduct.

5. SAME.

A servant may testify as to what his duties were and under whose authority he acted, though he had had but short experience in his work.

6. SAME—ASSUMPTION OF RISK.

A servant does not assume the risk of using appliances, the danger of which is known to the master, unknown to the servant, and not apparent.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600, 610-624.]

7. TRIAL—INSTRUCTIONS.

Where an instruction contains but a single sentence, and begins with the requirement to find from the evidence the matters therein, the direction to find from the evidence will apply to the entire sentence.

Appeal from Appellate Court, Fourth District.

Action by Joseph Snell against the Leighton & Howard Steel Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

This was an action on the case, brought by the appellee against appellant in the city court of East St. Louis to recover for personal injuries received while in the service of appellant as a molder's helper. The cause was tried before a jury, and a verdict rendered for \$1,909, and judgment was entered on the verdict. The declaration consists of but one count, and in substance is as follows: That appellant was engaged in the business of making steel castings; that appellee was in the service of appellant in the capacity of a molder's helper; that it was the duty of appellant to exercise ordinary care to furnish appellee a reasonably safe place in which to perform his duties, and not to expose him to unnecessary peril; that appellant negligently ordered appellee to get on top of a certain stationary crane, which had been out of order, and to

put the same in workable order; that this was a dangerous service for appellee to render, and that he did not comprehend the peril incident to the performance of it; that, while appellee was endeavoring to put the crane in order with due care and diligence, appellant so carelessly and improperly managed a certain other crane that appellee was struck and injured. Appellee's injuries consist of the loss of all the fingers, with the exception of the thumb, on his right hand, and the breaking of some of the bones of his left hand. The case was tried four times in the city court; the verdict being for the plaintiff upon three of the trials, and on one trial the jury disagreed. An appeal was prosecuted from the judgment so entered in the city court to the Appellate Court, and affirmed, and a further appeal is prosecuted to this court to reverse the judgments of the appellate and trial courts.

The facts, as shown from the record, are substantially as follows: Appellant was engaged in the manufacture of iron and steel in the city of East St. Louis. It manufactured bolsters and castings of different kinds. The molds for the castings are made from patterns, which are placed in wooden boxes called "flasks." The box is divided into an upper and lower part; the upper portion being called a "cope" and the lower a "drag." The molds are made by molders and molders' helpers. It is the duty of the molder to place his pattern in the flask so that the sand which is filled in around the edge of the pattern is firmly placed, in order that the pattern will remain true, and also so that the facing sand is finished smoothly, so that the casting will have an even surface after it is made. The duties of the molder's helper consist of mixing the sand preparatory to placing it in the flask, bringing gasoline and small iron clamps called "jaggers," used in the construction of the mold, and, in short, waiting on the molder. After the mold is made it is placed to one side, and is taken away by the craneman by means of an overhead or overhanging or traveling crane. In handling these flasks the molder uses, as the flasks are heavy, a compressed air hoist, commonly called a "jib crane." This crane is attached to the wall, and consists of a double arm extending from the wall some 16 feet, about 3 or 4 feet below the track on which the traveling crane runs. The motion of the arm is confined to a half circle. On the arm of this jib crane is a small truck, which runs backward and forward on the track on the arm of the jib. The truck has four wheels, and two of these wheels rest on each arm of the jib. Attached to this truck is a cylinder containing a piston rod, and on the end of the piston rod is a hook, to which are attached four chains. Two chains are also attached to the cylinder, which control the compressed air by which the jib is operated. The molder, in handling the flask, swings

the arm of the jib over the flask, lowers the piston by the exhaust chain on the cylinder, attaches the chains that are on the hooks of the piston rod to the flasks, when, by pulling the opposite chain, the piston rod rises, and he swings the flask to the point he desires. The jib crane is used only by the molders and helpers to get the castings out of the way. The flasks, copes, and drags, together with the sand and the material used by the molders and helpers, are furnished them by the cranimen. This crane, described in the evidence as the "traveler," is two large beams or girders extending from one side of the building to the other, which is about 125 feet. These girders are placed about 4 feet apart, covered, and connected on the ends by housing. On top of the steel girders a track is constructed, on which rest wheels which support the crane. On the beams or girders of the crane is the hoisting apparatus of the crane. Electricity is used for the motor power of the crane, and it is operated by a man called the "craneman," who is situated in a small cage suspended from the girders on one end of the crane. Two men, called "chainmen," follow the crane on the floor, and attach and detach articles carried by the crane. The track on which the traveling crane is situated is between 3 and 4 feet beyond the arm of the jib crane. This traveling crane is in almost constant operation. The record discloses that the truck on the jib crane arm occasionally gets off the track, which it had done on the occasion or at the time appellee was hurt, and when it gets off the track it becomes useless to the molders until it is replaced.

Wise & McNulty, for appellant. F. C. Smith and M. Millard, for appellee.

RICKS, J. (after stating the facts). It is first insisted by appellant that the court erred in refusing the peremptory instructions asked at the close of the plaintiff's evidence and again at the close of all the evidence. The argument of appellant is upon the theory that, unless appellee has shown by the burden of proof all the material allegations of his declaration, the peremptory instructions should have been given. This, of course, is not the law. The only thing this court can do is to look into the evidence to see whether or not there is any evidence fairly tending to support the plaintiff's cause of action, and, if we find that there is, then it was not the duty of the court to give the peremptory instructions. There can be no question in this case but that the evidence at least fairly tended to prove all the material allegations of the declaration, which is all that is necessary. Appellant testified, and he was corroborated by other witnesses, that he was working under the molder, and was instructed to obey the orders of the molder, and that the molder told him to "go up and fix the crane." He also testified that before he had attempted to get on

the jib crane he looked for the traveling crane and saw it standing still 150 or 200 feet away, and that after getting on the jib crane his back was to the traveling crane, and it came upon him while he was in that position and struck him in the back. The evidence also shows that McCash, the molder under whom appellee was working and who directed him to repair the crane, was standing in a position where he could have seen the traveling crane approaching, and was watching appellee fix the crane as he had told him to do, and that he never informed him of the danger. We think, from the evidence as shown from the above statement of facts, that it was not error to refuse the peremptory instructions.

It is next insisted that appellee did not use ordinary care under the circumstances, and that, if it was found that he did use ordinary care, he assumed the risk incident to the employment. The evidence discloses that appellee had only been in the employ of the company for about two weeks, and knew very little of the routine of the work. The principle is well settled that the duty to warn an inexperienced employé is limited to those dangers which are not open or obvious, or which are not likely to be appreciated in the exercise of ordinary prudence. While the plaintiff undoubtedly knew, if the traveling crane was in motion, it would strike him in the position he was in, yet he had a right to rely upon the fact that his superior, under whom he was working, was standing where he could see the crane and would inform him of any danger. In view of his inexperience, we think the jury might well have found that appellant owed him the duty of warning him of the danger attending the doing of the work. While every person, in undertaking to work, assumes the risk ordinarily incident to his employment, he only agrees to labor in the situation and with the tools provided, and in so far as the condition of these are apparent or may be ascertained by the exercise of ordinary diligence and care he assumes the risk, yet he does not assume the risk of using instruments and doing extraordinary work, the danger in which is known to the master and unknown to the servant. Several witnesses testified that appellee was undertaking to replace the truck the same as other molders had done before, and it was a common occurrence for the helpers to replace the truck, and, if they could not get it back on the track, they then sent for the machinists. Under the conditions here shown from the facts disclosed in this record, we are unable to say as a matter of law that appellee did not use ordinary care, or that he assumed the risk.

It is next contended that appellee was a fellow servant of the molders and cranimen, and, inasmuch as he was injured through their negligence, he cannot recover. The court was asked to give, and gave,

special interrogatories relative to the relation of fellow servant, as well as general instructions, and the jury found, under proper instructions, that appellee was not a fellow servant of the crane men and molders. We deem it sufficient to say that whether they were or not fellow servants, or whether the molder was a vice principal in such matters and orders, were questions of fact for the jury. There was evidence fairly tending to show the molder was authorized to direct the action and work of appellee in all matters pertaining to the molder's work, and there was also evidence fairly tending to show the molders usually repaired the jib crane, or had their helpers do so.

It is next insisted that certain evidence introduced in relation to the duties of the molder and his helper was erroneous; but we can see no reason why it was not proper to prove the duties of the helper, or, in other words, what he did and under whose authority he acted. Proof of a usual or uniform course of action in a given matter at least fairly tends to show it is by authority. Other evidence was objected to upon the ground that the witnesses had only been in the employ for a short time, and were not competent to testify to the duties of a molder's helper. It certainly is not the law that a party must be an expert to tell what his duties are and in what his labors consist while in the employ of a person or obeying the directions of one under whom he is working. The length of employment goes only to the weight, and not to the competency, of the evidence. We are unable to find any error in the admission of the evidence complained of.

It is next insisted that it was error to give the ninth instruction, which reads as follows: "If the jury believe, from the evidence, that the plaintiff was in the defendant's employ as a common laborer, and required, in the discharge of his duty, to assist other servants of the defendant, who were molders, as a helper, and was under the control or subject to the orders of said molders; that one of such molders negligently ordered or directed the plaintiff to repair, adjust, or put in order the stationary crane in question; that in giving such order (if the jury believe, from the evidence, he gave it) said molder was not a fellow servant with the plaintiff, as defined by the instruction given on that question; that it was a dangerous service for him to perform, and that the plaintiff did not appreciate or comprehend such danger; that, while the plaintiff was endeavoring to carry out and execute such order, the defendant so carelessly and improperly managed and controlled the other crane in question that the plaintiff was struck and injured by the same, as charged in the declaration, and that the plaintiff was in the exercise of ordinary care for his own safety before and at the time of his injury, the defendant is liable, and a verdict ought to be returned for the plaintiff." It is

said of this instruction that it assumes that appellee and the molder were not fellow servants. We do not agree with this contention. The instruction is long, and as printed is divided into three clauses by semicolons; but it begins by informing the jury that if they believe from the evidence, and then follow the various matters contained in the instruction. The writer of the instruction unnecessarily in the second clause repeated the expression, "if the jury believe, from the evidence"; but it neither added to nor took from the instruction the force of the direction contained in the first part of the instruction that all the matters therein following should be found from the evidence. It is not necessary that each thought or element or act pointed out or specified in the instruction shall be preceded immediately by the requirement that the jury must find it from the evidence. Where the instruction contains but a single sentence, and begins with the requirement to "find from the evidence" the matters therein, the direction to "find from the evidence" will apply to the entire sentence. *Chicago & Alton Railroad Co. v. Fisher*, 141 Ill. 614, 81 N. E. 406. It is also said that the instruction omits the question whether the molder had the power or authority to direct the appellee to repair the crane. The instruction tells the jury that they must believe, from the evidence, that appellee was under the control or subject to the orders of the molder. If he was under the control and subject to the orders of the molder, and the direction was with reference to work that was in the line in which the molder was engaged, or if it concerned the repairing of tools or machinery which the molder handled in the prosecution of his work, as the evidence in this case shows was true, then the molder did have authority to give the order as a vice principal and bind appellant, unless it could be said under the evidence, as the jury were advised, that the molder and the helper were fellow servants. We think the instruction is not subject to either of the criticisms made of it, and that, while it is not artistically drawn, it would be properly understood by the average mind.

Instruction 13 given for appellee is complained of also. It is said this instruction authorized a verdict for the plaintiff if the molders were authorized or were habitually allowed by the defendant to give orders and directions in regard to the repair of these jib cranes, and that there is no evidence upon which to base the instruction. It may be first said that the instruction does not direct a verdict or authorize a finding for the plaintiff; nor do we agree with the statement that there is no evidence upon which to base it. We think the evidence strongly tends to show that the molders and their helpers commonly did repair the jib crane, and that the traveling crane men and the machinists were only called upon when the efforts of the molders and their helpers failed. The contention that no witness testified that a helper

ever repaired the jib crane from the top cannot avail appellant. It was not a question of where the defect was, or its nature. The record does tend to show that it was more, easy and more usual to attempt the repair by letting the truck run to the lower end of the track at the lower end of the jib crane and work it in place by the use of the piston rod. It is not shown, however, that appellee had any knowledge of that method of doing the work; and, if it were, it would not necessarily follow that he was not authorized to obey the instructions of his foreman and attempt to fix it wherever it was. The manner in which he attempted to do it would simply raise the question of the care of appellee in doing the work, unless directed in some particular manner. Nor is it shown that the truck could have as well been brought to the lower end in this instance, which would be a question for the jury.

It is also insisted that there was error in the refusal of the court to give certain special interrogatories asked by appellant. We have looked into the interrogatories carefully, and find that the ones that presented ultimate facts were covered by those given at the request of appellee, and it was therefore not error to refuse them.

It is also insisted that the jury answered "No" to certain interrogatories, when the preponderance of the evidence shows they should have been answered in the affirmative. The answers were in keeping with the general verdict, and, as we have already said, there is evidence in the record at least fairly tending to support the verdict, which is all that is required. We have nothing to do with the weight of the evidence.

Finding no reversible error, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 162)

RODMAN v. QUICK et al.

CENTRAL SAFETY DEPOSIT CO. v.

RODMAN et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

MORTGAGES—FORECLOSURE—REDEMPTION BY SECOND MORTGAGEE.

The time allowed to the holder of a second mortgage to redeem from a prior mortgage, to the foreclosure of which she was not a party, rests in the discretion of the court, and will be extended by the Supreme Court on appeal, if the time allowed is too short.

Appeal from Circuit Court, Lake county: C. H. Donnelly, Judge.

Bill by Martha A. Rodman against Martha A. Quick and others. The Central Safety Deposit Company filed a cross-bill. Decree for defendants, and plaintiff appeals. Modified.

George W. Brown, for appellant. W. H. Ketcham and C. H. Thompson, for appellees.

HAND, J. This was a bill in chancery, filed in the circuit court of Lake county by the ap-

pellant, Martha A. Rodman, who was the owner of a note secured by a trust deed upon a farm located in said county, to redeem from a prior mortgage made to Martha A. Quick upon said farm, and which prior mortgage had been foreclosed without appellant being made a party to the proceeding. A decree permitting redemption was entered, from which an appeal was prosecuted to this court by Martha A. Rodman, on the ground the court did not adopt a correct basis for the statement of the account in determining the amount of redemption money necessary to be paid to effect a redemption from the senior mortgage, and that the time fixed within which the redemption should be made was too short a time. The decree was reversed on the first ground, and the case was remanded, with directions to the circuit court to proceed in conformity with the opinion of this court, which opinion is reported in 211 Ill. 546, 71 N. E. 1087, where will be found a full statement of the facts. That opinion was filed on October 24, 1904, and the case was reinstated in the trial court on January 30, 1905, and on the 30th day of March, following, a decree was entered finding \$14,390 to be the amount necessary to be paid by the appellant to the holder of the senior mortgage to redeem therefrom, and it was decreed that the said sum be paid within 60 days from the date of the entry of the decree, and in default of said payment the bill be dismissed, from which decree said Martha A. Rodman has again appealed, on the ground that the time fixed within which said sum should be paid was too short a time within which to permit her to raise said sum of money and redeem from said mortgage.

The original decree fixed the time within which the redemption should be made at 90 days from the entry of the decree, and that time was approved by this court. The time in which a redemption shall be made rests in the sound discretion of the court. The usual time allowed is 6 months, but that is not obligatory in all cases. *Bremer v. Calumet & Chicago Canal & Dock Co.*, 127 Ill. 464, 18 N. E. 321. In *Decker v. Patton*, 120 Ill. 464, 11 N. E. 897, the time was fixed at 12 months, and in *Taylor v. Dillenburg*, 168 Ill. 235, 48 N. E. 41, the time was fixed at 30 days. In the latter case the action of the lower court was overruled in fixing so short a time, and the decree was modified by this court, extending the time to 90 days from the date of the judgment of affirmance in this court. It was there said (page 239 of 168 Ill., page 43 of 48 N. E.): "The right to redeem here given is an equitable right, and with that right he [the party entitled to redeem] is entitled to a reasonable and equitable opportunity to realize the full benefit of it, and we think at least 90 days should have been allowed him." This court, when this case was here before, in considering this question said: "The master recommended

6 months and the chancellor fixed 90 days. * * * We think appellant had ample time in which to determine whether she desired to redeem and to arrange for the payment, and are unable to say that the time fixed by the chancellor was unreasonably short."

The law favors redemptions. The appellant could not know the amount of redemption money necessary until a final decree was entered, and we think 60 days was too short a time in which to require her to raise so large an amount of money. It will not, however, be necessary to reverse the decree and to remand the cause; but, in accordance with the practice followed in the Taylor Case, the decree of the circuit court will in all things be affirmed, except that the complainant be allowed 90 days from this date, instead of 60 days from the date of the decree, in which to redeem, and the appellees will pay the costs of this appeal.

Decree modified and affirmed.

(217 Ill. 174)

BROMWELL et al. v. FLOWERS et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. DRAINS—ASSESSMENTS—DUTIES OF COMMISSIONERS.

Under Laws 1885, p. 124, § 37, providing that, when the funds of a levee district have been expended, assessments to procure funds to be expended in the maintenance and repairs of drains may be levied, does not make it the imperative duty of the drainage commissioners, who have no funds available, to petition the court to levy an assessment for repairs.

2. MANDAMUS—DRAINAGE COMMISSIONERS.

Mandamus will not lie to compel drainage commissioners to petition the court for an assessment to provide funds to clean out a drain, where it is not shown that the refusal is an unjust discrimination against the landowner making the application.

Appeal from Circuit Court, Champaign County; Solon Philbrick, Judge.

Application of Letitia G. Bromwell and others for a writ of mandamus to I. H. Flowers and others. From a judgment denying the writ, petitioners appeal. Affirmed.

Ray, Dobbins & Riley and Wight & Alexander, for appellants. William B. Webber, for appellees.

BOGGS, J. The appellee district was organized on the 15th day of October, 1883, by an order of the county court of Champaign county, under the act approved and in force May 29, 1879, commonly called the "Levee Act." 2 Starr & C. Ann. St. 1896, p. 1500, c. 42. The appellants are the owners of section 7, town 18 N., range 7 E., in Champaign county, which lands were included in the district. The system of ditches adopted and constructed by the district included a lateral drain passing through said section 7, and thence emptying into the main ditch or drain of the system of ditches adopted and constructed. The work of constructing said main ditch and said lateral was performed

as a whole and paid for by assessments on the lands benefited thereby. On the 11th day of March, 1904, the appellants exhibited in the circuit court of Champaign county a petition praying that a writ of mandamus issue, commanding the appellee commissioners of said district to forthwith clean out, deepen, and repair said lateral drain through petitioners' lands, and on below to the main ditch of said drainage district, in such manner as to afford an outlet for the tile in petitioners' lands and for the proper drainage of petitioners' lands, or, in case the commissioners of said drainage district have not the money on hand or already provided for to do said work, that they be directed to take such proceeding as is by law provided to raise the money necessary to do said work, and then clean out, deepen, repair, and improve said lateral ditch, so as to provide an outlet for the drainage of petitioners' lands. The petition was, as finally amended, held to be obnoxious to demurrer, and was dismissed at the cost of the petitioners, who have brought the record here by appeal.

In addition to the facts hereinbefore stated, the petition alleged "that petitioners were assessed and paid \$1,836 for the construction of said system of drainage as originally constructed; that on two occasions since the construction of said system it has been necessary to levy additional assessments to clean out and open up the main ditch in said district, and upon the occasion of one of these levies petitioners were assessed and paid \$540 and on the other assessment they were assessed and paid \$300, making the total amount of \$2,675 paid by petitioners for the construction, maintenance, repair, and improvement of said system of drainage; that the lateral drain through petitioners' land, as originally constructed, was not deep enough to adequately drain petitioners' land, and that the commissioners have allowed the said lateral open drain to become filled up with silt and overgrown with weeds, grass, and willows, and so thereby obstructed that said lateral no longer affords an outlet for the tile drains laid by petitioners for the drainage of their lands; that the commissioners have expended all money levied and have no funds on hand to repair and improve said lateral drain, and that said lateral is one of many lateral drains in said district, and that the lateral in controversy only drains the land of a small minority of the owners of lands within said district, and that it has been and is impossible for petitioners to obtain the signatures of a majority of the landowners within said district who are of lawful age and who represent one-third in area of the lands in said district, on a petition to the county court of Champaign county for the levying of an assessment upon the lands in said district for the maintenance and repair of said lateral drain and additional work necessary for the

adequate drainage of petitioners' lands; that petitioners have requested and demanded of the commissioners that they clean out, deepen, and repair said lateral so established to drain petitioners' lands, or that they take such proceeding as by law is provided to levy an assessment for the purpose of cleaning out, deepening, and improving said lateral through petitioners' lands in order to afford an outlet and drainage for petitioners' lands, but that two of the commissioners said they would do nothing until compelled by the courts, but did not deny that the work was needed, and the third commissioner expressed his willingness to do the work and admitted it was needed, and that by reason of the commissioners refusing to repair said lateral all of the moneys paid by petitioners to said district have not benefited petitioners or provided drainage for their lands; that in consequence of the filling up of said lateral drain the lands of petitioners became wet and unfit for cultivation, and the outlets of the tile on their lands stopped; that said lateral is the only outlet to the main ditch provided by said commissioners for the drainage of petitioners' lands, and that since the same has become filled up petitioners derive no benefit, and will continue to derive no benefit from said system of drainage until said lateral is cleaned out, opened up, and deepened in such way as to afford an outlet for the waters on petitioners' lands."

The powers of the commissioners are such as the statute confers upon them, and their duties are prescribed by the statute. Section 37 of the act of May 29, 1879 (2 Starr & C. Ann. St. 1896, p. 1519, c. 42, par. 68), in the body of the section, authorizes the commissioners to appropriate and expend the funds coming to their hands, among other purposes, in the work of constructing, repairing, and maintaining ditches, drains, etc. The proviso to the section directs the course to be pursued by the commissioners when all funds of the district have been expended, and the ditches and drains of the district are in need of repair or of additional work thereon. The petition shows that the commissioners have expended all funds which have come into their hands, and the proviso to the section is therefore the measure of the power and duty of the commissioners. The said proviso provides that, when the funds of the district have been so expended, assessments to procure funds to be expended in and about the work of the maintenance and repairs of the ditches and drains, and other work specified in the proviso, may be levied on the lands of the district under the order of the court within which the district was organized, "on the petition of the majority of the owners of lands within said district who are of lawful age and represent at least one-third in area of such lands; or on the petition of the commissioners, accompanied by an itemized statement of accounts made by the commis-

sioners, under oath, showing the moneys received by the district and the manner in which they have been expended, together with plats, profiles of such additional work, and estimated cost of the same." It appears from the petition herein for the mandamus that neither the requisite number of the owners of lands within the district nor of the commissioners will join in a petition to the county court for the levy of the assessment.

There is no statutory requirement that the lateral ditches shall be kept clean and in repair by the commissioners; they having no funds applicable to that purpose. The authority given them to petition the county court for an order levying an assessment to procure funds for that purpose made it the duty of the commissioners, on the demand of the appellants, to take into consideration all facts and circumstances affecting the expediency, justice, and propriety of levying an assessment on all of the lands of the district for the purpose of repairing or deepening this lateral drain, and to join or refuse to join in the petition to the court, as their judgment or discretion, fairly and honestly executed, should dictate. The statute does not make it the imperative duty of the commissioners to petition for an assessment, but invests them with the power to do so, leaving the propriety of the exercise of the power to their judgment and discretion. This being true, the writ of mandamus may be availed of to require drainage commissioners to consider whether or not they will become petitioners, and the writ cannot be employed to compel them to sign the petition, unless it shall appear that their refusal to become petitioners is arbitrary, merely, and amounts to a fraud, or from a motive to accomplish their own personal or selfish ends. *People v. Kent*, 160 Ill. 655, 43 N. E. 760; *Beidler v. Kochersperger*, 171 Ill. 563, 49 N. E. 716; *People v. Van Cleave*, 183 Ill. 330, 55 N. E. 698, 47 L. R. A. 795. The petition in the case at bar alleges that the commissioners have considered as to their duty and have declined to file their petition, and there is no averment that they have acted otherwise than fairly and in accordance with their best judgment as to the true interests of the district. If the discretion appeared to have been abused and made to work injustice, relief might be had by means of the writ of mandamus. *Village of Glencoe v. People*, 78 Ill. 382. It does not appear from the petition for mandamus that the refusal of the commissioners to petition for an assessment to be levied upon all of the lands of the district to be expended in repairing the lateral ditch through the lands of the appellants will work an injustice to them. It appears from the petition that the lateral drain through the lands of the appellants is but one of many like lateral drains in the district. Whether such other lateral drains are cleaned out and kept in repair by the owners of

the lands through which they run, or from the funds of the district, is not disclosed by the petition. If the petition is to be taken most strongly against the petitioners, as is the rule, we are to assume that the lateral ditches are kept in repair by the landowners individually benefited thereby, and, that being true, it would be manifestly unjust to the other owners of land in the district to require them to also contribute to keep in repair the lateral ditches through appellants' lands.

The demurrer was properly sustained, and the judgment is affirmed.

Judgment affirmed.

(217 Ill. 185)

CITY OF ROCK ISLAND v. GINGLES.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—STREETS—CARE REQUIRED.

Where a city has exercised reasonable care to keep its streets in a reasonably safe condition, it is not liable for injuries caused by defects or obstructions.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1612-1615.]

2. SAME—EXCAVATION—GUARD.

Where an excavation in a street is plainly visible, a city is not bound to place a guard or signal at the excavation in the daytime.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1636, 1635, 1677.]

3. SAME—REASONABLE CARE.

A city is only required to use reasonable care and diligence to safely guard an excavation in a street by lights, barriers, or other suitable means, so as to make the street reasonably safe for travel.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Municipal Corporations, §§ 1612, 1636, 1637, 1653-1659.]

Appeal from Appellate Court, Second District.

Action by Monroe Gingles against the city of Rock Island. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Reversed.

This is an action on the case brought by appellee, against appellant, in the circuit court of Rock Island county, to recover for personal injuries sustained. The declaration alleges that on November 28, 1901, the plaintiff was riding in a certain vehicle drawn by a horse, on Ninth street, in the city of Rock Island, and at the corner of Fourth avenue said city had permitted one Thomas P. Rosenfield, a plumber, to dig a ditch across and at right angles with a street, and it was the duty of said city and plumber to keep said street in such safe condition as to protect and secure the safety of persons driving along Ninth street at Fourth avenue; yet the defendant, regardless of this duty, allow-

ed this ditch, several feet deep, to remain open and unguarded after dark upon the evening in question, and without any light or other means to warn plaintiff of its dangerous and unsafe condition, by means whereof the plaintiff, while driving along said street, and while in the exercise of due care and caution for his own safety, was injured by his horse falling into the ditch, overturning the vehicle, and throwing plaintiff under the struggling horse, whereby he was injured, to his damage of \$20,000. The evidence shows that Ninth street runs north and south, and is crossed at right angles by Fourth avenue. Several days before the accident a ditch five feet deep and two feet wide had been dug by Rosenfield in Fourth avenue, extending out into Ninth street. At about 5:30 p. m. on the day in question, while appellee was driving north on Ninth street, his horse, which was blind, fell into the ditch. At the time of the injury the ditch was in no way protected by barriers, lights, or other signals or obstructions to warn travelers of its existence. Upon the trial before the court and a jury, judgment was rendered in favor of the plaintiff for \$1,250 and costs of suit, which has been affirmed by the Appellate Court; and hence this appeal.

William L. Ludolph, for appellant. Harry M. McCaskrin and George C. Wenger, for appellee.

WILKIN, J. (after stating the facts). Several grounds of reversal are urged by counsel for appellant, but in our view of the case it will be sufficient to notice but one of them; that is, that the trial court erred in the giving of instructions. In the first paragraph of plaintiff's second instruction the jury were told that it was the duty of the city, imposed by law, to keep its streets in a reasonably safe condition for persons walking and driving upon them by day as well as night. It places an absolute duty on the city to keep its streets reasonably safe, and in this respect was erroneous. We have held in an unbroken line of cases, beginning with *City of Rockford v. Hildebrand*, 61 Ill. 155, and continued down to *City of Salem v. Webster*, 192 Ill. 369, 61 N. E. 323, that a city is only required to use reasonable care and diligence to keep its streets in a reasonably safe condition and repair for travel, and that when it has exercised that degree of diligence it is not liable for injury sustained on account of defects or obstructions in the same. In fact, it is not denied that the instruction is erroneous, in that it imposed upon the city a higher degree of diligence than the law would justify; but the contention of counsel for appellee is, and the Appellate Court seems to have adopted the view, that the error was harmless, for the reason that un-

der the facts the city was clearly shown to have been guilty of negligence, citing and relying upon the case of *City of Salem v. Webster*, supra. We are of the opinion that the evidence in this record does not justify the conclusion, but that the giving of the instruction constituted prejudicial error.

The ditch in question was not opened by the city itself, but by a third party under its permission. It had only been opened a day or two prior to the accident, and, while it is true that some of the city officials saw it, there was nothing to call their particular attention to the conditions at the time of the injury. Upon the trial there was a sharp conflict in the testimony as to how dark it was at the time. Some of the witnesses testified that it was sufficiently light for appellee to have seen the danger, while others were equally positive that it was after dark. An employé of the plumber in charge of the work was on his way to the excavation with a signal light at the time of the accident, and arrived but a very few minutes after it occurred. It cannot be claimed that it was the duty of the city, in the exercise of reasonable diligence and in order to keep the street in a safe condition, to place a signal or guard at the excavation during the daytime, when it was plainly visible to those traveling upon the street. Therefore whether, at a time so nearly between daylight and darkness as was here shown, the city, or the party acting under its permission, was using ordinary care and diligence to place a signal at the ditch was a question of the first importance in the case. Notwithstanding the jury may have believed the witnesses who testified that it was still light when the plaintiff was injured and that a reasonable effort was being made to put out timely signals, still, under this instruction they were bound to find for the plaintiff if they believed that the street was not absolutely kept in a reasonably safe condition. It is true that some of the instructions given on behalf of the defendant correctly stated the law; but whether the jury followed those instructions, or adopted the rule announced in the plaintiff's second, we have no means of ascertaining.

The fourth instruction given on behalf of appellee is also erroneous in laying down a rule of absolute duty on appellant to have the excavation safely guarded by lights, barriers, or other suitable means, so as to make the street reasonably safe for ordinary travel at the time of the injury, instead of simply requiring it to use reasonable care in that regard.

The judgment of the Appellate Court will be reversed, and the cause remanded to the circuit court for another trial.

Reversed and remanded.

(217 Ill. 190)

MUREN COAL & ICE CO. v. HOWELL.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. PLEADING—AMENDMENT—SAME CAUSE OF ACTION.

In an action to recover for the death of plaintiff's intestate, an averment in the original declaration that defendant coal company was accustomed to keep a clear space on both sides of its track at the place where intestate was injured included the averment in the amended declaration that it was its practice to keep one side clear, so that the cause of action stated in it was the same cause of action stated in the first count of the declaration first filed.

2. APPEAL—REVIEW—SECOND APPEAL.

Questions presented by the record on appeal, but which were not considered, because there was no proper assignment of error, will not be considered on a second appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4353-4355.]

3. EVIDENCE—DECLARATIONS—RES GESTÆ.

Where an injured person immediately after the accident stated to a witness, who was about 12 feet away and ran to his assistance, as to how the accident occurred, the statement is admissible as part of the res gestæ.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 372, 373.]

Appeal from Appellate Court, Fourth District.

Action by Herbert Howell, administrator, against the Muren Coal & Ice Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

For former appeal, see 63 N. E. 456.

Wise & McNulty, for appellant. Webb & Webb, for appellee.

HAND, J. This was an action on the case, commenced by the appellee in the circuit court of St. Clair county against the appellant to recover damages for the death of his intestate, August Schmidt, alleged to have been caused by the negligence of the appellant.

The declaration upon which the case was tried contained two counts. The first count charged "that August Schmidt was in the employ of the defendant as a coal driver, his duties requiring him to haul empty coal cars from the bottom and distribute them throughout the coal mine wherever needed, and to pull loaded coal cars from the entries and rooms to the bottom of the shaft, so that they might be hoisted; that there were, prior to said date, a large number of entries and rooms in said coal mine, with laid tracks for the transportation of coal; that it was the practice of defendant, and consistent with good mining, to clear away and remove slate, clod, and other substances from both sides of the track therein for a sufficient distance to allow drivers hauling coal over said railway to pass around the sides of coal cars on said railway tracks, wherever there was room between the sides of said railway tracks and the sides of the entry,

without coming in contact with slate, dirt, etc., thereby endangering such drivers while in the discharge of their duties in said coal mine; that said drivers had knowledge of said practice, relied on it, and expected the defendant to keep and maintain the said railway tracks free and clear of obstructions; that on the 28th day of March, 1900, a large lot of slate, clod, dirt, etc., fell from the roof of the eighth west entry leading off the main south entry in said mine on the railway track, at a point where there was ample room between said railway track and the rib side of said entry to allow the drivers to pass between said coal cars on said railway track and the rib side of said entry, and obstructed all that portion of said entry lying between said railway track and the rib side of said entry, so as to prevent drivers hauling coal therein from passing around coal cars on said side of said railway track, which rendered said railway track unsafe and dangerous to drivers hauling coal through said entries over said railway track; that defendant had notice of the fall of said slate, and that the same was an obstruction to that part of the said entry and the said railway track, and would prevent drivers passing through said entry from passing around coal cars on said track at that point on that side of said entry, and that it rendered said entry unsafe and dangerous; that defendant failed to remove said obstructions and abate said dangerous conditions, but negligently permitted the same to remain there until said August Schmidt was injured, well knowing said obstructions rendered said entry unsafe and dangerous; that August Schmidt on said date was hauling two loaded coal cars along said railway track to said entry, exercising due care, and without notice or knowledge that said slate, etc., had fallen from the roof of said entry, or that said entry was obstructed; and that when he reached said obstructions he discovered a coal car on said railway track immediately in front of him, and, seeing that a collision between said cars he was hauling and said car standing on said railway track was inevitable and that he would be likely to be injured, attempted to escape said collision and injury by trying to get off said railway track on the side so obstructed, but came in contact with the slate and other obstructions which had fallen from the roof, and which prevented said August Schmidt from escaping in that direction, and threw him back on the railway track between said cars, and allowed said cars to crush him, from the effects of which he afterwards died."

The second count was in the following form: "That the defendant was the owner of a coal mine and operating it; that there were a large number of railway tracks in certain entries, cross-cuts, and rooms used by the defendant in transporting coal by means of draft animals and coal cars in charge of a driver; that it was the duty of the defendant to keep said roadways

and railway tracks over which the driver was compelled to pass in a reasonably safe condition and free from obstructions; that the defendant negligently allowed and permitted a coal car to stand on a certain railway track and a large amount of coal, slate, etc., to remain on the side of said railway track near said standing car, obstructing the same, and making it dangerous and unsafe for the driver to pass there while in the discharge of his duties; that on the 28th day of March, 1900, one August Schmidt was in the employ of the defendant as a driver in charge of a mule and box cars in said coal mine, his duties being to drive said mule and cars over said railway track, and while he was hauling two loaded cars along said railway track in said mine near said obstruction, in the discharge of his duty and in the exercise of due care, and without notice of said obstructions near said standing car, said two cars being hauled collided with said standing car, catching him between said two cars and said standing car, crushing and injuring him, so that he died from his injuries; that upon seeing said standing car said August Schmidt undertook to escape said collision by going from said railway track on the side thereof that was so obstructed, and was thereby prevented and thrown back upon said railway track and between said cars by reason of said obstructions, and was killed."

The defendant filed the general issue, a plea of the statute of limitations, and a plea of former acquittal as to the second count. A demurrer was sustained as to the plea of the statute of limitations, and a replication was filed to the plea of former acquittal. The case was tried before the court and a jury, and resulted in a verdict and judgment in favor of the plaintiff for the sum of \$5,000, which was reversed by this court on the ground that the court misdirected the jury as to the law, and the cause was remanded for a new trial. *Muren Coal and Ice Co. v. Howell*, 204 Ill. 515, 68 N. E. 456. Upon the case being reinstated in the trial court, the defendant so amended its plea of the statute of limitations that it applied to the first count of the declaration only, and the court again sustained a demurrer thereto, and upon a trial the plaintiff recovered a judgment for \$3,500 upon the first count of the declaration, which has been affirmed by the Appellate Court for the Fourth District, and a further appeal has been prosecuted to this court.

It is first contended by the appellant that the court erred in sustaining a demurrer to the plea of the statute of limitations to the first count of the declaration. The injury occurred on the 28th day of March, 1900, and several declarations have been filed in the case, one of which was filed on February 3, 1902, which was within two years of the date of the injury. In the first count of that declaration it was averred "that it was the

custom of the defendant, in constructing its railway track, to place said track near the side of said entries known as the 'rib side,' and a sufficient distance from the walls thereof to enable servants of defendant, passing or working in such entries, to pass between the sides of coal cars hauled on said railway tracks and the rib side of said entries without danger of injury, and keep the space between the railway track and the rib side in said entry free and clear of slate, coal, and other obstructions; that the defendant always did this, as hereinafter stated, and the servants of defendant, having knowledge of such practice, relied on the defendant to keep said entries free and clear as aforesaid; that on the 28th day of March, 1900, a lot of slate, coal, etc., fell from the roof of the eighth west entry leading off of the main south entry in said coal mine, and obstructed all that portion of said entry lying between the railway track and the rib side of said entry, and rendered unsafe and dangerous the said railway track to said August Schmidt, working in said entry; that the defendant had notice of the fall of said slate, coal, etc., from the roof of said entry, and that it was an obstruction to that part of the entry and rendered it dangerous and unsafe, and defendant negligently and carelessly failed and omitted to remove said slate, dirt, etc., but allowed it to remain there, knowing that it was unsafe and dangerous, and knowing that said August Schmidt would be required to work therein and pass thereby; that on the said date August Schmidt was hauling two loaded cars along through said entry to the bottom of the shaft of said mine, exercising due care, and without notice or knowledge that said slate, coal, etc., had fallen from the roof of said entry, or that said entry was obstructed; that upon reaching a point on the railway track opposite said slate said Schmidt discovered a car upon said railway track immediately in front of him, and, seeing that a collision was inevitable between the cars, to avoid being injured he attempted to get off said railway track on the rib side, but there came in contact with said slate, that prevented him from escaping in that direction, and threw him back on the railway track between said cars, which crushed him, from the effect of which he died; that August Schmidt had knowledge of the practice of the defendant to keep that portion of the entry lying between the railway track and the rib side of said entry free and clear of obstructions, and relied on the defendant doing so; and that, when said Schmidt undertook to avoid the collision, he believed that portion of said entry to be free from obstructions, and expected to escape the collision by going in that direction."

It will be found, from a comparison of this count with the first count of the declaration upon which the trial took place, and upon which count the verdict was rendered, that the only substantial difference in their aver-

ments is that in the first count of the last declaration it was averred that it was the practice to keep a space clear on both sides of the tracks, when practicable, so that the drivers might pass around cars standing thereon, while in the first count of the declaration filed on February 8, 1902, it was stated that the practice was to keep a space clear upon the rib side of the tracks, so that drivers might pass around cars standing on the tracks. We think the averment that it was its practice to keep a space clear on both sides of its tracks fairly included the averment that it was its practice to keep a space clear upon the rib side of its tracks, and that it cannot be said that the cause of action stated in the first count of the declaration, under which the trial took place, is not the cause of action stated in the first count of the declaration filed on February 3, 1902. The cause of action of the plaintiff was the failure of the defendant to keep its entry and tracks free from obstructions. That neglect of duty was fully set out in the declaration filed on February 3, 1902, and the declaration filed on April 21, 1902, stated the same cause of action, differing in statement only as to detail. This was not the statement of a new cause of action. *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Town of Cicero v. Bartelme*, 212 Ill. 256, 72 N. E. 437. The trial court did not err in sustaining the demurrer to the plea of the statute of limitations to the first count of the declaration.

It is next contended by the appellant that the court should have held, as matter of law, its plea of former acquittal a bar to the action. The plea was filed to the second count of the declaration only, and as the jury returned a verdict in favor of the plaintiff upon the first count only, it would seem there was no recovery upon the cause of action set out in the second count; in other words, that the jury found the plea of former acquittal as to the second count to have been sustained. Be that, however, as it may, the record as to the plea of former acquittal stands now the same as it did when the case was here before. The defendant then did not assign as error the action of the trial court in refusing to hold said plea a bar to the action; and, having failed to raise that question then, it cannot raise it now. Parties cannot bring their cases to this court in piecemeal, but must raise all questions presented by the record upon the first appeal by a proper assignment of error, which they desire the court to pass upon, or they will be deemed to have waived such questions and cannot be permitted to raise them upon a subsequent appeal. *Ogden v. Larrabee*, 70 Ill. 510; *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878. In the *Ogden Case* it was said (page 512): "It is insisted the alleged error may be considered, for the reason it was not assigned for error on the former hearing. * * * If the doctrine insisted upon should be adopted,

and the parties permitted to assign successive errors on the same record, in complicated litigation like this no conclusive decision could be rendered in the lifetime of the parties interested. * * * The error complained of existed in the former record. The party had an opportunity then to assign it and direct the attention of the court to it; but, having failed to do so, he ought to be estopped, upon every principle of justice, from alleging at any future period error in the same record. Had error intervened prior to the former adjudication, it was his duty to assign it; otherwise, he will be deemed to have waived it forever. He will not be permitted to have his cause heard partly at one time and the residue at another." In the Lusk Case it was said (page 188 of 211 Ill., page 880 of 71 N. E.): "It is a well-settled rule that when a cause is litigated, and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to consideration and could have been presented, relating to the same subject-matter, are res judicata, whether they were presented or not."

At the close of all the evidence the appellant made a motion for a directed verdict, on the ground that the appellee had failed to make a case. The evidence introduced on behalf of the appellee fairly tended to show that the defendant was the owner of and engaged in operating a coal mine, in which were situated many entries and passageways which had located therein tracks, upon which were hauled, by mules, coal cars to and from the bottom of the shaft; that it was the practice of the defendant, in the operation of its mine, to keep clear from slate and other obstructions the space upon both sides of said tracks, where practicable, so that the drivers of the mules which hauled said cars could escape from the tracks, in case of collision or other dangers upon the tracks, to a place of safety at the side of the tracks, which practice was known to and relied upon by the drivers; that in one of the new entries in the mine, some two days prior to the injury to Schmidt, a large amount of slate had fallen from the roof and completely covered the track at the point where it fell; that the defendant had notice of such obstruction, but Schmidt had not; that the employes of the defendant, whose duty it was to remove said fallen slate, piled a portion thereof upon the rib side of the entry in close proximity to the track; that a car loaded with coal was left standing upon the track at the place where said slate had fallen; that Schmidt was directed to go into that entry and haul cars loaded with coal; that as he was passing the point in the entry where said slate had fallen, which was downgrade, with a trip of two loaded cars, he discovered said car upon the track when too late to avoid a collision; that he attempted to escape from between the cars he was hauling and the standing car upon the rib side of the entry; that by reason of the obstruction placed between the track and the

rib side of the entry he was unable to reach a place of safety, but was thrown back upon the track between the standing car and the trip of cars at the time of the collision, and was crushed and bruised by the colliding cars in such manner as to cause his death. When the case was here upon the first appeal the evidence was substantially the same as it is upon this appeal, and it was then held the evidence fairly tended to support the plaintiff's cause of action, and that the court did not err in declining to take the case from the jury. We think the evidence found in this record fairly tends to support the plaintiff's cause of action. The questions of the defendant's negligence, Schmidt's contributory negligence, and whether or not it was the practice of the defendant in its mine to keep the space clear upon both sides of its tracks, so that its drivers might escape to a place of safety in case of a collision or other accident upon the tracks, of which practice Schmidt had notice and upon which he relied, were all questions of fact which we think the evidence fairly tended to establish. The court did not err in declining to take the case from the jury at the close of all the evidence.

On the trial Henry Genteman, over the objection of the defendant, was permitted to testify substantially as follows: "On the 28th of March, 1900, I was working for Murens. I was working in room 7, entry 8. William Wright was my partner. I knew August Schmidt. He was driving. There was a fall of slate there on Monday morning. The car we were loading was standing on the main track. We were sitting in the cross-cut, lurching, about 12 feet from the car. The first thing I heard was the cars bump. We jumped up and ran right over to him. The cars were brought close together. Schmidt said he could not get out on account of the slate. He said he could not make it. The slate he referred to was on the rib side. It was about half as high as the car." Over the objection of defendant, William Wright testified to substantially the same facts. It is contended the facts testified to by these witnesses were not so closely connected with the injury as to make them a part of the *res gestæ*, and that their admission constitutes reversible error. The injury, the arrival of the witnesses, and the explanation to them by Schmidt as to the manner in which the injury took place occurred almost simultaneously. There was no opportunity on his part for deliberation or fabrication, and we think the evidence was admissible. *Quincy Horse Railway & Carrying Co. v. Gnuse*, 137 Ill. 264, 27 N. E. 190; *Springfield Consolidated Railway Co. v. Welsch*, 155 Ill. 511, 40 N. E. 1034; *Springfield Consolidated Railway Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884.

It is also urged that the court erred in its rulings upon the admission and exclusion of evidence, and it is said the jury were mis-

directed as to the law. We have considered all the questions raised by the appellant in regard to the rulings of the court upon the evidence, and have examined the instructions given to which objections have been made and those which were refused, and think the rulings of the court upon the evidence and instructions substantially correct. The facts are not complicated, and three juries have, after hearing the evidence, found in favor of the plaintiff. The evidence admitted over the objections of the defendant, other than the testimony of Genteman and Wright, was upon subjects of minor importance, and the same may be said of the evidence which was excluded; and the jury, we think, were fully and fairly instructed as to the law of the case, and we have found nothing in the record which would justify a reversal of the case.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(217 Ill. 200)

CHICAGO PORTRAIT CO. v. CHICAGO CRAYON CO.

(Supreme Court of Illinois, Oct. 24, 1905.)

1. APPEAL—JUDGMENTS APPEALABLE—FINAL JUDGMENTS.

A judgment merely sustaining a demurrer to the declaration, but neither adjudging that the plaintiff take nothing by the writ or that the defendant go hence without day, nor containing words of equivalent meaning, is not a final judgment, within the statute authorizing appeals from final judgments.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 465.]

2. SAME—DISMISSAL OF APPEAL—WANT OF JURISDICTION.

Where an appeal is taken to the Appellate Court from a judgment which is not final in form, that court should dismiss the appeal for want of jurisdiction, and is without power to enter judgment on the merits, regardless of the absence of objection by the parties.

3. ESTOPPEL—CONSENT TO JURISDICTION.

The fact that appellant appealed to the Appellate Court from an interlocutory judgment and submitted the case to such court for a decision on the merits does not estop him to urge on appeal to the Supreme Court that the Appellate Court had no jurisdiction over the appeal.

4. COSTS—DISMISSAL OF APPEAL.

Appellant from an interlocutory judgment from which no appeal will lie will be required to pay all costs occasioned by such appeal.

Appeal from Appellate Court, First District.

Action by the Chicago Portrait Company against the Chicago Crayon Company. From a judgment of the Appellate Court, affirming a judgment for defendant, plaintiff appeals. Reversed.

Duncombe & Evans, for appellant. A. D. Gash, for appellee.

CARTWRIGHT, C. J. Appellant was plaintiff and appellee was defendant in this suit in the circuit court of Cook county. That court sustained the general demurrer of the defendant to the declaration, and the

plaintiff elected to stand by the declaration. The recital of said facts in the record is followed by this judgment: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor." There was no disposition of the rights of the parties or of the suit; but plaintiff prayed an appeal from said judgment to the Appellate Court for the First District, and assigned for error that the court sustained the demurrer and dismissed the suit. Neither party raised any question as to the jurisdiction of the Appellate Court, but submitted the cause on the merits. The Appellate Court, in the opinion filed, called attention to the fact that the judgment was not final, or such that an appeal could be taken from it, but, treating it as final, disposed of the case on the merits and affirmed the judgment. Appellant prosecuted its further appeal to this court, and assigns for error that the Appellate Court took jurisdiction of the appeal and decided the case on its merits, instead of dismissing the appeal.

In the argument for appellant the only error relied upon is that the Appellate Court had no jurisdiction of the appeal, for the reason that the judgment was not final. The answer of appellee to that argument is that appellant is estopped, by taking the appeal and submitting the cause upon the merits, from now saying that the Appellate Court ought to have dismissed its appeal. The judgment was not final, and the statute only authorizes appeals from final judgments. The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ, nor that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried, and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final. *Wenon v. Fossick*, 218 Ill. 70, 72 N. E. 732; 11 Ency. of Pl. & Pr. 925. The only question, therefore, is whether appellant is estopped, by taking the appeal, from questioning the jurisdiction of the Appellate Court. If a court on appeal has jurisdiction of the subject-matter and of the parties, any objection to the manner in which it reaches the court will be waived by the parties appearing and pleading without objection. *Lynn v. Lynn*, 160 Ill. 307, 43 N. E. 482. But, where the court has no jurisdiction of the subject-matter, the jurisdiction cannot be conferred by agreement of parties and the want of jurisdiction cannot be waived by failing to object. 2 Cyc. 536. The fact that appellant took the appeal to the Appellate Court does not affect the question. *Peak v. People*, 71 Ill. 278. It is not competent for parties to confer jurisdiction of the subject-matter up-

on an appellate court by their stipulation. *Westcott v. Kinney*, 120 Ill. 564, 12 N. E. 81. In this case the Appellate Court had no jurisdiction of the subject-matter, not being authorized by law to hear or consider an appeal from a judgment which is not final, and appellant is not legally estopped to set up a want of jurisdiction. A court, finding it has no jurisdiction of a cause, should dismiss it of its own motion, and the Appellate Court should have dismissed the appeal at appellant's cost. Appellant, having taken an appeal where by law no appeal would lie, will not be permitted to recover costs, but will be required to pay all costs occasioned by such appeal.

The judgment of the Appellate Court is reversed, and the cause is remanded to that court, with directions to dismiss the appeal at appellant's cost.

Reversed and remanded.

(217 Ill. 208)

BALTIMORE & O. S. W. R. CO. v. MULLEN.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—INJURIES TO PASSENGER—EVIDENCE.

Where a passenger was injured in alighting from a train, the fact that it was dark, and that he felt no motion of the train and believed it had stopped, and got off at place pointed out to him by the officials as a depot, must be considered by the jury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

It is not negligence per se to alight from a moving train in the darkness at the direction of the train officials, or in the belief that it had come to a stop.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1361½, 1391.]

3. SAME—TIME TO ALIGHT.

A railroad company must give a passenger a reasonable time to alight safely at the end of his journey.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1223.]

Appeal from Appellate Court, Third District.

Action by John Mullen against the Baltimore & Ohio Southwestern Railroad Company. From a judgment of the Appellate Division, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in case, brought in the circuit court of Cass county in March, 1902, by the appellee against the appellant company to recover damages for a personal injury. To the second amended declaration the plea of general issue was filed. The cause was tried before the court and a jury, and resulted in a verdict and judgment in favor of appellee for the sum of \$1,730. An appeal was taken to the Appellate Court, which has affirmed the judgment of the circuit court; and the present appeal is prosecuted from such judgment of affirmance. The following extract from the opinion of the Appellate

Court, deciding this case, sets forth the material facts, to wit:

"This suit was before this court at a former term, and the judgment then appealed from was reversed because of errors in the instructions. 108 Ill. App. 637. Upon remandment the cause was again tried, resulting in a judgment for the plaintiff for \$1,730. The second trial was had upon the second and third counts of the declaration only, which charge, in substance, that the defendant had negligent and incompetent servants in charge of its train from St. Louis to Flora, Ill.; that said servants opened the vestibule doors of the coach in which plaintiff was riding, and called the station of Flora; that plaintiff then went out on the vestibule platform; that the conductor and brakeman were there, and one of them informed him the depot was 'right there,' indicating a point directly opposite where the train then was, and thus induced in his mind the belief that the train had stopped at the station; that it was in the nighttime, and so dark plaintiff could not distinguish any object, and by means of the false information thus given him by the conductor or brakeman he was induced to believe, and did believe, that the train had stopped; that he attempted to alight from said train, but that it was not at the place indicated, and had not stopped as plaintiff had been erroneously led to believe, and in attempting to alight he was drawn under the wheels and injured. On the morning of the accident, which occurred at about 4:35 o'clock, the appellee, a farmer, about 68 years of age, was a passenger upon one of appellant's trains for the purpose of being carried from East St. Louis to Flora, Ill., where he intended changing cars to another branch of appellant's road. He testifies that, when the conductor took up his ticket, he informed the conductor that he had had but little sleep for two nights, and asked to be waked at Flora; that as the train neared Flora the brakeman came into the car and called the name of the station, whereupon appellee awoke, arose, put on his overcoat, took his lunch basket on his arm, and went to the rear platform of the coach; that the conductor and brakeman were standing on the platform of the adjoining coach; that the vestibule doors were open; that he asked them where the depot was, and that one of them replied, 'Right there,' and pointed to the place where he afterwards got off; that said answer, and the fact that he did not feel the motion of the train, led him to believe that the train had stopped; that it was so dark he was unable to see whether or not it had; that he then stepped off, holding onto the railing as he did so, and was thrown under the wheels of the car. After appellee's wounds were dressed the agent of appellant procured from him a written statement as to how the accident occurred, which was introduced in evi-

dence by appellant, and tends to corroborate appellee's testimony. The evidence also shows that, when the train approached Flora from the west, it first stopped at a point about 200 feet west of the crossing of the track of the main line of the road with that of what was called the 'Springfield Division'; running north and south, and then proceeded to the depot, which was located east of the crossing, in the angle formed by the main and Springfield tracks, at the rate of not to exceed five miles an hour. After the accident appellee was found lying near the main track about 40 feet west of the crossing. His hand was injured to such an extent that amputation was necessary. The conductor and brakeman both deny that they were at the place where appellee testifies they were when the accident occurred, or that either of them made any statement to him as to the location of the depot, or that they saw him get off. The brakeman admits that he awoke appellee before the train stopped for the crossing, and told him that the train was approaching Flora, and that appellee then got up, stepped into the aisle, and put on his overcoat, but denies that he saw him on the train thereafter, or that he called the station until after making the stop at the crossing. The evidence tends to show that there were a number of electric and other lights burning at and within the depot and other buildings in the vicinity of where the accident occurred, and that there were gas lights burning in the vestibule, through which appellee left the car."

Henry Phillips and Shutt, Graham & Graham (Edward Barton, of counsel), for appellant. Mills & McClure, for appellee.

MAGRUDER, J. (after stating the facts). Upon the trial below, at the close of the plaintiff's testimony, the defendant asked the court to give the jury a written instruction to find the defendant not guilty, which was refused, and exception was taken. At the close of all the testimony defendant's counsel again asked of the court a written instruction to the jury to find the defendant not guilty, which was also refused, and exception taken. The refusal of the court to instruct the jury to find for the defendant raises the question whether there is any evidence tending to sustain the cause of action set up in the declaration.

It is insisted by the appellant that the appellee was guilty of contributory negligence in attempting to alight from the train while it was in motion. This court has held in some cases that it is negligence for a passenger to get off a train of which the motive power is steam while the cars are in motion. *Cicero & Proviso Street Railway Co. v. Meixner*, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331. It will generally be found, however, upon an examination of such cases, that the passenger, thus alighting from a steam car when in motion, was aware at the time

that it was in motion. In other cases it has been held that the question whether or not the alighting from a steam car which is in motion constitutes of itself contributory negligence is a question of fact, to be determined by the jury, even where the passenger knowingly and intentionally alights from such moving train. Thus, in *Chicago & Alton Railroad Co. v. Byrum*, 153 Ill. 131, 137, 38 N. E. 580, this court said: "Whether or not appellee was guilty of such contributory negligence in alighting from a moving train as would bar a recovery was a question of fact, to be determined by the jury under all the attendant and surrounding circumstances. * * * It was the duty of appellant to stop its train a reasonable length of time at Elkhart to allow appellee, in the exercise of ordinary care and diligence, to alight therefrom with safety, and if appellant failed in this duty, and by reason thereof appellee was injured while in the exercise of ordinary care and caution, appellant would be liable." In *Chicago & Eastern Illinois Railroad Co. v. Stormont*, 190 Ill. 42, 46, 60 N. E. 104, 105, it was said: "The main contention of the defendant was that the plaintiff was not entitled to recover at all, because the train was in motion when she alighted from the same. This view of the law was erroneous, and the instructions, so far as they announced such erroneous view, were properly modified by the court before being given to the jury." In *Chicago & Alton Railroad Co. v. Gore*, 202 Ill. 188, 192, 66 N. E. 1063, 1064, 95 Am. St. Rep. 224, it was said: "It is so far within the scope of the authority of a conductor of a railway train to advise and direct passengers in the matter of boarding the train that an attempt to step on a moving train in compliance with such advise or direction cannot be declared as matter of law to be negligence that will bar recovery, unless the danger is so open and obvious that only a reckless man would encounter it. * * * Whether or not the appellee, in attempting to get upon the car while the same was in motion on the occasion in question, was guilty of such contributory negligence as would bar a recovery, was a question of fact, to be determined by the jury in view of all the attendant and surrounding circumstances." The considerations which apply to getting on a moving train are also applicable to the matter of getting off a train which is in motion.

Without attempting to distinguish between cases, which seem to hold that it is negligence as matter of law to attempt to alight from the car of a train propelled by steam while it is in motion, and those which hold that the question, whether such attempt constitutes contributory negligence or not is a question of fact for the jury, it is sufficient, for the purposes of the case at bar, to say that, where a passenger alights from a train at a particular point upon the invitation

of the conductor, or brakeman, or other employé on board the train, or where such passenger alights from the train under the belief that it is not in motion, and the circumstances show that there is reasonable ground for such belief, then these facts may be taken into consideration by the jury in determining whether the plaintiff has or has not been guilty of contributory negligence. In *Chicago & Alton Railroad Co. v. Winters*, 175 Ill. 293, 51 N. E. 901, it was held that the direction, invitation, or assurance of safety, given by a servant of the company, may so qualify a plaintiff's act as to relieve it of the quality of negligence which it would otherwise have; and it was there said: "One who obeys the instructions or directions of another, upon whose assurance he has a right to rely, cannot be charged with contributory negligence at the instance of such other, in an action for injuries received in attempting to follow out the instructions." As was said in *Chicago & Alton Railroad Co. v. Winters*, supra, in cases where the facts showed that a passenger dismounted from a train at a place of danger and was injured in so doing, and where it was held that such passenger was not entitled to recover damages for such injuries from the railroad company, it appeared that such movement of the passenger in alighting from the train was not made by any direction or invitation from the conductor of the train or other servant of the company. In 5 *American and English Encyclopedia of Law* (2d Ed.) p. 653, it is said: "The direction of the conductor of a train to an intending passenger as to his method of getting upon the train is clearly within the scope of his authority, and in complying with this direction the passenger is not guilty of negligence, unless he exposes himself to open and apparent danger." The same rule applies as to alighting from a train. *Id.* pp. 657-660; *Chicago & Northwestern Railway Co. v. Scates*, 90 Ill. 586. In *Chicago & Northwestern Railway Co. v. Scates*, supra, it was said (page 591): "Where an action was brought to recover for injuries received by a party who attempted to get off a train while in motion, it was held that a passenger has no right to get off a train of cars in motion, and, if he undertakes to do so without the knowledge or direction of any employé of the company, it is at his peril, and he must bear the consequences, however disastrous. * * * If it is to be regarded dangerous for a passenger to get off a train of cars in motion, it is likewise dangerous to get on a train when in motion. If a person is guilty of such negligence in getting off a train of cars in motion as will preclude a recovery for an injury received, upon the same principle and for the same reason a person injured in getting on a train of cars in motion and in consequence thereof should be regarded

guilty of such negligence as will prevent a recovery." *Illinois Central Railroad Co. v. Slatton*, 54 Ill. 133, 5 Am. Rep. 109; *Ohio & Mississippi Railway Co. v. Stratton*, 78 Ill. 88; *Illinois Central Railroad Co. v. Chambers*, 71 Ill. 519. On the contrary, the alighting of a passenger from a train thus in motion is not at his peril, if he does so with the knowledge or direction of an employé of the company. There are also cases where the facts show that the party alighting from a moving train had reason to believe that the train had stopped. Where such belief has a reasonable basis in the facts and circumstances surrounding the party at the time of the accident, the act of alighting does not, in and of itself, amount to negligence as matter of law. *Hoehn v. Chicago, Peoria & St. Louis Railway Co.*, 152 Ill. 223, 38 N. E. 549; *England v. Boston & Maine Railroad Co.*, 153 Mass. 490, 27 N. E. 1; *Pittsburg, C. & St. L. Ry. Co. v. Miller*, 33 Ind. App. 128, 70 N. E. 1006; *Minock v. Detroit, G. & M. R. Co.*, 97 Mich. 425, 56 N. W. 780.

In the case at bar the appellee, a man 67 years of age, had been traveling for two nights, and was wearied and tired, and so stated to the brakeman when he took his seat in the car, asking the brakeman to awaken him when they reached Flora. There was a railroad crossing before the train arrived in Flora. The train first stopped about 200 feet west of this crossing. Before the crossing was reached the brakeman awoke appellee, and, as he states, announced that the next station was Flora. The depot, where appellee intended to alight, was a considerable distance east of this railroad crossing. Appellee arose from his sleep and from his seat, and put on his overcoat, and took his lunch basket on his arm after the announcement thus made to him by the brakeman, and went to the rear platform of the car, where he found the vestibule doors open. He says that the conductor and the brakeman were both standing on the platform of the rear car, next to the one in which he was riding. He says that he asked them where the depot was, and one of them said, pointing to a place directly opposite where they then were, "Right there." His contention is that, in view of what was thus said to him by either the brakeman or the conductor, he thought he had reached the depot and was at the proper place for alighting. The train had stopped at the crossing, and was evidently just moving beyond the crossing, and was at that time a considerable distance west of the depot. In other words, it was not a fact that the depot was "right there," or directly opposite the point where he alighted. There is some conflict in the testimony as to whether the name of the station, Flora, was called after the crossing was passed, or before it was reached. The testimony very strongly tends to show, however, that

the name of the station was not called after the first announcement to the appellee when he was awakened from his sleep.

Authorities are produced by the appellant, holding that the fact that the name of a station is called and the further fact that the vestibule doors of the car have been opened do not of themselves constitute an invitation to the passenger to alight. As is said by the Supreme Court of Massachusetts in *England v. Boston & Maine Railroad Co.*, 158 Mass. 490, 27 N. E. 1: "Assuming that the action of the brakeman in calling the station and fastening back the door was to be regarded as an invitation, it was clearly not an invitation to alight from a moving train, but from the train after it had come to a stop." In the present case, if there had been nothing more than the calling of the name of the station, or the fastening back of the vestibule doors, it could not be said that appellee was invited by any employé of the company to alight at that place. But when these circumstances are taken into consideration in connection with the fact that the appellee was told, when he went on the platform, by the conductor or the brakeman, that the depot where he had to alight was "right there" at the place where he then was, and in connection with the further facts that it was a dark night and had been raining, and that appellee, wearied and worn with long journeying, had just awakened from sleep at the early hour of 4 o'clock in the morning in the month of November, it cannot be said that it was error to submit to the jury, as a question of fact, whether or not the appellee was guilty of contributory negligence in attempting to alight at the point where he did alight. Whether there was light enough from a restaurant, or other places near by, to enable appellee to see whether the train was moving or not, and where he was stepping when he alighted, was a question of fact submitted to the jury under the instructions.

In *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. 631, it was held that in case the conductor announces a station at which his train is not bound to stop, just before the same is reached, and if, following such announcement, the train actually does stop at the station platform, a passenger for such station would be justified in presuming it was for the purpose of discharging him there, and in proceeding to get off, and if, while it is so stopped and with due promptness and care, the passenger attempts to get off, and is thrown down and injured by the starting up of the train, that presumption would become conclusive on the company, and that where the ordinary signal is given on approaching a station, and it is announced in the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train was going to stop at such station, and it does stop there, the company

cannot avoid liability to the passenger for an injury caused by the train starting before he has time to get off by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given. In the case at bar, if notice was given to the appellee that the next station at which the car would stop was Flora, and, after such notice was given, the car did actually stop at the crossing in question before the depot was reached, the appellee had a right to suppose that the stoppage of the car was at the proper place for him to get off. The evidence tends to show that the appellee had no knowledge that the train would stop at a railroad crossing before it reached the depot, and then, after such stoppage, would move on again and stop at the depot.

In *Chicago & Alton Railroad Co. v. Arnol*, 144 Ill. 261, 268, 33 N. E. 204, 205, 19 L. R. A. 818, it was said by this court as follows: "In this country it is the almost universal practice to announce the station which the train is approaching before it is reached and while the train is still in motion; and it is universally understood that such announcement is intended as notice to passengers, without warning to the contrary, that the next stop of the train will be at the station announced. The purpose is understood to be to enable the passengers intending to alight at that station to be ready to leave the cars promptly, without undue haste or inconvenience to themselves or unnecessary delay of the train. * * * If the conduct of appellant's servants and their management of the train amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and prudent persons, and appellee, acting in good faith upon such invitation, arose, upon the train coming to a standstill, for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she, by reason of such apparent invitation, was placed in peril from the further movement of the train, the duty at once arose on the part of appellant to stop its train a sufficient length of time to permit her to leave it in safety, or to warn her of the danger in time to avert injury. * * * The duty of the carrier was to be measured by the peril to the passenger, whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger." In *Ward v. Chicago & Northwestern Railway Co.*, 165 Ill. 462, 46 N. E. 365, it was held that a railroad company, having provided its stations with platforms, must use due care in stopping its coaches, so as to afford passengers an opportunity to safely alight thereon, particularly after its servants have announced that the next stop would be at a station; and it was also there held that a railroad passenger, who is justified by the

conduct of the servants of the road in alighting from a train, and who, while exercising due care, is injured by reason of the carrier's negligence in omitting to provide a safe place to alight, may recover for the injuries so received.

There is a direct conflict between the testimony of the appellee and the testimony of the conductor and brakeman as to what occurred just before the appellee alighted from the train. The conductor and brakeman deny that they were present and saw the appellee when he alighted. They also deny that they heard him ask where the depot was, and deny that they pointed to the place opposite where he was, and said to him, in answer to his question, "Right there." The accident occurred at about 4:35 in the morning. At 1 o'clock of the same day agents or employes of the appellant went to the appellee, while he was yet suffering from his injury and sitting upon the edge of his bed, and asked him to make a written statement as to how the accident occurred. A stenographer took down his statement, and wrote it up, and about 3 o'clock in the afternoon of that day it was presented to him and signed by him in the presence of two witnesses. This statement was introduced in evidence upon the trial of the case by the appellant, and not by the appellee. In this statement appellee says: "In the first place I was laying down in the train trying to sleep. I asked the conductor to wake me up when I reached Flora. I told him I did not sleep any last two nights. When I got there, he woke me up, and I got on my overcoat in a hurry, and picked up my lunch basket. I followed out of the car the brakeman and conductor at the rear end of car. I asked the brakeman standing right there, as I went through the coach, and when I had hold of the handles going down the steps, 'Where is the depot?' He said, 'Right there.' I also saw the conductor at the same time. He was not far from the end of the car. I started to go down the steps. I thought the train was stopped, as I could not feel any jar. I was going down the steps, when on the last step I stepped to the ground, or aimed to step there. The first thing I knew I was struck somewhere. I was close up to the rail, and tried to get away from it. I had enough sense to try to get away from it. I was sensible all the time. I tried to get up, but could not. When I got up, I saw that my hand was torn and mashed, and grabbed it with my other hand. I hold the company at fault, as the conductor ought to have told me that the train had not stopped when he saw me going down the steps. As I fell, I heard some one holler, 'The train caught him.' I think I heard some one holler; whether it was the brakeman or conductor I could not tell. I hold the company at fault, as I was in a strange place, and they ought to have hollered or not let me go." This statement, thus made a few hours after

the accident happened, was a part of the appellant's own evidence. This statement confirms the testimony of the appellee, as given upon the trial of the cause. In *American Hoist & Derrick Co. v. Hall*, 208 Ill. 597, 70 N. E. 581, it was said: "Appellant voluntarily put appellee upon the witness stand, and made him its own witness, thereby vouching for his credibility, and, while it is true it was not bound by his conclusions, and might contradict him by other witnesses, yet it could not impeach him." *Mitchell v. Sawyer*, 115 Ill. 650, 5 N. E. 109; *Bowman v. Ash*, 143 Ill. 649, 32 N. E. 486. In view of the introduction of this statement confirming the testimony of the appellee, it cannot be said that there was not evidence justifying the jury in coming to the conclusion that the appellee was induced to alight by the invitation of the appellant's employes, and that he had reasonable ground for believing that he was at the proper place for alighting.

As to the question of the negligence of the appellant, it is clear that if the conductor or the brakeman, or both of them, stood on the platform and permitted the appellee to alight at the hour and under the circumstances already stated, and induced him to believe that he was alighting at the depot, then the company was certainly guilty of such negligence as authorizes a recovery against it. The appellee was a passenger upon the appellant's train, and the implied contract with him to carry him safely necessarily included the furnishing of reasonable opportunity to alight from the train safely at the end of his journey. *Chicago & Alton Railroad Co. v. Arnol*, supra.

Much criticism is made by appellant's counsel upon the instructions given for the appellee, upon the modification of instructions asked by appellant and the giving of such instructions as modified, and upon the refusal of certain instructions asked by the appellant. It would swell this opinion to an inordinate length to attempt to discuss all these criticisms in regard to the instructions. We have examined them all carefully, and are of the opinion that those given announced views in accordance with the principles hereinbefore discussed, and those refused announced views in opposition to the rules here announced. This being so, there was no such error in the giving, modification, or refusal of instructions as to justify a reversal of the case.

Complaint is made of some of the remarks made by counsel for appellee in his argument to the jury. Upon this subject we concur in the following view, expressed by the Appellate Court in their opinion deciding this case, to wit: "It is urged that the judgment should be reversed because of improper remarks of counsel for appellee in their opening statement and closing argument. While a number of the remarks referred to were more or less objectionable and improper, we do not think they were so seriously so as to have

affected the verdict. Objections to most of them were sustained by the trial judge, who afterwards approved the verdict."

The judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

Judgment affirmed.

(217 Ill. 215)

CLOSE et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONFIRMATION OF ASSESSMENTS—REVIEW.

An objection to an ordinance authorizing a special improvement, that it does not specify the nature, character, locality, and description of the proposed improvement, is not sufficiently specific; but, where no objection is made, the question raised thereby will be reviewed on appeal.

2. SAME.

Where the record, on appeal from a judgment confirming a special assessment, shows that objection to the sufficiency of the description was not passed upon in the county court, it cannot be reviewed.

3. APPEAL—EXCEPTIONS.

Where the decision of a question depends on evidence which can only be made a part of the record by a bill of exceptions, the decision cannot be reviewed without a bill of exceptions.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the city of Chicago against James B. Close and others. From a judgment of the county court in favor of plaintiff, defendants appeal. Affirmed.

F. E. Elliott (H. G. Parkins, of counsel), for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, C. J. This is an appeal from a judgment of the county court of Cook county confirming a special assessment against property of appellants to defray the cost of constructing a pumping station and system of sewers in the city of Chicago. The points relied upon for a reversal of the judgment are: First, that the ordinance for the improvement does not describe the branches from the main trunk sewer in Ninety-Fifth street, referred to in paragraph 7 of subsection "a" of the ordinance, as required by the local improvement act; and, second, that the ordinance, which involved an expenditure of more than \$100,000, was not published in the proceedings of the city council, as usual, in full, one week before action was taken thereon by said council.

Various property owners represented by different counsel objected to the assessment, and at the hearing one of the attorneys was spokesman for all and presented the objections. By leave of court appellants adopted the objections filed by said attorney, and among them was the following: "The ordinance authorizing said improvement does not specify the nature, character, locality, and de-

scription of the proposed local improvement." This is one of the usual objections filed in special assessment cases, and it is equally applicable to all cases. It is not specific, and does not point out in what respect an ordinance is insufficient in matter of description. Where such an objection is filed, it is the duty of the court, on motion of the petitioner, to require the objection to be made specific, so as to point out in what respect the ordinance is lacking, or to require the objector to point out specifically upon what objection he relies and its nature. *Clark v. City of Chicago*, 214 Ill. 818, 73 N. E. 358. If that is not done, the fact that the objection is general in its nature will not prevent a review on appeal of the question raised by it. *Mead v. City of Chicago*, 186 Ill. 54, 57 N. E. 824. In this case, however, the record affirmatively shows that the objection in question was not relied upon or presented to the court, so that there was no decision by the court whether the ordinance sufficiently described the improvement. The record states the points presented to the court by counsel representing the combination of property owners who took part in the hearing, with the further statement that they covered all the points the objectors cared to make on legal objections. In response to an inquiry of the court, the attorney for appellants assented to what had been said by the attorney representing the combination, and said that it covered about all he cared to say. The points so stated to the court do not include the question whether the ordinance was sufficient in matter of description, and the county court did not consider or decide that question. An appeal is allowed for the purpose of reviewing decisions of the county court, and the objection will, therefore, not be considered on this appeal.

The estimate of cost exceeded \$100,000, and the statute required the ordinance to be referred to the proper committee and published in the proceedings of the city council in the usual way, in full, at least one week before any action was taken by the council. *Hurd's Rev. St. 1899*, p. 164, c. 10; *Kerfoot v. City of Chicago*, 195 Ill. 229, 63 N. E. 101. The appellee made out a prima facie case, and evidence was necessary to sustain the objection. Evidence was offered in support of it; but, when the objection was overruled by the court, no exception was taken by appellants. Where an error appears in the record proper as made up by the clerk, no exception is necessary to present the error for review on appeal. So far as the proceedings of a court are matters of record without a bill of exceptions, a decision of the court need not be excepted to; but, where the alleged error consists of a ruling of the court as to a matter which can only be made a part of the record by a bill of exceptions, a party cannot complain of the ruling unless there is an exception properly preserved in a bill of exceptions. *Trigger v. Drainage District*, 193 Ill. 230, 61 N. E. 1114. No exception or bill

of exceptions is necessary to preserve the question whether an ordinance is void on its face or insufficient to support a special assessment; but, where the decision of a question depends upon evidence which can only be made part of the record by a bill of exceptions, the decision cannot be reviewed without a proper exception. In the case of *Fisher v. City of Chicago*, 218 Ill. 268, 72 N. E. 680, appellants had unsuccessfully attempted to obtain a bill of exceptions by mandamus against the judge of the county court (*People ex rel. v. Carter*, 210 Ill. 122, 71 N. E. 369), and, having failed in their attempt, were without a bill of exceptions showing the evidence in support of their objections and an exception to the decision of the court.

Neither of the objections presented in this court can be considered. The judgment of the county court is affirmed.

Judgment affirmed.

(217 Ill. 235)

GRAHAM et al. v. DEUTERMAN et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. WILLS—MENTAL INCAPACITY—EVIDENCE.

In proceedings to contest a will, the opinion of a witness that testator was mentally incompetent, based upon his feebleness and the fact that he was nearsighted, is insufficient to establish such claim, where the evidence shows that he transacted business and understood what he was doing when he made the will.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Wills, §§ 137, 138, 147.]

2. SAME—ADMISSIBILITY.

In proceedings to contest a will for want of testamentary capacity, evidence that many years before the will was executed testator stole small articles from his neighbors held inadmissible.

Error to Circuit Court, McLean County; C. D. Myers, Judge.

Action by Alice Deuterman and others against Charles S. Graham and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Welty, Sterling & Whitmore and Blinn & Covey, for plaintiffs in error. Livingston & Bach and F. L. Capps, for defendants in error.

HAND, J. William A. Graham, of Atlanta, Logan county, executed his last will and testament on the 6th day of July, 1901, and died on the 14th day of the following month. He gave his personal property absolutely to his widow, Mary A. Graham, also his real estate during her natural life, and charged her with the support and education of his minor son, Arthur E. Graham, during his minority, and upon her death devised his real estate in fee to his sons Charles S. and Arthur E. Graham, in equal portions. He left him surviving seven children, other than Charles S. and Arthur E., to each of whom he bequeathed \$25. The will was admitted to probate, and Mary A. and Charles S. Graham qualified as exec-

utrix and executor thereof. The estate consisted of a small amount of personal property and a farm of 160 acres, of the value of \$16,000, upon which William A. Graham, his wife, and Arthur E. resided as a home at the time of the testator's death. He was indebted in the sum of \$3,000, a portion of which was secured by a mortgage upon the farm. Upon the 3d day of November, 1902, the seven children of William A. Graham, other than Charles S. and Arthur E., filed a bill in the circuit court of McLean county to contest the will, on the ground of want of testamentary capacity in the testator to make the will, and on the ground that the testator was induced to make the will in consequence of the undue influence of Mary A. and Charles S. Graham. Answers were filed denying the want of testamentary capacity on the part of the testator and that the execution of the will was the result of undue influence. A trial was had before a jury, and there was a finding in favor of the will upon the question of undue influence under the direction of the court; but the jury found that William A. Graham was mentally incapable of making said will at the date of its execution. A motion for a new trial was overruled, and a decree was entered setting aside the will. That decree was reversed by this court (*Graham v. Deuterman*, 206 Ill. 378, 69 N. E. 237) and the case was remanded for a new trial. Upon its reinstatement in the circuit court a second trial was had, with a like result as the first, and the record has again been brought to this court for review by writ of error by the proponents of the will.

When the case was here the first time the testimony of the several witnesses who testified upon the trial for and against the will was set out in the opinion of the court then filed, and it was held, after a review of such testimony, that the verdict was manifestly against the clear weight of the evidence. On the second trial the testimony of the witnesses who testified against the will upon the first trial was reproduced before the jury, together with that of other witnesses whose testimony was of the same character; but no new facts tending to prove the incapacity of the testator to make a will, which we deem material, were submitted to the jury upon the second trial, and the material testimony found in this record is therefore substantially the same as was found in the record when the case was here before, and from a careful consideration thereof we are forced to the same conclusion which we then reached, viz., that the verdict is manifestly against the clear weight of the evidence.

It appears from the undisputed evidence that William A. Graham was 72 years of age at the time he made his will; that prior to that time, for many years, he had lived upon the farm upon which he died; that for some years prior to his death the farm had been rented, and that during that time he

had collected the rent; that up to within a few weeks of his death he made deposits, accepted certificates of deposit, and had checks cashed, which he had received in payment of farm produce or otherwise, at the bank in the village near where he resided. He also conveyed land, borrowed money, gave mortgages, bought merchandise, and transacted generally such business as is customary with men of his occupation and standing in life. In February, 1900, he went to a justice of the peace in the neighborhood and had prepared and executed a will, the provisions of which were identical with those of the present will, with the exception that he gave his widow only a life interest in his personal property. Shortly before the making of the will he gave to the township assessor a list of his property for the purpose of assessment for taxation, and in 1900 the census enumerator obtained from him the necessary data upon which to base his report with reference to himself and family. At the time he executed the will he appeared to be rational and in the same mental condition in which he had been through life.

Mr. B. R. Quisenberry, one of the witnesses to the will, testified: "Am 43 years of age and reside in Atlanta. Am bookkeeper in the People's Bank. I have lived in Atlanta about 14 years. Was acquainted with William A. Graham in his lifetime, and knew him about 12 years before he died. Atlanta is a mile and a half from where he lived. I saw him occasionally during the time I knew him. He transacted business at the bank. He sometimes had deposits there in the way of certificates. Sometimes he would cash checks. He would bring in the checks of other men or customers of the bank, and sometimes I would pay him the cash, and sometimes part cash and give him a certificate of deposit for the balance. The last time I remember of his being in the bank was about six months prior to his death. I was present at the time the will spoken of was executed. I was requested to go there by Mr. Harris. Mr. Arnold, Mr. Harris, and myself went to Mr. Graham's house, and found him in bed. He sat up in bed, and I talked to him. We were there about half an hour, I should judge. The will was read over by Mr. Harris by sections, and at the reading of the will Mr. Graham says, 'That is my will.' He then requested me to sign the will as a witness. Mr. Harris explained the meaning of a couple of sections of the will so Mr. Graham understood it. He said, 'That is as I would have it.' I saw him sign the will. The paper now shown me, purporting to be the last will and testament of William A. Graham, is the one he signed. That is my signature as a witness. Mr. Arnold, Mr. Harris, and myself were present when he signed it, and they were also present when I signed it as a witness with Mr. Graham. We signed in the presence of Mr. Graham. As far as I could see, at the time Mr. Graham executed

this will, I thought his mind was all right. I think he was capable of transacting ordinary business. I did not discover any difference in his mental condition from what it always had been."

Mr. J. E. Arnold, the other attesting witness, testified: "My age is 48 years. I reside in Atlanta. I have lived in Atlanta about 31 years. My occupation is selling groceries. I was acquainted with William A. Graham in his lifetime. I had known him practically all my life. He lived about a mile and a half from Atlanta. I was supervisor of Atlanta for four years, and am still a member of the board of education, and have been for 16 years. William A. Graham's place of doing business was in Atlanta. He had some trouble with his eyesight and always wore glasses. He was a farmer by occupation. I think he died in August, 1901. While I knew him I transacted business with him—sold him groceries. I sold to him and his family all he bought from 1883 to 1894. I never transacted any business with him except selling him groceries. After 1893 or 1894 I didn't sell him many, but I sold him some every once in a while. I saw him up to the time, it was perhaps six months before he died, and then I saw him again the date of the will. I was there at the time he signed the will at his house. I had a conversation with him at that time. He was then in bed. When we went in he was lying in bed, and I think Mrs. Graham propped him up. Mr. Quisenberry and Mr. Harris were with me. Mr. Quisenberry lived in Atlanta. After we got there Mr. Harris read the will over by sections. He said that was his will just as he wanted it. He had given the other children their portion, excepting Charles and Arthur. While we were talking Mr. Harris asked Mr. Graham why he was making his will that way, and he said he had given the other children their portion. I saw him sign the paper. I was present at the time. Mr. Quisenberry and Mr. Harris were also present. I don't just remember what was said about witnessing the will, but I signed it as a witness, at the request of Mr. Graham; that is, William A. Graham. The signature 'J. E. Arnold' is my signature as witness to the will. To the best of my knowledge, when Mr. Graham executed his will, he was a man of sound mind and memory. I think at that time he was capable of transacting ordinary business. I could not see any difference, so far as his mental faculties were concerned, from what they always had been."

The evidence shows the testator was near-sighted, that he had met with an accident which prevented him from walking readily, and that during the last years of his life he had consumption, from which disease he died. A number of witnesses testified that in their opinion he was incapable of making a will or transacting ordinary business at the time the will bears date. None of those witnesses, however, testified to any fact or facts which

showed the testator to be mentally incapable of transacting ordinary business or making a will; but such opinions appear to have been based mainly upon the ground that the testator appeared to be in a weak condition physically, and that when he went from home some member of the family usually accompanied him. The testator was undoubtedly in a weak physical condition, and, by reason of being crippled and his eyesight being affected, his wife or his son, or some one else, usually, but not always, accompanied him when he went to the village or other place away from the farm. The opinions of witnesses that he was incapacitated to do business or to make a will are entitled to but little weight, when the evidence clearly shows at the several times covered by the testimony of the witnesses he did do business intelligently, and that he fully understood the business in which he was engaged at the time he executed the will.

The court upon the trial permitted several witnesses to testify, over the objection of the proponents, to certain facts which tended to show that William A. Graham, when comparatively a young man, was guilty of the larceny of certain small articles, such as grain sacks, whippetrees, umbrellas, spades, cordwood, etc., from persons who resided in the neighborhood where he then lived. Some of the transactions referred to occurred prior to the War of the Rebellion, and none within 15 or 20 years of the date of the execution of the will. This testimony was wholly foreign to the issue being tried, and could have had but one effect, and that was to blacken the memory of the testator and prejudice the jurors against him, and induce them to hold the will invalid on the ground that the testator was unworthy to make a will and had made one which was unjust to the contestants. The testimony as to such transactions was very indefinite and unsatisfactory; but, if it were conceded that all that the witnesses testified to was true, and that many years before the will was executed—or, for that matter, immediately before it was executed—the testator had stolen a number of grain sacks, a spade, several umbrellas, and other small articles, we are unable to see how those facts incapacitated him mentally to make a will. The testimony was incompetent and should have been excluded.

The decree of the circuit court will be reversed, and the cause remanded for another trial.

Reversed and remanded.

(217 Ill. 262)

ULLSPERGER v. MEYER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. FRAUDS, STATUTE OF—SALE OF LANDS—SUFFICIENCY OF MEMORANDUM.

Statute of Frauds (Hurd's Rev. St. 1903, p. 995, c. 59) § 2, provides that no action shall be brought to charge any person upon a contract for the sale of lands, unless such contract or some memorandum thereof shall be in writ-

ing and signed by the party to be charged. Section 3 provides that the consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved by parol evidence. *Held*, that a written memorandum of a land contract, containing a sufficient description of the property to identify the same, the terms and conditions of the sale, and the names of the vendor and vendee, and signed by the party to be charged, is sufficient to satisfy the statute.

2. VENDOR AND PURCHASER—CONTRACTS—UNILATERAL AGREEMENTS—ACCEPTANCE BY OTHER PARTY.

Where the purchaser verbally accepts a contract for the sale of land signed only by the vendor, and notifies the vendor of that fact, and offers to perform, the contract becomes mutual and binding upon both parties.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 17.]

3. SAME—CONSTRUCTION OF CONTRACT—TIME OF PERFORMANCE—FAILURE TO SPECIFY.

Where a contract for the sale of land fails to specify a time for its completion, and time is not made the essence of the contract, the law will imply a reasonable time, dependent upon the particular circumstances, for its performance, and the contract may be specifically enforced.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 118.]

4. SPECIFIC PERFORMANCE—DEFENSES—INADEQUACY OF CONSIDERATION.

Where an answer to a bill for specific performance falls to show that defendant was overreached or imposed upon by fraud in naming the consideration agreed upon, it will be presumed that such consideration was adequate, and its inadequacy in fact will not of itself defeat the suit.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 151.]

5. SAME—SUFFICIENCY OF CONTRACT.

A memorandum, dated and signed by the vendor and reading as follows: "Received of [the purchaser] \$100 on said purchase of the property, No. 1,031 M. Ave., at the price of \$1,400"—is prima facie capable of specific performance against the vendor.

6. SAME—DISCRETION OF CHANCELLOR.

A chancellor may exercise his discretion to refuse specific performance only where the facts are doubtful or the contract or its terms are so uncertain that injustice might arise, he has no arbitrary discretion to deny relief.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 17, 18.]

Appeal from Circuit Court, Cook County; John L. Healy, Judge.

Bill by Anton Ullsperger against Charlotte Meyer. From a decree of a dismissal, complainant appeals. Reversed.

Walther & Lanaghan, for appellant. Chester Firebaugh and Samuel J. Schaeffer, for appellee.

RICKS, J. This was a suit for specific performance of a certain contract set out in appellant's bill of complaint, which is, in substance, as follows: It alleges: That on the 8th day of January, 1905, defendant was seised and possessed, in fee simple, of real estate situated in the city of Chicago, county of Cook, and state of Illinois, described as follows: The real estate and premises known

as No. 1031 Milwaukee avenue, which are otherwise and legally described as lot 13 in the subdivision of the westerly half of block 11, in McReynold's subdivision of part of the E. ½ of the N. E. ¼ of section 6, township 39 N., range 14 E. of the 3d P. M. That, being so seised, on that date said defendant agreed to sell said premises and real estate to the complainant for the sum of \$14,000, and the complainant agreed to purchase said real estate and to pay said defendant therefor said sum of \$14,000. That on that date, to evidence the sale and purchase, the said Charlotte Meyer, by the name of C. Meyer, executed a certain document in writing, which document is in the words and figures following:

"Chicago, Jan. 8, 1904. Received of Anton Ullsperger \$100 on said purchase of the property No. 1031 Milwaukee ave., at the price of \$14,000. C. Meyer." The bill further alleges: That the said document bears date January 8, 1904, but in fact the same was written and signed by the defendant on the 8th day of January, 1905, and that an error and mistake were made by the person writing said document in stating the date as 1904, instead of 1905. That the said premises, described as No. 1031 Milwaukee avenue in said document aforesaid, are the same premises and real estate above described as lot 13, etc., and in the purchase of said premises aforesaid the complainant intended to purchase said lot 13, and said defendant intended to sell to the complainant said lot 13, aforesaid. That the complainant has always been willing to comply with the terms of the agreement on his part to be performed, and that a few days after the said 8th day of January, 1905, complainant applied to said defendant and offered to pay her the sum of \$13,900, being the balance then due to the defendant under the said agreement, on said defendant delivering to the complainant a sufficient deed for said premises according to said agreement; and the defendant refused, and still refuses, to comply with said agreement on her part, although the complainant is and always has been ready and willing to pay said sum of \$13,900 and to fully perform his part of said agreement whenever the defendant will make and deliver to complainant a good and sufficient deed for said premises aforesaid. That the defendant, subsequent to executing said document aforesaid, informed the complainant that she would not accept the balance of \$13,900, and would not sell and convey said premises and real estate to the complainant in accordance with said agreement, and absolutely refused to carry said agreement out. The bill makes said Charlotte Meyer a party defendant, and prays that she may answer said bill not under oath, answer under oath being waived, and that the defendant may be decreed specifically to perform the said agreement entered into and make a good and sufficient deed of conveyance to the complainant of said prem-

ises, the complainant being ready and willing, and thereby offering specifically to perform said agreement on his part upon the defendant making out a good and sufficient title to the said premises and executing a proper conveyance thereof to the complainant pursuant to the terms of said agreement, and to pay the defendant the residue of said purchase money, and for general relief. To the bill general and special demurrers were filed, and the demurrers were sustained, and a decree was accordingly entered dismissing the bill for want of equity; and this appeal is prosecuted to review that decree.

The principal question presented for our consideration is whether or not the memorandum of writing entered into was sufficient to take the contract out of the statute of frauds and perjuries. The statute of frauds and perjuries (Hurd's Rev. St. 1903, p. 995, c. 59) reads:

"Sec. 2. No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party."

Section 3 of the same chapter reads: "The consideration of any such promise or agreement need not be set forth or expressed in the writing, but may be proved or disproved by parol or other legal evidence."

From the reading of the above sections of the statute it will be seen that it is only necessary that some memorandum or note be made of the contract and signed by the party to be charged therewith. "The statute does not require that the contract itself shall be reduced to writing. It is sufficient if there be a memorandum of the contract in writing, signed by the party to be charged or by some one by him duly authorized. *Cossitt v. Hobbs*, 56 Ill. 231; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 661; *Spangler v. Danforth*, 65 Ill. 152; *Wood v. Davis*, 82 Ill. 311. No particular form of language is necessary to constitute the memorandum requisite to satisfy the requirements of the statute. An admission in writing of the bargain having been made, although it may not furnish exclusive evidence of the contract, as a final agreement would do, or an offer in writing so stating the proposal that its mere acceptance would fix the terms of the bargain, will, if accepted, satisfy the statute, and the acceptance of the offer in writing may be shown by parol. *Browne on Statute of Frauds*, § 345a; *Esmay v. Gorton*, 18 Ill. 483, and authorities supra; *Farwell v. Lowther*, 18 Ill. 252." *Lasher v. Gardner*, 124 Ill. 441, 16 N. E. 919.

The authorities are agreed that if the memorandum shall contain on its face the names of the parties vendor and vendee, a

sufficiently clear and explicit description of the thing, interest, or property as will be capable of identification, together with the terms and conditions of the contract, and signed by the party to be charged, it will be sufficient upon which to predicate a decree for specific performance. *McConnell v. Brillhart*, *supra*. The contract or memorandum set up in the bill, while in the nature of a receipt, clearly evidences a sale of the property therein described as having taken place from appellee to appellant, and acknowledges that \$100 has been paid upon the purchase price of \$14,000 by appellant. Appellant is named as the purchaser, and the text of the writing clearly designates appellee as the vendor by whom the writing is signed; so that it will be seen that the contract or writing relied upon contains all that is required by the statute, and more, as the statute does not require that the consideration shall be stated in the writing but authorizes it to be established by parol.

It is insisted that there is no time specified for the completion of the contract, and that therefore the contract is not complete. Under such a contract the law would imply that it was to be performed within a reasonable time after entering into the same, and what would be a reasonable time would be a matter of proof under all the conditions and circumstances that might surround the case. *Gibson v. Brown*, 214 Ill. 330, 73 N. E. 578; *Driver v. Ford*, 90 Ill. 595; *Hamilton v. Scully*, 118 Ill. 192, 8 N. E. 767; *Biddison v. Johnson*, 50 Ill. App. 178. Time was not made the essence of the contract in question, and the bill was not obnoxious to demurrer because of the absence of the provision specifying the time in which the performance should take place. The allegation in the bill touching that matter is that appellant, within a few days after the making of the contract, applied to appellee for performance on appellee's part, and that appellant at the same time offered to perform on his part by paying the full balance of the purchase price.

The contention that the sum of \$14,000 was an inadequate consideration, and that specific performance was properly refused for that reason, we regard as untenable. The consideration was that agreed upon between the parties, as shown by the contract and the allegations of the bill. In the absence of an answer showing that appellee was overreached, or some inequitable advantage taken of her through which the named consideration was fixed, the law presumes that the consideration fixed by the parties was an adequate and reasonable consideration. Furthermore, mere inadequacy of consideration, if agreed upon by the parties without fraud, would not be sufficient to defeat a decree for specific performance. The owner of the property has the right to sell it, or contract to sell it, for such price as he sees fit and is satisfied to fix; and if he does sell or agree to sell for a valuable consideration, although it may

be inadequate, and no advantage was taken of him or the consideration fixed through fraud or misrepresentation, he cannot, when he finds that the property is worth more than he agreed to take or sell for, rescind the sale or refuse to perform.

It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is that the contract is signed by appellee only. It is found in option contracts, and unilateral contracts generally, that the rule here contended for has no application; that the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor and an offer to perform, renders the contract mutual and binding.

But it is said that in the particular contract before us there was no future act or option contemplated, and that the contract had all its validity at the time it was originally made, and that to entitle specific performance of such contract there must be mutuality of obligation and remedy. It is difficult to understand upon what substantial ground the difference in the rule applicable to the two sets of contracts contended for, if it exists, is based. We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the statute of frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutuality upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a contrariety of holdings by the courts of last resort in the various states upon this subject; but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the statute of frauds, if signed by the vendor. In 29 Am. & Eng. Enc. Law (2d Ed.) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (page 858): "The weight of authority is that the statute is satisfied if the memorandum be signed by the parties sought to be charged alone, or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands, the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, as the act of filing a bill for specific performance binds the plaintiff and

renders the contract mutual." A reference to the authorities there cited shows that the rule thus obtains in England and in the majority of the United States. Speaking of this rule, Mr. Pomeroy, in his work on Specific Performance (section 75), in part says: "It may, perhaps, be sustained upon the following grounds: The statute of frauds does not reach the substance of contracts and render them valid or invalid. It simply furnishes a rule of evidence. Whenever, therefore, any agreement is enforced against a defendant who has signed it by a plaintiff who has not, it cannot be said that the agreement, so far as it purports to bind the plaintiff, is a nullity. In the suit against him the statute does no more than require a certain kind of proof in case he avails himself of it as a defense. The defense, however, is wholly a personal one, and if he neglects to set it up the agreement would be established against him, notwithstanding the statute. For these reasons it cannot be said that a memorandum signed by one party alone is so completely wanting in mutuality that no action upon it can be sustained." Mr. Story, in his Equity Jurisprudence (volume 2, § 736a), says: "But it is not necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality is no objection to its enforcement." Parsons, in his work on Contracts (volume 2, p. 290), says: "And it is now quite settled that the agreement need not be signed by both parties, but only by him who is to be charged by it. And he is estopped from denying the execution of the instrument on the ground that it wants the signature of the other party."

Early in the nineteenth century the question came before Chancellor Kent, and in two cases (*Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 282, and *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484) the chancellor intimated that the rule was as contended for by appellee. But in 1817, in *Clason v. Bailey & Vorhees*, 14 Johns. 484, the question was again before him for consideration, and the authorities are fully reviewed, and the conclusion of the chancellor is thus stated (page 486): "Clason's name was inserted in the contract by his authorized agent, and if it were admitted that the name of the other party was not there by their direction, yet the better opinion is that Clason, the party who is sought to be charged, is estopped by his name from saying that the contract was not duly signed within the purview of the statute of frauds, and that it is sufficient if the agreement be signed by the party to be charged. It appears to me that this is the result of the weight of authority both in the courts of law and equity." After reviewing the authorities the chancellor further said (page 489): "I have

thought, and often intimated, that the weight of argument was in favor of the construction that the agreement concerning lands, to be enforced in equity, should be mutually binding, and that the one party ought not to be at liberty to enforce at his pleasure an agreement which the other was not entitled to claim. It appears to be settled (*Hawkins v. Holmes*, 1 P. Wms. 770) that, though the plaintiff has signed the agreement, he cannot enforce it against the party who has not signed it. The remedy, therefore, in such case, is not mutual. But, notwithstanding this objection, it appears from the review of the cases that the point is too well settled to be now questioned." To like effect is *McCrea v. Purmont*, 16 Wend. 460, 30 Am. Dec. 103.

So far as we are advised the question was first presented to this court in *Johnson v. Dodge*, 17 Ill. 433. That was a bill for specific performance of a contract for the sale of land signed by the vendor only. The vendee was to pay one-fourth in cash and one-fourth in one, two, and three years, respectively. He paid \$50 at the time the writing was made and delivered to him. The vendee offered to perform and the vendor refused, when the vendee's bill was filed and dismissed for want of equity. This court reversed the decree of the lower court, and upon the subject now being considered said (page 442): "It was not necessary to the obligation of the contract that it should have been signed by the vendee. His acceptance and possession of the contract, and payment of money under it, are unequivocal evidences of his concurrence, and constitute him a party as fully and irrevocably as his signing the contract could"—citing 2 Parsons on Contracts, 290; *McCrea v. Purmont*, supra; *Shirley v. Shirley*, 7 Blackf. 452; *Estes v. Furlong*, 59 Ill. 298; *Cossitt v. Hobbs*, 58 Ill. 231. In *Esmay v. Gorton*, 18 Ill. 483, it is said (page 486): "While the contract must be mutual, the current of authorities seems to settle the construction of the statute of frauds as only requiring the signature of the party to be charged, and the party so charged, on bill for specific performance, may not allege the want of the signature of the other contracting party." To like effect are *Farwell v. Lowther*, 18 Ill. 252; *Perkins v. Hadsell*, 50 Ill. 216; *Estes v. Furlong*, supra; *Spangler v. Danforth*, 65 Ill. 152; *Gradle v. Warner*, 140 Ill. 123, 29 N. E. 1118; *Memory v. Niepert*, 131 Ill. 623, 23 N. E. 431; *Ames v. Moir*, 130 Ill. 582, 22 N. E. 535; *Plumb v. Campbell*, 129 Ill. 101, 18 N. E. 790; *Forthman v. Deters*, 206 Ill. 159, 69 N. E. 97, 99 Am. St. Rep. 145. The case of *Forthman v. Deters*, supra, is a very late case and on all fours with the case at bar, and in which the question now before us was fully considered, and the conclusion there reached and announced is that where a party accepts and adopts a written contract, even though it is not signed by him, he is

deemed to have assented to its terms and conditions and is bound by them, and that, where the contract purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality and makes the contract binding on both parties. We deem that case conclusive of the case at bar. We regard the rule as too well established to be open that appellee, who is the vendor having signed the writing herein above set forth, cannot defeat performance upon the ground of want of mutuality, based upon the fact alone that appellant, the vendee, did not sign the same. The appellant had paid part of the consideration and had offered to pay the whole of it within a few days of the making of the contract, and unless appellee by her answer shall show that to enforce the same would be inequitable, for some reason other than the mere want of the signature of appellant to the contract, we are of the opinion that she should be required to perform.

It is suggested that the chancellor is vested with discretion in the granting of specific performance, and that therefore this court will not enforce a decree wherein that discretion has been exercised and relief denied. The discretion with which the chancellor is vested is a legal, and not arbitrary, discretion. He may only exercise his discretion and deny relief when the facts are doubtful, or the contract or some of its terms are so uncertain that injustice might arise. No such condition here exists.

The decree of the circuit court is reversed, and the cause remanded to that court, with directions to overrule the demurrer and for such further proceedings as to justice and equity shall appertain.

Decree reversed.

(217 Ill. 286)

HULBERT v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENT ACT—CONSTITUTIONAL LAW.

The local improvement act of 1897 (4 Starr & C. Ann. St. 1902, p. 175, c. 24, par. 79) is not unconstitutional so far as it fixes the rate of interest on installments of a special assessment.

2. APPEAL—ASSIGNMENT OF ERRORS.

Where no exception is taken to any ruling of the court on the evidence, and no propositions of law are submitted, an assignment of error that the court entertained erroneous views of the law, based on remarks of the court in a colloquy between court and counsel, cannot be sustained.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the city of Chicago against Thomas H. Hulbert. Judgment for defendant, and plaintiff appeals. Affirmed.

George W. Wilbur, for appellant. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

BOGGS, J. This was a petition for a judgment confirming a special assessment levied to defray the cost of improving Ballou street, from Fullerton to Diversey avenues, in the city of Chicago, by adjusting sewers, catch-basins and manholes, and constructing new catch-basins and a granite concrete combined curb and gutter, and grading and paving with asphalt. The ordinance provided that the assessment should be divided into installments, and that interest at the rate of 5 per cent. per annum should be collected thereon. The insistence that the provisions of the ordinance, and of the statute under which it is framed, fixing an arbitrary rate of interest to be paid on the installments, are unconstitutional, received the consideration of this court in *Hulbert v. City of Chicago*, 213 Ill. 452, 72 N. E. 1097, and *Gage v. City of Chicago*, 74 N. E. 726, and we found it to be not well taken. The reasons presented in the brief of counsel in the case at bar in support of the position of appellant on this point are such only as were advanced by counsel in the cases cited. The point was properly determined in the former decisions of the court.

By agreement of the parties the questions of fact whether the property of the objector was assessed in a greater sum than it would be benefited, or more than its proportionate share of the cost of the proposed improvement, were submitted to the court for decision without a jury. Counsel for the appellant insists that it appeared from the testimony that the amounts assessed against the lots were greatly in excess of the benefits conferred by the improvement. The appellant and one A. G. Chapin, a real estate agent, testified in support of the objector, and Frank J. Wisner and W. E. Castleman, who were also engaged in business as real estate agents, testified in support of the correctness of the assessment. We have read all of the testimony as given by these witnesses. It is conflicting, and consists almost entirely of the estimates of the different witnesses as to values and as to the increase in values which will accrue from the improvement. In the opinions of the witnesses for the appellant the lots will all be benefited, but in an amount much less than that assessed against them. In the judgment of the witnesses who testified in behalf of the city the improvement will confer benefits on all the lots at least equal to the amounts assessed against the property. We are unable to say that the court should have accepted the estimates and judgment of the witnesses for the appellant as the better guide to a correct determination of the question. So far as it is disclosed by anything appearing in the record the witnesses are equally credible and equally qualified to express an opinion as to the value of the different lots and the effect which will result from the improvement of the street.

Counsel for the appellant contends that the court entertained an erroneous view of the legal principles involved in the determination of these questions of fact. Counsel has caused to be preserved some expressions used by the court during the progress of the trial, in a colloquy between the court and counsel, which, as counsel thinks, indicate that the judge held erroneous views as to matters of law. No objection was made or exception taken to any ruling of the court relative to the admissibility of testimony, and no propositions were presented to the court to be held as principles of law applicable to the case, as is provided shall be done by paragraph 42 of the practice act (Hurd's Rev. St. 1901, p. 1342, c. 110), if it is desired to preserve for review the question whether the court held and applied correct principles of law in arriving at a conclusion in the case. There is, therefore, nothing in the record on which to base an assignment of error that the action of the court resulted from incorrect views as to the law of the case. *West Chicago Park Com'rs v. Metropolitan West Side Elevated Railroad Co.*, 182 Ill. 246, 55 N. E. 344.

The judgment appealed from must be, and is, affirmed.

Judgment affirmed.

(217 Ill. 289)

LANDER et al. v. LANDER et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. WILLS — CONSTRUCTION — DESCRIPTION OF PROPERTY.

Where a will describes the property devised as "the grounds and buildings composing my livery stable property" in a named place, such description is sufficient to lead to a definite ascertainment of the particular property which testator had in mind.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1221.]

2. SAME — MISRECITALS — EFFECT.

A will recited that certain deeds had been executed by the testator, giving a life estate to his wife with remainder to his daughter. As a matter of fact no such deeds had been executed. The will further provided that "it is my will that she, my said wife, shall take her life interest in said real estate * * * as evidenced by said deeds of transfer, and that our said daughter shall take her residuary interest in said real estate as her full share of my estate." Held, that testator did not die intestate as to such property because of the erroneous recital.

Appeal from Circuit Court, McLean County; G. W. Patton, Judge.

Bill by Frank Lander and others against Letitia Lander and others. Decree for defendants, and plaintiffs appeal. Affirmed.

This is a bill for partition of lots 2, 3, and 4, of John D. Fowle's subdivision of the south 60 feet of lot 9 of block 35 of Allin, Gridley & Prickett's addition to the town, now city, of Bloomington, and also lot 3 of John D. Fowle's subdivision of lot 8 and the north 6 feet of lot 9 in block 35 of the said Allin, Gridley & Prickett's addition, in McLean

county, filed on August 1, 1904, in the circuit court of said county, by the appellants, Frank Lander and Ida M. Jones, against the appellees, Letitia G. Lander, Louise Lander, and George H. Miller, and George Morrison and Leonard H. Munsell, composing the firm of Munsell & Morrison. One Charles W. Lander, late of said county, was in his lifetime the owner, seised in fee, of said property above described, and, being so seised in fee simple of the same, died testate on September 17, 1899, leaving as his only heirs at law his widow, the appellee Letitia G. Lander, and his three children, the appellants, Frank Lander and Ida M. Jones (formerly Ida Lander), complainants below, and the appellee Louise Lander, defendant below. The will of Charles W. Lander was admitted to probate in the county court of McLean county on October 21, 1899. The first paragraph of the will is set out in the opinion. The second paragraph devises two policies of insurance held by the testator upon his life, one for \$2,500 and the other for \$5,000, to his son, Frank Lander, and his daughter, Ida Lander—one-half of the proceeds of the \$2,500 policy and two-fifths of the \$5,000 policy to his son, and to his daughter, Ida, one-half of the proceeds of said \$2,500 policy and three-fifths of said \$5,000 policy—"and my note for \$750 to be paid out of my personal property as aforesaid as her full share in my estate. And I hereby make the payment of the said note for \$750 to Ida Lander, as aforesaid, and the payment of any and all debts I may owe at this date, a special charge against my said personal property, or the proceeds thereof in the hands of my said wife, Letitia Lander, until fully paid." The will makes the son, Frank Lander, and the daughter, Ida Lander, executors thereof. The bill proceeds upon the theory that by the terms of paragraph 1 of the will there was no devise of said real estate above described, but that the same was intestate property, or, in other words, that the deceased died intestate as to said real estate. It is alleged in the bill and answer and cross-bill, and not denied, that the lots above described are the same property as that which is referred to in paragraph 1 of the will in the following words, to wit: "The grounds and buildings composing my livery stable property in Bloomington, Ill." Charging that the deceased died intestate as to the real estate in question, the bill alleges that the three children were the owners each of one-third thereof, subject to the dower interest of the widow in one-third, and prays for partition and for the assignment of the widow's dower. George H. Miller is made a defendant, as having an interest in a party wall between the livery stable property and the property upon the adjoining lot. Munsell & Morrison are made defendants, as being tenants of the livery stable property under a lease dated June 5, 1903, for three years, executed by the widow, Letitia G. Lander.

The answer to the original bill, filed by Letitia G. and Louise Lander, denies that the property in question is intestate property, and denies that the appellants, or either of them, have any rights or interest therein, and avers that the will, independently of the deed referred to therein, devises the premises in question to said appellees; that is to say, to Letitia Lander a life estate, with remainder to Louise Lander in fee simple. The answer also denies that the recital in the will that the property had been transferred by deed to Letitia Lander for life, with remainder to the daughter, Louise Lander, was erroneous, but avers that the testator did in fact execute and deliver such deed in escrow, but that the custodian thereof either lost or destroyed the deed. The answer admits the widow has managed and controlled the property, collected the rents, paid the taxes, kept up the insurance, and made necessary improvements, and denies that appellants, or either of them, have any rights therein or any right to an accounting, and avers that appellants, complainants below, took out letters as executor and executrix of said estate and accepted their legacies under the will, and that the widow and the daughter, Louise, accepted their legacies and paid to Ida M. Jones the \$750 as provided by the will, which she accepted. The answer further avers that by reason of the acceptance of the legacies by the appellants they have elected to accept the will, and are estopped from setting up title to said property by reason of any irregularity or ambiguity in the other specific devises in the will.

On February 20, 1905, the appellees Letitia and Louise Lander filed an amended cross-bill, and therein set up the substance of the original bill, and therein averred that the premises described in the will as "the grounds and buildings composing my livery stable property in Bloomington, Ill.," were the same premises as those described in the bill, and averred that by the will said premises were devised to appellees Letitia and Louise by the third sentence of the first clause of the will, as set out in the opinion. The cross-bill avers that the appellants took out letters and administered upon said estate, and that there was paid out of the personal property to Ida M. Jones \$750 and also all the debts due by the estate, and that by reason of the devise containing no accurate legal description the record title of said appellees is clouded, so as to depreciate the value of the property and prevent a sale; and the cross-bill prays that the original bill may be dismissed, that the court may construe the will as having devised said premises to the appellees, Letitia and Louise Lander, with a life estate in the former with remainder to the latter in fee simple, as is provided in the will, that such titles may be confirmed, and that appellees may have "such other and further relief

in the premises as to equity may appertain," etc.

The present appellants, defendants below to the cross-bill, filed a demurrer to said cross-bill. This demurrer was overruled by the court, but the appellants stood by their demurrer; and thereupon the cross-bill was taken as confessed against the defendants thereto, the present appellants, and the court rendered a decree dismissing the original bill and granting the relief prayed by the cross-bill, decreeing that the title to said property be vested in Louise Lander in fee, subject only to a life estate vested in Letitia G. Lander. The present appeal is prosecuted from the decree so rendered, dismissing the original bill and granting the relief prayed by the cross-bill.

S. P. Robinson and Welty, Sterling & Whitmore, for appellants. Frank B. McKenna, for appellees.

MAGRUDER, J. (after stating the facts). Section 1 of the will of Charles W. Lander, deceased, referred to in the statement preceding this opinion, is as follows: "First: I have already transferred to my wife, Letitia Lander, by absolute deed for life, remainder to my and our daughter, Louise Lander, in fee simple, the grounds and buildings composing my livery stable property in Bloomington, Ill., as the full share of my said daughter Louise in my estate; and by deed of gift and transfer, bearing even date herewith, I also give, transfer, and set over all of my personal property to my said wife, Letitia Lander, subject to the payment of a note of mine to my daughter, Ida Lander, for \$750.00, and also subject to the payment of all debts, if any, I may now owe at this date. Now it is my will that she, my said wife, shall have and take her life interest in said real estate and her absolute title to said personal property as evidenced by said deeds of transfer, as and for her full share, interest, and dower in my estate, and that our said daughter, Louise Lander, shall have and take her said residuary interest in said real estate as her full share in my estate."

The contention of the appellants, Frank Lander and Ida M. Jones, is that by section 1 of the will the real property therein referred to was not devised at all to the widow and daughter, but that the same was intestate property; and the only issue to be determined by this court is whether or not the real estate in question, owned by Charles W. Lander at the time of his death, is intestate property. The basis of the contention thus made by appellants is the recital in section 1 of the will by the testator that he had already executed a deed transferring the property to his wife, Letitia Lander, for life, with remainder to his daughter, Louise Lander, in fee simple, and that, inasmuch as the testator did not make

any such deed as he refers to, giving a life estate to his wife and the remainder in fee simple to his daughter, Louise, this erroneous recital does not show any purpose on the part of Charles W. Lander to bequeath or devise anything by the will, and that his intention can only be ascertained by resort to the deed referred to. The doctrine thus invoked by appellants is announced by this court in the case of *Hunt v. Evans*, 134 Ill. 496, 25 N. E. 579, 11 L. R. A. 185, in which case it appeared that Edwin Evans, the testator, made a will and recited therein that he had deeded in trust to Williams & Plumb, as trustees, certain lots in Streator, La Salle county, with store buildings on them, for the purpose and upon the trust named in said deed, reserving to himself during his life the rents of the property, and upon his death the residue to be vested in a certain body of directors with a view of establishing a public library for the use of the inhabitants of Streator. No deed in trust to Williams & Plumb, as trustees, conveying the property to establish a public library, was found, notwithstanding the recital in the will that such a deed had been executed; and in construing the will in that case this court said (page 501 of 134 Ill., page 580 of 25 N. E. [11 L. R. A. 185]): "While the authorities may not be entirely harmonious, we think the decided weight of authority establishes the doctrine that where the recital is to the effect that the testator has devised something in another part of the will, when in fact he or she has not done so, and thus the recital turns out to be erroneous, then such recital is construed to show a purpose and intention of the testator to devise by the will, and the courts carry out such purpose and intent to devise by the will, and give such erroneous recital the effect of a devise by implication. But where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person, named in the recital, property, when in truth and in fact he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the deviser to give by the will, and in such case resort must be had to the other instrument, and not to the will, by persons interested. *Harris v. Harris*, 3 Eq. Irish Rep. 610, is a leading case on the subject. It is there said: 'The doctrine as to the effect of erroneous recitals in wills is well established, namely, that, if the erroneous recital in a testamentary instrument be of a gift contained in that instrument, the recital may operate as being in itself a devise or bequest by implication of that very property; but, when the erroneous recital refers to an estate created by another instrument, that recital cannot operate to create an estate by implication.' * * * Here the recital has no reference whatever to a gift or devise created by or under the

will, but it refers to a deed of trust, an instrument in no manner connected with the will, under which the title to the property passed; and, under the rule announced, reliance cannot be placed on the erroneous recital in the will to pass the title to the property to the persons named as trustees in that recital. * * * The fact that Evans may have made a deed, in and by which he had conveyed certain property in trust, as he declared in the will he had done, was not a devise of property in trust, nor could it be held to be a declaration of trust signed by him. The clause in the will can be regarded as nothing more than a mere statement or declaration that Edwin Evans had by a certain deed conveyed certain property in trust. But the evidence that a trust had been created would be the deed itself, and not the declaration named in the will."

Applying the views announced in *Hunt v. Evans*, supra, to the case at bar, appellants say that the testator in section 1 refers to a deed which he had executed, giving a life estate to his wife and remainder in fee to his daughter, Louise, that this deed is in no manner connected with the will, and that under the rule announced no reliance can be placed upon this erroneous recital in the will to pass the title to the property to the appellees, Letitia and Louise Lander. In other words, it is said that here there is an erroneous recital which refers to an estate created by another instrument, and that that estate cannot operate to create an estate by implication. If the first sentence of section 1 of the will now under consideration be considered by itself, the contention of appellants would be correct. The fact that Charles W. Lander may have made a deed, such as he declares in his will that he did make, was not a devise of the property in question. But the will of Charles W. Lander is different from the will referred to in *Hunt v. Evans*, supra. It not only contains a statement that the testator had theretofore executed the deed in question, but it proceeds in the third sentence of section 1 to make the following statement: "Now it is my will that she, my said wife, shall have and take her life interest in said real estate, and her absolute title to said personal property as evidenced by said deeds of transfer, as and for her full share, interest, and dower in my estate, and that our said daughter, Louise Lander, shall have and take her said residuary interest in said real estate as her full share in my estate." The third sentence of section 1, as above quoted, is something more than a mere declaration that a deed had been executed. It is a statement by the testator that it is his will, then—at the time when he executed his will—that his wife should take a life estate and his daughter a residuary estate in said property described in section 1. It is not necessary here, in order to establish a devise by the testator, to

rely solely and exclusively upon the first sentence of the will; but such first sentence must be construed in connection with the third sentence, and in our opinion the latter, construed with the former, certainly does devise the property to the widow and the daughter, Louise, independently of the declaration as to the deed made in the first sentence.

Counsel for appellants say that there is an indefiniteness in the description of the property in section 1. The first sentence of section 1 refers to the property as "the grounds and buildings composing my livery stable property in Bloomington, Ill." It is conceded by the appellants that the property thus referred to is the same as the lots described in the will by number and block. It is not necessary that an estate devised by will should be described with the accuracy necessary in the case of a deed. Such descriptions as "all the property I possess," or "the residue of my estate," or "mountain lands," or "uplands," have been held sufficient to pass real estate. Page on Wills, § 488. In *Boyd v. Strahan*, 36 Ill. 355, this court, after referring to the familiar rule that in the interpretation of wills the intention of the testator must govern and is to be gathered from the entire will, said (page 359): "There is no other class of written instruments known to the law in which so little importance is to be attached to the technical sense of language in comparison with that sense in which the apparent object of the writer indicates his words to have been used." The description of the property in the will in the case at bar as the "grounds and buildings composing my livery stable property in Bloomington, Ill.," is sufficient to lead to a definite ascertainment of the particular property which the testator had in his mind; and, although the first sentence of the will does not disclose any purpose on the part of the testator to make a devise, yet it is a declaration that he had conveyed the property by a deed, and the property therein mentioned is referred to in the third sentence as "said real estate." In other words, the first sentence of section 1, though not a devise, but only a mere declaration, is yet properly referred to in the third sentence of section 1 as containing a description of the property which is devised by the third sentence of said section. If section 1, when all its parts are construed together, had amounted to nothing more than a declaration that the testator had previously made a deed, then, under the principle announced in *Hunt v. Evans*, supra, it would be true that the testator had died intestate as to the property in question, and a bill for partition as filed by the appellants would properly lie. But in the view we take of the will, that the third sentence of it does amount to a devise of a life estate to the widow and of a remainder to the daughter, Louise,

the deceased did not die intestate as to this property. It passed by his will to his widow and his daughter, Louise. Accordingly the court below decided correctly in holding that the property was testate property, and in dismissing the bill and overruling the demurrer to the cross-bill.

For the reasons above stated, the decree of the circuit court of McLean county is affirmed.

Decree affirmed.

(217 Ill. 309)

COVER v. JAMES et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. DEED—ESTATE GRANTED—JOINT TENANCY.

Under Hurd's Rev. St. 1903, c. 30, §§ 9, 13, a deed expressly stating that, in case of the death of either of the grantees, the survivor shall have the whole of the property, limits the estate granted to both jointly for life, with the right to survivorship.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 431, 433.]

2. SAME.

In order to create a joint tenancy by deed, it is unnecessary that the exact words of Hurd's Rev. St. 1903, c. 30, § 5, declaring the estate to pass, "not in tenancy in common, but in joint tenancy," shall be used.

3. SAME.

A deed to two persons of certain described premises, providing that on the death of either of them "the other to have the whole property without litigation," creates a joint tenancy for life in the grantees, with remainder in fee simple to the survivor.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 431, 433.]

Appeal from Circuit Court, Union County; Wm. N. Butler, Judge.

Bill by Bessie Cover against Clark James and others. Decree for defendants, and plaintiff appeals. Reversed.

Appellant, Bessie Cover, a minor, by her legal guardian, filed her bill in the circuit court of Union county against appellees, in which she sought to have canceled, set aside, and declared null and void a certain certificate of purchase from the sheriff of Union county to the appellee Clark James covering certain lands which she claimed to own, and to have the title to the land decreed to be in her. The bill, as amended, averred that Jehu R. Cover, father of appellant, in his lifetime was the owner in fee of certain lands therein described, and on October 29, 1901, he and his wife, by a warranty deed, conveyed said premises to their children A. Ford Cover and the appellant, Bessie Cover, the material parts of which deed are as follows: "This indenture witnesseth: That the grantors, Jehu R. Cover and Josie Cover, his wife, of the city of Anna, in the county of Union, and state of Illinois, for and in consideration of the sum of \$2,400 in hand paid, convey and warrant to A. Ford Cover and Bessie Cover, of the city of Anna, county of Union, and state of Illinois, the following described real estate, to wit: * * * Hereby releasing

and waiving all rights under and by virtue of the homestead exemption laws of this state. In case of the death of either A. Ford Cover or Bessie Cover, the other to have the whole of said property without litigation." The bill further averred that the grantors meant and intended by said deed to make said grantees joint tenants, with the right of survivorship, and that the effect of said deed in law and equity was to make said grantees joint tenants and to convey a contingent remainder in them to the survivor; that on June 1, 1902, the grantees went into possession of the premises under said deed, and the said Bessie Cover is now in the actual possession thereof and has paid all taxes due thereon; that the said Jehu R. Cover left surviving him his widow, Josie Cover, and Charles Cover, Jessie Stokes, Dollie Culley, A. Ford Cover, and Bessie Cover, his only heirs at law; that on July 1, 1904, A. Ford Cover died, leaving as his heirs at law Josie Cover, Bessie Cover, Jessie Stokes, Charles Cover, and Dollie Culley; that on May 1, 1902, the said Clark James, one of the appellees, obtained a judgment against Dollie Culley, and caused execution to be levied by the sheriff of Union county upon her alleged interest in the said lands, which were sold on October 24, 1904, to Clark James, and a certificate of purchase issued therefor; that the said Jessie Stokes, Charles Cover, and Dollie Culley claim some interest in said lands as heirs of A. Ford Cover; that the certificate of purchase is a cloud upon the title of Bessie Cover in said premises, and the claim of the other heirs tends to depreciate the value of said land. The prayer of the bill is that the certificate of purchase be set aside and declared void as against the said Bessie Cover and as a cloud upon her title, and that the same be delivered up and canceled, and that the title of said land be decreed to be in the said Bessie Cover. The appellee Clark James filed his general and special demurrer to said bill, and the other appellees, Charles Cover, Jessie Stokes, and Dollie Culley, filed their cross-bill, alleging that the deed of conveyance to A. Ford Cover and Bessie Cover was not in joint tenancy, but as tenants in common, and that complainants in the cross-bill were the heirs of the said A. Ford Cover, and prayed partition of the premises. The demurrer to the original bill as amended was sustained; and, appellant electing to stand by her bill, the same was dismissed for want of equity. A motion was then made by appellant to strike the cross-bill from the files, which motion was overruled, and an appeal has been prosecuted to this court.

James Lingle and A. Ney Sessions, for appellant. William D. Lyerle and Taylor Dodd, for appellees.

WILKIN, J. (after stating the facts). The decision of the case depends upon the proper construction to be placed on the deed from Jehu R. Cover to A. Ford Cover and Bessie

Cover. The contention of counsel for the appellant is that the deed conveyed the property therein mentioned to the grantees as joint tenants for life, with the remainder to the survivor of them, or to convey a contingent remainder to the survivor, and therefore all right, title, and interest in the said A. Ford Cover ceased upon his death. He died before the levy and the sale under which the appellee James claims, and, if appellant's position is correct, he took nothing by the purchase, and his certificate of sale should have been set aside; also, if A. Ford Cover took but a life estate, nothing descended to his heirs, and the motion of appellant to strike their cross-bill from the files should have been sustained. On the other hand, it is insisted on behalf of the appellees that said deed conveyed to the grantees the estate in fee simple as tenants in common, and therefore the undivided one-half of the same, upon the death of A. Ford Cover, descended to his heirs, and the interest of Dollie Culley, one of such heirs, was subject to levy and sale on the judgment of said Clark James. Section 13, c. 30, p. 441, of Hurd's Revised Statutes of 1903, provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee-simple estate of inheritance, if a less estate be not limited by express words or do not appear to have been granted, conveyed or devised by construction or operation of law." Here the deed does expressly state that in case of the death of either of the grantees the survivor shall have the whole of the property, thus clearly limiting the estate granted to both jointly for life, with the right of survivorship.

It is insisted, however, by counsel for appellees that this last provision cannot be given effect, because it does not appear in the granting clause of the deed, or, as is said, does appear in the habendum; and reliance is placed upon the case of *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796, 50 Am. St. Rep. 165. In that case a deed somewhat similar to the one now before the court was construed as conveying the fee-simple title to the grantees, and it was held that the expression, "in case either of the grantees dies without an heir, her interest to revert to the survivor," was an attempt to mount a fee upon a fee, and was therefore void. The granting clause of that deed was held to convey the fee-simple title under the provisions of section 9 of chapter 30, supra. If a fee-simple title was in fact granted, it is clear that that estate could not be limited or qualified by the subsequent language. Merely because the deed was substantially in the form prescribed by section 9, however, a fee-simple title was not necessarily conveyed. That section prescribes the form of the deed, and provides that every deed substantially in that form shall be deemed and held to be a conveyance in fee simple to the

grantee, etc.; but it must be construed in connection with section 13, supra, under which, if a less estate be limited by express words, or appear to have been granted, conveyed, or devised by construction or operation of law, the conveyance, not using words heretofore necessary to transfer an estate of inheritance, shall not be deemed to convey a fee-simple estate.

In *Riggin v. Love*, 72 Ill. 553, a deed from Erastus Wheeler and Julia A. Wheeler, his wife, was executed to Eliza McGilton, the language of which was: "That the said parties of the first part, for and in consideration of * * * have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said party of the second part the following described real estate, to wit: [Then follows the description of the property.] To have and to hold the said above-granted premises to the said Eliza McGilton during her natural life, and at her death the same is by these presents conveyed and confirmed absolutely unto her husband, Andrew McGilton, of * * *; and in case of the death of him, the said husband, Andrew McGilton, before that of her, the said Eliza McGilton, then by these presents the said aforescribed real estate is conveyed and confirmed absolutely unto the heirs at law of him, the said Andrew McGilton, subject only to the lawful claims of her, the said Eliza McGilton, as aforesaid." It was there insisted by the appellants that the deed vested a fee-simple estate in the property described in the grantee, Eliza McGilton; their contention being that the granting clause in the deed conveyed the estate to Eliza McGilton without limitation or qualification, which under the statute of conveyance was sufficient to convey the fee, although words which at common law were necessary for that purpose were not added, and therefore the words in the habendum clause were repugnant to the grant and void. But we held that while the habendum clause in the deed could not perform the office of divesting the estate already granted, and would be void if repugnant to that estate, still, where no estate is mentioned in the granting clause, the habendum becomes effective to declare the intention, and will rebut any implication which would otherwise arise from the omission in this respect in the granting clause, and that the deed, taken as a whole, conveyed but a life estate in Eliza McGilton. The *Riggin* Case was followed in *Welch v. Welch*, 183 Ill. 237, 55 N. E. 694. There a father had conveyed to his daughter, in consideration of \$12,000, certain property. The granting clause used the words "convey and warrant," with the habendum, "to have and to hold to the said Susan Brown for and during the term of her natural life, * * * with remainder to the heirs of her body and their assigns, forever." She claimed that the conveyance was

to her in fee, but the court sustained a demurrer to her bill and dismissed the same at her costs. She contended, upon appeal to this court, that the words "convey and warrant" passed an estate in fee simple, and that the attempted limitation of her estate by the habendum clause was void, as being repugnant to the estate therein before conveyed, and insisted that that portion of the deed should be removed as a cloud upon her title. We held against that contention, citing and quoting at length from the case of *Riggin v. Love*, supra.

The contention is that under this statute a joint tenancy can only be created by express language in a deed that the estate is not to pass in tenancy in common, but in joint tenancy; in other words, that the deed must use the express language of section 5 of chapter 30, in order to be effective as a conveyance in joint tenancy. It is true that estates in joint tenancy are not favored by our statute, as they were at common law; but we do not understand that the strictness insisted upon by counsel has been required. *Slater v. Gruger*, 165 Ill. 329, 46 N. E. 235; *Mustain v. Gardner*, 203 Ill. 284, 67 N. E. 779. In our view of the case, however, it is not necessary to hold that a joint tenancy was created by the deed in question in order to give effect to the intention of the grantor. That the position of counsel for appellee and the decision of the court below do violence to his expressed intention must be conceded. In *Mittel v. Karl*, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 635, a warranty deed by John Mittel conveyed premises to "Maria Jobst and Michael Jobst, her husband, and 'the survivor of them, in her or his own right.'" In construing that deed, after holding that the words "the survivor of them," etc., could not be ignored, we say (page 68 of 133 Ill., page 554 of 24 N. E. [8 L. R. A. 655]): "These words were placed in the deed by the contracting parties for a purpose, and they cannot arbitrarily be rejected. In the construction of written contracts, it is the duty of the court to ascertain the intention of the parties, and the intention, when ascertained, must control; but in arriving at the intention effect must be given to each clause, word, or term employed by the party, rejecting none as meaningless or surplusage"—citing *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505. And, after discussing the question as to whether that deed conveyed an estate in joint tenancy, we further said (page 70 of 133 Ill., page 555 of 24 N. E. [8 L. R. A. 655]): "We think the language of the deed, when properly understood, will admit of but one construction, and that is that the premises were conveyed to Maria and Michael Jobst for life, with a contingent remainder in fee to the survivor. By the language of the grant to 'Michael Jobst and Maria Jobst, and the survivor of them, in his or her own right,' it was doubtless intended that the one who should die first

should take only a life estate in the premises, with the remainder in fee to the survivor and his heirs." The authorities cited in support of this position, as well as the reasoning of the learned judge who wrote the opinion, fully supported it. It is there further said: "There is no way in which it can be held that Jobst and his wife took the fee as tenants in common without rejecting the clause in the deed providing that the survivor should take the fee, and we are aware of no rule of construction under which that can be done. As is said in *Riggin v. Love*, 72 Ill. 553, a construction which requires us to reject an entire clause of the deed is not to be admitted, except from unavoidable necessity; but the intention of the parties, as manifested by the language employed in the deed, should, so far as practicable, be carried into effect." So in this case, whether the father understood the difference between the estates in joint tenancy and tenancy in common or not, he manifestly did understand what his desire was—that is, that the survivor of his children, the grantees, should have the entire estate—and under the rule announced in *Mittel v. Karl* there is no difficulty in giving effect to that intention.

We think the court below was in error in holding that A. Ford Cover and Bessie Cover took the estate as tenants in common, and in sustaining the demurrer to the bill of the appellant, Bessie Cover. Under the views here expressed it is clear that the complainants in the cross-bill were entitled to no relief under the same, and whether, technically, the motion to strike it from the files was proper or not is unimportant.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to proceed in conformity with the views herein expressed.

Reversed and remanded.

(217 Ill. 317)

TRI-CITY RY. CO. v. GOULD.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—DILIGENCE REQUIRED.

A street railway company must use all that care and vigilance for the protection of its passengers consistent with the practical operation of its road.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1069, 1168.]

2. SAME.

An instruction as to the care required of a carrier is erroneous which does not require it to be "consistent with the practical operation of the road."

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1327.]

3. TRIAL—INSTRUCTIONS—EVIDENCE—WEIGHT.

An instruction that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if the jury has reason to believe that such other witnesses were mistaken in their testimony, or knowingly testified untruthfully and are not corroborated, is erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 542.]

Appeal from Appellate Court, Second District.

Action by M. A. Gould against the Tri-City Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Reversed.

This is an action on the case, brought in the circuit court of Rock Island county by appellee against appellant to recover damages alleged to have been suffered by appellee on account of being put or thrown off of one of appellant's cars by a conductor in the service of appellant. The ejection of appellee from the car took place on June 27, 1902, at about 11 o'clock in the night, which was dark and rainy. The declaration consisted of one count only, to which the plea of the general issue was filed. The cause has been tried twice; the first time at the September term, 1903, of the circuit court of Rock Island county, when a verdict was rendered in favor of appellee for \$1,550. A new trial was granted. The second trial took place at the January term, 1904, and verdict was rendered against appellant for \$1,100; and, motion for new trial having been overruled, judgment was entered for the latter amount. From this judgment an appeal was taken to the Appellate Court, which has affirmed the judgment; and this appeal is prosecuted from such judgment of affirmance.

Appellee, a civil engineer by profession, and on June 27, 1902, serving a third term as county surveyor, was at that time about 71 years old, and had an office in the courthouse in Rock Island. About 9 o'clock on the evening of June 27, 1902, he left his office, got a lunch, stopped at a saloon, and played a couple of games of cards, drank one glass of whisky, and boarded a car of appellant to go to his home in Moline. When he boarded the car, it was about 10:30 o'clock at night. Appellant's line of railway is operated by electric power between the cities of Moline and Rock Island, the municipal limits of which two cities adjoin. Moline lies east of Rock Island. The car was an open one, with a running board or footboard on each side, from which passengers got on and off the car, and on which the conductor passed to and fro to collect fares. When the car reached Tenth street in Moline, appellee says that he thought they had reached Fifteenth street, where he had to make a transfer. The night being dark, he opened the curtain of the car to see whether it was at or near Fifteenth street, and stepped his right foot on the footboard to look around and see where he was. He says that at that time the conductor of the car came along and gave him a violent push on the breast that sent him back to his seat, and told him to get back in the car where he belonged. The conductor passed a seat or two ahead, and on his return to the rear of the car appellee called the conductor a "brute," a "stinker," and, he pre-

sumes, a "damned fool." He says he was angry for being pushed back. The conductor told him: "Dry up, or I will throw you off." Appellee replied: "You had better try that, you damn fool." At that time appellee was sitting facing the car with his hands down and bent forward, when Souders, the conductor, grabbed him by the neck and collar and threw him off. When he was thrown from the car, he alighted on his hip on the brick pavement about 4 feet from the car. There was evidence tending to show that force enough was used to tear his collar and necktie, and to tear his coat and throw off one of his oxford shoes. Appellee says that at that time the car was in motion and running 4 or 5 miles an hour, and, when he got up from the ground, it was 200 feet away. The conductor, Souders, and the witness Sand, who was a passenger on the car, both testify that appellee used profane and indecent language, but differ as to the language used. Sand says that, when appellee was thrown off the car, "the car was very near stopped." Souders, the conductor, and Holtz, the motorman, say that the car, at the time of the ejection of appellee, had stopped. The motorman heard none of the conversation between the conductor and appellee.

The Appellate Court, in their opinion, say: "There is a conflict in the testimony respecting the occurrences which immediately followed; but the testimony of appellee, which is corroborated to some extent, is to the effect that appellee resented the action of the conductor by calling him a 'brute,' a 'stinker,' and a 'damned fool.' The conductor then ordered appellee to dry up, or he would throw him off. While the witnesses do not agree as to the language used by appellee to the conductor, yet there is no serious conflict in the testimony concerning what the conductor did. He took hold of appellee by the neck and collar, and threw him off the car. Appellee fell on his hip, and received the injuries complained of. * * * The car was an open one, with curtains drawn down. Appellee was in a seat alone."

The second instruction given for the appellee by the trial court is as follows: "If the jury believe from the evidence that the defendant was engaged in the business of transporting passengers for hire upon a street railroad operated by it, then the law denominates the defendant a common carrier of passengers. And if the jury believe from the evidence that the plaintiff was a passenger on board the car of defendant, as charged in the declaration, then, while he was such passenger, the defendant, through its servants in charge of such car, was required to do all that human care, vigilance, and foresight could reasonably do, in view of the character and mode of conveyance adopted, to safely carry him as such pas-

senger; and if the jury believe from the evidence that while he, the plaintiff, was such passenger on said car, he was unlawfully assaulted and afterwards unlawfully thrown off said car, while the same was in motion, by the conductor of said car, and was injured thereby, then the defendant company is in law liable to the plaintiff in damages for such act."

The seventh instruction given by the court for the appellee is as follows: "The court instructs the jury that while in this case the plaintiff, in order to recover, must prove his case by a preponderance of the evidence, yet the word 'preponderance' only means the greater weight; and this weight is not to be determined solely by the number of witnesses testifying to a given point or fact, but the preponderance of the evidence is to be determined by the jury from all the facts and circumstances in evidence, and the credibility of the witnesses as well; that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses are mistaken in their testimony, or have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by facts or circumstances proven in the case."

Jackson, Hurst & Stafford, for appellant.
J. T. & S. R. Kenworthy, for appellee.

MAGRUDER, J. (after stating the facts). The judgments in this case must be reversed for error in giving the second and seventh instructions, given for appellee, as the same are set forth in the statement preceding this opinion. The second instruction is erroneous, because it does not limit the degree of care required of the carrier to such care as is consistent with the practical operation of the road. In other words, that part of the second instruction, which told the jury that "the defendant, through its servants in charge of such car, was required to do all that human care, vigilance, and foresight could reasonably do, in view of the character and mode of conveyance adopted, to safely carry him as such passenger," should have read as follows: "The defendant, through its servants in charge of such car, was required to do all that human care, vigilance, and foresight could reasonably do, in view of the character and mode of conveyance adopted, and consistently with the practical operation of the road, to safely carry him as such passenger." Such was the holding of this court in *North Chicago Street Railroad Co. v. Polkey*, 203 Ill. 225, 67 N. E. 793. The seventh instruction was condemned in *Keller v. Hansen*, 14 Ill. App. 640, and *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760.

The judgments of the circuit and appellate courts are reversed, and the cause is remand-

ed to the former court for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

(217 Ill. 322)

WEST CHICAGO ST. R. CO. v. SCHULZ.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. NEGLIGENCE—TRIAL—DIRECTING VERDICT.

In an action for personal injuries, where the evidence is conflicting as to how the injury occurred, it is error to direct a verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 277-286.]

2. TRIAL—INSTRUCTIONS.

If an instruction is correct so far as it goes, and does not assume to point out all the elements necessary to a recovery, it may be supplemented by other instructions.

3. STREET RAILROADS—COLLISION WITH WAGON—CARE REQUIRED.

In an action for injuries caused by collision with defendant's street car, an instruction that a street railway company is chargeable with notice that the public may lawfully use the entire street, and that it must employ due care to avoid injury to persons using that part of the street occupied by its tracks, is not misleading in failing to charge that such persons must exercise due care for their own safety, where other instructions fully covered that phase of the case.

Appeal from Appellate Court, First District.

Action by John Schulz against the West Chicago Street Railroad Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Frank F. Aring, Theodore G. Case, and John T. Murray (A. W. Browne, of counsel), for appellee.

HAND, J. This is an appeal from a judgment of the Appellate Court for the First District, affirming a judgment of the circuit court of Cook county for the sum of \$3,500 in favor of the appellee for a personal injury alleged to have been sustained by him by reason of the negligence of the appellant. The declaration alleged, in substance, that while the plaintiff was riding on a wagon on Blue Island avenue, in the city of Chicago, and while he was exercising due care and diligence for his own safety, the defendant, by its servants, carelessly and negligently drove a train of street cars with great force and violence against the said wagon, whereby the same was overturned and the plaintiff was thrown to the ground and permanently injured.

The first contention made by the appellant is that the trial court erred in declining to take the case from the jury upon its motion at the close of all the evidence. The evidence introduced on the part of the plaintiff tended to show that he, in company with one John Walsh, was riding in a wagon drawn by two horses in a southwesterly direction

on Blue Island avenue, in the city of Chicago; that the appellant has two lines of street car tracks in said avenue; that the team and wagon were upon the west track; that when near Hastings street, which crosses Blue Island avenue, appellee looked back and saw a train of cars, consisting of a grip car and a trailer, upon said west track, some 300 feet distant, approaching at a high rate of speed; that when the train was about 100 feet from him he started to turn the team from the street car track to the west side of the street; that before the wagon left the track he was overtaken by said train, and the train struck the wagon, which was loaded with about 500 pounds of iron rods about 12 feet in length, and it was overturned, and the end of one of said iron rods was forced through the left foot of appellee. The testimony of the appellant tended to show that the team and wagon driven by the appellee were standing upon the west side of said Blue Island avenue, near the curb; that, as the train of appellant approached the team, two women, with a horse and buggy, who were immediately in front of the team, started to drive across the track in front of the approaching train; that the gripman sounded the gong, which frightened the horse attached to the buggy, whereupon it backed against the team, which caused the team to back, and the iron rods, which projected over the rear end of the wagon some 3 feet, came in contact with the rear car, and before the train could be stopped the wagon was overturned and appellee injured. It will be seen there was a direct conflict in the testimony as to the manner in which the injury occurred, and the trial court, upon motion for a directed verdict, could not as a matter of law determine that there could be no recovery, as it is apparent if the servants of appellant, in the daytime and without excuse, drove said train at a high rate of speed against the wagon in which the appellee was lawfully riding upon one of the public streets of said city, and while he was attempting to leave the street car track, but before he had time to do so, the appellant is liable to the appellee for the injury which he sustained by reason of such negligent and wrongful act. The court did not err in declining to take the case from the jury.

The only other reason urged for a reversal is the giving of appellee's seventh instruction. That instruction informed the jury that while a street railway company is invested with the right of way over other vehicles over the portion of the street occupied by its tracks, and although it is the duty of the drivers of such vehicles to turn out and allow street cars to pass, and to use care not to obstruct or delay their passage, the public are not deprived of the right to use all parts of a public street in an ordinary manner, and may drive along or across street car tracks located in a public street without becoming trespassers, and that a street rail-

way company is chargeable with knowledge that the public may lawfully use the entire street, and that it must, in operating its cars, employ due care to avoid injuring those who are rightfully using that part of the street occupied by its tracks. The criticism made upon this instruction is that it omits all reference to due care for his own safety on the part of a person driving upon or across a public street while passing over or along a street car track or tracks. It was not the design of this instruction to give to the jury a statement of all the elements which they must take into consideration before they could find for the appellee or against the appellant; but it was its design to inform the jury of the relative rights of the appellee and appellant in the public streets of said city where the injury took place. In framing instructions it is not ordinarily required that any one instruction should state all the law of a case; but if an instruction is correct so far as it goes, and does not assume to point out all the elements of proof necessary to a recovery and direct a verdict, it may be supplemented by other instructions, and omissions therefrom may be supplied by other instructions. In this case two instructions given on behalf of the appellee and three given on behalf of the appellant specifically informed the jury that the appellee could not recover without proof on his part that he was in the exercise of due care for his own safety at the time he was injured. The twenty-third instruction given on behalf of appellant, which in part covered the proposition contained in appellee's seventh instruction, viz., that the street railway company has a superior right of way over other vehicles in the portion of the street occupied by its tracks, and that it is the duty of persons passing over or traveling upon said tracks not to obstruct or delay its cars, concluded as follows: "And if the jury believe, from the evidence, that the plaintiff neglected such duty, and failed thereby to use ordinary care for his own safety at the time and place of the accident, and was thereby injured, then he cannot recover in this case." And the appellant's sixteenth instruction informed the jury "that the allegation in the plaintiff's declaration that at the time of the injury to the plaintiff he was using all due care and diligence means that at the time he was in the exercise of ordinary care for his own safety and protection; and you are instructed that the allegation is essential and must be proven. And if the jury believe, from the evidence in the case, that the plaintiff did not exercise such ordinary care at the time of the injury and immediately before the same, that then the jury should find the defendant not guilty, regardless of whether the jury believe the defendant was guilty of negligence or not." The jury were fully instructed to the effect that the appellee could not recover, unless the proof showed he was in the exercise of due care for his own safety

at the time he was injured. We are of the opinion that the jury were not misled by the giving of appellee's seventh instruction.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(217 Ill. 332)

BOYD v. CHICAGO & N. W. RY. CO. et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. MASTER AND SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTOR.

A railroad company is not liable for the negligence of an independent contractor, not exercising any special power derived from the charter of the railroad.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1251.]

2. SAME—EXERCISE OF CHARTER POWERS.

Where an independent contractor was constructing a railroad on the right of way of a corporation, which retained only the right to see that the contract is performed, he was not exercising a special power derived from the charter of the corporation, so as to render it liable for his negligence.

3. SAME—EVIDENCE.

Where a railroad company procured a right of way and contracted with an independent contractor for the grading of the same, it was not liable for an injury to a day laborer, hired by one to whom the contractor had sublet a portion of the grading, caused by the falling of an overhanging bank of earth while the laborer was shoveling gravel into a car.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1251, 1261.]

Error to Appellate Court, Second District.

Action by Charles L. Boyd, administrator, against the Chicago & Northwestern Railway Company and others. Judgment for certain defendants was affirmed by the Appellate Court, and plaintiff brings error. Affirmed.

Hiram Blaisdell and Oliver R. Barrett, for plaintiff in error. Stevens & Horton, for defendants in error.

CARTWRIGHT, J. B. W. Goens was a subcontractor under George O. Smith for grading and preparing a part of the roadbed for a railroad track. Goens hired John Lyons as a laborer, and Lyons was injured by the falling of clay from the face of a bank in widening a cut, and died from his injuries. Plaintiff in error, as administrator of the estate of Lyons, sued Goens and Smith and the defendants in error, the Chicago & Northwestern Railway Company and the Peoria & Northwestern Railway Company, to recover damages, alleging that the death of Lyons was caused by negligence in respect to the bank and in the management and control of the work. At the close of the evidence for the plaintiff the court directed a verdict of not guilty as to the two railway companies and Smith, but denied a motion of Goens to direct a verdict of not guilty as to him. Goens then introduced evidence, after which, on motion of plaintiff, the court set aside the order directing a verdict as to Smith, and the

plaintiff thereupon dismissed his suit as to Smith and Goens. A verdict was returned as to the railway companies in accordance with the direction of the court, and the plaintiff moved for a new trial as to said companies. The court overruled the motion for a new trial and rendered judgment on the verdict. Upon a writ of error from the Appellate Court for the Second District the judgment was affirmed and a certificate of importance was granted, under which a writ of error was sued out of this court to review the judgment of the Appellate Court.

The Peoria & Northwestern Railway Company procured the right of way from Peoria to Nelson, on the Chicago & Northwestern Railway, and transferred the right of way to the Chicago & Northwestern Railway Company. The grading of the roadbed was done under a contract between the Chicago & Northwestern Railway Company and Winston Bros., of Minneapolis. Winston Bros. sublet a part of the grading to Smith, and Smith again sublet a part of what had been sublet to him to Goens. Lyons was hired by Goens, and was shoveling gravel into a car when the overhanging clay fell and struck him. Counsel are agreed as to the rules of law governing the liability of railway corporations in such cases, and the controversy relates only to the application of such rules to this case. A railway corporation will be held liable for the wrongful act of a contractor while exercising, with the assent of the corporation, some chartered power or privilege of the corporation which he could not have exercised independently of its charter; but it will not be liable for the wrongful act of an independent contractor not exercising any special power derived from the charter. 1 Thompson on Negligence, § 671; 3 Elliott on Railroads, § 1063.

In the brief and argument for plaintiff in error it is stated that, in order to establish the liability of defendants in error, the fact must appear "that the contractor was exercising, with the assent of the railroad companies, some power which he could not have exercised independently of their charter." A railway corporation takes the responsibility of seeing that no wrong is done through the exercise of its chartered powers by persons whom it permits to exercise them, and, if the corporation has a public or statutory duty to perform, the employment of an independent contractor with control of the work will not relieve it from liability. It must perform such duties or be liable for any neglect thereof. The question in this case is whether the construction of a railway by a contractor upon the right of way and property of the railway corporation is the exercise of chartered powers or privileges by the contractor, and it is answered in the negative by the decision in the case of *West v. St. Louis, Vandalia & Terre Haute Railroad Co.*, 63 Ill. 545. In that case the railway company con-

tracted with a firm of contractors to construct its railroad and appurtenances. A servant of the contractors was injured by the use of a poisonous mixture upon the timbers of a freight house. It was decided that the railway company, in letting the contract, did not commit the execution of any of its franchises to the contractors, and that the contractors, in hiring the plaintiff, were only exercising their private and natural right, and not any special power derived from the charter of the corporation. The settled rule was recognized and stated, and the court pointed out that there was a radical difference between that case and previous ones in which a liability was imposed.

Every act of a corporation is done under its charter, in the sense that, if there were no corporation, it could not perform the act; but, if the act is one which might have been done by an individual, no different rule obtains as to liability merely because there is a corporation. Where a corporation was authorized by its charter to enter upon the premises of individuals and take therefrom materials for the construction of its works, and provision was made for assessing the value of the materials taken and damages occasioned by reason of the taking, and judgment was to be rendered against the corporation for such value and damages, it was held liable for the act of a contractor in taking such materials. *Leshner v. Wabash Navigation Co.*, 14 Ill. 85, 56 Am. Dec. 494; *Hinde v. Wabash Navigation Co.*, 15 Ill. 72. Such an entry could only be made by virtue of the charter, and the privileges and liabilities of the charter attached to the corporation. Again, where acts of incorporation conferred the right to enter upon premises and construct a railroad track over them, and the work was let to contractors, who entered upon land and took down the fences and left them down, resulting in the killing of stock or other damages, the corporations were liable. *Chicago, St. Paul & Fond du Lac Railroad Co. v. McCarthy*, 20 Ill. 385, 71 Am. Dec. 285; *Illinois Central Railroad Co. v. Finnigan*, 21 Ill. 646; *Chicago & Rock Island Railroad Co. v. Whipple*, 22 Ill. 105. In such cases the contractors were exercising chartered powers in entering upon the lands, and without the charters would have had no right to do so. A railroad corporation is liable for the performance of its duty to keep its road fenced, and can never relieve itself of the duty by committing the work to a contractor. So, also, a railroad company is liable for the trespasses of contractors engaged in constructing its road, in entering upon land without right and digging a ditch and making embankments. *Rockford, Rock Island & St. Louis Railroad Co. v. Wells*, 66 Ill. 321; *Cairo & St. Louis Railroad Co. v. Woosley*, 85 Ill. 370.

Plaintiff in error relies upon the decisions in *Chicago Economic Fuel Gas Co. v. Myers*,

168 Ill. 139, 48 N. E. 66, and North Chicago Street Railroad Co. v. Dudgeon, 184 Ill. 477, 56 N. E. 796. Those cases were entirely different from this, and they also came within another principle which established the liability of the corporations. In both cases work was being done in the public streets of the city of Chicago, and in such a case there is an implied condition that the grantee of the license or permission will see to it that those using the streets are protected from unnecessary danger on account of the work. In such a case a duty is assumed by the corporation, and it can never relieve itself from the performance of the duty by committing the work to a contractor. The work, in such a case, is inherently dangerous to those using the streets, unless performed with proper care and properly guarded. Where work to be done in a street necessarily obstructs and renders it dangerous, the one for whom the work is done cannot avert liability for negligence in doing it by proving that he let the work to a contractor. 1 Thompson on Negligence, § 653. In the case of Chicago & Grand Trunk Railway Co. v. Hart, 209 Ill. 414, 70 N. E. 654, 86 L. R. A. 75, the controversy was whether the liability of the lessor extended to injuries suffered by servants of the lessee in the exercise of chartered powers in running trains over the road. Neither of those cases is applicable here, and the general doctrine is not accurately stated in Toledo, St. Louis & Kansas City Railroad Co. v. Conroy, 89 Ill. App. 351.

Plaintiff in error insists the railway companies are liable under the decision in City of Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46, 103 Am. St. Rep. 221, on the ground that the Chicago & Northwestern Railway Company retained control and direction of the work. In that case the work was intrinsically and inherently dangerous, and in such a case the rule of respondeat superior applies, although the work is done by an independent contractor. The commissioner of public works also had control of the manner and method of doing the work, with power to inspect, approve, or reject all material and labor, and to make alterations in the work. In this case the railway company had no control of the means by which the work was to be accomplished, and there was only a right of general supervision and inspection to see that the contract was properly performed. The contractor had control and direction of the methods and means for the performance of the work, and was an independent contractor, and not a servant of the railroad companies. Elliott on Railroads, supra.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 340)

COAL BELT ELECTRIC RY. CO. v. KAYS.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—REVIEW.

Where there was no motion to direct a verdict for defendant, and no question raised in any manner concerning the relation of fellow servant between plaintiff and defendant's motorman, whether the evidence showed that the negligence causing the injury was that of the motorman, who was a fellow servant, is not presented for review.

2. TRIAL—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.

That an instruction was modified, so as to limit the burden of proof of a certain allegation to certain counts of the declaration, was harmless error, where another instruction on the same subject covered all the counts in the declaration.

Appeal from Appellate Court, Fourth District.

Action by George W. Kays against the Coal Belt Electric Railway Company. Judgment for plaintiff was affirmed in Appellate Court, and defendant appeals. Affirmed.

William H. Warder, for appellant. William A. Schwartz and Hosea V. Ferrell, for appellee.

CARTWRIGHT, C. J. This suit was brought by appellee in the circuit court of Williamson county against appellant to recover damages for injuries sustained while in its employ. The declaration contained four counts, and in each of them it was alleged that defendant operated an electric railway; that plaintiff was employed by defendant as a car repairer; that he was ordered to stand upon a wire car ladder, extending 15 feet above the track, for the purpose of repairing the trolley and guy wire; and that while he was performing said work the defendant, without notice to him, jerked or pulled said ladder, causing him to fall therefrom upon the railroad track, inflicting the injuries. In addition to said averments the second and fourth counts contained the further averments that defendant negligently ordered and commanded plaintiff to leave his work as car repairer and repair the trolley and guy wire by standing on the ladder. The evidence on the part of the plaintiff tended to prove the charge of negligence in moving the car ladder. It was a ladder or scaffold 15 or 16 feet high, built of four upright pieces about 4 feet apart at the bottom and with a platform at the top two feet square. It stood on a common flat car used for hand service and for carrying ties. The car was attached to a regular motor car, and the evidence for plaintiff was that, while he was on the car repairing the wire and facing northwest, the motor car was started without notice or warning, and he lost his balance and was thrown or fell off. The evidence on the part of defendant tended to prove that plaintiff was directed to ride on the ladder car from

near the power house to the main line to make some repairs; that it was necessary for some one to ride on the car to raise the trolley wire at certain points where the guy wires were attached, to allow the ladder car to pass under; that two of the guy wires were lifted by plaintiff as the car passed along, but he failed to lift the last one, which caught the ladder and pulled it over; that a signal was given to stop, and the guy wire slipped off, and the ladder came back to position, but that the plaintiff fell or jumped off. The jury returned a verdict for \$3,000, on which judgment was entered. On appeal to the Appellate Court for the Fourth District the judgment was affirmed.

It is first contended that the plaintiff failed to make out a cause of action; that, if the evidence introduced by him be regarded as true, the accident was caused solely by the action of the motorman, without any order or command from any other person; and that it appears conclusively from the evidence that the plaintiff and motorman were fellow servants. This question is not preserved in the record as a question of law which may be reviewed in this court. The trial court was not asked to direct a verdict of not guilty, nor was any question concerning the relation between the plaintiff and motorman raised in any manner.

The defendant asked the court to give to the jury an instruction that the burden of proof was on the plaintiff to prove, by a preponderance of the evidence, all the material allegations of the declaration or of some count thereof; that one of the material allegations was that the defendant negligently and carelessly moved the ladder car while the plaintiff was working thereon, and that if this allegation was not supported by a preponderance of the evidence the plaintiff was not entitled to recover. The court modified it, by limiting it to the first and third counts of the declaration, and gave it as modified. The court erred in modifying the instruction. The averment of each count that the defendant negligently and carelessly moved the car ladder while plaintiff was working on it was material, and without proof of that averment he was not entitled to recover. It is true that the second and fourth counts added an allegation that the act of the foreman in directing the plaintiff to do the work was negligent; but neither of those counts alleged that the injury resulted from such order. Neither of those counts stated a cause of action without the averment that the car ladder was negligently moved. It was not alleged that the injury resulted from giving the order or the inexperience of the plaintiff, and the work which he was ordered to do was of the most simple character, which, so far as appears, could be performed by any one.

But in our opinion the modification excepted to is not ground for reversal of the judgment, for the reason that the ninth in-

struction given by the court covered all the counts, and fairly stated to the jury the same principle contained in the one modified.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 343)

CHICAGO TERMINAL TRANSFER R. CO. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EMINENT DOMAIN—FORM OF VERDICT.

In condemnation proceedings, an instruction as to the form of a verdict, leaving the amount to be allowed for compensation blank, but providing that "we, the jury, find no other property will be taken or damaged," is erroneous, where the evidence of defendant shows that it is entitled to damages for property not actually taken.

2. SAME—CONSTITUTIONAL LAW.

Local Improvement Act 1897, § 23 (Starr & C. Ann. St. Supp. 1902, c. 24, par. 59), making the report of the commissioners in condemnation of a street prima facie evidence, being a mere rule of procedure, is not unconstitutional.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 932.]

3. SAME—EVIDENCE.

In condemnation proceedings by the city to extend a street across a railroad right of way, the city can show a way by user of less width than the street proposed, which fact is to be considered in connection with the evidence of defendant that the extension of the street across its railroad yards would render them less useful and greatly increase the cost of operation.

Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Action by the city of Chicago against the Chicago Terminal Transfer Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jesse B. Barton, for appellant. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

BOGGS, J. The appellee city adopted an ordinance providing for the extension of South Homan avenue across the right of way of the appellant company, the cost thereof to be paid by special assessment to be levied on property benefited by the improvement. The commissioners' report estimated the value of the property to be taken at one dollar, and "the total damages to property not taken, no dollars." The appellant company filed an answer and also a cross-petition. In the latter pleading it alleged that the proceeding is for the purpose of opening South Homan avenue across the railroad yards of respondent, and set forth that on the land sought to be taken are two main tracks and eight other tracks, the latter constituting a part of its yards, which yards extend from Kedzie avenue to Central Park avenue, a distance of about one-half mile and being 124½ feet in width, and alleging that, if Homan avenue is opened, it will decrease the

value of respondent's property at least \$50,000. The issues were submitted to a jury for trial. A verdict was returned, fixing the just compensation to be paid for the property taken at \$1, and finding that "no other property will be taken or damaged." Judgment of condemnation was entered accordingly, and the appellant company has perfected this appeal to reverse the judgment.

Witnesses produced in behalf of the appellant company testified that the company owned yards extending from Kedzie to Central Park avenue, a distance of one-half mile and of a width of 124½ feet; that the proposed opening of the avenue would extend the same across these yards about midway of the length thereof, and across ten of the tracks of the appellant company, two of said tracks being main tracks and the other eight switching tracks or yard tracks; that the company used the property, over a portion of which it was proposed to extend the avenue, as one of its yards, and that the opening thereof would require the employment by the appellant company of an additional locomotive and the necessary force of employes to operate the same for one-half of each working day; that additional time and force would be required in order to comply with the requirement of law that the avenue shall not be obstructed by cars beyond a specified time; that cars could not be put in motion in the yards and allowed to run unattended across the avenue, if extended over the yards, as may now be done, thus increasing the number of employes to be paid by the appellant company, and thus damaging and decreasing the value of the portion of the yard not to be occupied by the avenue. These witnesses expressed the opinion that the expenses of transacting the business of the company in the yards would be increased in the sum of \$15 to \$20 per day by the opening of the avenue as proposed by the ordinance. The city offered no testimony to contradict the testimony of these witnesses.

The court gave to the jury a prepared form of the verdict to be rendered, as follows: "We the jury, find the just compensation to be paid to the owner or owners of the following described pieces and parcels of land and property sought to be taken for the proposed improvement aforesaid, as follows, to wit: To the owner or owners of that part of the right of way of the Chicago Terminal Transfer Railroad lying within the east and west lines of South Homan avenue produced from the south, * * * the sum of ——. We, the jury, find no other property will be taken or damaged." At the time said form of verdict was given to the jury, the court said to the jury: "Then here is a form of verdict which you are all to sign, after filling up the amount which you will award." The appellant company has just cause to complain that this verdict, accompanied by the remarks of the court, was erroneous and prejudicial to its cause. It eliminated from the case, so far as the jury were called upon to decide, the

contention of the appellant company that the extension of the avenue across its yards would impair the usefulness of property belonging to the company other than the area of the yard included within the proposed projected limits of the avenue. The verdict contained the distinct statement that no other property than that to be taken would be damaged, and the remark of the court could scarcely have been otherwise considered by the jury than as a positive direction that they had no further duty to perform than to insert in the blank space in the verdict the amount they found the appellant company entitled to receive as compensation for so much of the right of way as would be occupied also by the public as a street when the avenue should be opened, sign the verdict, and return the same into court. The evidence produced by the company, heretofore referred to, which showed that property belonging to it that was not to be taken would be damaged was practically rendered inoperative by this form for a verdict and by the remark of the court relative thereto.

The contention of the appellant company that so much of section 23 of the local improvement act of 1897 (Starr & C. Ann. St. Supp. 1902, c. 24, par. 59) as makes the report of the commissioners *prima facie* evidence is contrary to the Constitutions of the United States and of the state of Illinois, is not well advanced. Statutes giving *prima facie* weight to facts or to official certificates are properly regarded as rules of procedure changing the burden of proof. In the absence of this statute, the city, in the case at bar, would have been required in the first instance to assume the burden of producing proof relative to the amount which the appellant company would be entitled to receive by way of compensation for so much of its right of way as would be also occupied by the proposed public way. The statute does no more than to declare that this amount shall be inferred or assumed from the report of the commissioners until evidence to the contrary is introduced. That statutes of this character, giving presumptive or *prima facie* weight to facts or official certificates, are valid and constitutional, is not an open question in this court. *Meadowcroft v. People*, 163 Ill. 53, 45 N. E. 303, 35 L. R. A. 173, 54 Am. St. Rep. 447; *Gage v. Caraher*, 125 Ill. 447, 17 N. E. 777; *Chicago, Burlington & Quincy Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141, 41 Am. St. Rep. 278. Prof. Wigmore regards such statutes as creating rules of presumptions changing the burden of proof, and as not contravening the constitutional provision that no person shall be deprived of his property without due process of law. 2 Wigmore on Evidence, pp. 1670, 1671. The report in the case at bar established *prima facie* that the occupation of a portion of its yards by the public for use as a public avenue did not damage any other property belonging to the company. This *prima*

facie case was subject to be rebutted, and, as we have seen, was met and overcome by the proof produced in behalf of the appellant company. The presumption, therefore, no longer prevailed. *Wathen v. Allison* Ditch District, 213 Ill. 138, 72 N. E. 781. On the contrary, the evidence produced in behalf of the appellant established that it was entitled to an assessment of damages in its favor on the cross-petition.

It was competent for the city to show, if it could, that a right of way for public travel across the tracks of the appellant company at the point in question had been established by user. If that right existed, even for a way less in width than the width of the avenue proposed to be laid out across the right of way, it was proper to be considered in connection with the proof produced on the part of the appellant company for the purpose of showing that its yards were rendered less convenient and the cost of transacting its business in the yards greatly increased by the opening of a public way through the yards.

For the error indicated, the judgment will be reversed, and the cause will be remanded for such other and further proceedings as to law and justice shall appertain.

Reversed and remanded.

(217 Ill. 348)

STECHER et al. v. PEOPLE, for Use of MORTON et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INTOXICATING LIQUORS—CIVIL DAMAGES—EVIDENCE.

In an action against a saloonkeeper to recover for the death of plaintiff's father, who was shot by another, to authorize a recovery it must be shown that defendant sold intoxicating liquors to the person committing the homicide, and that in consequence thereof plaintiff's father was shot and they were thereby deprived of their means of support.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 423, 427.]

2. APPEAL—REVIEW.

A finding by a jury that the proximate cause of the injury complained of by plaintiff was the act of defendant, when approved by the trial and appellate courts, is conclusive on the Supreme Court.

3. JUDGMENT—RES JUDICATA.

A judgment for defendants, in an action by a widow under the dramshop act, is not a bar to an action by the children.

Appeal from Appellate Court, Fourth District.

Action by the people, for the use of Louis Morton and others, against Rudolph Stecher and others. Judgment for plaintiffs was affirmed by the Appellate Court, and defendants appeal. Affirmed.

Herbert & Levy, for appellants. Andrew S. Caldwell, for appellees.

HAND, J. This is an appeal from a judgment of the Appellate Court for the Fourth District, affirming a judgment of the circuit

court of Jackson county for the sum of \$1,500 in favor of the plaintiff in an action of debt. The declaration contained one count, and numerous pleas were filed. It appeared from the evidence that C. R. Strong was in the saloon business in Carbondale, in said county; that he gave a bond for the sum of \$3,000, as such saloonkeeper, conditioned according to law, with the appellants Rudolph Stecher and Joe Steinle as sureties; that on the evening of the 28th of November, 1900, Strong sold to Abe Sheffe intoxicating liquors; that Sheffe, in consequence of drinking the same, became intoxicated; that Sheffe, Morton, and two other colored men on that evening were in a room situated above said saloon, shooting "craps"; that during the game Sheffe and one Louis Williams became involved in a controversy as to which had won a certain bet; that Morton approached Sheffe with an open pocket-knife in his hand, and said, "Abe, Louis won your money fair"; that they then commenced to quarrel, whereupon Sheffe drew a revolver and shot and killed Morton. Sheffe was a quiet man, except when intoxicated, when he was quarrelsome, and he and Morton, prior to the shooting, were friends.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendants moved the court to peremptorily instruct the jury to return a verdict in their favor, which the court declined to do. In order to be entitled to recover it was necessary for the plaintiff to prove that Strong sold intoxicating liquors to Sheffe, that Sheffe became intoxicated from the use thereof, and that in consequence of such intoxication he shot and killed Morton, the father of the minor children for whose use the suit is brought, and thereby deprived them of their means of support. *Baker & Reddick v. Summers*, 201 Ill. 52, 66 N. E. 302. It is not denied that Strong sold Sheffe intoxicating liquors, that Sheffe drank the same in his saloon and became intoxicated therefrom, and that Sheffe, while intoxicated, shot and killed Morton. It is urged, however, that it does not appear from the evidence that Sheffe shot and killed Morton in consequence of such intoxication, or, in other words, it does not appear that the intoxication of Sheffe was the proximate cause of the death of Morton. The question of the proximate cause of an injury is ordinarily a question of fact for the jury (*Schulte v. Schleeper*, 210 Ill. 357, 71 N. E. 325); and when the evidence, together with the legitimate inferences that may be drawn therefrom, fairly tends to establish that the wrongful act of the defendant produced the injury complained of, the finding of a jury to the effect that the proximate cause of the injury was the act of the defendant, when approved by the trial and appellate courts, cannot be disturbed by, and is conclusive upon, this court. *Birdsell Manf. Co. v. Ogle*

vee, 187 Ill. 149, 58 N. E. 231. We think there was ample evidence that the intoxication of Sheffe was the proximate cause of the injury—that is, that he would not have shot Morton had he been sober—to require the court to submit that question to the jury, and that the court did not err in declining to instruct the jury to return a verdict in favor of the defendants.

The defendants upon the trial offered in evidence, in bar of the action, the record of a judgment of the circuit court of Jackson county in favor of the defendants and against Rosa Morton, the widow of Morton, in a suit in that court brought by her, wherein she sought unsuccessfully to recover damages from the defendants for the death of her husband, caused by Sheffe while intoxicated. Under section 9 of the dram-shop act (Hurd's Rev. St. 1903, p. 780, c. 43) the widow and also the children of Morton are given a right of action against Strong and his bondsmen, if their means of support, within the purview of that section, by the wrongful act of Strong had been taken from them. The right of action of the widow and that of the children were, however, separate and distinct, and in no wise dependent upon each other, and the action on behalf of the children would in no way be controlled by the action on behalf of the widow. A judgment, therefore, in favor of the defendants against the widow, could not be pleaded or proven in bar of an action in favor of the children against the defendants.

The defendants called Abe Sheffe as a witness, and he testified upon the trial to a state of facts which, if true, tended to show that he acted in self-defense in taking the life of Morton, and that he did not take the life of Morton in consequence of his intoxication. The plaintiff was permitted to prove, over the objection of the appellants, by a number of witnesses, that shortly after the killing of Morton Sheffe stated to them that he shot Morton by reason of the fact that he was drunk. We see no error in the ruling of the court in admitting the testimony of these witnesses. Sheffe having testified he killed Morton in self-defense, and the proper foundation having been laid, it was clearly proper, for the purpose of impeachment, to prove he had stated out of court, after the death of Morton, that he shot him because he was drunk, as such statement on his part tended to break the force of the statement made by him while upon the stand as a witness in this case that he killed Morton while acting in his necessary self-defense.

It is also urged that there is a variance between the declaration and the proofs. The declaration averred that the defendants sold intoxicating liquors to Sheffe and Morton, and that at the time of the killing of Morton both Sheffe and Morton were intoxicated, while the proof failed to show

that on the evening Morton was killed he had been drinking intoxicating liquors. The question of variance thus presented was not raised upon the trial, but appears to have been raised in the Appellate Court for the first time. The question of variance, not having been raised in the trial court, cannot for the first time be raised on appeal or writ of error.

It is said by the appellants, in the closing paragraph of their brief, that "the only question in this case is whether or not Sheffe killed Morton in consequence of his intoxication." The foregoing is not a fair statement of the question presented to this court; the question here being, does the evidence, together with all the inferences which may legitimately be drawn therefrom, fairly tend to prove that Sheffe killed Morton in consequence of his intoxication? When thus stated we have no hesitancy in saying that the evidence found in this record does fairly tend to establish such fact, and are therefore of the opinion that the judgment of the Appellate Court should be affirmed, which will accordingly be done.

Judgment affirmed.

(217 Ill. 371)

WIGHTMAN et al. v. EVANSTON YARYAN CO. et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EQUITY—PARTIES—INTERVENTION—WHEN RIGHT ACCRUES.

The right of intervention is governed by the general rules of equity, where there has been no general statutory regulation thereof.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 276.]

2. SAME—INTEREST OF INTERVENER.

In order to authorize intervention in a suit, the interest of the intervener must be one created by a claim or lien on the property in suit, or some part thereof.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 278.]

3. MORTGAGES—FORECLOSURE—PARTIES—INTERVENTION.

In a proceeding to foreclose a trust deed securing bonds issued by a heating and lighting corporation, parties holding unexpired contracts with the corporation cannot intervene, though the court has appointed a receiver who refuses to carry out the contracts, and although fraud and collusion as to the foreclosure is charged.

Appeal from Branch Appellate Court, First District.

Action by the Northern Trust Company, against the Evanston Yaryan Company. Charles A. Wightman and others petition for leave to intervene. From a judgment of the Appellate Court, affirming an order dismissing the petition of intervention, Wightman and others appeal. Affirmed.

This is an appeal from the affirmance by the Appellate Court of an order dismissing the amended and supplemental petition of intervention by appellants, filed in an action begun by the Northern Trust Company, a

corporation, against the appellee, the Evans-ton Yaryan Company, a corporation, to foreclose a trust deed. The Yaryan Company, a corporation organized under the laws of this state, was engaged in the business of furnishing electric lights and hot-water heating service by means of wires, mains, and conductors in the streets of the city of Evanston, under authority of an ordinance of that city passed March 27, 1900. On January 10, 1901, the company made a mortgage or trust deed to the Northern Trust Company, trustee, covering all of its property and franchise, to secure bonds not exceeding \$400,000 in amount, \$189,000 of which were subsequently issued. On August 16, 1902, the trustee filed its bill in the superior court of Cook county to foreclose the mortgage or trust deed because of the nonpayment of the interest coupons which fell due the preceding July. On the same day the bill was filed the company filed its answer, admitting all of the allegations of the bill, and thereupon the court appointed a receiver and directed him to operate the plant until otherwise ordered.

Various intervening petitions were filed by appellants, who claimed to have unexpired contracts with the light and heating company for heat and light service to be furnished their residences. On March 17, 1903, pursuant to leave of the court granted, all of the appellants joined in filing one amended intervening petition, which was intended to and did supersede all petitions theretofore filed by any of them. This amended petition is voluminous, setting up many immaterial and unimportant facts and conclusions. For the purposes of this decision the following material allegations are deemed sufficient: It set up the incorporation with a capital stock of \$2,500 and the subsequent increase of the same to \$400,000, and alleged, upon information and belief, that no part of the increased capital stock had been paid. It also averred the execution of certain contracts between the company and petitioners, individually, for heat and light, covering periods of five years yet unexpired, and that the receiver had notified them that he would not furnish heat and light according to their respective contracts, and demanded higher rates. It further alleged that the bill to foreclose, and the answer thereto, were collusive, and that the stockholders of the company and the bondholders are largely the same persons, and that the company is not insolvent, and the foreclosure proceedings were instituted for the purpose of securing the cancellation of the contracts with the patrons of the company; that the company threatened to consent to the final decree of foreclosure. It prayed that the receiver be directed to carry out the contracts with petitioners, and that the court determine whether the foreclosure proceedings were collusive, and refuse to enter a decree by consent of the company.

On March 21, 1903, before any action was taken upon this amended petition, a decree of sale was entered as prayed in the bill to foreclose. On April 13, 1903, before the sale, appellants filed a motion to vacate this decree, and on the following day an order was entered denying the motion and dismissing appellants' petition. From that order they appealed to the Appellate Court, where the order was affirmed, and a further appeal has been prosecuted to this court.

Lynden Evans, for appellants. Isham, Lincoln & Beale, for appellees.

WILKIN, J. (after stating the facts). The only question presented for our decision by the assignment of errors is the ruling of the superior court in dismissing the petition and refusing to order the appellees to answer the same. No question is raised as to the decree of foreclosure and sale entered on March 21, 1903. If appellants had the claimed right of intervention, then the order of the superior court should be reversed; otherwise, it must be affirmed. The controlling question in the case is, have the appellants shown by their petition such an interest in the foreclosure proceedings as will entitle them to become parties thereto? If no such right is shown, then all the questions raised and discussed by counsel on their behalf become unimportant.

The right of intervention has been defined to be: "The admission, by leave of the court, of a person not an original party to pending legal proceedings, by which such person becomes a party thereto, for the protection of some right or interest alleged by him to be affected by such proceedings." 17 Am. & Eng. Enc. Law (2d Ed.) 180. Some of the states have adopted statutes authorizing intervention under certain facts and circumstances, under which persons having an interest in the matters in litigation in the success of either party, or an interest against both, are allowed to intervene. Mere interest in the matter in litigation under such statutes warrants intervention in actions at law. We do not understand that those statutes affect the rights of parties in suits in equity, where the distinction between law and equity is maintained. We have no statute extending the rights of parties to intervene, except in attachment cases where a stranger to the proceeding claims property attached. In this state, therefore, the right of intervention must be controlled by the general rules in equity as to the answer of the proper parties. "In equity no one is entitled to be made or become a party to the suit unless he has an interest in its object. But it is the usual practice to permit strangers to the litigation claiming an interest in the subject-matter to intervene on their own behalf to assert the titles." 17 Am. & Eng. Enc. Law (2d Ed.) 183. The rule in the United States courts is that "persons who are not parties to a suit have no standing in court to enable

them to file a petition in said suit. If they have any occasion to ask any relief in relation to the matters involved in said suit or to the proceedings therein, they must file an original bill. * * * Strangers to a cause cannot be heard therein, either by petition or motion, except in certain cases arising from necessity, as where the pleadings contained scandal against a stranger, or where the strangers purchase the subject of litigation pending the suit, and the like.

* * * Creditors who are allowed to prove debts and persons belonging to the class on whose behalf a suit is brought are regarded quasi parties, and, of course, may have a standing in court." *Anderson v. Jacksonville, etc., Railroad Co.*, 2 Woods, 628, Fed. Cas. No. 358; *Drake v. Goodridge*, 6 Blatchf. 151, Fed. Cas. No. 4,062; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; Page v. Holmes Burglar Alarm Tel. Pole (C. C.) 18 Blatchf. 118, 2 Fed. 330. This court said, in *Marsh v. Green*, 79 Ill. 385, speaking by the late Justice Walker: "As we understand the modern practice, any person feeling that he has an interest in the litigation may apply to the court and be permitted to intervene and become a party and have his rights passed upon on the hearing, and the court will permit him to become such party on a proper showing. He would, of course, not be permitted to intermeddle when he had no substantial interest in the subject-matter of the suit." And in *Shannahan v. Stevens*, 139 Ill. 428, 28 N. E. 804, Justice Scholfeld, rendering the opinion, said: "Patrick Shannahan, having the right to be made a party to the bill, necessarily retained the right to move the court to become such upon the record at any time while the record was within the control of the court"—citing *Marsh v. Green*, supra.

From the foregoing text and decisions we understand the rule to be no more nor less than that parties having an interest in the subject-matter of the suit in equity, and who are either necessary or proper parties to such suit, if not made so by the plaintiff, may come in by way of application to intervene, and be made parties complainant or defendant, to the end that their interests may be adjudicated and protected. It is difficult to see upon what principle it can be seriously contended that the appellants were either necessary or proper parties to the bill to foreclose. They do not pretend that they had any right, title, or lien upon the mortgaged property. The sole ground of their claim of right to appear in that proceeding and prevent a decree of foreclosure is that they had certain contracts with the defendant company to furnish them heat and light, which contracts would be impaired by a decree of foreclosure. In other words, they were mere contract creditors of the corporation, and, if they had the right to interfere in the foreclosure proceedings, then any other creditor of the corporation would have the same

right, although his claim had not been reduced to judgment or otherwise made a lien upon the mortgaged property. Counsel says they were not mere contract creditors because their agreement with the company was to furnish heat and light; that is, their contracts were with a service company. But how that fact can be given the effect of changing their relation to the company from that of mere contract creditors to parties having a lien or right to the subject-matter of the foreclosure proceedings is not shown, nor are we able to discover any substantial reason or authority for the position. As said in *Marsh v. Green*, supra, they will not be permitted to intermeddle when they have no substantial interest in the subject-matter of the suit; and as said in *Anderson v. Jacksonville, etc., Railroad Co.*, supra: "If they have any occasion to ask any relief in relation to matters involved in said suit, or to the proceedings therein, they must file an original bill."

We entertain no doubt that, under the general rule applicable to parties in chancery proceedings, the court below ruled properly in dismissing the intervening petition. If we turn to the decisions rendered by the various courts in those jurisdictions in which statutes are in force authorizing intervention, we find that they hold, without exception, that the interest which will entitle a party to intervene must be an interest in the matter about which the litigation is to be, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment; that is, the interest must be one created by a claim to the demand of property in suit, or some part thereof, or a lien upon the property, or some part thereof, which is the subject-matter of litigation. 17 Am. & Eng. Enc. Law (2d Ed.) 181. Thus, in *Horn v. Volcano Water Co.*, 13 Cal. 70, 73 Am. Dec. 569, which was an action on a note and mortgage against the water company, to which the defendant filed an answer of general denial, creditors of the company were admitted to intervene, alleging that the note and mortgage were executed in fraud of their rights, and were therefore void. On the right of intervention, the court, by Field, J., said: "Petition of the creditor Rawle does not disclose any right on his part to intervene. It shows that he was a simple contract creditor holding obligations against the company, but it does not show that any portion of them was secured by any lien upon the mortgaged premises. The interest mentioned in the statute which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment." In *Carraby v. Morgan*, 5 Mart. (N. S.) 500, *Pierre v. Masse*, 7 Mart. (N. S.) 196, and *Gasquet v. Johnson*, 1 La. 425,

under a similar provision in the Louisiana Code, the same doctrine is announced, and in the last case cited the court said: "This, we suppose, must be a direct interest, by which the intervening party is to obtain immediate gain or suffer loss by the judgment which may be rendered between the original parties; otherwise, the strange anomaly would be introduced into our jurisprudence of suffering an accumulation of suits in all instances where doubts might be entertained or enter into the imagination of subsequent plaintiffs that the defendant against whom a previous action was under prosecution might not have property sufficient to discharge all his debts, for, as the first judgment obtained might give a preference to the person who should obtain it, all subsequent suitors, down to the last, would have the indirect interest in defeating the action of the first." In *Brown & Son v. Saul*, 4 Mart. (N. S.) 434, 16 Am. Dec. 175, the court, construing the same statute, said: "But the interest here intended we are of the opinion must be direct and closely connected with the object in dispute, founded on some right, claim, or lien, either conventional or legal. It surely will not be contended that under this law, in every case where a creditor sues, his debtors all separately, or any one of the creditors of the same debtor, may intervene on a bare suggestion of insolvency." In *Dennis v. Spencer*, 51 Minn. 259, 53 N. W. 631, 38 Am. St. Rep. 499, the question before the court being whether the appellant had the right to intervene and participate in the trial of an action, it was held: "The interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in a suit as originally brought, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal effect of the judgment therein." See also, *McClurg v. State Bindery Co.*, 3 S. D. 362, 53 N. W. 428, 44 Am. St. Rep. 799. The same doctrine has been held in Colorado, Iowa, Nebraska, New Mexico, Texas, and other states.

While, of course, these decisions are not directly in point, yet by analogy they sustain the rule announced in equity proceedings, and a summary of the limitations upon the rights of persons to intervene in actions to which they have been made parties is found on page 185 of volume 17 of the *American and English Encyclopedia of Law*, as follows: "The intervenor must take the suit as he finds it. He is bound by the record of the case at the time of his intervention. If he claims property in controversy, he can interfere only so far as is necessary to prove his right to it. He cannot, under such circumstances, contest the plaintiff's claim against the defendant, or raise an issue as to the formality of the pleadings or the regularity of the procedure in the principal cause; nor can he plead exceptions having for their object the dismissal of the action. He can-

not change the issue between the parties, nor raise a new one. He cannot insist upon a change in the form of procedure, nor delay the trial of the action." And each of these several limitations is well supported by the authorities cited in the note. The reason for thus qualifying the right to intervene rests upon the principle that parties to a suit have the right to proceed with it to final judgment or decree free from interference by others, and if parties desire to obstruct the litigation, except as qualified in the foregoing, they must do so by an original action.

We do not deem it important, in the foregoing view, to consider the question as to the right of the court to direct the receiver to carry out the contracts of the company with the appellants; but, as we understand, the court had no power to make such an order. *Central Trust Co. v. Marietta & N. G. Railway Co.* (C. C.) 51 Fed. 15, 16 L. R. A. 90, citing *Express Co. v. Railway Co.*, 99 U. S. 191, 25 L. Ed. 319. See, also, *Ellis v. Boston H. & E. Railroad Co.*, 107 Mass. 1.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(217 Ill. 381)

JONES v. BARM.

(Supreme Court of Illinois. Oct. 24, 1905.)

ABATEMENT—ACTION FOR HINDERING PLAINTIFF'S BUSINESS.

An action to recover for an alleged tort in hindering, injuring, and interfering with plaintiff's business does not survive the death of the defendant, at common law or by virtue of Hurd's Rev. St. 1903, c. 3, § 122, excepting actions of slander and libel; the cause of action alleged being to a certain extent in the nature of an alleged slander against plaintiff's business.

Appeal from Appellate Court, First District.

Action by Albert C. Jones against Frank H. Barm. On the death of defendant, Antje Barm was substituted as defendant. Judgment for defendant was affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

Appellant, Albert C. Jones, began an action on the case in the circuit court of Cook county against one Frank H. Barm. On March 11, 1903, after the commencement of the suit, Frank H. Barm died. His administratrix was substituted as party defendant, and a summons was issued against her. On July 21, 1903, she filed her plea in abatement, alleging the death of Frank H. Barm, and that the cause of action set forth in the declaration did not survive. A demurrer was filed to the plea, which was overruled and an order entered abating the suit, together with a judgment for costs against the plaintiff. This judgment has been affirmed by the Appellate Court, and a further appeal has been prosecuted to this court.

Thomas J. O'Hare, for appellant. E. A. Aborn, for appellee.

WILKIN, J. (after stating the facts). The sole question is whether or not the action was one which survived. The declaration alleges that Barmm, on July 1, 1902, began and instituted a persistent and malicious interference with plaintiff's business, by ejecting one of the plaintiff's customers from his place of business; by denying and barring entrance to plaintiff's place of business to a customer; by falsely representing that plaintiff had removed his place of business; by bringing a reporter of a newspaper to take a picture of plaintiff while he was engaged with a customer, and suddenly throwing open the door to plaintiff's office, wherein plaintiff and the customer were in consultation, and demanding in loud, boisterous tones the acquiescence of plaintiff and his customer in taking their picture together; by removing plaintiff's name from his office door; and by other and divers acts. It is very apparent from these allegations of the declaration that the suit was brought to recover for an alleged tort of deceased in hindering, injuring, and interfering with plaintiff's business. At common law actions of tort did not survive the death of the sole plaintiff or defendant. Therefore, if this action survives at all, it must be by virtue of some statutory provision.

It is insisted by plaintiff that the action survives by virtue of section 122 of chapter 3, p. 125, Hurd's Rev. St. 1903, which is as follows: "In addition to the actions which survive by the common law, the following shall also survive: Actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property, or for detention or conversion of personal property, and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies, and all actions for fraud and deceit." We cannot agree with this contention. In the section above quoted, actions of slander and libel are expressly excepted. The cause of action alleged in this declaration is to a certain extent in the nature of an alleged slander uttered by Barmm against plaintiff's business. The damage occasioned was not to any particular piece of tangible personal property owned by the plaintiff, but was a damage to his business, which could not be seen with the naked eye, but could only be estimated in a rough way by a money value or by loss of trade or profit. If the case comes under any provision of the statute, it must be the one with reference to actions to recover damages for an injury to personal property. Taking into consideration the well-known meaning of the term "personal property," and the connection in which it is used in the statute, we are of the opinion that it was not the intention of the Legislature that it should be applied to the right of action occasioned by the malicious interfering by one person with the business of another, but was intended to apply only to actions for damages to tangible ar-

ticles and things movable—to chattels—as distinguished from actions for damages to one's business. The action did not survive, and the demurrer to the plea was properly overruled, and the judgment will be affirmed. Judgment affirmed.

(217 Ill. 390)

TRAVELERS' INS. CO. v. AYERS.

(Supreme Court of Illinois. Oct. 24, 1905.)

INSURANCE—ACCIDENT POLICY—DEATH BY INHALING GAS.

A provision in an accident policy was to the effect that the insurance should not cover death resulting wholly, partly, directly, or indirectly from any gas or vapor. Held not to exempt the company from liability for death by asphyxiation from gas escaping into the room in which the insured was asleep and unconsciously inhaled by him, causing death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1176.]

Appeal from Appellate Court, First District.

Action by Mary A. Ayers against the Travelers' Insurance Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Horton & Brown, for appellant. James Jay Sheridan and Monroe Fulkerson, for appellee.

RICKS, J. This was a suit brought on an accident insurance policy which was issued on March 15, 1890, to John C. Ayers, husband of appellee. The trial resulted in a verdict in favor of appellee for \$4,573.24, upon which judgment was entered, from which an appeal was prosecuted to the Appellate Court, where the judgment of the lower court was affirmed, and a further appeal is prosecuted to this court to reverse the judgment of the Appellate Court.

The facts in the case are undisputed, and the record discloses that the insured, John C. Ayers, was in Richmond, Ind., and on Wednesday of the week of November 10, 1900, was assigned to a room in the Arnold Hotel, and on Saturday, November 10th, about noon, was found dead, or breathing practically his last breath. The evidence discloses that at the time the insured was found there was a strong odor of gas in the room, and it appeared that prior to the Saturday morning the room had been lighted by natural gas, and on that morning the natural gas was changed to artificial gas, and in doing so it was necessary to turn off the gas in the basement while making the change, and after the change was made the evidence discloses that the gas was again turned on. The evidence also discloses that the deceased usually left the gas burning when he retired for the night. All premiums were paid at the time of the accident, and it is not contended that any of the conditions of the policy were not complied with by the insured. There can be no ques-

tion but that the cause of his death was the inhaling of the gas, and the only question to be determined in this case is whether or not the provisions of the policy exempt the payment where the gas was involuntarily inhaled.

It is insisted by appellant that the provision of the policy, "This insurance shall not cover * * * death * * * resulting, wholly or partly, directly or indirectly, * * * from any gas or vapor," covers death by asphyxiation from gas, voluntary or involuntary, conscious or unconscious, and that the case is distinguished from the cases of *Healey v. Mutual Accident Ass'n*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355, *Metropolitan Accident Ass'n v. Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359, and *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654, which follow the case of *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758, wherein it is held that a clause in an accident insurance policy exempting the company from liability where the insured met his death from inhaling gas does not excuse the payment where such a death was due to gas breathed into the lungs in an unconscious and involuntary manner, and in discussing the question the court said: "But, in expressing its intention not to be liable for death from 'inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which, *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that the death was caused by accidental means, the proper meaning of the word compels, as does the logic of the thing, the conclusion that there was not that voluntary or conscious act necessarily involved in the process of inhaling. An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. The finding itself defines the cause of death as the breathing of the atmosphere of the room full of illuminating gas. To inhale gas requires an act of volition on the person's part before the danger is incurred. Poison may be taken by mistake, or poisonous substances may be inadvertently touched; but, whatever the motive of the insured, his act precedes either fact." In the case of *Metropolitan Accident Ass'n v. Froiland*, supra, the contract contained the provision, "I agree that this insurance should not be held to extend * * * to poison in any way taken, administered, absorbed, or inhaled." In discussing this

case the court says (page 36 of 161 Ill., page 768 of 43 N. E. [52 Am. St. Rep. 359]): "But it is insisted that the qualifying words 'in any way' have relation to the motive of the insured in taking the poison, and embrace his involuntary, as well as his voluntary, action in that regard. We are of the opinion that the words 'in any way' relate to the mode or manner in which the poison is taken, and not to the motive of the insured in taking it. Very nearly this precise question was so decided in *Connecticut Life Ins. Co. v. Akens*, 150 U. S. 468, 14 Sup. Ct. 155, 37 L. Ed. 1148. It was there held that, in the phrase 'self-destruction in any form,' the words 'in any form' clearly related only to the manner of killing, and that the clause was by no means synonymous in meaning with such clauses as 'die by suicide, sane or insane,' or 'by suicide, felonious or otherwise, sane or insane.' In accordance with the ruling in *Dunlap's Case* and in *Healey v. Mutual Accident Ass'n*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637, we must hold in the case at bar that the death of the member (Froiland), having been caused by accident, is not excluded from the risks covered by the contract of insurance sued on, by reason of the exception above mentioned. Insurance contracts are to be liberally construed, so as not to defeat the indemnity which, in making the contract, it was the object to secure, unless plainly necessary from the language of the contract." *Fidelity & Casualty Co. v. Waterman*, supra, was a case where the intestate was asphyxiated by illuminating gas in the Northwestern Hotel, at Aurora, Ill., and it was proven that the fixtures in the room were defective. It was also proven that the deceased was intoxicated at the time of the accident. The terms of the policy were, "This insurance does not cover disappearances, nor war risks, nor voluntary exposure to unnecessary danger, nor injuries, fatal or otherwise, * * * received while or in consequence of having been under the influence of or affected by nor resulting, directly or indirectly, from intoxicants, anesthetics, narcotics, sunstroke, freezing, vertigo, sleep-walking, fits, hernia, or any disease or bodily infirmity." In discussing the terms of this contract the court reviewed the case of *Travelers' Ins. Co. v. Dunlap*, supra, and *Paul v. Travelers' Ins. Co.* supra, and adhered to the rule announced in those cases, and further said (page 635 of 161 Ill., page 284 of 44 N. E. [32 L. R. A. 654]): "That point, as we understand it, is that the word 'inhaling' or 'inhalation' or 'inhaled,' as used in exceptions contained in these policies of life or accident insurance, implies a voluntary and intelligent act, as distinguished from an involuntary and unconscious act. Read in the light of the decisions, the words now in question do not mean otherwise than if they explicitly read, 'poison, or anything, accidentally or other-

wise, consciously and by an act of volition, drawn into the system by inspiration.' This view is fully supported by a late decision of the Court of Appeals of New York. That court had before it, in *Mennelley v. Employers' Liability Assur. Corp.* (Sup.) 25 N. Y. Supp. 230, the case of a provision in an accident policy that it does not insure against death or disablement from anything accidentally inhaled. The insured had died at night of asphyxia, caused by involuntarily and accidentally breathing into his lungs, while asleep, illuminating gas which had accidentally escaped into his room at a hotel. It was held that the case was not distinguishable in principle from the Paul Case, and that the provision in the policy did not relieve the insurer from liability. And we may add that this *Mennelley* Case, which had then just been published, was cited by this court with approval in *Travelers' Ins. Co. v. Dunlap, supra.*"

We cannot agree with appellant's contention that the wording of its contract is broad and clear enough to make it distinguishable from the cases above cited. In cases where it has been held the company was not liable, the terms of the contract were clear and explicit, and needed no construction. In the case of *Seltzinger v. Modern Woodmen*, 204 Ill. 58, 68 N. E. 478, the conditions were "suicide, sane or insane." This phrase is so simple that it does not merit construction, as any person that could read would readily grasp its meaning. It would be very little trouble for insurance companies to word their contracts so that all the terms and conditions could be easily understood, and no advantage could then be taken of any one by reason that the terms were not known to the insurer. Such contracts as the one under consideration are gotten up solely by the company's officers; the insured having nothing whatever to say or any suggestions to make with reference to their terms. They are scarcely ever read by the applicant, and, if they are read, the terms, as a usual thing, could not be readily understood, and the insured would be at the mercy of the agent of the company, and must accept whatever interpretation he sees fit to put upon the contract. Such contracts have always been construed most strongly against the insurer. As was said in the case of *Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642; 43 N. E. 765, 52 Am. St. Rep. 355: "It would not be difficult for the insurer to use language which, in respect to the question here under consideration, would be free from doubt. A policy of insurance should not be so framed as to be susceptible of one construction in the hands of the soliciting agent and of quite a different one in the hands of the adjuster." The terms of the policies in the cases above cited are so similar to those in the policy in the case at bar, and what is said in the discussion of the conditions is so applicable to the conditions in this case, that we deem it unnecessary to extend the opinion in this case to any greater

length. Suffice it to say that we adhere to what has heretofore been said in the cases above quoted from upon the conditions and terms of the policy, and are of the opinion that the court did not err in refusing the peremptory instruction, the refusal of which raises the only question urged in this court and is the only ground relied upon for reversal. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(217 Ill. 404)

CHICAGO UNION TRACTION CO. v. JACOBSON.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. STREET RAILROADS—COLLISION WITH WAGON.

In an action against a street railroad company for collision with plaintiff's wagon, whether plaintiff was in the exercise of due care held a question for the jury under the evidence.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 255.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a teamster deliberately drives on the tracks of a street car company, knowing that a car is approaching at a high rate of speed and must strike his wagon unless the car is stopped, and with intent to compel the car to stop, he is guilty of negligence per se.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, §§ 214, 215, 255.]

3. TRIAL—INSTRUCTIONS.

Where an instruction given was identical in principle with one which was refused, the refusal was not error.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

Appeal from Appellate Court, First District.

Action by Lars R. Jacobson against the Chicago Union Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Haynie R. Pearson and Samuel W. Jackson, for appellee.

CARTWRIGHT, C. J. The appellee, Lars R. Jacobson, was driving a team, drawing a heavy truck loaded with flour, on West Twelfth street between the intersecting streets, Albany avenue and Whipple street, in the city of Chicago. He delivered a small quantity of the flour at a grocery store three doors east of Albany avenue, and then turned his team across the street car track of appellant, the Chicago Union Traction Company. An electric car of appellant was approaching from the east, in the vicinity of Whipple street, the next street east. He saw the car, which was running at about the usual rate of speed, and was familiar with the rate at which the cars were usually run. After looking at the car, he gave no further attention to it, and when nearly across the track the car struck the rear end of the wagon, turning it over and throwing him

from his seat to the pavement. He brought this suit against appellant in the circuit court of Cook county for damages, alleging that he was in the exercise of due care, and that the collision, and consequent injury to him, resulted from general careless and negligent management of the car. The plea was the general issue, and upon a trial he recovered a judgment, which has been affirmed by the Appellate Court for the First District.

The grounds relied upon for reversal of the judgment of the Appellate Court are that the trial court erred in refusing to direct a verdict of not guilty and submitting to the jury the question whether appellee was guilty of contributory negligence, and in refusing the third instruction requested by the defendant. Counsel for the appellant do not deny that the evidence tended to prove negligence on its part; but they contend that the evidence established that plaintiff was not in the exercise of ordinary care and was guilty of contributory negligence as a matter of law. Counsel for appellee devote most of their argument to the proposition that the appellant was guilty of negligence; but that fact is not denied, and its existence did not dispense with the exercise of ordinary care on the part of the appellee. If appellee was guilty of negligence contributing to the collision and injury, the law would not permit a recovery upon the ground that appellant was also negligent in failing to employ all reasonable means to avoid the collision.

The claim of counsel for appellant is that the only inference which could be drawn from the testimony of plaintiff was that, when he turned his horses and drove across the car track, he knew that the car would inevitably strike the wagon unless the motorman slowed down or stopped the car, that with full knowledge of such fact he deliberately took the chances of getting across the track in safety, and that such conduct was contributory negligence as a matter of law. The accident occurred in the middle of the block, between street intersections, and the question whether he drove across the track in disregard of the rights of appellant, knowing that the car would probably strike his wagon unless it stopped or slowed down, and intending to compel the car to stop or slacken speed, depended almost wholly upon his own testimony. That would be a justifiable inference from portions of his testimony. He said that he knew the car would have to stop or slow down, or it would probably strike his wagon, and that the car could slack up just as well as he could with a team, and he thought the motorman could stop when the car was right close to the wagon. That testimony would justify the conclusion that appellee knew, when he drove upon the track, that a collision would be inevitable, in the ordinary operation of the car, unless the motorman of appellant should prevent the collision by his care and

diligence. But appellee also testified that when he turned his team to cross the track the car was about 100 feet east of Whipple street, that said street was about 200 feet east of him, and that he thought he had time to get across the track. He was bound to exercise a reasonable judgment in view of all the circumstances; and the court, in passing on the motion, was required to consider all the evidence, including the distance of the car from the wagon, the rate of speed, and all the circumstances. We cannot say that in so considering it the evidence necessarily led to but one conclusion; but we think that the question whether, under all the circumstances, appellee believed, upon reasonable grounds, that he had time to get across the track before the car would reach him, was proper to be submitted to the jury.

The third instruction which the defendant requested the court to give, and which the court refused to give to the jury, stated that if appellee started to cross the track, and saw the car coming from the east at a high rate of speed, and knew that he could not cross the track without being struck by the car unless it should be stopped or slackened in speed, and deliberately took the chances of crossing the track in safety, he could not recover. That was the theory of the defendant, and there was evidence tending to prove it. Counsel for appellee reiterate the rule that negligence is ordinarily a question of fact for the jury, and insist that the instruction would have invaded the province of the jury by telling them that the facts contained in it would prevent a recovery. Negligence is a deduction or conclusion of fact from the facts and circumstances proved in a case, and is generally a question for the jury. But that statement does not mean that the question is not affected or controlled by rules of law. The law prescribes and regulates the rights and duties of all parties in relation to each other, and it is proper for the court to instruct the jury concerning such rights and duties. *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78. The instruction was based on the respective rights and duties of the parties at the place where the accident occurred, and the hypothesis of fact was such that the act would be negligent as a matter of law. If teamsters, generally, may drive across street car tracks between street intersections, knowing that a collision will be inevitable unless a car is stopped, and intending to take precedence over the car and compel those in charge of the car to stop it, the rights of a street car company on its track and of the general traveling public would be invaded and practically destroyed. *North Chicago Electric Railway Co. v. Peuser*, supra. The law does not permit one in such a place to drive in the path of a moving car, relying upon those in charge of the car to stop it and protect him from

injury. But the twenty-seventh instruction given at the request of the appellant was identical in principle with the one which was refused. It stated that if appellee looked east before he started to cross the track and saw the car approaching and the distance which it was from him, and knew that if the car did not stop or slacken speed it would probably strike the wagon before he could cross the track, and with such knowledge undertook to cross the track, he could not recover. It was unnecessary to repeat the instruction, and for that reason it was proper to refuse the third.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(217 Ill. 409)

EDDLEMAN et ux. v. UNION COUNTY TRACTION & POWER CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EMINENT DOMAIN—PROCEEDINGS—APPEARANCE.

A general appearance to a contest of the merits of a condemnation proceeding constitutes a waiver of error in denying a motion to quash the service of summons.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 499.]

2. VENUE—CHANGE—PROCEEDINGS.

Where a petition for a change of venue in condemnation proceedings is not joined in by all of the defendants, and is not sworn to by one of the two defendants signing the same, the change of venue is properly denied.

3. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—SEPARATE TRIAL—DISCRETION OF COURT.

The question whether a separate trial shall be granted to certain defendants in condemnation proceedings rests within the discretion of the trial court, with which the Supreme Court will not interfere, in the absence of a showing of abuse.

4. CORPORATIONS—LEGALITY OF CORPORATE EXISTENCE.

The legality of the existence of a corporation cannot be attacked in condemnation proceedings instituted by it, but only in a direct proceeding by quo warranto.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 78.]

5. EMINENT DOMAIN—STREET RAILROADS.

Private property, necessary for car barns, power houses, etc., may be condemned by a street railroad.

6. SAME—PARTIES—PURCHASERS.

A purchaser of the interest of a litigant in property, the title to which is in controversy, and which is also being subjected to condemnation proceedings, may be permitted by the court to become a party to the condemnation proceedings.

7. SAME—DISPUTED TITLE—DISPOSITION OF AWARD.

Where a chancery suit involving the title to property is pending during the pendency of condemnation proceedings against the same property, the court, in the condemnation proceedings, may charge the jury that the damages should be paid into the hands of the county treasurer, to abide the result of the chancery suit.

Appeal from Union County Court; Monroe C. Crawford, Judge.

Condemnation proceedings by the Union County Traction & Power Company against William M. Eddleman and others. From a judgment of condemnation, defendants Eddleman appeal. Affirmed.

This is a proceeding commenced before the county judge of Union county in vacation on December 30, 1904, by the appellee company to condemn two parcels of land in the city of Anna, in order to establish thereon car barns and a power house. An amended petition was filed on January 6, 1905, and the parties defendant to the petition, as originally filed and as subsequently amended, were the appellants, William Eddleman and Dora E. Eddleman, and George W. Smith, and Edgar Mohler, and William Bruchhauser, Jr.; but the petition was subsequently dismissed as to Smith and Mohler. A cross-petition was filed by the appellants, William M. and Dora E. Eddleman, on January 31, 1905. The cause was tried on January 31, 1905, and on February 3, 4, 6, and 7, 1905. The jury rendered their verdicts on February 7, 1905. As to the first piece of property, called the "Creamery property," the jury found the fair cash market value thereof on January 9, 1905, to be \$1,400, and assessed the same to the appellant William M. Eddleman; and they found, as to the second piece of property, called the "Trent property," containing one acre, that the fair cash market value of the same on January 9, 1905, was \$800, and assessed the same to the appellant Dora E. Eddleman and one Arnaud A. Fasig. Motion for new trial was overruled, and judgment was entered. By the judgment it was ordered and adjudged by the court that the petitioner, the appellee company, should enter upon and take the property, known as the "Creamery property," being one acre more or less, upon the payment to the defendant William M. Eddleman of the full compensation as ascertained by the jury, being the sum of \$1,400, said sum to be paid on or before March 7, 1905, and that the petitioner should enter upon and take the property, known as the "Trent property," containing one acre, upon the payment of the full compensation as ascertained therefor by the jury, being the sum of \$800, to the county treasurer of the county of Union, said sum to be paid on or before March 7, 1905, "which said sum shall be held and paid out by said county treasurer upon the order and decree of the circuit court of the county of Union and state aforesaid finding to whom said sum of money shall be paid, and ordering the payment of the same in a certain cause now pending in said court on the chancery side thereof, being general number 5,722, entitled a bill to redeem, filed therein on the 1st day of November, 1901, wherein George W. Smith is complainant and Ida M. Browning and others are defend-

ants. To the action of the court in rendering said judgment, the defendants William M. Eddleman and Dora E. Eddleman then and there except." The present appeal is prosecuted from the judgment so entered.

Taylor Dodd and David W. Karraker, for appellants. A. Ney Sessions and James Lingle, for appellee.

MAGRUDER, J. (after stating the facts). The province of the jury in this condemnation proceeding was to ascertain the value of the property to be taken, amounting to about two acres altogether, and to award the compensation therefor to the owners of the property. As we understand the argument of the appellants, they do not complain that the award is not sufficient compensation. It is not claimed that the sum of \$1,400, awarded as compensation for the creamery property, is not just and fair; nor is it claimed that the sum of \$800, awarded as compensation for the Trent property, is not just and fair. It is not shown that the admission or rejection of any evidence in any way erroneously affected the amount of compensation awarded. But the record bristles with motions, and some objections are made to some of the instructions given and refused.

First. The appellants moved the court to quash the summons and the service thereof, because of an alleged variance between the name of the petitioner in the petition and in the summons, which motion was overruled, whereupon the appellant William M. Eddleman moved to quash the service of the summons, which motion was sustained; the appellants limiting their appearance to the purpose only of the motion to quash. Thereupon the appellee, petitioner below, entered a cross-motion to amend, which was granted. In the summons as originally issued the defendants were required to answer unto the "Union County Praction & Power Company"; and the variance was the use of the word "Praction," instead of the word "Traction." After the amendment was made by changing the name from "Praction" to "Traction," so as to make the name in the summons agree with that in the petition, appellants moved to quash the service of the summons, for the reason that they had not been served with a copy of the summons as amended. This motion was overruled. There was no error committed by the court in this regard, because there was subsequently a general appearance by the appellants and a contest by them in regard to the merits of the case. In *Hercules Iron Works v. Elgin, Joliet & Eastern Railway Co.*, 141 Ill. 491, 30 N. E. 1050, which was a proceeding to condemn a part of defendant's land for a railroad right of way, it was said (page 495 of 141 Ill., page 1050 of 30 N. E.): "A special appearance was entered and motion made to quash the summons and return, which was overruled and exception taken.

The point has been waived by the subsequent entry of general appearance and defending upon the merits. * * * Subsequently, by stipulation of the parties, leave was given the railway company to amend the original petition, * * * and finally appellant not only appeared and defended generally, but filed its cross-petition, invoking the aid of the court in its behalf. Any objection to the original process or its service upon appellant has been waived.

Second. On January 30, 1905, the appellants filed a petition for a change of venue upon the alleged ground that the judge was prejudiced against them, which motion was overruled, and exception taken to the order overruling the same. The application for change of venue was properly refused, because all of the defendants below did not join in the same, as is required by the statute. Section 9 of the statute in regard to venue (*Starr & C. Ann. St. 1896, c. 146, par. 9*) provides that, when there are two or more defendants, a change of venue shall not be granted, unless the application is made by or with the consent of all the parties defendant; and there is a proviso that in proceedings for condemnation, when the application is by all the owners of any parcel of property to be condemned, a change of venue may be made of so much of the case as affects them, if it can be done without prejudice to the other defendants in the proceeding. Section 3 of the venue act provides that every application for a change of venue shall be by a petition, setting forth the cause of the application and praying for a change of venue, which petition shall be verified by the affidavit of the applicant. As will appear from the statement of facts preceding this opinion, there were several other defendants in the court below—to say nothing about Arnaud A. Fasig—besides the appellants, William M. and Dora E. Eddleman. The appellants, William M. and Dora E. Eddleman, were the only defendants making the application for a change of venue, which was not joined in by either or any of the other defendants; and in addition to this petition for a change of venue, although signed by William M. and Dora E. Eddleman, was not sworn to by Dora E. Eddleman. Dora E. Eddleman, as well as William M. Eddleman, was an applicant for the change of venue; but the petition was not verified by her affidavit, although the defendants themselves introduced in evidence a deed dated November 1, 1901, executed by Ida M. Browning and her husband, conveying the Trent property to the said Dora E. Eddleman.

Third. On January 31, 1905, the appellants moved and petitioned the court for a separate trial from the other defendants. This motion was overruled, but the court committed no error by doing so, for the reason that the matter of granting a separate trial was within the discretion of the court.

and we see nothing in the record to indicate that there was any abuse of this discretion. In *Johnson v. Freeport & Mississippi River Railway Co.*, 116 Ill. 521, 525, 6 N. E. 211, 214, we said: "In proceedings under the eminent domain act, each separate owner may have his damages assessed before a separate jury, and so is entitled to a separate appeal from the judgment rendered on the verdict. Such, also, is the case where different persons have several and distinct interests in the same tract." We have also held that whether or not a separate trial shall be allowed in cases of this character is discretionary with the court, and that, in the absence of anything to show an abuse of that discretion in refusing a separate trial, the action of the court below will not be interfered with. *Concordia Cemetery Ass'n v. Minnesota & Northwestern Railroad Co.*, 121 Ill. 190, 12 N. E. 536; *Braun v. Metropolitan West Side Elevated Railroad Co.*, 166 Ill. 434, 46 N. E. 974. There is nothing in the present record to indicate that the appellants did not have as full, fair, and adequate a hearing together with the other parties to the proceeding as they could have had in a separate trial, and accordingly there was no abuse of the court's discretion.

Fourth. On January 30, 1905, the appellants made a motion to dismiss the petition, assigning some half dozen reasons in support of said motion. Several of these reasons make the charge that the appellee company was an illegal corporation, having a void charter and attempting to exercise powers not granted to it. The motion to dismiss, so far as it was based upon these reasons, was properly overruled, because the legality of the formation of a corporation can only be tested, and the question whether it is attempting to exercise unlawful powers can only be determined, in a direct proceeding by writ of quo warranto. We have held in a number of cases that an attempt cannot be made to defeat a collateral proceeding by showing that the corporation instituting that proceeding was not legally organized, and that the legality of the organization of the corporation can only be attacked and judicially examined in a direct proceeding by quo warranto. *Lees v. Drainage Com'rs*, 125 Ill. 47, 16 N. E. 915; *Osborn v. People*, 103 Ill. 224; *Blake v. People*, 109 Ill. 504; *Renwick v. Hall*, 84 Ill. 162.

One of the reasons assigned in support of the motion to dismiss the petition was that the lands sought to be condemned were not necessary for the use of appellee. This was a question of fact, submitted to the court to be determined by matters appearing dehors the record by the action of both parties. The appellants submitted to the court an affidavit, made by William M. Eddleman, simply stating that the lands sought to be condemned were not necessary and indispensable for the use of the petitioner for the purposes stated in the petition, with-

out giving any reasons why they were not necessary. Affidavits tending to show that the condemnation of the lands was necessary were filed and presented by the appellee company. After such affidavits were presented to the court, and the question of the necessity of the condemnation of the lands had been argued, the court permitted the appellee company to introduce certain oral testimony and also certain documentary evidence, consisting of the articles of incorporation of the appellee company and certain ordinances under which authority was given to the company to lay down its tracks in the streets of the cities of Anna and Jonesboro; and it is contended by the appellants that the court erred in not deciding the case upon the affidavits only and in permitting additional testimony to be introduced. This was a matter which was within the discretion of the court, and the court, after hearing the additional evidence introduced by the appellee company, offered to the defendants the privilege of introducing any further evidence upon the subject which they might desire, but the defendants declined to do so. We are unable to see that the defendants were injured in any way by this action of the court. If all the testimony and affidavits, including the affidavits and the additional evidence, be considered, it cannot be said that the necessity for the condemnation of the property in question was not established. The bill of exceptions in this case does not recite that it contains all the evidence which was introduced. Where the certificate of evidence or bill of exceptions does not purport to preserve all the evidence, it must be presumed that there was sufficient evidence to sustain the findings of fact made by the court. *Allen v. Henn*, 197 Ill. 486, 64 N. E. 250, and cases referred to.

Another reason assigned for the motion to dismiss was that the appellee company made no effort to agree with the appellants upon the price of the land sought to be condemned. The petition in a condemnation case must not fail to show an inability to agree with the landowner as to the compensation to be paid. In the case at bar, the appellant William M. Eddleman claimed to own one piece of property, and his wife, Dora E., claimed to own the other. He was the agent of his wife in reference to her property. The proof shows quite conclusively that the appellee company attempted to settle with appellant William M. Eddleman, acting for himself and his wife, and failed to procure a settlement or an agreement as to the compensation to be paid for the property. The fact, if it is a fact, that offers are not shown to have been made to settle with the other defendants, whose title the appellants are disputing, is a matter about which the appellants are not entitled to complain. The petitioner below, the appellee company here, was unable to agree with the present appellants, and we think that the petition sufficiently alleges that fact, and that

the proof sufficiently establishes it. *Reed v. Ohio and Mississippi Railway Co.*, 126 Ill. 48, 17 N. E. 807.

Another reason assigned in support of the motion to dismiss is that the appellee corporation had no right to condemn the property in question for the purposes for which it was sought to be condemned; that is to say, for car barns and a power house to be used in connection with appellee's railroad, as laid in the public streets. This question has been settled by the cases of *Harvey v. Aurora & Geneva Railway Co.*, 174 Ill. 295, 51 N. E. 163; *Aurora & Geneva Railway Co. v. Harvey*, 178 Ill. 477, 53 N. E. 331; *Dewey v. Chicago & Milwaukee Electric Railway Co.*, 184 Ill. 426, 56 N. E. 804; and *Harvey v. Aurora & Geneva Railway Co.*, 186 Ill. 283, 57 N. E. 857. In these cases it has been held that the right of a street railway company to diverge from the highway and go upon private property depends upon the necessities of construction as a question of fact, and that a street railway company, under the horse and dummy railroad act of 1874, may condemn such private property as is necessary for side tracks, station grounds, power houses, switches, or turnouts necessary to render the use of the highway or street practicable and efficient.

Fifth. On January 30, 1905, Arnaud A. Fasig filed a petition asking to be made a party defendant to the proceeding, and the prayer of the petition was allowed. Appellants complain that in thus permitting Fasig to be made a defendant the court committed error. It appears from the evidence that on January 17, 1905, George W. Smith and wife, of Missouri, conveyed to Arnaud A. Fasig all their interest in the premises known as the "Trent property." The quitclaim deed, so executed by Smith and wife to Fasig, was introduced in evidence by the latter. It also appears from the evidence that on November 1, 1900, said George W. Smith was the owner of the Trent property, and on that day made a deed conveying the property for an expressed consideration of \$280 to the Anna Building & Loan Association, of the city of Anna; that on the 28th day of January, 1901, the Anna Building & Loan Association conveyed the property by a quitclaim deed to Ida M. Browning, of the city of Anna; and that on the 1st day of November, 1901, Ida M. Browning and her husband, for an expressed consideration of \$400, conveyed the property by quitclaim deed to Dora E. Eddleman. The last three named deeds were introduced in evidence by the appellee. There is evidence tending to show that the deed from Smith to the building and loan association, although absolute on its face, was in reality a mortgage to secure an indebtedness of \$280, and that subsequently, having borrowed from Ida M. Browning and her husband said sum of \$280 and paid the debt to the building and loan association, he caused the association to make Ida M. Browning a deed to secure the

money borrowed from her, and at the same time caused a policy of fire insurance upon the property to be assigned to her; that the said deed from the loan association to Ida M. Browning was a mere mortgage, although absolute on its face; that Ida M. Browning went into possession of the premises on January 28, 1901, and continued in possession until February 15, 1901, when the residence thereon was burned, and the insurance company paid to Mrs. Browning \$300, which was sufficient to pay the sum of \$280 and interest; that Smith, on March 10, 1901, demanded of Browning a reconveyance of the premises, which was refused on the ground that there was still due \$18.89, which sum Smith tendered to Browning, but the latter refused to receive the same or make the deed. A bill was filed by George W. Smith against Ida M. Browning in the circuit court of Union county, setting up the facts hereinbefore stated, and asking that Smith be allowed to redeem the property and that Browning and wife be required to make him a deed. Dora E. Eddleman was made a party defendant to this chancery proceeding, and came in and answered, and claimed that she held a deed from the Brownings, and had no knowledge that the deeds from Smith to the association, and from the association to Mrs. Browning, were mere mortgages. The chancery cause was referred to a master, who made a report sustaining the allegations of Smith's bill and his right to redeem the property. At the time of the trial of the present condemnation proceeding, the chancery suit of Smith against Browning was still pending in the circuit court and undecided, although the master's report had been filed as above stated. The proceedings in the chancery suit were introduced in evidence by the defendants upon the trial below. It thus appears that the title to the property was in litigation, and that a contest was going on between Smith and Dora E. Eddleman as to whether the latter was entitled to hold the property free from Smith's right of redemption. Under this state of facts, Smith conveyed his interest to Fasig. The matter of the title, therefore, was in conflict as between Mrs. Eddleman, on the one side, and Fasig, as grantee of Smith, on the other. One of the instructions given in behalf of the appellee to the jury called the attention of the jury to the fact that the title was thus in dispute and was to be determined finally by the circuit court, where the chancery suit was pending; and the jury were instructed that, when they should reach a verdict as to the fair, cash market value of the property known as the "Trent property," they were to award the value of the same to the defendants Fasig and Dora E. Eddleman. The jury found the value of the Trent property to be \$800, and assessed it to Dora E. Eddleman and Arnaud A. Fasig. The judgment of the court giving the petitioner the right to enter upon and take the Trent property required it to pay the

compensation of \$800 to the county treasurer of Union county, to be held and paid out by the county treasurer upon the order and decree of the circuit court finding to whom the money should be paid, etc.

It is said by the appellants that Fasig should not have been made a party defendant, because he did not own any part of the premises sought to be condemned at the time of the filing of the petition to condemn, and that whatever interest he had at the time of the trial he acquired by the deed from Smith after the commencement of the condemnation proceeding. It is said that the damages are to be assessed as of the time of the filing of the petition, and only in favor of the party who is then owner of the premises, and that consequently Fasig cannot claim damages and is not entitled to receive the same. It is true that the compensation to be paid by the petitioner must be fixed by the valuation of the property taken at the date of the filing of the petition. It follows from this that rights acquired by third persons after that date are acquired *pendente lite*, and are subordinate to the rights of the petitioner, so that such third persons, especially if they be tenants, cannot recover for improvements placed upon the premises after the filing of the petition. *Chicago, Evanston & Lake Superior Railroad Co. v. Catholic Bishop*, 119 Ill. 525, 10 N. E. 372; *Concordia Cemetery Ass'n v. Minnesota & Northwestern Railroad Co.*, 121 Ill. 199, 12 N. E. 536; *Schreiber v. Chicago & Evanston Railroad Co.*, 115 Ill. 340, 3 N. E. 427. Fasig would certainly be entitled to be paid for the Trent property, even though he did receive a deed for it after the filing of the petition for condemnation. His land could not be taken from him without compensating him for it. The authorities cited only hold that his rights, having been acquired *pendente lite*, are subject to the rights of the petitioner seeking condemnation. The case of *Wabash, St. Louis & Pacific Railway Co. v. McDougall*, 118 Ill. 229, 8 N. E. 678, referred to by counsel for appellants, holds that damages for the taking and injury to land belong to the owner at the time of the injury and do not pass to a subsequent vendee; but that was a case where the question involved related to damages to property not taken by reason of the construction of the railroad. The purchaser was compensated for the damage of the railroad in the reduced price paid for the land because of the railroad being upon it. This, however, does not militate against the right of a purchaser *pendente lite* to be paid for his property when it is taken from him, whether he bought it before the condemnation proceeding was begun or while it was being prosecuted. There was no error in making Fasig a party defendant for the reason thus insisted upon.

Sixth. Nor can it be said that any instruction was given to the jury which required them to pass upon the title to the property. The only thing which the jury were required

to determine was the value of the property taken or damaged at the time of the filing of the petition. The question of title was for the court to decide. The instructions of the court, as well as the judgment entered by the court, proceeded upon the theory that, inasmuch as there was a dispute as to the title and a pending proceeding in chancery in another court to determine the title, the money awarded by the jury as compensation should be paid into the hands of the county treasurer to abide the result of the chancery suit as to the title, and to be paid over to the party who should be held in that suit to be the owner of the property. The jury confined themselves to their own province of determining the value of the property, and there is no question of the correctness of their finding in this respect. Their attention was merely called to the fact of an existing dispute as to the title, so that they might not award the compensation to either party to such dispute. There was no possible harm done to the rights of the appellants in this matter. If the chancery suit results in finding that Mrs. Eddleman is the owner of the property, she will get the \$800; but, if the chancery court holds that Fasig is entitled to the property, then he will get the \$800. It was not the province of the county court in the condemnation proceeding to pass upon the question of title, especially as it was already in the hands of a court of superior jurisdiction. In *McCormick v. West Chicago Park Com'rs*, 118 Ill. 655, 8 N. E. 818, it was held that, under a similar state of facts to that here existing, it was proper that the compensation awarded should be paid to the county treasurer. In *Chicago West Division Railway Co. v. Metropolitan West Side Elevated Railroad Co.*, 152 Ill. 519, 524, 38 N. E. 736, 738, it was said: "The jury in this case did not disregard the law, but, as has been seen, by the verdict compensation was allowed for the premises taken. * * * While the amount of compensation which should be paid for property taken may, as a general rule, be determined without much difficulty, yet where there is a conflict in the title, and the title is claimed by different persons, or where there may be different estates held by different persons in the property, it may be, and often is, a subject attended with difficulty to determine to whom the compensation should be awarded. If an error has been committed here, the error was not a failure to award compensation for the property taken, as that was done." We are of the opinion that there was no error committed by the court in permitting the evidence to be introduced showing the condition of the title or in the instructions given to the jury in relation thereto. The deeds from Smith to the building and loan association, and from the latter to Mrs. Browning, and from her and her husband to the appellant Dora E. Eddleman, were introduced by the appellants themselves.

What has already been said answers the objections made by appellants to the action of the court in refusing to give instructions numbered 2 and 3, asked by the appellants. Instruction numbered 2, asked by the appellants and refused, required the jury to find that the title of Dora E. Eddleman was older and better than the title of Fasig. This instruction, if given, would have required the jury to pass upon the title, and this is the very defect which appellants criticize in one of the instructions given for the appellee in relation to title, though, as has already been stated, the instruction did not as matter of fact require the jury to pass upon the title, but merely called their attention to the fact of a dispute in regard to it.

Seventh. Some complaint is made that the court permitted the petition to be amended as to the description of the Trent property after the return of the verdict. But there was no amendment of the description in any material particular which affected the validity of the verdict or the material finding of the jury as embodied therein. The description of the property in the verdict and the description of the property in the petition, after the latter was amended, were the same in all essential particulars, and both the description in the verdict and the description in the petition, as amended, were sufficient to identify beyond question the Trent property. The action of the court in this regard was not mentioned in the reasons assigned in support of the motion for new trial, nor does the bill of exceptions show that any exception was taken to the action of the court in this regard.

Some other objections are urged by the appellants, but are not of sufficient importance to deserve notice. After a careful examination of the record, we see no reason for reversing the judgment entered by the court below. Accordingly the judgment of the county court is affirmed.

Judgment affirmed.

(217 Ill. 500)

HEWES v. CHICAGO & E. I. R. CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where a passenger refused a seat provided for him in the car and remained on the platform, and when the train approached a station, instead of waiting for it to stop, swung his body out from the steps, intending to alight and go to the smoking car, but was struck by a cattle guard which he did not see in the darkness, he could not recover for the injuries received.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1376, 1391.]

2. NEGLIGENCE—TRIAL—DIRECTING VERDICT.

Where all reasonable minds would, on certain admitted facts, agree that the injury was the result of plaintiff's negligence, the court may direct a verdict for defendant.

Appeal from Appellate Court, First District.

Action by Raymond G. Hewes against the Chicago & Eastern Illinois Railroad Com-

pany. Judgment for defendant was affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

Brandt & Hoffmann, for appellant. Calhoun, Lyford & Sheean, for appellee.

HAND, J. This was an action on the case, commenced in the superior court of Cook county by the appellant against the appellee to recover damages for an injury to his person, alleged to have been sustained on October 11, 1892, in consequence of the negligence of the appellee in constructing a cattle guard so near its tracks that, as the car upon which he was a passenger was passing said cattle guard, his body came in contact with said cattle guard, and he was thrown from the train to and upon the ground. The declaration contained three counts, and the general issue was pleaded. At the close of the plaintiff's evidence the court peremptorily instructed the jury to return a verdict in favor of the defendant, which was done accordingly, and judgment was rendered on the verdict in favor of the defendant. The Appellate Court for the First District, upon appeal, affirmed the judgment of the superior court, and, a certificate of importance having been granted, a further appeal has been prosecuted to this court.

The sole question raised in this court is, does the evidence introduced on behalf of the plaintiff, when taken to be true, together with all legitimate inferences which may be drawn therefrom in favor of the plaintiff, tend to support the cause of action set out in his declaration? The evidence shows that the defendant, at the time of the injury, owned and operated a double-track railroad which ran north and south through Columbia Heights, a suburb of Chicago; that its south-bound trains ran on the west and its north-bound trains upon the east track; that its passenger depot at that place was located upon the east side of the tracks; that about 200 feet north of the depot, between the tracks, a cattle guard $4\frac{1}{2}$ or 5 feet high, in the form of an inverted letter V with the top cut off, was located; and that the east side of the body of a passenger car going south, in passing said cattle guard, would come within 6 inches thereof. At about 7 o'clock on the evening of the injury the plaintiff, who was then 17½ years of age and employed in a piano factory at Chicago Heights, took a south-bound train of defendant at that place to go to his home at Crete. Columbia Heights is about midway between Chicago Heights and Crete. The train upon which he took passage consisted of a passenger, smoker, baggage car, and an engine and tender. He was late, and in company with a companion mounted the rear platform of the rear car of the train. He was smoking, and upon looking into the passenger car through the open door he saw his uncle, who was a minister, and his wife, sitting in the car, and, not desiring to be observed by them with a light-

ed cigar in his possession, he dodged back, and remained standing upon the platform east of the car door until the engineer commenced to slacken the speed of the train for the stop at Columbia Heights. As the train slackened its speed he stepped down upon the first step, took hold of the handholds with both hands, and swung his body out from the car, with a view to leave the passenger car upon which he was riding when the train stopped, and to go forward and ride in the smoker from that point to Crete. Just as he swung out from the car the left side of his body came in contact with the cattle guard, and he was thrown from his position on the step, and fell upon the rails and ground, and sustained the injury for which he seeks to recover in this action.

There was ample room inside the car when the plaintiff went upon the platform. It was quite dark, and no one connected with the operation of the train knew the plaintiff was upon the rear platform. Had the plaintiff entered the car and taken a seat, or, if he desired to enter the smoker, had he passed through the rear car, or waited until the train stopped and alighted and passed around that car to the smoker, or had he remained standing upon the platform near the car door, he would not have been injured. He, however, took a position upon the lower step of the car and swung his body out into the darkness while the car was in motion, and at a point some 200 feet north of the place where the train usually stopped to discharge and receive passengers, with a view, as he says, to be able to alight from the train and take a position in the smoker quickly, and when his body was in a position outside the line of the car, it came in contact with the cattle guard, and the injury occurred. A railroad company owes a high degree of care to its passengers, but it will not be held liable for an inquiry to a passenger who declines a seat which has been provided for him in the car, and remains standing upon the platform, and who, when the train approaches a station, instead of waiting for the train to stop, climbs upon the lower step of the car, and, holding on with his hands, projects his person beyond the line of the car into the darkness, in order that when the train stops he may alight quickly. There is no element of wantonness or willfulness on the part of the defendant in this case, and, as it is clear the negligence of the plaintiff was the proximate cause of the injury, the trial and appellate courts properly held there could be no recovery. The general rule is that negligence and contributory negligence are questions of fact for the jury; but when the facts are admitted, and all reasonable minds will agree that the injury was the result of the plaintiff's own negligence, the court may, as a matter of law, find that there was such contributory negligence on the part of the plaintiff as to defeat a recovery, and so inform the jury by a peremptory instruction. *Werk v. Illinois Steel Co.*, 154 Ill. 427, 40 N. E. 442;

Chicago & Northwestern Railway Co. v. Hansen, 166 Ill. 623, 46 N. E. 1071; *Beldler v. Branshaw*, 200 Ill. 425, 63 N. E. 1086.

In the briefs filed in this case upon behalf of plaintiff many cases are cited where the employes of railroad companies have been permitted to recover for injuries sustained by them, while in the performance of their duties as such employes, by coming in contact with overhead or other obstructions located near the tracks upon which the trains upon which they were employed at the time they were injured were running; also where passengers have been injured from such obstructions while riding in dangerous positions upon trains which were overloaded, and where they were unable to obtain upon the train a place of safety, and by persons while riding upon the running boards, or otherwise, of overcrowded street cars. The diligence of counsel has, however, brought to our attention no case which holds that a passenger may, without notice to the railroad company and without excuse, voluntarily assume a place of danger upon the train, and then recover damages for an injury sustained by him while in such position, if the railroad company has performed its full duty to him by providing a safe and convenient place for him in which to ride. We think the authorities relied upon by the appellant are not in point, as a different principle controls in the cases relied upon to show a right of recovery from that which controls in the case at bar.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(217 Ill. 485)

DRAINAGE COM'RS OF DIST. NO. 1 v. VILLAGE OF CERRO GORDO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. DRAINAGE—AUTHORITY OF COMMISSIONERS—ASSESSMENTS.

Commissioners of a drainage district organized under 2 Starr & C. Ann. St. 1896, c. 42, para. 146, 149, §§ 40, 42, have no power to attach to the district streets and alleys of an adjacent village which had connected its drains with the drains of the district, nor levy any assessments against the village or such streets and alleys.

2. SAME—WAIVER OF OBJECTIONS.

As drainage commissioners have no power to attach to the district streets and alleys of an adjacent village which has connected its drains with those of the district, they cannot require the village authorities to defend a proposed assessment of benefits against the village, and the latter waives no rights by failing to present objections at the meeting of the commissioners, or by failing to appeal from any action the commissioners might take.

Error to Circuit Court, Platt County; Solon Philbrick, Judge.

Action by the drainage commissioners of district No. 1 against the village of Cerro Gordo. Judgment for defendant, and plaintiff brings error. Affirmed.

This is a writ of error to reverse the judgment entered in the Platt circuit court, sustaining a demurrer to a declaration filed by the drainage district against the village in an action of debt and dismissing the action. The declaration alleged that the drainage district was duly organized under the act of the General Assembly approved June 27, 1885, commonly known as the "Farm Drainage Act"; that the village was situate adjacent to the district, and was possessed of and in the control of certain streets and alleys therein, and on the 1st day of April, 1904, the authorities of the village connected the drains, ditches, and tiles draining a part of the streets and alleys, with the ditches, drains, and tiles of the drainage district, and thereby acquired and still have the drainage of said streets and alleys by and through the ditches of the said drainage district; that on the 2d day of July, 1904, the drainage commissioners of said district duly entered an order attaching all that part of the streets and alleys of the village to said drainage district which had been drained into the ditches and tiles of the said drainage district by and with and through the ditches and tiles and drains laid and connected by the said village, and made the same a part of the said drainage district, and classified the said streets and alleys the same as if they had been included in said district as originally organized, at one-fifteenth of the four original assessments levied upon the lands and property of said drainage district for the construction of the drains and ditches of said drainage district, and gave notice, as required by law, to the officers of said village, of the time when and the place where the said commissioners of said drainage district would meet to hear objections to said classification of the streets and alleys of the said village; that at the time and place mentioned in said notice the commissioners of said drainage district duly met to hear all objections which might be urged by the said village to the said classification aforesaid; that the said village, by its officers, appeared at the time and place mentioned for hearing of the objections to said classification, and objected thereto on the grounds that the village should not pay one-fifteenth of the four original levies levied upon said drainage district, and that said classification should be made against the lots along said portion of said streets and alleys so attached to said drainage district No. 1, and not against the said village, and made no other or further objection to said classification; that said commissioners, having heard all objections made by said village and having duly considered the same, did affirm the said classification as originally made and filed by said commissioners, and filed their said confirmed classification as required by law; that on the 13th day of July, 1904, the said commissioners filed an assessment roll, and assessed against said village, for benefits received by that part of

the streets and alleys of said village so attached to said drainage district, the sum of \$978.66, the same being assessed in conformation with the classification so above made and confirmed, and being the one-fifteenth part of the four levies made by the said drainage district for the construction of the system of ditches, tiles, and drains in said drainage district; that the said assessment, being so filed, then and there became a debt due and owing by the said village to the said drainage district; that the same remains wholly due and unpaid and in no manner appealed from or set aside; that after making said classification and hearing the objections so made by said village to said classification, and after the said commissioners of said drainage district had confirmed said classification, the said village failed to appeal therefrom, and has failed, neglected, and refused to pay the amount of said assessment so levied upon and assessed against the said streets and alleys of said village upon said classification.

Ray, Dobbins & Riley and James L. Hicks, for plaintiff in error. Reed & Reed and A. C. Edie, for defendant in error.

BOGGS, J. (after stating the facts). The grounds of demurrer are that the village and the drainage district are creatures of the statute, and have only such powers and duties as the statute has authorized and conferred upon them; that the district has no grant of power authorizing it to attach the streets and alleys of a village to the district, and make such streets and alleys a part of the territory of the district, or to classify them, and that the commissioners of the district were wholly wanting in power and authority to require the village to appear before them for the purpose of objecting to the attempted classification of its streets and alleys as a part of the district; that all proceedings alleged in the declaration to have taken place at the time of the meeting of the said commissioners were beyond the jurisdiction of the drainage district, and wholly without force of law, and void, and cannot be made the basis of any legal demand in favor of the district against the village. The district contends that the provisions of section 42 of the act under which it was organized (2 Starr & C. Ann. St. 1896, p. 1552, c. 42, par. 149) authorized the enlargement of the territory of the district by the addition thereto of the streets and alleys of the village.

Section 42 authorizes the enlargement of drainage districts by either of two methods: First, by empowering the owners of lands outside of the drainage district to connect their ditches with the ditches of the drainage district on terms of payment in the section specified, and providing that such "individual landowners" as shall so connect their ditches with the ditches of the district shall be deemed to have voluntarily

applied to be included in the district, and their lands benefited by such ditches shall be treated, classified, and taxed as other land in the district; and, second, the commissioners of a drainage district may extend and enlarge the boundaries of the district on the presentation to them of a petition signed by a specified proportion of landowners of an area outside the district who desire to have their lands added thereto. The first of these methods is initiated only by "individual landowners" who desire to avail themselves of the privilege given by the section to connect ditches which they have constructed on their own lands with the ditches of the district, and who, by so connecting the ditches, are deemed to have voluntarily brought their lands within the territory and jurisdiction of the district. The second method is by petition of landowners who desire that their lands be added to the district. The first method has no reference to the streets and alleys of a village, and there is no allegation that the petition essential to the second method has ever been presented to the commissioners. The streets and alleys of the village did not become attached to or form a part of the drainage district, and the district possessed no power to classify the streets and alleys or to levy an assessment against the village on the theory those ways were a part of the district.

Nor can the assessment be sustained as having been authorized by the provisions of section 40 of the said farm drainage act. That section provides that if, in the construction of the work of any drainage district, "any public highway or railroad, or any part of the same, will be benefited, the commissioners may assess to such public road or railroad such sum or sums as will be just and equitable for such public road or railroad to pay, in proportion to the benefits received. * * * The amount of such road tax shall be paid out of the road and bridge tax of the town or district in which the public highway or part benefited lies." 2 Starr & C. Ann. St. 1896, c. 42, par. 146, p. 1551. The argument of the plaintiffs in error is that the word "highway" is the generic name for all kinds of public ways, including streets and alleys, and that the word as employed in said section 40 should be given that meaning, and the section held to empower the commissioners of a drainage district, if the construction of the ditches of the district shall benefit the streets or alleys of any village, to assess against such village such amount as will be just and equitable to be paid for the benefits so conferred on the streets and alleys by the work of the district. The words "public highway" and the words "public road" are used in section 40 as though interchangeable in meaning, and the section provides that the sums assessed for benefits to such public highway or public road shall be paid out of the road and bridge tax of

the town or district in which the same, or the part benefited, lies. Hence it is plain that the words "public highways" were intended to mean public roads—not the streets or alleys of a city or village—and that the benefits authorized to be assessed as compensation to the drainage district for benefits conferred by its ditches or drains were to be assessed and paid, as the statute expressly provides, "out of the road and bridge tax," and not out of the funds of any city or village.

The declaration alleges that the village, by its officers, appeared before the commissioners, at the time and place mentioned for hearing objections to said classification and in pursuance of the notice given to so appear, and objected thereto on the grounds (1) that the village should not pay one-fifteenth of the four original assessments levied upon said drainage district, and (2) that said classification should be made against the lots along said portion of said streets and alleys so attached to said drainage district and not against the village, and made no other or further objection to said classification; that the commissioners overruled the objections and ordered that the village be assessed for benefits to its streets and alleys in the sum of \$976.66; and that the village did not prosecute an appeal from such action of the commissioners. It is urged by the plaintiffs in error that the village should not now be heard to urge any other objections than those interposed before the commissioners, and ought to be deemed estopped to make further defense because of its failure to avail itself of the right to prosecute an appeal to the county court from the decision of the commissioners. If we are correct in what has been said, the commissioners were wholly wanting in power or jurisdiction to enter the order attaching the streets and alleys of the village, or any part thereof, to the district, or to classify or assess any sum against the village, or the streets and alleys of the village, for benefits, or to notify the authorities of the village to appear before them to defend against any such proposed classification or assessment for benefits. That being true, the action taken by the commissioners in that respect was without any legal force and void, and the village could lose no rights by presenting or failing to present objections at the meeting of the commissioners or by failing to appeal from any action the commissioners might assume to take. The commissioners were wanting in jurisdiction over the subject-matter, and the appearance of the village and the filing of objections by officials of the village did not and could not confer jurisdiction on the commissioners over such subject-matter. The Legislature alone could do that.

The demurrer was well interposed and was properly sustained. The judgment of the circuit court must be, and is, affirmed. Judgment affirmed.

(217 Ill. 547)

BURBACH v. BURBACH et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CONVERSION—DIRECTIONS IN WILL.

Where testator devised land to be sold by his executors and trustees, and the proceeds were to be divided, there was an equitable conversion, and the proceeds should be regarded as personal property, and not a proper subject of partition.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 28-32.]

2. TRUSTS—DESIGNATION OF TRUSTEES—BENEFICIARIES AS TRUSTEES.

A trust created by a will is not void because the trustees are among the beneficiaries of the trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 206.]

3. SAME—TITLE OF TRUSTEES—MERGER OF INTERESTS.

Where a will devises land in trust for the purposes of a sale and division of proceeds among the trustees and other beneficiaries, the trustees take a joint title, and their separate interests as beneficiaries are not merged with their interest as trustees.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 177, 199.]

4. SAME—ACTIVE TRUSTS.

A devise of land in trust to sell the same and divide the proceeds when the trustees deem it to the interest of the estate, and pending that time to hold possession, manage, and lease the property and pay over the net income to the beneficiaries, creates an active trust.

Error to Circuit Court, Cook County; M. F. Tuley, Judge.

Bill for partition by Henry Burbach against William Burbach and others. From a decree of dismissal, complainant appeals. Affirmed.

Merki & Potter (Edward P. Vail, of counsel), for plaintiff in error. Michael F. Girtlen (Edmund W. Burke, of counsel), for defendants in error.

CARTWRIGHT, C. J. The circuit court of Cook county sustained a demurrer to the bill of appellant filed in that court for the partition of real estate in said county and dismissed the bill.

The state of facts set forth in the bill is as follows: Adelheid Burbach, at the time of her death, owned cash and personal property to the amount of more than \$20,000, and was seised in fee simple of the lots and real estate described in the bill, and there were no debts or claims against her estate. She left three sons, Henry Burbach, the complainant, William Burbach, and Werner Burbach; one daughter, Mary Tobin; and two grandchildren, John M. Burbach and Florence M. Burbach, children of her deceased son. She left a last will and testament, by which she devised and bequeathed to her said three sons, William Burbach, Henry Burbach, and Werner Burbach, and to the survivor of them, and their successor or successors in trust, all her property and estate, both real and personal, in trust for the following uses and purposes: She directed that said trustees

should collect all the personal estate and take possession of the real estate, and should, as soon as they deemed it to the interest of the estate, sell and convey all the real estate in fee, and execute all necessary deeds and instruments for the conveyance thereof. The will contained particular provisions as to the management of the proceeds or securities taken in payment for the real estate. Pending the sale of the whole or any part of the real estate, the trustees were directed to care for, manage, and superintend the same, to collect the rents and keep the property in good salable order and condition, and to pay the net income in equal shares to William Burbach, Henry Burbach, Werner Burbach, Mary Tobin, and Mary C. Burbach, the widow of said deceased son and mother of said grandchildren. Upon a division of the estate the trustees were directed to pay to William Burbach, Henry Burbach, and Werner Burbach each one-fifth; to set apart one-fifth for the benefit of Mary C. Burbach during her lifetime or until her remarriage, and upon her death to divide the same between said grandchildren; and the remaining one-fifth was to be held in trust for the benefit of Mary Tobin during her lifetime, and upon her death to be divided equally between her children.

It is admitted by counsel for the appellant that, as to the one-fifth which is to be held by the trustees for the benefit of Mary C. Burbach during her lifetime or until her remarriage and afterward to be divided between her children, and the one-fifth to be held in trust for Mary Tobin during her lifetime and upon her death to be divided between her children, there are active trusts which are not executed by the statute of uses; but it is contended that as to three-fifths of the estate, of which the trustees are also beneficiaries, the trusts are executed by the statute, for the reason that they cannot be trustees for themselves. It is also contended that, the legal and equitable title to said three-fifths being vested in the same persons, the two estates have been merged, and that, the legal and equitable title being united in the same persons, no necessity exists for the power of sale, and hence there is no such power, and the lesser equitable estates have been extinguished.

A good reason for sustaining the demurrer and dismissing the bill is that the beneficiaries under the will take the property, not as real estate, but as personal property. Whoever takes property under a will takes it in the character impressed upon it by the testator, and where a testator devises land to be sold by his executors or trustees and the proceeds are to be divided there is an equitable conversion, and the proceeds are regarded as personal property. Rankin v. Rankin, 36 Ill. 293, 87 Am. Dec. 205; In re Corrington, 124 Ill. 363, 16 N. E. 252; Crerar v. Williams, 145 Ill. 625, 34 N. E. 467, 21 L. R. A. 454; Robison v. Botkin, 181 Ill. 182, 54 N. E. 915.

In this case it was the intention of the testatrix that there should be a sale of the real estate. It was not left to the trustees to sell or not as they might deem best, and the only discretion given to them was as to the time when the sale should be made. They were to divide the proceeds, which would be personal property, and not a proper subject for a bill for partition.

The provisions of the will are not void on the ground that the three trustees are also beneficiaries. Whatever may be said as to the fitness of trustees to take property in trust for themselves, they are not necessarily and in all cases incapable of doing so (Perry on Trusts, § 59), and where one is a trustee for himself and others that fact does not defeat the trust (Summers v. Higley, 191 Ill. 193, 60 N. E. 909). The title held by the trustees is joint, and there is no merger of separate interests in the different trustees arising out of the fact that they are also beneficiaries. The trust is an active one, in which the trustees hold possession, manage, and lease the property, and pay over the income, after deducting all expenses, to the beneficiaries. As soon as it appears to be for the best interest of the estate, they are to sell the real estate and divide the proceeds.

The decree is affirmed.

Decree affirmed.

(217 Ill. 605)

CHICAGO & A. R. CO. v. WALKER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—WHO ARE PASSENGERS.

Where plaintiff held the return coupon of a ticket purchased from a railroad company, and went to the depot to take a train, she was a passenger entitled to all the privileges of one.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 984.]

2. SAME—WAITING ROOM.

A railroad company must furnish a suitable waiting room for passengers and keep the same open for all regular trains and for trains which stop on signals.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 714, 738, 740.]

3. SAME.

Where a passenger on going to the depot finds it locked, she is not a trespasser where she enters the room, which is opened and lighted by one not an agent of the company.

4. SAME—NEGLIGENCE—DANGEROUS PREMISES.

A passenger came to defendant's station at night with a ticket, and was admitted to the room by the village marshal, who unlocked the door, and was injured by falling through a hole in the waiting room floor, which had been there a long time. Held to make the question of defendant's negligence one for the jury.

5. EVIDENCE—DEMONSTRATIONS.

Where a physician testifies as to the injury to plaintiff's ankle, he may use a skeleton for the purpose of explaining the same to the jury.

Appeal from Appellate Court, Second District.

Action by Anna Sloan Walker against the Chicago & Alton Railroad Company. Judgment for plaintiff was affirmed by the Ap-

pellate Court, and defendant appeals. Affirmed.

This is an action on the case, brought by appellee against the appellant, to recover for personal injuries alleged to have been sustained by reason of catching the heel of her shoe in a hole in the floor of appellant's depot at Braceville, Ill., causing her to fall out of the door onto the platform. On May 8, 1903, the appellee lived at Gardner, and purchased a round-trip ticket to Braceville for the purpose of visiting her brother. She intended to return to her home upon a train which left Braceville at 11:02 p. m. Her brother and two little girls accompanied her to the depot, which they found dark and locked. The train which she expected to take stopped only upon signal, and her brother had taken a lantern for this purpose. Shortly after their arrival the village marshal came to the depot and unlocked the door of the waiting room with a key which he had in his possession. The party entered the room, and the marshal lit a lamp or lantern which was in the room. When the train whistled, the brother and the two children went out on the platform, and were followed by the appellee and the marshal. There was a hole in the floor of the waiting room, about two inches wide and several inches long, opposite and near the door, and as appellee passed out the heel of her left shoe caught in the hole, and she fell through the door to the platform and was injured. Upon a hearing before the court and a jury judgment was rendered in her favor for \$4,000, which has been affirmed by the appellate court, from which order of affirmance this further appeal has been prosecuted.

C. W. Brown, for appellant. E. L. Clover, for appellee.

WILKIN, J. (after stating the facts). At the close of appellee's evidence, and again at the close of all the evidence, the defendant made motions to instruct the jury to find it not guilty, which were refused, and that ruling is assigned as error. As often said, the only question for our consideration under this assignment is whether or not there is any evidence at all in the record fairly tending to support the verdict. There is no substantial conflict in the testimony, which shows that on the morning of the accident appellee purchased a round-trip ticket from appellant's agent, as stated above. She used half of the ticket, and had the other half in her possession when she, her brother, and the children went to the depot. She was therefore at the depot rightfully as a passenger, and was entitled to all of the rights and privileges of the same. Wabash, St. Louis & Pacific Railway Co. v. Rector, 104 Ill. 296; Illinois Central Railroad Co. v. Treat, 179 Ill. 576, 54 N. E. 290. The train did not stop at that station, except upon signal, and the depot was dark and the door locked. Her

brother started to find the marshal, indicating that he knew how to get into the depot at that time, and that the officer had a key. How he knew this fact does not appear, nor is it material. The marshal came before he was found by the brother, and opened the door with the key which he had in his possession, as above stated. He testified that he received the key from his predecessor in office the 3d day of May of the same year, and that two or three days afterward he again received it from the station agent of the defendant. He was then asked what the agent said to him at the time the key was delivered to him, what his habit and custom was with reference to passengers waiting at the depot for this train, whether he was in the habit of opening and lighting the station for passengers before the day in question, and whether he received any compensation from the appellant for such services; but objections were sustained to all these questions. The station agent testified that he did not know the marshal had a key and he never had any conversation with him in reference to it, and that no arrangements were made by the defendant for passengers waiting for this train. He also testified that on at least two occasions during his service for the company he had seen light in the depot after he had closed and left it for the night, and he made no inquiries as to how these lights came to be there. He was asked if he did not state in a certain conversation that the marshal offered him the key on one occasion and said he did not want to keep it any longer, and answered: "It is true and isn't true. I did not say that." The evidence shows, without contradiction, that the hole in the floor had been there for a long time, and the station agent himself testified that he had seen it at least 300 times each day. The appellant claims that the evidence fails to show that the marshal had authority to open the depot building, and that it is not, therefore, responsible for his act in doing so; that, if the door had not been opened, the injury would not have occurred. There was certainly some evidence fairly tending to prove that the marshal had the key to the waiting room and opened the door with the knowledge and consent of the defendant. In fact, we think the evidence fully justified the jury in reaching that conclusion. It was the duty of the appellant, under the law, to furnish a suitable waiting room for its passengers, and to keep the same open for all trains which stopped there, either regularly or on signal, to receive passengers. The room in question was provided for that purpose, but a dangerous hole was allowed to remain in the floor, which must have been known to render the floor dangerous to persons using the room. Appellee was rightfully in the room. She was in no sense a trespasser or an intruder therein. When the door was opened, she had a lawful right to enter,

without questioning the authority of the person who opened it. There is nothing to show that she was not in the exercise of due care for her own safety or was in any way to blame for the accident. Evidence was offered by the plaintiff to prove the particular circumstances and conditions under which the key was left with the marshal, a part, at least, of which was, we think, improperly excluded. Notwithstanding the exclusion of such testimony, there was sufficient evidence tending to support the plaintiff's cause of action and the verdict of the jury. The court, therefore, properly refused the motion to withdraw the case from the jury.

Physicians who testified on behalf of the plaintiff were permitted, over the objection of the defendant, to use the skeleton of a human foot in explaining to the jury the location of the various bones and ligaments of the ankles; and this, it is said, was error, though the point does not seem to be seriously urged. We think the ruling of the court in that regard was unobjectionable. The skeleton itself was not offered in evidence, but was simply used by the expert witnesses to illustrate their testimony. The court might, in its discretion, have permitted the plaintiff to exhibit her injured ankle to the jury, and allowed physicians to explain from it the nature and character of the injury. *Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. 1038; *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 670. It was equally proper to use the skeleton for the purpose of explaining the testimony. Even if the skeleton has been improperly used, no substantial injury could have resulted therefrom to the defendant, as its counsel had full opportunity to cross-examine the witnesses.

Complaint is made of the refusal of the trial court to give to the jury three instructions asked by appellant. The first was intended to tell the jury, that there was not sufficient evidence to authorize them to find that the marshal had authority to open and light the station. It was very properly refused. There being evidence tending to prove that fact, the question was for the consideration of the jury, and not within the province of the court. The second and third were to the effect that if the appellee entered the station after the same had been locked, through a door which had been unlocked by some other person than an authorized agent of appellant, then appellee cannot recover. The refusal of these two instructions was not error, for the reason that the court did, at appellant's request, instruct the jury that if the depot was not opened by authority of defendant, and plaintiff entered the waiting room without authority or invitation or consent of defendant, she could not recover. This was substantially the same proposition embraced in the two instructions refused, and was fully as

favorable to the company as the law would justify.

It is suggested that the amount of damages awarded is excessive; but, as this is a question conclusively settled by the judgment of the Appellate Court, it is not open to inquiry here.

We find no reversible error in the record, and the judgments of the circuit and appellate courts will be affirmed.

Judgment affirmed.

(217 Ill. 483)

SEYFERTH v. GROVES & S. R. R. CO.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. VENDOR AND PURCHASER—OPTION TO SELL LAND.

Where a written agreement to convey land at the option of the proposed vendee within a given time and at a certain price was extended on a sufficient consideration, and with knowledge on the part of the vendor that he is bound, though the other party is not, it is binding for the time of the extension.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 23.]

2. SAME—AVOIDANCE.

A vendor cannot have a contract for the sale of land avoided, because the nominal consideration named in giving an option of the land was not paid, where on tender thereof he had stated that if he wanted anything he would "take it all at once."

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 87, 848.]

Appeal from Appellate Court, Fourth District.

Bill by Andrew Seyferth against the Groves & Sand Ridge Railroad Company. Decree for defendant, and plaintiff appeals. Affirmed.

Herbert & Levy, for appellant. W. W. Barr and R. J. Stephens (J. M. Dickinson, of counsel), for appellee.

RICKS, J. The only question presented upon the record in this case is one of law, and is whether or not the written option set out in the opinion was binding upon appellant to the end of the time stated therein.

The Appellate Court, in stating and disposing of the case, made the following remarks, in which we concur and adopt the same as our views:

"Andrew Seyferth, the appellant, filed a bill in the circuit court of Jackson county to enjoin the Groves & Sand Ridge Railroad Company, appellee, 'from going upon or doing any act preparatory to or in construction of its railroad' upon the land of complainant described in the bill. The defendant answered the bill, to which complainant filed replication. Upon hearing had before the court the finding was for the defendant, and a decree was entered dismissing the bill for want of equity and for costs, from which appellant appeals. On the 20th day of October, 1902, appellant, in consideration

of \$1.00, executed and delivered to the agent of appellee a written contract, under which, among other things, he granted unto the Groves & Sand Ridge Railroad Company the option to purchase the following described lands belonging to the undersigned (describing the land in controversy, being a strip for right of way), upon condition expressed 'that if said railroad company shall, within four months from the date hereof, pay or tender to the undersigned * * * the further sum of \$45 per acre, then the undersigned * * * agrees that he will make, execute, and deliver to the said railroad company a good and sufficient deed, with general warranty, conveying to the said railroad company a fee-simple title. * * * The undersigned hereby grant to the said railroad company, its contractors, subcontractors, and its and their agents, servants, and assigns, the right, upon the execution of this present instrument, to take immediate possession of the said strip of land and to construct a railroad upon the same, and for that purpose to enter in and upon said strip of land with all necessary men, horses, carts, and implements, laborers, and material required for the construction of said railroad, hereby releasing to the said railway company * * * all damages on account thereof; and said railroad company shall have the right * * * to remove the railroad track and superstructure therefrom in case the option herein provided for shall not be exercised: Provided, however, that if the railroad company shall not so pay or tender the said further sum within the period aforesaid all rights under this instrument shall cease and determine from and after the expiration of the period aforesaid.' This instrument was signed by appellant and his wife, Emma Seyferth, and both acknowledged the same November 5, 1902, before a notary public, whose certificate is attached. The consideration, \$1.00, recited in the contract, was not in fact paid; and for this reason appellant contends that the contract or option agreement is void and without effect. Nothing was said about the \$1.00 consideration by either the appellant or the agent of appellee at the time the writing was drawn up and signed; but on the 5th day of November, when the agent returned with the notary public to appellant's house to take the acknowledgment of appellant and his wife, appellant called attention to the fact that he had not received the \$1.00 consideration, and thereupon the agent took from his pocket \$1.00 and tendered it to the appellant. He did not take it, saying, 'If I want anything, I will take it all at once.' On February 7, 1903, appellant served notice on appellee that he withdrew the option and revoked the contract. The next day appellee, by its agent, tendered appellant the sum required by the contract and demanded a deed, which was refused. On the 12th day of May, 1903, ac-

cording to the bill, which was filed on the 18th day of the same month, appellee went upon the strip of land in controversy and took possession preparatory to the construction of its railroad thereon.

"As we view the record, the foregoing is a full and fair statement of all the facts in evidence that have any bearing upon the questions presented. We are of the opinion that the conclusion reached by the chancellor who heard the case was justified, and that the decree was right. No question is made of the validity of this contract in all of its essential features, unless it may be held void for want of a consideration. This is a proceeding in a court of equity, and under the circumstances shown the complainant in the bill is not in a position to avoid an obligation for want of payment of a purely nominal consideration, which was tendered and declined for the stated and only reason that, if he wanted anything (meaning the \$1.00 nominal consideration), 'I will take it all at once'; that is, when the defendant shall have exercised his option and paid for the land. It was equivalent to saying to appellee that he waived the payment, or that he preferred postponement of the payment, or that, as between the parties, it should be considered as paid, though the money was not to be received until a later adjustment. From the evidence it clearly appears that, when the contract was acknowledged, and thereafter until the notice of his withdrawal, his understanding, no less than that of appellee, was that the contract was valid and binding. At any rate, from aught he said or did, no other conclusion can be drawn. He may not be heard to say that his undisclosed reason for refusing the tendered consideration was other than stated or reasonably to be inferred from what he did and said. That would be contrary to equity and conscience, and may not prevail in a proceeding of this kind. In this case the tender of the payment of the consideration at the time the contract was completed by the signature of the wife, formally acknowledged and delivered to the appellee's agent, must be held as effective as though the money had been received. If appellant refused to receive the money when tendered, in order to secure the advantage now claimed, and concealed his purpose, as he did, then he was acting in bad faith, and therefore is not entitled to a hearing in the court of equity."

We might further add that it is now universally held that a written agreement to convey land, at the option of the proposed vendee, within a given time and at a certain price, if made upon a sufficient consideration, with full knowledge on the part of the person extending the option that he is bound and the other is not, is such a contract, though lacking mutuality, as will be enforced in equity, where the party holding the option signifies his acceptance within the time lim-

ited upon the terms as stated; and as is said in *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, "where the one holding a buyer's option makes his election to purchase, and tenders the amount agreed to according to the terms of the contract, it is the duty of the seller to accept the price and execute a deed to the purchaser for the property. * * * Such contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them"—citing *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394.

We are of the opinion that the judgment of the Appellate Court, affirming the decree of the circuit court, is right, and it is accordingly affirmed.

Judgment affirmed.

(217 Ill. 462)

BALTIMORE & O. S. W. R. CO. v. BRUBAKER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. RAILROADS—RIGHT OF WAY—RECORD OF CONVEYANCE.

A contract to convey a strip of land to a railroad for a right of way upon certain conditions is a contract relating to real estate, within Hurd's Rev. St. 1903, c. 30, § 28, providing that deeds, mortgages, and other instruments relating to or affecting the title to real estate shall be recorded.

2. EVIDENCE—SECONDARY EVIDENCE—SUFFICIENCY OF PRELIMINARY EVIDENCE.

Testimony that witness made a contract for a conveyance and delivered the same to the purchaser, who recorded it, and that the contract is not in witness' possession, is not of itself such preliminary proof as will permit the introduction of the record in evidence to prove the contract.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 561-564.]

3. APPEAL—PRESERVATION OF ERROR—OBJECTION IN LOWER COURT—SUFFICIENCY OF SPECIFICATION.

Where an objection to the admission in evidence of a record did not specify the grounds of objection, it could not be urged on appeal that the preliminary proof was not sufficient to authorize the admission of the evidence.

4. CONTRACTS—CONSTRUCTION—SEPARATE INSTRUMENTS.

Where a recorded contract for the conveyance of a right of way is followed by a deed executed in accordance therewith, both the contract and the deed will be considered as constituting one agreement, although several months elapsed between the execution of the two instruments.

5. SPECIFIC PERFORMANCE—WHEN GRANTED—RIGHT TO RELIEF.

Specific performance should be awarded as a matter of right, where all the necessary elements which justify such relief are made to appear.

6. SAME—ENFORCEMENT AGAINST PURCHASERS.

Where a railroad procured a right of way through a farm upon the express condition that it would make necessary passageways to allow the landowner free access to his lands, and the agreement was recognized and carried out by both parties thereto for over 50 years, such agreement would be specifically enforced against a railroad which subsequently acquired the right of way at foreclosure and attempted to fill up the passageway.

7. SAME—ABROGATION OF CONTRACT—STATUTORY REMEDIES.

The statute providing a method of compelling railroads to construct crossings does not affect a contract previously made between a railroad and landowner, whereby the former agreed to construct such farm crossings and passageways as should be necessary to give the latter free access to his lands, in such sense as to require the landowner to proceed under the statute, instead of for specific performance of his contract.

Error to Circuit Court, Marion County; Wm. M. Farmer, Judge.

Bill by Eli Brubaker against the Baltimore & Ohio Southwestern Railroad Company. There was a decree for plaintiff, and defendant brings error. Affirmed.

This is a bill in chancery, filed in the circuit court of Marion county by the defendant in error against the plaintiff in error, asking for a specific performance of an agreement in writing for certain underground crossings under plaintiff in error's right of way, as expressed in a certain agreement for a deed and the deed following said agreement. The evidence shows that on March 14, 1853, defendant in error was the owner in fee simple of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 15, town 2 N., range 3 E., in Marion county. On that date he entered into a written contract with the Ohio & Mississippi Railroad Company whereby, for the sum of \$32, he sold and agreed to convey by warranty deed to said company a right of way 100 feet in width crossing the land above described, upon the express condition and consideration that the railroad company should cause to be made at the points designated by the defendant in error one or more crossings, and should fence on each side of the right of way, and forever keep the fence in repair. Pursuant to this agreement, on July 21, 1853, a deed of conveyance was executed and delivered to the railroad company, in which it was covenanted and agreed that the railroad company should erect and maintain the necessary crossings on said premises, one of which was to be on the east line thereof. There was a creek, running almost north and south, directly crossing the land and the right of way, dividing the premises into two parts. East of the creek there was a depression crossing the right of way. The defendant in error was then, and is now, the owner of about 320 acres of land, all of which, with the exception of 50 or 60 acres, lies south of the railroad; but his house and barn are situated on the 50 acres north of the railroad. The railroad company built the road across the premises, and constructed a trestle or bridge about 180 feet long over the creek, and one about 127 feet long over the depression east thereof, and under the trestles were left three passageways; two under the trestle crossing the creek, and the other under the trestle over the depression. The defendant in error built gates corresponding with the openings under the trestles, and con-

structed and made roads leading from one part of his farm to the other, and leading through the gates and through the crossings under the railroad, which gates, crossings, and roads were maintained until about August 15, 1903. The railroad company continued to operate this road until about the year 1899, when it was purchased at a foreclosure sale by the plaintiff in error. On August 15, 1903, the plaintiff in error, in violation of the agreement, completely filled up the trestle and crossings at the creek, except a narrow passageway on the west side thereof, and completely filled up the trestle and crossing at the depression, thus leaving defendant in error but one passageway, and that very narrow and inadequate. The prayer of the bill was that the plaintiff in error be required to specifically perform the contract to the extent of reopening and restoring the crossings under the trestle on the west side of the creek and the one under the trestle over the depression. Upon a hearing before the chancellor a decree was entered ordering the plaintiff in error to open the crossing on the west side of the creek under the railroad at the second bent of the trestle in direct line with defendant in error's gate on the north side of the right of way, and at the place where the farm road crossed the railroad before the crossing was obstructed, which opening was to be not less than 12 feet wide and 15 feet in height, and to restore the crossing to the same condition it was in before it was filled up, so that defendant in error would have a direct and easy access from one part of his farm to the other. The plaintiff in error was also ordered by the decree to open the crossing at the trestle over the depression in direct line with the gate on the north side of the right of way, and at the same place where the road crossed the right of way before the depression was filled up, which opening was to be the same size as the one west of it. From this decree a writ of error has been prosecuted to this court.

L. M. Kagy, Kramer & Kramer, and B. A. Campbell (Edward Barton, of counsel), for plaintiff in error. Frank F. Noleman and W. F. Bundy, for defendant in error.

WILKIN, J. (after stating the facts). A preliminary contract, with a receipt for the money for the right of way, was signed on March 14, 1853. The deed therefor was not executed until July 21, 1853. The contract and receipt were placed upon record. Upon the trial of the cause, the record of said contract was offered in evidence and objected to. It is first insisted by the plaintiff in error that the record was not properly admitted in evidence for the reason that the contract was not such an instrument as under the statute is required or entitled to be recorded, and that the proper preliminary proof was not made in order to entitle the record to be admitted as secondary evidence. Section 28 of

chapter 30, Hurd's Rev. St. 1903, provides that deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate shall be recorded in the county in which such real estate is situated. The contract in question provided that defendant in error would convey to the Ohio & Mississippi Railroad Company the 100-foot strip of land as a right of way, upon condition that the company should cause to be made one or more crossings, leaving a passageway under the bridge over the creek, and should fence the right of way. This contract was one which related to or affected the title to the real estate, and, under the foregoing section of the statute, was entitled to be recorded. After the contract had been executed, it was delivered to the Ohio & Mississippi Railroad Company and recorded in the recorder's office of Marion county. When defendant in error was on the witness stand, he testified that he delivered the agreement to the Ohio & Mississippi Railroad Company, and it was afterwards recorded, and that he did not have it in his possession at the time of the trial. Demand was made upon the company to produce it. Section 36 of chapter 30, Hurd's Rev. St. 1903, with reference to the admissibility of the record of an instrument, provides that whenever upon the trial of any cause any party shall under oath state that the original of any deed or other instrument concerning land is lost or not in the possession of the party wishing to use it, and that to the best of his knowledge such instrument was not intentionally destroyed or in any manner disposed of for the purpose of introducing a copy thereof in place of the original, the record of such instrument may be read in evidence with like effect as though the original of such deed or instrument had been produced. The defendant in error merely testified that the instrument was delivered to the Ohio & Mississippi Railroad Company and afterwards placed upon record, and was not in his possession. We have held in several cases that such preliminary proof in itself was not sufficient, on specific objection, to authorize the introduction of a record. *Scott v. Bassett*, 174 Ill. 390, 51 N. E. 577; *Scott v. Bassett*, 194 Ill. 602, 62 N. E. 914. But in this case the objection made to the introduction of the record did not point out the specific grounds of the objection, and cannot be urged for the first time upon this appeal. *Gillespie v. Gillespie*, 159 Ill. 84, 42 N. E. 305. If, however, the record was improperly introduced upon the hearing, we do not see how the plaintiff in error was in any way injured thereby, as the same provisions of the contract were substantially incorporated into the deed subsequently executed.

It is next insisted that, even though the preliminary proof was sufficient to admit the record, yet defendant in error is not entitled to have the provisions of this agreement

specifically enforced, because it was a preliminary agreement, which was subsequently embodied in the deed of June 21, 1853, and there is no evidence in the record that the defendant in error ever signed this agreement. In support of this contention the case of *Dreiske v. Elsendrath Co.*, 214 Ill. 199, 73 N. E. 379, is cited. An examination of that case will show that it is not based upon the same facts as those involved in this case. In that case certain preliminary letters had passed between the parties showing that a subsequent contract was contemplated, and we held that such letters did not amount to a contract which could be specifically enforced. Here the facts are altogether different. The agreement originally entered into was for a conveyance, together with a receipt acknowledging the payment of the consideration, and also an agreement for the passageways, as above described. The deed, which was subsequently executed, contained substantially the same provisions as the original contract. We are of the opinion that it was the intention of the parties that both instruments should be executed together, and should constitute in substance one agreement, and in that view it would make no difference that several months elapsed between the dates of their execution. *Rock Island & Peoria Railway Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291, 19 L. R. A. 105. As to the execution of the agreement, the defendant in error testified on cross-examination that he did say that he remembered signing only one paper, but that he might have signed both. The contract was filed for record by the railroad company, and there could be no doubt, from all the facts and circumstances in evidence, that it was executed by defendant in error.

There was no objection made to the introduction of the deed, and it contained the following clause: "And it is understood that said company shall erect and maintain such crossings as may be necessary to the accommodation of persons whose lands are divided by the track, * * * one crossing to be made on the east line of the above track, it being the east line of the land of the undersigned." It is insisted that this contract cannot be specifically enforced, even as embodied in the deed, for the reason that it is not clear, certain, unambiguous, specific, definite, complete, and unequivocal in its terms; also that it is a contract which is so varying as to require different constructions under different circumstances. It is undoubtedly the law that the specific performance of a contract will only be enforced where the terms are clear, unambiguous, reasonable, and certain. *Dreiske v. Elsendrath Co.*, supra. But, when this contract and deed are construed in the light of the surrounding circumstances, they cannot be said to be either uncertain, unreasonable, or ambiguous. The right of way was to be 100 feet wide and

across the entire premises. There were two openings or depressions, which were to remain open for passageways. The right of way divided the farm into two parts; the larger part being south of the right of way and the farm buildings on the north. The occupant of the farm would necessarily require openings, in order to pass from one part of it to the other, and the contract in question was manifestly intended to so provide by passageways under the right of way. When the trestles were built, these openings were left by the company, and fences and roads constructed in conformity therewith, which was a clear recognition by the parties of the terms and conditions of the contract; and those acts of recognition continued for more than 50 years. It was not until the present company, the plaintiff in error, acquired the right of way, that any attempt was made to repudiate the contract or deprive the defendant in error of the full benefit of his contract.

It is said, however, that the specific performance of the contract rests in the sound discretion of the court, and will not be decreed, where it appears that the specific matter insisted upon possesses no value to the plaintiff, or rests only in the realm of fancy, speculation, or conjecture, or where the performance would result in hardship or injustice to the defendant; that the crossing in question, on account of being constructed of wood, is a menace to the safety of the employes and other persons using the road; also that, while complainant is entitled to one passageway, he ought not to have three. It is undoubtedly the law that the specific performance of the contract is within the sound discretion of the court, and will not be enforced as a matter of course, or where it will impose unreasonable or unjust hardship upon one of the parties without corresponding benefits to the other. However, where all the necessary elements, conditions, and incidents are present, relief by way of specific performance should be granted as a matter of right, and not as a mere favor. *Evans v. Gerry*, 174 Ill. 595, 51 N. E. 615, and cases cited. Here no such hardship or injustice is shown as resulting to the company as to justify a court of equity in arbitrarily refusing to compel a compliance with the contract. The agreement was of the first importance to the defendant in error, without the benefits of which he would be deprived of the convenient and ordinary use of his farm. The company procured the right of way for a small consideration, upon the express condition that the defendant in error should have free access from and to the va-

rious parts of the farm. It is true that it will cost the company a considerable sum of money to preserve and maintain the crossings; but having been left for so many years in compliance with the contract of the parties, and having become so permanently fixed, it would be neither equitable nor just to now permit them to be closed up. The case of *Cleveland, Cincinnati, Chicago & St. Louis Railway Co. v. Munsell*, 192 Ill. 430, 61 N. E. 374, and kindred cases, holding that no easement in the right of way under a railroad company can be acquired by prescription, have no application to the case in hand. Here defendant in error does not rely upon an easement, but upon a contract alleged to have been entered into between himself and the railroad company; and the evidence as to the length of time the passageways have been used and recognized by the parties simply goes to the question of the existence of the contract and the understanding of the parties as to the location of the passageways. The decree of the circuit court is in harmony with the principles announced in *Rock Island & Peoria Railway Co. v. Dimick*, supra.

The point that the defendant in error had a complete and adequate remedy at law, either by mandamus or by action under the statute to compel the desired opening, is without force. In the first place, the contract here relied upon was executed long before the statute referred to had been adopted. It may be that under that statute the complainant could have acquired one passageway, but his contract was broader than the statute, and entitled him to necessary passageways; three having been left open and recognized as necessary for a long term of years. The passageways claimed were reasonably necessary for the proper use of complainant's farm, and the contract related to the particular conditions and circumstances of the same. The contract was in no way qualified or abrogated by the passage of the statute. Possibly the complainant might have obtained some relief by mandamus, but his only complete and adequate remedy under his contract was in a court of equity to compel the performance of the same.

The foregoing views dispose of the entire merits of the case, and other questions raised and discussed become unimportant and need not be decided. We are satisfied that the decree of the court below is in conformity with the law and facts of the case, and should be affirmed.

Decree affirmed.

(217 Ill. 423)

KINCAID v. VICKERS et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

BOUNDARIES—ESTABLISHMENT—LIMITATIONS.

Where adjoining landowners have established a disputed boundary by parol agreement, and possession is subsequently held for over 20 years in accordance with such agreement, any right to question the same is barred by limitations.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 223.]

Appeal from Circuit Court, Massac County; Wm. N. Butler, Judge.

Bill by Robert E. Kincaid against Tyre S. Vickers and another. Decree for defendants, and plaintiff appeals. Affirmed.

Appellant, Robert E. Kincaid, filed his bill against Margarette Anna Kincaid and Tyre S. Vickers in the circuit court of Massac county, in which he sought to partition a strip of land 10 rods wide east and west, lying along the boundary line between the N. E. $\frac{1}{4}$ and the N. W. $\frac{1}{4}$ of fractional section 1, township 19 N., range 6 E., in Massac county. The bill alleges that Robert E. Kincaid and Margarette Anna Kincaid were tenants in common, the former owning one-fourth of the land and the latter three-fourths thereof; that Tyre S. Vickers was in possession, and claimed to hold the open, notorious, adverse, exclusive, and continuous possession of the same, under claim of ownership, for over 20 years immediately preceding the filing of the bill, whereas in fact the said Vickers had been in possession a much shorter period than 20 years. The prayer was that the claim of title by Vickers be declared null and void and of no avail against the title of Robert E. Kincaid and Margarette Anna Kincaid, and that he be ordered to surrender possession of the premises, and that the same be partitioned. Appellee Vickers filed his answer, in which he alleged that he and his grantors had been in the open, adverse, notorious, exclusive, and continuous possession of the premises under claim of ownership for over 40 years immediately preceding the filing of the bill, and that the premises of which he had possession were not the premises described in the bill. The cause was referred to a master, who recommended a decree in accordance with the prayer of the bill. Exceptions were filed to his report, which were sustained by the chancellor, and the bill was dismissed for want of equity. From the decree so rendered an appeal has been prosecuted to this court.

Charles M. Founts and S. Bartlett Kerr, for appellant. Courtney & Helm, for appellees.

WILKIN, J. (after stating the facts). The sole question for our determination is one of fact; that is, whether or not the proof sustains the allegations of the bill. Fractional section 1 is contiguous to the Ohio river. The east line is 20.50 chains long, and

is the boundary between Massac and Polk counties. The west line is 29.10 chains long. The north and south half-mile line between the two quarter sections is 24.80 chains long. The northwest quarter of the section contains 111.97 acres, and the northeast quarter contains 108.33 acres. Beaver Dam Lake enters the section at the northeast corner, and crosses the north and south half-mile line between the two quarter sections about 30 yards from the north boundary, and passes out of the section a short distance east of the northwest corner, leaving a small tract of land capable of cultivation in both quarter sections. A little over 5 rods east of the north and south half-mile line between the quarter sections a slough starts from the north bank of Beaver Dam Lake, the break in the bank being 20 feet wide and 6 or 7 feet deep, and running in a northwesterly direction into another lake, variously called Kineman Lake, Kincaid Lake, and Long Lake. In 1868 Edmond Allcock, together with his wife, sons, and daughters, conveyed by warranty deed to his daughter Lucinda Martin, through whom Robert E. and Margarette Anna Kincaid claim title, the whole of the N. E. $\frac{1}{4}$, and she immediately took possession under her deed. At the time of this conveyance Edmond Allcock was the owner of the N. W. $\frac{1}{4}$ of the section, together with a strip of land 5 rods wide immediately east of the north and south half-mile line between the quarter sections. In 1870, Allcock conveyed the N. W. $\frac{1}{4}$ to Henry Metcalf, through whom Tyre S. Vickers claims title. In this deed to Metcalf, Allcock also attempted to convey the 5-rod strip, immediately east of the north and south half-mile line between the two quarter sections, which two years before he had conveyed to his daughter Lucinda Martin. James B. Martin acquired the rights and title of his mother, Lucinda Martin, and a dispute arose between him and Metcalf as to the boundary line between the two quarter sections. The county surveyor, a Mr. Hancock, was employed to locate the line. By agreement between the parties the line was located where a former surveyor, named Johnson, had located it, and Metcalf was permitted to take possession of the 5-rod strip. A stake was driven at the corner, and a line established through Beaver Lake to the Ohio river, and Metcalf on the west and Martin on the east for a number of years cultivated to this line as thus established. In 1884 appellee Tyre S. Vickers purchased the N. W. $\frac{1}{4}$ of Metcalf, and they went to the north line and measured the distance from the north and south half-mile line east 5 rods, where the line had previously been established by Metcalf and Martin. In 1902 the land was resurveyed by William Martin, and the line in dispute again located. A few years before the last survey Vickers constructed a wire fence from the south bank of Beaver Dam Lake south to the Ohio river, and it is claimed that upon the land being resurveyed by Martin it was found that this

fence was 3.52 chains, or 14 rods and 2 links, east of the south half-mile line between the two quarter sections, thus giving Vickers 9 rods and 2 links more land than had previously been agreed upon, and the bill for partition was filed for the purpose of ousting him from the possession of this strip.

It is conceded by appellant that Vickers is entitled to the strip 5 rods wide lying immediately east of the half-mile line, and the question for determination therefore is whether or not he has within the last 20 years moved his fence east 9 rods and 2 links. Appellee acquired title to the one-fourth interest which he claims in the strip in dispute by virtue of a deed executed to him by his mother, Margarette Anna Kincaid, just prior to the filing of the bill. In the case of *Clayton v. Feig*, 179 Ill. 541, 54 N. E. 149, we held that where there is a dispute between adjoining owners of land as to the true boundary line, they may establish it, first, by parol agreement and possession in pursuance thereof, and the line so agreed upon will be binding upon them; second, an agreement may be implied from the unequivocal acts and declarations of the parties and acquiescence for a considerable length of time; third, that such an agreement, either express or implied, is enforceable both at law and in equity, whether the period of limitation has run or not; fourth, the line may be ascertained by way of estoppel, without any agreement, when the parties have had undisputed possession in conformity thereto for more than 20 years. It therefore became a question of fact as to the manner in which this boundary line was established, if at all, and how long it has continued at the place it is now located.

James B. Martin, the grantor of the Kincaids, testified that a dispute arose between his mother and Metcalf after the survey by Hancock, and they agreed to let the old line be the line between them; that after the death of his mother, when he became the owner of the land, William Fritts showed him where Johnson had located the line, and that he (Fritts) and Metcalf measured 5 rods east from the corner, and it brought them in line with the old turn row; that he and Metcalf then and there agreed that this line, which they staked out in the old turn row, should be the boundary line between their properties; that he knows where Vickers' fence is now located, and that the line which he and Metcalf agreed upon is 6 or 8 feet east of Vickers' fence; that this fence is located on and has been considered the boundary line between the owners from 1864 to the present time; and that all of the owners from 1864 to the present time have cultivated and have had possession on their

respective sides up to the line where Vickers' fence now stands. Appellee Vickers testified that when he bought the farm from Metcalf they went to the northeast corner of the N. W. $\frac{1}{4}$, where Johnson had located the corner, and cut a pole 16 $\frac{1}{2}$ feet long and measured off 5 rods, and it brought them to this fence, or a little over the fence, and that he knew this boundary to have been in the same place where his fence is now located for 5 years before he bought it, and that he has had actual possession, under claim of title, up to this line where his fence is now located since 1884, and his grantor, Metcalf, had possession up to the same line 5 years prior thereto. Joe Anderson, who was reared on the farm in question, testified that he knew this to be the boundary line for at least 45 years; that he had never lived farther than 6 miles from the premises, and he had been on the same many times each year; that the line indicated by the fence, as it is now located, has been considered the boundary line between the two farms by the respective owners thereof for 45 years. David Arnold testified that he cultivated this land some 32 or 33 years ago, and knew where the fence now is, and could see no difference between the location where it now is and had been for at least 32 or 33 years; that the fence formerly on the line was a worm or rail fence, and there was a cottonwood tree and a pecan tree right along on the turning row in the line of the fence; and that a sycamore stood over next to the river along the same line where the fence was. There is evidence also tending to show that the wire fence built by Vickers had been nailed to these cottonwood and pecan trees, and had since broken loose from one of them. William D. Lynn testified that he had known the land for 50 years, and the fence as now located on the old turn row has been the boundary line between the premises.

There is very little, if any, testimony in the record disputing the foregoing evidence as to the location of the fence for the time stated by the witnesses, and we are of the opinion that the preponderance of the evidence satisfactorily shows that the division line between the two pieces of land was established by the respective owners by agreement, that it has been accepted for more than 20 years at its present location, and any right which appellant or his grantors had in the strip in dispute has long since been barred by the statute of limitations. Therefore the decree of the circuit court was correct, and the bill for partition was properly dismissed, and the decree will be affirmed.

Decree affirmed.

(182 N. Y. 470)

SANDERS v. SAXTON et al.(Court of Appeals of New York. Oct. 24, 1905.)
STATES—CANCELLATION OF TAX DEED—WHEN ACTION LIES.

In an action by an owner of certain land against the commissioner of the land office and the comptroller of the state to have certain deeds executed to the state by the comptroller of the state on sale of land for delinquent taxes declared void, the state is a necessary party, and, as there is no statute authorizing suit against the state for such purpose, the action cannot be maintained.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Joshua C. Sanders against Charles T. Saxton and others. From a judgment of the Appellate Division (85 N. Y. Supp. 762, 89 App. Div. 421), affirming a judgment for plaintiff (73 N. Y. Supp. 1095, 89 App. Div. 421), defendants appeal. Reversed.

Julius M. Mayer, Atty. Gen. (Horace McGuire, on the brief), for appellants. Robert Goeller, for respondent.

CULLEN, C. J. The action was brought by the plaintiff, as the owner in fee and possessor of certain lands in the late town of New Utrecht, in the county of Kings (now part of the borough of Brooklyn, in the city of New York), against the defendants, except the defendant Roberts, as commissioners of the land office of the state of New York, and against the defendant Roberts, as comptroller of said state, to have certain deeds executed by the comptroller to the people of the state on sales of said lands for unpaid taxes adjudged illegal and void and the record of the same in the registrar's office to be so marked, and to require the comptroller to cancel and vacate the record thereof in his office. Judgment was granted substantially as prayed for in the complaint, and that judgment affirmed by the Appellate Division, from which affirmation an appeal has been taken to this court.

At the threshold of the examination of this appeal there is presented to us the question of the right of the plaintiff to maintain an action of the character specified against the defendants as officers of the state. This question was raised in the trial court by a motion made at the opening of the case to dismiss the complaint on the ground that it stated no cause of action against the defendants and that the court had no jurisdiction of the subject-matter of the suit. To the denial of that motion the appellants properly excepted. The motion being made on the pleadings, no consideration of the sufficiency of the evidence is involved, and the exception survives the unanimous affirmance by the Appellate Division. We think the question has been erroneously decided by the courts below, that the action was not maintainable, and that the complaint should have been dismissed on the defendants' motion. It is elementary law that the state,

being a sovereign, cannot be sued, except with its own consent (*Cohens v. Virginia*, 6 Wheat. 264, 5 L. Ed. 257; *Matter of Hoople*, 179 N. Y. 308, 72 N. E. 229), subject, of course, to the one qualification, found in the federal Constitution, that an action may be maintained by one state against another state. But, though the state cannot be subjected to hostile litigation at the instance of the individual, that immunity is not possessed by its officers, who can be held responsible for illegal trespasses or torts on the rights of an individual, even though they act or assume to act under the authority and pursuant to the directions of the state. This principle was established at quite an early period in our history by the decision of the Supreme Court of the United States in *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204. There the taxing officers of the state of Ohio threatened to collect a tax imposed by the state on a bank chartered by the United States and had already seized part of the specie held by the bank. It being determined that the state could not constitutionally impose the tax on the bank, it was further held that the officers of the state were properly restrained from collecting the tax and compelled to restore the funds they had already taken. In *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447, it was held that a state officer might be enjoined from executing a state law in conflict with the federal Constitution, and from incumbering, by patents to others, lands which had been contracted to a railroad company. In *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, it was held that while the United States could not be sued without their consent, still an action might be brought in ejectment to recover lands in the possession of the officers and agents of the United States. These cases and others fully support the doctrine that the officers and agents of the United States and of the states may be sued for their illegal acts or to recover property illegally possessed by them, despite the immunity of their principal.

That doctrine, however, does not cover the case now before us. The defendants are not in possession of the plaintiff's property, nor have they been. They have not committed, nor do they threaten to commit, any trespass thereon, or an other illegal act by which the rights of the plaintiff may be jeopardized or impaired. The action is both in effect and in form to cancel and remove the deeds to the people of the state of New York as clouds upon the plaintiff's title. The grantee in such a deed is plainly a necessary party to such an action, as it is the title of that grantee that is to be passed upon, and it cannot be adjudged void unless he is brought in court. No one would ordinarily think of disputing this proposition. The only reason for omitting to make the state a party in this case is that it cannot be made a party, and for that reason, it is sought to avoid the im-

munity that the state possesses by making its officers parties in its stead. But it is also settled by the decisions of the Supreme Court that "the United States are not bound by a judgment to which they are not parties, and that no officer of the government can, by defending a suit against private persons, conclude the United States by the judgment." *Carr v. United States*, 98 U. S. 433, 25 L. Ed. 209; *United States v. Lee*, *supra*. Now, as the only object and purpose of a suit in equity to remove a cloud on the title to property is to have any adverse title that may be asserted under such cloud passed on and adjudged void, so that the plaintiff in possession may be forever afterwards free from any danger of the hostile claim, it would seem plain that, where the judgment in an action cannot conclude or bind a party claiming under the adverse title, the action must fail. It is true that in one of the earlier cases (*Davis v. Gray*, *supra*) it is said: "Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the same were a party to the record." If these remarks are to be construed apart from the context of the opinion in which they are found, the proposition stated therein is far too broad, as it would entirely abrogate the immunity from suit which all the authorities concede the state possesses. But that the court intended to lay down no such rule is apparent from its subsequent decision in *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448. In that case the state passed a statute compromising the claims of its bondholders by the issue of a new consolidated bond in substitution of its former debt, and declaring that the statute should be deemed a contract between the state and its bondholders. Subsequently, by an amendment to the state Constitution, the amount authorized to be raised by taxation of property within the state was limited and the interest on the consolidated bonds reduced. The holders of the consolidated bonds presented their coupons for payment, which was refused, and thereupon brought an action in equity to restrain the state officers from applying the proceeds of the state taxes to other purposes than the payment of said coupons. The court held that the statute under which the bonds were issued constituted a contract between the state and the holders of the bonds within the protection of the federal Constitution. But it further held that in reality the suit was a suit against the state itself, and therefore could not be maintained. In the prevailing opinion there is an exhaustive review of all the earlier decisions of the subject. It is shown that in the *Osborn*, the *Davis*, and the *Lee* Cases the actions were to restrain the commission of unlawful acts by the state or government officers for which the command of their principal afforded no justification, or to recover

possession of property held equally without warrant of right. The distinction between those cases and the one then before the court is clearly pointed out, in that in the latter case the moneys sought to be reached were the moneys of the state, in the state treasury, impressed with no trusts, and the relation existing between the state and the bondholder was merely that of debtor and creditor. Accordingly it was held that such an action was essentially one against the state itself and therefore could not be maintained.

The same principle governs the case now before us. The title now sought to be adjudged void is the title of the people of the state, the defense of which has not been committed to an officer by whose appearance the state could be concluded. Nor is the decision in *Louisiana v. Jumel* limited or qualified by the subsequent decision in *Rolston v. Missouri Fund Commissioners*, 120 U. S. 390, 7 Sup. Ct. 599, 30 L. Ed. 721. The distinction between the two cases is stated in a few sentences in the opinion in the later case: "But this case is entirely different from that [*Jumel Case*]. There the effort was to compel a state officer to do what a state prohibited him from doing. Here the suit is to get a state officer to do what the state requires of him." The property rights of the plaintiff are not infringed by this decision. He is in possession of the land. If any one should assume to enter upon it by ousting him from possession, he might defend that possession not only physically, but by actions in the courts, and, if the title of the state is invalid, successfully in the courts. Even in the case of a deed to an individual purchaser on a tax sale, we have held that the Legislature may restrict or abolish the right of the owner of the land to relief in equity against the deed as a cloud on his title, since such owner, if in possession, may maintain his possession, and, if out of possession, may recover it by ejectment. *Loomis v. City of Little Falls*, 176 N. Y. 31, 68 N. E. 105. As we have not been referred to any statute authorizing a suit against the state for the matter set forth in the complaint, we are of opinion that the action cannot be maintained.

The judgment of the Appellate Division and that of the Special Term should be reversed, and the complaint dismissed, with costs in all the courts.

GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

Judgment reversed, etc.

(182 N. Y. 468)

In re DAVIS' WILL.

(Court of Appeals of New York. Oct. 17, 1905.)

1. WILLS—PROBATE—INTERVENTION BY FOREIGN ADMINISTRATOR.

Under Code Civ. Proc. § 2617, the administrator of a deceased resident of this state, appointed to represent the estate of decedent as one of the heirs at law in a foreign state

of a deceased resident of that state, is a proper party in a proceeding in New York for the probate of an alleged will of the deceased resident of the state, and entitled to intervene for the purpose of opposing the probate of such will.

2. SAME.

Where, on the probate of a will, all the facts required by Code Civ. Proc. § 2623, have been established, it is no ground for defeating the probate that the sole devisee, legatee, and executrix named therein had died before the testatrix.

Appeal from Supreme Court, Appellate Division, Third Department.

In the matter of the will of Jane Davis. From an order of the Appellate Division (93 N. Y. Supp. 1004, 105 App. Div. 221), affirming a decree (92 N. Y. Supp. 968) admitting to probate the will of Jane Davis, Robert D. Chittenden and others appeal; and from an order affirming an order permitting the administrators of the intestate appointed in another state to intervene, George W. French and others appeal. Affirmed.

See 94 N. Y. Supp. 1143.

Jane Davis, a resident of Galway, in the county of Saratoga, died on the 19th of September, 1904, leaving a last will and testament by which she devised and bequeathed all her property, both real and personal, to her sister, Della C. Davis, whom she also appointed sole executrix. The only other provision of the will was a clause revoking all former wills by her made. At the time of her death the testatrix was an heir at law and one of the next of kin of Samuel Davis, who had recently died a resident of San Francisco, Cal., and whose estate, of not less than \$2,000,000, was then under administration in that state. When the will was presented for probate to the surrogate of Saratoga county, Robert D. Chittenden, the public administrator of Fresno county, Cal., applied for permission to intervene and be made a party to the proceeding, upon the ground that on the 3d of October, 1904, he had been appointed administrator of the goods, chattels, and credits of Jane Davis in the county of Fresno, and that he had entered an appearance in the settlement of the estate of said Samuel Davis. The application, although opposed, was granted, and thereupon said administrator filed objections to the probate of the will, upon the ground, among others, that as Della C. Davis, the sole devisee, legatee, and executrix therein named, had died two years before the testatrix, the will passed no property and was ineffectual for any purpose. Probate was made, however, and an appeal was taken to the Appellate Division by the proponents of the will from the order permitting the administrator to intervene, and by the administrator from the decree of probate. Both the order and the decree were unanimously affirmed, and the unsuccessful parties appealed to this court. The Appellate Division allowed the appeal from said order, and certified the following question for determination: "Should an administrator of the

estate of a deceased person, appointed by a foreign state, under a claim that the decedent died intestate, be allowed to intervene in a proceeding for the probate of the alleged last will and testament of the said decedent pending in the courts of this state, and to oppose such probate?"

Elias H. Peters and John H. Burke, for Robert D. Chittenden. John L. Henning and Irving W. Wiswall, for Thomas M. Dungan. Edgar T. Brackett, Hiram C. Todd, and Halstead H. Frost, Jr., for George W. French et al.

VANN, J. (after stating the facts). The able opinion below leaves little for us to say, and our only reason for saying anything is that the novelty of the questions presented may make a brief expression of our views useful to the profession.

1. The right of the surrogate to make the order of intervention depends upon the Code of Civil Procedure, which, after naming the persons who must be cited upon a petition for the probate of a will, provides as follows: "Any person, although not cited, who is named as a devisee or legatee in the will propounded, or as executor, trustee, devisee or legatee in any other paper purporting to be a will of the decedent, or who is otherwise interested in sustaining or defeating the will, may appear, and, at his election, support or oppose the application. A person so appearing becomes a party to the special proceeding. But this section does not affect a right or interest of such a person unless he so becomes a party. And in case the will propounded for probate is opposed, due and timely notice of the hearing of the objections to the will shall be given, in such manner as the surrogate shall direct, to all persons in being, who would take any interest in any property under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall be so notified." Code Civ. Proc. § 2617. The statute, in authorizing a person "who is otherwise interested in sustaining or defeating the will" to appear and at his election to support or oppose its probate, means only a person who has a pecuniary interest to protect, either as an individual or in a representative capacity. An interest resting on sentiment or sympathy, or on any basis other than the gain or loss of money or its equivalent, is not sufficient; but any one who would be deprived of property in the broad sense of the word, or who would become entitled to property by the probate of a will, is authorized to appear and be heard upon the subject. Conflict of jurisdiction and delay in administration may thus be avoided. This accords with the general rule that every one may ask to be heard before a decree is made which may affect his rights, even if it does not finally deter-

mine them. Necessary parties must be brought in, and proper parties may be, upon applying in due form and season. The section is new, and in some respects formulates, but in others amplifies, the practice existing before the Code. *Foster v. Foster*, 7 Paige, 48; *Matter of Greeley*, 15 Abb. Pr. (N. S.) 393; *Estate of Bunce*, 6 Dem. Sur. 278; *Dayton on Surrogates*, 158; *Williams on Executors*, *295.

As was said by the learned surrogate in his opinion, "the right to administer the estate is a sufficient interest in this state to entitle the person in whom it is vested to contest the probate of a will." The administrator in California was authorized by a decree of the proper court in that state to take possession of the assets of the deceased in his county, to convert them into money, and to distribute the proceeds according to law. That decree was granted before any application had been made to prove the will. The assets were of great value, and the administrator had a personal interest to the extent of his fees for services already rendered, and a much more important interest as the representative of others; for, if there was no will, he had exclusive jurisdiction and control of all the personal property of the decedent in the county of Fresno, Cal., for the purpose of administration. He represented the beneficiaries, who were the substantial owners of the property. Probate of a will, however, would deprive him of power to administer and leave the validity of all his acts before he heard that there was a will open to question. He had an interest to protect and the right to become a party to the proceeding, so as to see that no paper purporting to be a will of the decedent was admitted to probate unless it was genuine and executed by a competent person according to law. The practice in this state, so far as it has been established, is in accord with these views. Thus intervention has been allowed by a legatee under a prior will, although he was neither an heir at law nor next of kin of the testator (*Turhune v. Brookfield*, 1 Redf. Sur. 220); by the executors under a prior will, even when the parties beneficially interested had released their interest (*Matter of Greeley*, 15 Abb. Prac. [N. S.] 393); by a public administrator when the decedent left no known next of kin, and by the Attorney General when he left no known heir at law (*Gombault v. Public Administrator*, 4 Bradf. Sur. 226); and by a judgment creditor of a devisee under a will, when there was a purported codicil which took away the devise (*Matter of Coryell*, 4 App. Div. 429, 39 N. Y. Supp. 508). In *Matter of Brown*, 47 Hun, 360, it was held that the receiver of the property of a judgment debtor could not contest the probate of the will of the wife of the debtor, although, if probate should be denied, the debtor would come into property

enough to pay his debts; but Judge Landon, in commenting on this case in *Matter of Coryell*, supra, pointedly said: "The difference between compelling a debtor to acquire property enough to satisfy his creditors, and disabling the creditor to protect the lien which he has already acquired upon his debtor's property, is apparent." We think that the order permitting the administrator to intervene was properly made.

2. Upon the trial before the surrogate the only ground relied upon to defeat probate of the will was the fact that the sole devisee, legatee, and executrix named therein had died before the testatrix. The surrogate was not asked to construe the will or to pass upon its effect, but to adjudge that it was not a will. It was not claimed that the instrument presented for probate was not a will in form or that it was invalid upon its face. The sole claim was that upon proof of an extrinsic fact it became apparent that the will was not effective to pass property or to appoint an executor, although it was effective as a revocation of all former wills. The Code provides that "before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution." Code Civ. Proc. § 2622. The old statute provided that the surrogate should be satisfied with the "genuineness and validity" of the will, and the limitation in the present statute is significant. Laws 1837, p. 527, c. 460, § 17. The Code further provides that: "If it appears to the surrogate that the will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint, it must be admitted to probate, as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly." Code Civ. Proc. § 2623. All these facts were duly proved and not one of them was contested. The surrogate, therefore, had no discretion but was required to admit the will to probate. The next section provides that: "If a party expressly puts in issue, before the surrogate, the validity, construction, or effect of any disposition of personal property, contained in the will of a resident of the state, executed within the state, the surrogate must determine the question, upon rendering a decree; unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in the last section." Id. § 2624. It follows by reasonable implication from this section that the surrogate had no power to refuse to admit the will to probate, unless there was a failure to prove one or more of the matters specified in section 2623. The statute contemplates that, unless the will is admitted to probate, there is no

power to construe it. Probate logically precedes construction, for otherwise there is no will to construe.

There is no authority to construe the will for the purpose of defeating probate, although it may be examined to discover its bearing upon questions relating to its execution, the capacity of the testator, and the like. Were the rule otherwise, singular results might follow. If the only disposing clause of a will should devise and bequeath all the property of the testator to a trustee for 100 years, the surrogate could not refuse to admit it to probate because the gift was void under our statutes, although it would be apparent upon the face of the instrument. It would be his duty to admit the will to probate upon due proof of the statutory requirements, and, if asked to construe it, to pass upon the validity of the gift afterward. We have a statute which provides that a devise to a child shall not lapse, even if the devisee dies before the testator, provided he leaves a descendant who survives the testator, and that such a devise shall vest in the surviving descendant the same as if the "devisee had survived the testator and had died intestate." 2 Rev. St. (1st Ed.) p. 66, pt. 2, c. 6, tit. 1, § 52. Upon the trial of a proceeding to prove a will the surrogate could not try the question of fact as to who died first, which might arise under this statute, even if the validity of the only gift in the will depended wholly upon it. The same would be true of an issue as to marriage or divorce, where the status of marriage determined the effect of the only devise or bequest. Such issues are immaterial in a proceeding to prove a will, and there is nothing in the statute, which is the exclusive source of the surrogate's authority, to show that the Legislature intended to clothe him with power to decide them. We agree with the learned Appellate Division that "the true rule of law is that when a paper, unrevoked, testamentary in character, purporting on its face to devise or bequeath real or personal property, executed according to the formalities of the statute by a person of proper age and qualifications and shown satisfactorily to be of sound mind and not under restraint, is presented to a Surrogate's Court for probate, such court has no authority, upon the question of its admission to probate, to inquire whether the provisions of the paper are ineffectual to pass title because the sole beneficiary and executor is dead and the devise or bequest has thereby lapsed, or because the provisions of the instrument are ineffectual to pass title to the person named. Any other rule would lead to confusion and to the introduction of false issues in the probate of wills."

The order appealed from should be affirmed, with costs payable out of the estate, and the question certified answered in the affirmative. The decree appealed from should

be affirmed, with costs payable by the public administrator personally.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order affirmed.

(123 N. Y. 489)

In re LONG BEACH LAND CO.

(Court of Appeals of New York. Oct. 24, 1905.)

TAXATION—REVIEW OF ASSESSMENT—STIPULATION—VALIDITY.

In certiorari to review an assessment of land claimed to be held under leases, the parties entered into a stipulation that, if the court should hold that the owner was not entitled to immediate possession, the assessment should be reduced to a specified sum. *Held*, that the court properly refused to pass on the question of the validity of the leases in such a proceeding, so that the stipulation should be disregarded, and the court should ascertain the fair value of the land on which the owner is taxable, notwithstanding the leases.

Appeal from Supreme Court, Appellate Division, Second Department.

Application of the Long Beach Land Company for writ of certiorari to William H. S. Smith and others, assessors of the town of Hempstead. From an order of the Appellate Division, affirming an order of the Special Term reducing an assessment, defendants appeal. Reversed.

The relator, the Long Beach Land Company, is the owner of a large tract of beach land situated in the town of Hempstead, Long Island. This land formerly belonged to that town, which conveyed it to the relator in 1900, and in 1904 the land and buildings were assessed at \$200,000 by the local board of assessors. The relator complains of this valuation as excessive, and has brought this proceeding to obtain a reduction thereof. It appears from the relator's petition that in the year 1880 certain persons, who claimed to act for the town of Hempstead, executed two leases, demising the land in question to one Thomas R. Sharp for the period of 50 years, at an annual rental reserved in one lease of \$300 and in the other of \$700. A corporation known as the "Long Beach Association" subsequently acquired the rights of the said Sharp in these leases. The lessee, or his assigns, erected buildings on the land; but there is nothing in the leases which gives them the right to remove such buildings at the end of the term. The relator claims that by reason of these leases it can have no actual possession of this land until the expiration of such leases in 1930, and that its income therefrom is confined to the rents reserved, amounting to \$500. The board of assessors in their return to the writ alleged that the lands were worth \$200,000 and that they regard that sum as a fair valuation. They alleged that the leases above mentioned were void; that the town

had never 'made long leases of all of said lands to Thomas R. Sharp,' as alleged in relator's petition, but, instead, that such alleged leases were made and delivered by the members of the town board of said town of Hempstead without authorization of the inhabitants of the town and in violation of law; that the said alleged leases were mere paper writings signed by individual officials, and of no legal force or effect; and that, they being null and void, the relator has the right to the present use and enjoyment of the said property." The return also contains the following stipulation: "Defendants further say that, should it be decided by the court that the petitioner has not now and is not entitled to possession and use of the premises so assessed, they would regard the sum of \$200,000 as too high a valuation to be put on the lands. If so decided by the court, they will not put the petitioner to the trouble of offering proof of value, but will consent to the entry of an order fixing the value at \$50,000." The parties have also entered into the following stipulation: "That the lands referred to in the petition and return are a part of the common lands which were of the town of Hempstead, granted by the Dongan patent and previous patents; that the alleged leases, referred to as granted by members of the town board, were never submitted to the people of the town at a town meeting after they were given; neither was the proposition to lease submitted before they were given." At Special Term the assessment was reduced to \$50,000, and its decision thereon has been affirmed by the Appellate Division.

George Wallace, for appellants. James W. Treadwell and Fred Ingraham, for respondent.

WERNER, J. (after stating the facts). Both parties concede, and the courts below have held, that the validity of the so-called leases to Sharp cannot be passed upon in this proceeding. It is obvious, however, that these leases have been considered and their validity assumed by the courts below in reducing the assessment. In the absence of other evidence, effect has been given to the stipulation contained in the return of the assessors to the effect that, if it should be decided by the court that the relator "has not now and is not entitled to possession and use of the premises, they would regard the sum of \$200,000 as too high a valuation to be put upon the lands," and would consent that the value be fixed at \$50,000. We think this stipulation should have been disregarded. The court should have proceeded, by reference or otherwise, to ascertain the fair value of the land. In their return the assessors stated that they regarded the sum of \$200,000 to be the fair value of the lands. They denied the validity of the leases, and their stipulation relating to the reduction of the assessment was qualified by the condition,

if the court should decide that the relator was not entitled to the possession of the land, in which event they regarded the sum of \$200,000 as too high a value and would consent to its being fixed at \$50,000. Since the court properly decided that it had no power in this proceeding to determine the validity of the leases, the occasion and purpose of the stipulation failed. It was limited by its terms to an event that has never occurred. When the court refused to pass upon the validity of the leases, the stipulation was no longer of any force. It is evident that the assessors did not regard the leases as valid, and they so stated in their return. They regarded the relator as entitled to the immediate possession of the premises, and upon that basis fixed the fair value thereof at \$200,000. It was only in the event that the court should hold the contrary that they consented to a reduction to \$50,000. It appears that since this application was made the Appellate Division has affirmed a decision of the County Court made in a proceeding to apportion the taxes for the previous year (1903) between the owner and the tenant, the Long Beach Association, wherein apportionment was denied. In that proceeding it was held that the relator here was the rightful owner of the buildings upon the premises (Matter of Long Beach Land Co., 101 App. Div. 159, 91 N. Y. Supp. 503), and, while that decision was rendered after the assessment in question was made and is not controlling here, it throws a strong side light upon the stipulation relied upon by the relator and explains the purpose for which it was made.

The learned counsel for the relator further contends that the deed from the town to the relator conveyed nothing to the latter except the reversionary interest remaining after the expiration of the leases, together with the rents reserved, and therefore the assessment is excessive. The answer to that contention is that the relator was the owner of the land and as such owner was subject to be taxed upon the basis of the fair value thereof, notwithstanding the existence of the leases. This situation is not changed by section 8 of the tax law (Laws 1896, p. 800, c. 908), which provides that rents reserved in leases for a term of more than 21 years shall be taxable to the person entitled to receive the same as personal property. This statute was originally enacted to remedy some of the conditions which were created by the old manorial or Van Rensselaer leases, and which gave rise to the anti-rent war, as it was called. Laws 1846, p. 466, c. 327; *City of Buffalo v. Le Couteux*, 15 N. Y. 451. Shortly after its enactment this statute was construed by the Supreme Court, and it was stated that it might in some cases result in double taxation, but the necessity and expediency of the tax was to be judged by the Legislature. *Livingston v.*

Hollenbeck, 4 Barb. 9; *Le Couteux v. Supervisors of Erie Co.*, 7 Barb. 249. It is not perceived, therefore, how this statute affects the liability of the relator to pay taxes upon the real estate in question.

It follows that the order appealed from should be reversed, and the proceeding remitted to the Special Term, with directions to proceed, either by reference or otherwise, to take proof as to the value of the lands in question, with costs to abide the final award of costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. O'BRIEN, J., absent.

Order reversed, etc.

(132 N. Y. 494)

BOWMAN v. DOMESTIC & FOREIGN MISSIONARY SOC. OF PROTESTANT EPISCOPAL CHURCH IN UNITED STATES OF AMERICA et al.

(Court of Appeals of New York. Oct. 24, 1905.)

CHARITIES—CHARITABLE BEQUEST—VALIDITY—ADMINISTRATION BY COURT.

Where testator bequeathed a sum to be divided between the "Indian Missions and the Domestic Missions of the United States," and there are no such corporations or associations, nor sufficient extrinsic evidence to identify the legatees, it is not a bequest to a specific beneficiary; but, where the evidence indicates the charitable purpose of the testatrix, it may be supported as a trust for charitable uses, to be administered by the Supreme Court.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by John P. Bowman, executor of Mary W. Jewett, against the Domestic & Foreign Missionary Society of the Protestant Episcopal Church of the United States of America and others. From a judgment of the Appellate Division (90 N. Y. Supp. 898, 100 App. Div. 29) which reversed in part a judgment (87 N. Y. Supp. 621) construing the will of Mary W. Jewett, the executor appeals. Affirmed.

John P. Bowman and Timothy J. Nighar, for appellant. Charles E. Hotchkiss, Julien T. Davies, and Charles K. Allen, for respondent.

WERNER, J. This action was brought to obtain a construction of the will of Mary W. Jewett, who died in the village of Clarkson, Monroe county, on or about April 13, 1903. The only portion thereof in controversy on this appeal is the ninth paragraph, which reads as follows: "I give, devise, and bequeath the sum of two thousand dollars, to be equally divided between the Indian Missions and Domestic Missions of the United States, in memoriam of the late Mary A. Archer." The respondent, the Domestic & Foreign Missionary Society of the Protestant Episcopal Church of the United States of

America, was duly incorporated under the laws of this state, having for its purpose the general conduct of missionary operations in all lands. This society claims to be entitled to the bequest contained in the above-quoted clause, and for that reason is made a party to the action. Upon oral evidence showing that the defendant is the only missionary organization connected with the Protestant Episcopal Church, of which the testatrix had been a lifelong and active member, the trial court held that the clause in question was void for indefiniteness, in that neither the will nor the evidence was sufficiently clear to show that the defendant was intended to be the beneficiary. The Appellate Division reversed the judgment of the trial court in this respect, and held that the defendant missionary society was described and indicated with enough accuracy to be entitled to the bequest. We think the trial court correctly held that the clause in question, even when read in connection with evidence adduced at the trial, was too indefinite to be construed as a direct bequest either to the defendant or to any other beneficiary.

But we are also of the opinion that the bequest did not fail, and that it can be supported as a trust for charitable purposes, under the provisions of chapter 701, p. 1748, of the Laws of 1893, as amended by chapter 291, p. 751, of the Laws of 1901. Section 1 of that act, which was not changed by the amendment of 1901, reads as follows: "No gift, grant, bequest or devise to religious, educational, charitable, or benevolent uses, which shall, in other respects be valid under the laws of this state, shall or be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, bequest or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the Supreme Court." The effect of this statute, as demonstrated in the case of *Allen v. Stevens*; 161 N. Y. 122, 55 N. E. 568, was to restore the ancient doctrine of charitable uses and trusts as a part of the law of this state, and the statute was designed to cover just such a case as the one at bar. The obvious purpose of the testatrix was to have this fund distributed for the benefit of domestic and Indian missions. She was a regular member, attendant, and communicant of the Protestant Episcopal Church, and actively engaged in the charitable work carried on through its instrumentality. The defendant is the organized medium through which the Protestant Episcopal Church of America carries on its missionary operations, which include work in the Western states and territories among the Indians, negroes, and white

people, and in the prosecution of which large sums are disbursed every year.

The ninth clause, supplemented by the evidence, sufficiently indicates the charitable purpose to which the testatrix desired to apply her bequest, to enable the Supreme Court, under the power derived from the statute, to administer this as a trust in which the beneficiary or trustee is not named or designated with absolute certainty or correctness. This it can do through the instrumentality of a trustee appointed by it. If that course is deemed wise, the court will doubtless be influenced in the choice of a trustee by the nature of the charity to be administered, and may appoint the defendant as the medium best adapted to accomplish the end sought.

The judgment appealed from should be modified as indicated herein, and, as thus modified, affirmed, without costs to either party as against the other.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. O'BRIEN, J., absent.

Judgment accordingly.

(132 N. Y. 499)

GREEN v. DAVIES et al.

(Court of Appeals of New York. Oct. 24, 1905.)

1. ACTION—JOINDER OF CAUSES.

Under Code Civ. Proc. § 484, a cause of action for slander cannot be united with one for malicious prosecution, even if they originated simultaneously.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Action, §§ 350, 418.]

2. SAME—SLANDER—MALICIOUS PROSECUTION.

A complaint alleged that defendants conspired to injure the plaintiff; that in pursuance of the conspiracy several defendants slandered him and fraudulently sued him for slander, in which he was arrested; that he thereby suffered damages. Held not to state a single cause of action for conspiracy, but two separate causes of action, the one for slander and the other for malicious prosecution, rendering the complaint demurrable for misjoinder.

3. LIBEL AND SLANDER—ACTIONS—JOINDER OF CAUSES.

Where several slanders are uttered in pursuance of a common agreement between the parties so to do, an action for slander is maintainable against one or more of them, and each is jointly liable with the other, so that separate causes of action may be joined in the same complaint.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 171.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Asher Green against Andrew J. Davies and others. From an order of the Appellate Division (91 N. Y. Supp. 470, 100 App. Div. 359) affirming an interlocutory judgment overruling a demurrer to the complaint, certain defendants appeal by permission. Reversed.

The following question was certified: "Does it appear upon the face of the amended complaint in this action that causes of action have been improperly united, in that, first, the cause of action against each defendant for slanders alleged in said amended complaint to have been published by him are joined therein with causes of action for slander alleged to have been published by his codefendants; and, second, the cause of action alleged in said amended complaint for the arrest of the plaintiff and for malicious abuse of legal process against the plaintiff has been joined with causes of action for the slanders alleged to have been published by the various defendants?" The nature of the action and the facts, so far as material, are stated in the opinion.

S. Livingston Samuels, for appellants.
Laurence G. Goodhart, for respondent.

CULLEN, C. J. The complaint alleges that the defendants conspired to traduce the plaintiff and injure him in his good name and reputation, and lead his intimate acquaintances and business customers to believe that the plaintiff was insane and not capable of attending to his business, and to cause the plaintiff to be imprisoned on a false charge and to wickedly abuse the process of the Supreme Court; that in pursuance of the said conspiracy several of the defendants uttered against the plaintiff several slanders, particularly set forth in the complaint, and in further pursuance of such conspiracy one of the defendants maliciously and fraudulently instituted a suit in the Supreme Court against the plaintiff for a slander alleged to have been uttered by the plaintiff against said defendant; that the plaintiff was arrested and held to bail in said action, which action was thereafter terminated in favor of the plaintiff, the defendant in said action—by which conspiracy and the acts of the defendants thereunder plaintiff suffered damage. The plaintiff also asks judgment for a further sum which he alleges he was compelled to expend in the defense of the action brought against him. To this complaint the appellants demurred on the ground that separate causes of action were improperly joined, to wit: First, a cause of action for slander and one for malicious abuse of legal process; second, a cause of action for slander uttered by one of the appellants with causes of action for slanders uttered by the other defendants. The demurrer was overruled at Special Term, and the interlocutory judgment entered on that decision was affirmed by the Appellate Division by a divided court, which has allowed an appeal to this court.

That, under section 484 of the Code of Civil Procedure, a cause of action for slander cannot be united with one for false imprisonment, even if they originated simultaneously, was held by this court in *De Wolfe v. Abraham*, 151 N. Y. 186, 45 N. E. 455. The same principle necessarily con-

demns the joinder of a cause of action for slander with one for malicious prosecution or for malicious abuse of legal process. This much was conceded by the learned courts below, but their judgments proceeded on the theory that the action was not for slander or malicious prosecution, but for conspiracy to injure the plaintiff, of which the slander and arrest were merely the overt acts done in execution of the conspiracy. We are of opinion that this doctrine is opposed to the decisions in this state and cannot be upheld. While it is true that in a criminal prosecution for conspiracy the unlawful combination and confederacy are the gist of the offense, not the overt acts done in pursuance thereof, which at common law it was not necessary to set forth in the indictment, though that rule has been changed by the statute law of this state, the doctrine does not apply to civil suits for actionable torts. In *Hutchins v. Hutchins*, 7 Hill, 104, it was said by Chief Justice Nelson, citing authorities: "The writ of conspiracy, technically speaking, did not lie at common law in any case, except where the conspiracy was to indict the party either of treason or felony, by which his life was in danger, and he had been acquitted of the indictment by verdict. All the other cases of conspiracy in the books were but actions on the case; and though it was usual to charge the conspiracy in the declaration, the averment was immaterial, and need not be proved. The action could always be brought against one defendant, or, if brought against more, one might be found guilty, and the rest acquitted." The question again arose in *Brckett v. Griswold*, 112 N. Y. 454, 20 N. E. 376, where Judge Andrews wrote: "The gravamen is fraud and damage, and not the conspiracy. * * * The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated. But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded, and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise to show the guilty participation of the defendant. * * * Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved. These principles are well settled. The opinion of Chief Justice Nelson in *Hutchins v. Hutchins*, supra, contains an elaborate consideration of the subject, and no other authority need be cited." In *Kelt v. Wyman*, 67 Hun, 337, 22 N. Y. Supp. 133, the complaint was brought against two defendants for maliciously conspiring to injure the

reputation and business credit of the plaintiff by charging and circulating among his acquaintances and customers the report that he had defrauded his former partner. On the trial the plaintiff failed to connect one of the defendants with the utterance of the slanders, but recovered judgment against the other. On appeal it was contended that the action was for conspiracy, and that the acquittal of one of the two defendants was fatal to its maintenance. This contention was overruled by the General Term of the First Department in a very clear opinion written by Judge Follett, who showed from the authorities that the gravamen of the action was not the conspiracy, but the tort.

There may be apparent exceptions to this rule, but the exceptions are more apparent than real. Such was the case of *Train v. Taylor*, 51 Hun, 215, 4 N. Y. Supp. 492. That case, as shown by Judge Follett, was rightly decided, whether the reasons given for the decision were correct or not. The action was brought against a firm and its creditor for an alleged fraud by which the members of the firm purchased goods on credit, intending not to pay for the same. They sold said goods, and with the proceeds thereof paid their co-defendant, who was their creditor. The jury found a verdict in favor of the firm, but against the creditor. This judgment was properly reversed because it was impossible that there could be any fraud on the part of the creditor unless his debtors, his codefendants, had been guilty of fraud in the purchase of the goods. There may be cases where acts committed in pursuance of a combination of a number of persons to injure a third person are actionable, while the same acts, if done by a single individual acting without such concert, would not be actionable. Such cases may be termed actions for conspiracy, but where the conspiracy results in the commission of that which would be an actionable tort, whether committed by one or by many, then the cause of action is the tort, not the conspiracy. *Buffalo Lubricating Oil Company v. Standard Oil Company*, 42 Hun, 153, and *Id.*, 106 N. Y. 669, 12 N. E. 826, is not an authority for the respondent. In that case the only point raised was that a corporation could not be guilty of conspiracy, because it was impossible that the corporation should have the malicious intent. Of that claim this court said: "It is well settled by the authorities cited that the malice and wicked intent needful to sustain such actions may be imputed to corporations." The case did not in any manner deal with the question now before us. Indeed, in the opinion delivered in the Supreme Court by Judge Barker he states: "On the trial it is not necessary to prove a conspiracy between the defendants, if one is alleged in the complaint, except for the purpose of securing a joint recovery against all."

As to the second objection to the complaint, that an action for slander can be maintained

against one person only, we are of opinion that it is not well founded. There is no decision in this state on the point, and though dicta are to be found in the old text-books and in some of the English cases which support the appellants' contention, the opinion of modern writers is against it. Odgers on Libel and Slander, p. 370. It is difficult to see on principle why there should be any such rule. The reason given by the old authorities, that a slander can be but the utterance of a single tongue, is not conclusive. Granting that only one person can speak the slander, still other persons may hire or procure him to utter it. In the case of other torts, such persons and the actual perpetrator of the act are joint tortfeasors. Thus a principal and agent may be jointly sued for the negligence of the latter. *Phelps v. Wait*, 30 N. Y. 78. There is no reason for any different rule in a slander case. We do not mean to suggest that the repetition by one person of a slander uttered by another is any part of the original slander. On the contrary, they give rise to two distinct causes of action. But, if the two slanders were uttered in pursuance of a common agreement between the parties that such slander should be uttered, then each is jointly liable with the other for their utterance, and separate causes of action for slander may be joined in the same complaint under section 484 of the Code.

The order of the Appellate Division and the interlocutory judgment of the Special Term should be reversed, and judgment rendered for the defendant on demurrer, with costs in all the courts, with leave to the plaintiff to serve an amended complaint within 20 days on the payment of such costs. Question certified answered in the affirmative.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order reversed, etc.

(123 N. Y. 1)

KOEHLER v. NEW YORK STEAM CO.

(Court of Appeals of New York. Oct. 24, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—DIRECTING VERDICT.

In an action to recover for the death of plaintiff's intestate by the bursting of a steam pipe from the alleged defective condition of the metal at the point of fracture, it is error to direct a verdict for defendant, where the evidence, though conflicting, would have warranted a finding that the defect might have been discovered by careful inspection.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, § 1029.]

2. MASTER AND SERVANT—INJURY TO SERVANT—INSPECTION.

A master is liable for the negligence of a servant to whom he has committed the duty of inspection.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 175.]

Appeal from Supreme Court, Appellate Division, First Department.

Action by Elizabeth Koehler, administratrix of John Koehler, against the New York Steam Company. Judgment for defendant was affirmed by the Appellate Division by divided court (87 N. Y. Supp. 1139, 93 App. Div. 612), and plaintiff appeals. Reversed.

This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant. The accident which caused the death occurred on the afternoon of Sunday, September 23, 1900. At that time the intestate was a laborer in the employ of the defendant, a corporation engaged in the business of supplying steam for motive and heating purposes by means of pipes laid under the streets of the city of New York. The accident occurred at the corner of Cedar and William streets. The intestate, with other laborers, was at work in a trench engaged in repairing a pipe under the direction of the defendant's foreman. While thus engaged an elbow upon another pipe owned and controlled by the defendant, and which was then charged with steam, split open, allowing the steam to escape, and scalding the deceased so badly that he died in consequence thereof a few days later. The elbow that burst was a new one, and shortly prior to the accident had been taken from the defendant's storeroom, where large numbers of similar castings were kept. Upon the trial the evidence was conflicting as to whether there was a defect in the elbow or whether a careful inspection would have disclosed such defect. The action has been tried three times. Upon the first trial the jury rendered a verdict in favor of the plaintiff. The judgment entered upon this verdict was reversed by the Appellate Division for an error in a ruling upon the evidence. 71 App. Div. 222, 75 N. Y. Supp. 597. Upon the second trial the jury again rendered a verdict in favor of the plaintiff, and again the judgment was reversed by the Appellate Division. 84 App. Div. 221, 82 N. Y. Supp. 588. Upon the third trial a verdict was directed by the court in favor of the defendant. The judgment entered thereon was affirmed by the Appellate Division by a divided court, and this appeal is from that affirmance.

Edward A. Alexander, G. Herbert Cone, Jerome H. Buck, and Ignatius Weltner, for appellant. Frank Verner Johnson, for respondent.

WERNER, J. (after stating the facts). The learned Appellate Division, in its opinion delivered upon the second appeal in this action (84 App. Div. 221, 82 N. Y. Supp. 588), held that the evidence would have warranted a jury in finding that the elbow in question was defective and that a careful inspection would have disclosed the defect. But that learned court also held that the uncontra-

dicted evidence of the defendant's employes proved that a proper inspection had been made. Upon that view of the evidence the court seems to have decided as matter of law that the defendant had fully performed its duty when it had provided the means and men for a proper inspection. To state it in a different form, the court held that although the evidence warranted the jury in finding that a defective condition existed which could have been discovered by a careful inspection, yet the defendant was not liable, since it had provided for an inspection by competent employes. In this conclusion we think the learned court below clearly erred. It has become one of the axioms of negligence law that the duty of inspection is the master's duty, and one that cannot be delegated, so as to relieve the master from responsibility. If a servant performs this duty, he is the alter ego of the master, and for any negligence in its discharge the latter is liable. This rule is well stated by Chief Judge Cullen in *McGuire v. Bell Telephone Co.*, 167 N. Y. 208, 211, 60 N. E. 433, 434, 52 L. R. A. 437, as follows: "The master personally owes to his servants the duty of using ordinary care and diligence to provide for them a reasonably safe place to work, and sound and suitable appliances and materials with which to work, and is bound to inspect and examine these things from time to time, and use ordinary care to discover and repair defects in them. Reasonable care involves proper inspection, and negligence in respect to it, in such cases as this, is the negligence of the master, and none the less so when the inspection is committed to a servant." The rule thus set forth is established by a long line of cases in this court, of which we cite only a few: *Bailey v. R. W. & O. R. R. Co.*, 139 N. Y. 302, 34 N. E. 918; *Durkin v. Sharp*, 88 N. Y. 225; *Simone v. Kirk*, 173 N. Y. 7, 13, 65 N. E. 739; *Byrne v. Eastmans Co.*, 163 N. Y. 461, 465, 57 N. E. 738; *Eastland v. Clarke*, 165 N. Y. 420, 429, 59 N. E. 202.

The evidence before the Appellate Division upon the former appeal was exactly the same as that in the record now before us, and we think it was properly held that the evidence would have warranted the jury in finding that there was a defect in the elbow which a careful inspection would have disclosed. In its opinion (84 App. Div. 224, 82 N. Y. Supp. 590) the court below said: "While the defendant's witnesses in point of numbers and weight preponderate over those brought by the plaintiff, we should hesitate to disturb this verdict if it rested entirely upon this disputed question of fact as to whether the bursting was or was not due to the original defect in the elbow or casting." An examination of the record convinces us that the Appellate Division correctly decided that the evidence was conflicting on all the material facts involved. At the time of the accident the pipe of which the elbow was a part was

subject to a pressure of 80 to 85 pounds of steam to the square inch. It is not disputed that the metal on the inside of the neck of the elbow at the point of fracture was spongy, although the claim is made that there was enough solid metal outside of this spongy portion to make the casting safe.

Viola, an expert called as a witness on behalf of plaintiff, was shown the broken elbow upon the trial, and was asked to state whether he observed any defects in it. He answered: "Yes, the lower part of this elbow is defective. Some part of this casting is spongy. * * * The outer side is a sound casting, perfectly sound, and the only defect is in the lower middle piece, the lower joint of the casting. That, I say, is spongy." He then testified that the defect that "I have observed * * * in the broken part of this elbow could have been discovered by the use of the hammer test." The hammer test consists of tapping the outside of the casting with a hammer, and the sound indicates the condition of the metal. This was assumed by both parties to be a proper method of testing the casting. In answer to a hypothetical question put to Viola, in which the facts surrounding the bursting of the elbow were set forth, he stated his opinion as to the cause of the bursting as follows: "It could only be a defect of the elbow." In answer to a question by the court as to what defect he meant, he stated: "The spongy part, which cannot stand the same pressure as the sound part." Upon cross-examination by the defendant's counsel he testified: "In all castings sponginess on the interior can happen, but not always. I know that this metal is cast in a mold with sand, and that the part around the sand cools first and forms a shell there, and the inside cools later. When the inside of the iron cools, it contracts somewhat, and the inside contracting is likely to draw away a little from the outside shell at times." Moldenke, another expert called on behalf of plaintiff, also pointed out this spongy condition as a defect, and stated that in his opinion this defect was the cause of the bursting. He further stated that "under the circumstances a 10 pound pressure was sufficient to break this elbow in the condition that I find it here." Upon cross-examination he testified: "In casting iron in any form whatsoever there are always chances that there will be some blow holes, or sand holes, or something of that kind, in the castings, and that happens, to some extent, in all castings, and it should be carefully watched so that it should not happen. It has to be watched to some extent, not in almost all castings. It only happens when the iron is not of the right quality, or the mold is not right, or some cause that can be avoided with proper management. In casting a solid piece of metal the outside of that metal cools first, and that forms a hard shell, and the inside cools a little later usually, and that contracts somewhat, and that would have the effect of making a slight

spongy appearance upon the inside at times if it were left to do so. That is not the practical result which we find very frequently in casting if it is handled right. If the casting is fed properly, the liquid interior is refed or replenished, so that it sets just as sound as the outside. That is one of the causes of the spongy appearance. I have had occasion to break open any number of castings of this particular form and shape, and I know, as matter of fact, that where a casting is made in the form of an elbow like this, and the iron is molded into this particular shape, that a slight sponginess frequently appears in this particular portion of the casting." Upon redirect examination he was asked how he arrived at the conclusion as to what pressure would break open a spongy elbow, and he replied: "The reason goes into the constitution of the iron. We have here a spongy portion of the iron. We know that when pressure is applied to a piece of cast iron of this nature that the pressure will get between the crystals and separate them one by one quietly. Then we have a weak spot here, and perhaps a pressure of 10 pounds to the square inch may be sufficient to separate the crystals. Naturally, cracks form, and then steam escapes, and it breaks a hundred times easier than a sound one would. * * *

In other words, there may be something acting—my experience shows that there is something acting—on the spongy part, which makes it absolutely weak in that spot. It may take years to show it, or it may take half an hour. But when it is finally through the steam escapes, then you have an opening, and it is only a matter of time when it bursts. That is my opinion, as far as I know. So the question of pounds to the square inch does not cut a figure in this thing at all." This evidence on the part of the plaintiff is supplemented by the testimony of the defendant's witness Johnson, who was a machinist in the employ of the defendant, and was called by it as a witness. He testified that it was part of his duties to test castings with a hammer. Upon cross-examination by plaintiff's counsel, he stated: "The narrow part of plaintiff's Exhibit C (the elbow in question) at one end is spongy. It is a weak spot. I consider that a weak spot."

It is unnecessary to go at length into the testimony adduced on behalf of the defendant, for it is apparent that the evidence on behalf of the plaintiff above referred to was sufficient to create an issue of fact upon the vital question whether there was a defect in the elbow which a reasonably careful inspection would have disclosed. It is sufficient to say that the evidence of the defendant's employees and experts tended to show that the elbow in question had been examined by means of the hammer test, that the defect was not discoverable by means of that test, that the casting was considerably heavier than those which were then ordinarily used for the same purpose, that there was a sufficient thickness

of solid iron outside of this spongy portion to make the elbow safe, and that the iron of which it was made was of sufficient strength to withstand a pressure of at least 1,500 pounds to the square inch. The credibility of these witnesses and the weight of their testimony were, of course, matters for the consideration of the jury, in the light of the plaintiff's experts, Viola and Moldenke, to the effect that the amount of pressure a casting may stand for a given time is not necessarily an indication of its actual condition, since a spongy spot may yield to pressure quite suddenly or disintegrate by degrees.

In disposing of this case it is to be borne in mind that this is a directed verdict, and the appellant is not only entitled to the most favorable inferences deducible from the evidence, but all the disputed facts are to be treated as established in her favor. *Higgins v. Eagleton*, 155 N. Y. 466, 50 N. E. 287; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 347, 60 N. E. 632; *Waldron v. Fargo*, 170 N. Y. 130, 62 N. E. 1077; *Sundheimer v. City of New York*, 176 N. Y. 495, 68 N. E. 867. There was also some slight evidence tending to show that, between the time when the elbow was placed in position and the time of the accident, marks or dents were made on the elbow. It was argued that these dents might have been made by the workmen in the process of handing tools to the laborers in the trench, and that the bursting of the elbow might have been caused by a violent blow upon the pipe while under pressure. But these are mere suggestions which seem to have no substantial support in the evidence. All that can be said upon that point, in any event, is that this also may have been a question of fact for the jury. There is no affirmative evidence as to the conduct of plaintiff's intestate, but the circumstances disclosed by the whole case are such as to clearly make the question of his alleged contributory negligence one of fact for the jury.

The judgment of the Appellate Division and that of the trial court should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. O'BRIEN, J., absent.

Judgment reversed.

(133 N. Y. 9)

PEOPLE ex rel. MOLLER et al. v. O'DONNEL et al., Commissioners of Taxes, etc. (Court of Appeals of New York. Oct. 24, 1905.)
TAXATION—SEPARATE TAX DISTRICTS—PROPERTY IN HANDS OF EXECUTORS—ASSESSMENT.

Under Laws 1896, p. 800, c. 908, § 8, providing that every person shall be taxed in the tax district where he resides for all personalty owned by him or under his control as trustee or executor,

and that, where property is in the possession of two or more persons as executors or trustees, each shall be taxed for an equal portion thereof, each borough of the city of New York must be considered a separate tax district, and an assessment for personalty in the borough of the Bronx against two executors and trustees, one of whom resides in the borough of Manhattan, is invalid against such executor, and he is entitled to its cancellation as to his half thereof.

Bartlett and Haight, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the people, on the relation of Emma L. Moller and others, executors of Joseph H. Godwin, against Frank A. O'Donnell and others, commissioners of taxes and assessments of the city of New York. From a judgment of the Appellate Division (94 N. Y. Supp. 884, 106 App. Div. 528) reversing an order of the Special Term denying a motion to quash a writ of certiorari, plaintiff appealed. Reversed.

Howard R. Bayne and Arthur M. Silber, for appellants. John J. Delany, Corp. Counsel (George S. Coleman and E. Crosby Kindlerberger, of counsel), for respondents.

CULLEN, C. J. The relators, executors and trustees of the will of Joseph H. Godwin, deceased, resided in the city of New York, the relator Moller in the borough of the Bronx and the relator Smith in the borough of Manhattan. In 1904 the relator Smith, as such executor and trustee, was assessed for personalty at the sum of \$150,000, the tax on which he paid. The same year both relators, as executors and trustees, were assessed in the borough of the Bronx at the sum of \$150,000. The relators thereupon obtained a writ of certiorari for the purpose of canceling or reducing the assessment made upon them in the Bronx. A motion made to set aside the writ on the ground that the assessment was regular and valid was denied by the Special Term. The order of the Special Term was reversed by the Appellate Division and the motion to set aside the writ granted.

While it may be true that under the definition of a "tax district" found in section 2 of the tax law (Laws 1896, p. 794, c. 908) the whole city constitutes but a single district, because the assessments in the several boroughs by the deputy tax commissioners are made subject to the direction and supervision of the board of taxes and assessments, it is nevertheless plain that under the provisions of the charter of the city (chapter 17 [Laws 1901, p. 376, c. 466]) a valid assessment for personalty, against a resident other than a corporation, possibly, can be made only in the borough in which the taxpayer resides. Section 892 of the charter provides that in each borough office of the department there shall be entered in "the annual record of the assessed valuation of real and personal estate of the borough" the assessed valuation of the property within the limits of the borough,

which book shall be open for public inspection, examination, and correction. Previous to the time for opening the said books for inspection, the fact that the books are to be opened must be advertised in the City Record and in one or more newspapers published in the borough. Section 894 provides that there shall be entered in each borough the names of the persons or corporations subject to taxation, and that, if at any time prior to the 1st of May in any year it shall appear to the tax commissioners that a person assessed for taxation on personal estate on the books or rolls of one borough should have been assessed therefor on the books or rolls of another borough, they shall forthwith cause the assessment to be canceled and a new assessment to be made in the proper borough, and within five days thereafter cause written notice of the new assessment to be mailed to the taxpayer at his residence or business address. Ever since the case of *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, it has been the settled law of this state that for the imposition of a valid tax it is necessary that the taxpayer have notice of his assessment, in order that, if aggrieved, he may have a hearing and an opportunity to obtain relief. In the case of the ordinary annual taxes the taxpayer must take notice of the provisions of the statute prescribing the time when the assessment books are open for inspection. He must examine the books and discover for himself whether he has been erroneously or excessively assessed for taxation. It was never intended, however, that the citizen should be compelled to examine the assessment books of each of the five boroughs in order to protect himself from improper taxation. This is made manifest by the provision of section 894, already quoted, which prescribes the course of procedure when "a person assessed for taxation on personal estate on the books or rolls of one borough should have been assessed therefor on the books or rolls of another borough," which necessarily implies that there is only one borough in which the taxpayer can be properly assessed for personalty; that is to say, the borough of his residence. If an assessment in a different borough is valid, why the provision for a new assessment in the proper borough and why the requirement for notice to the taxpayer of the new assessment? Therefore, conceding that for many purposes the whole city should be deemed to constitute but a single tax district, it is clear that each borough should be considered a separate tax district so far as are involved the provisions of section 8 of the tax law, which enact that every person shall be taxed in the tax district where he resides for all personal property owned by him or under his control as trustee or executor. The learned Appellate Division of the First Department has substantially held this very doctrine in the recent case of *People ex rel. Wood v. O'Donnell*, 107 App.

Div. —, 96 N. Y. Supp. —. The section further enacts that where the property is in the possession of two or more persons as executors or trustees each shall be taxed for an equal portion of the property held by them. It follows that each of the relators should have been assessed in the borough of his residence for one-half of the estate. The assessment against the relator Smith in the borough of Manhattan was, therefore, regular and valid, but that assessment is not here in dispute; the tax thereon having been paid by the relators without question.

Under these views the assessment against the relator Smith in the borough of the Bronx was invalid, and that relator is certainly entitled to have the assessment canceled as to him. The assessment, however, was made against both Smith and Moller at the sum of \$150,000. We have recently held in *People ex rel. Kellogg v. Wells*, 182 N. Y. 314, 74 N. E. 879, that such an assessment necessarily imports a valuation of the whole estate at the amount assessed, and can be sustained against the individual over whom the assessors had jurisdiction only to his aliquot share of the total valuation. In that case two executors, one of whom was a nonresident of the state, were jointly assessed for \$50,000. It was decided that the assessment could be sustained against the resident executor only to the extent of \$25,000. If we are correct in the view that the boroughs of the city of New York are to be deemed separate tax districts within the provisions of section 8, p. 800, of the tax law hitherto stated, then no sound distinction can be drawn between that case and the case now before us. It is said there is an inconsistency between the assessment of one-half an estate in one borough at \$150,000 and the other half at \$75,000 in another borough. Doubtless this is so, but such a result often follows. Had one of these relators lived in Niagara county, while the other lived in New York, it is not only entirely possible, but by no means improbable, that the assessments of the two counties would have been for different sums, though theoretically they should have been the same. It is always possible, if not likely, that this may occur where the same fact is to be determined by tribunals composed of different persons.

The order of the Appellate Division should be reversed, the assessment against the relator Smith canceled and that against the relator Moller reduced to \$75,000, with costs to the appellants in all courts.

GRAY, VANN, and WERNER, JJ., concur. BARTLETT and HAIGHT, JJ., dissent from so much of the judgment as reduces the assessment on relator Moller. O'BRIEN, J., absent.

Order reversed, etc.

(217 Ill. 180)

CITY OF CHICAGO v. HOGBERG et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. DEDICATION—PLAT—CONSTRUCTION.

In construing a plat, the rules applicable in construing deeds apply, and any conflict on the plat, and all doubts as to the meaning thereof, are to be construed most strongly against the dedicator.

2. SAME—ALLEY—RESERVATION OF TITLE.

Where, on a plat, dotted lines are used as a continuation of the lot lines, crossing the space at the rear of the lots marked "Private Alley," it shows that it was the intent to pass to the purchasers of the corresponding lots the space between the dotted lines, subject to an easement in favor of the lot owners, and not that the dedicator intended to reserve to herself the fee in the strip.

3. EASEMENT—ABANDONMENT—REVERSION.

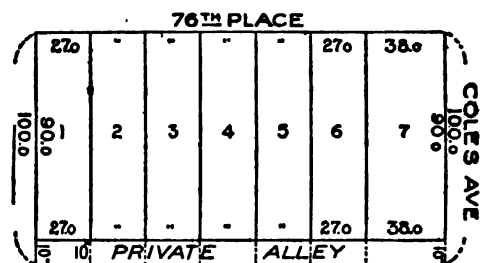
Where owners of lots have title to an alley subject to an easement, and agree to abandon the alley, and inclose the same with their lots, each lot owner becomes seized of the absolute title to his entire lot including the portion of the alley so inclosed.

Appeal from Circuit Court, Cook County; Julian W. Mack, Judge.

Bill by Charles E. Hogberg and others against the city of Chicago. Decree for plaintiffs, and defendant appeals. Affirmed.

Michael F. Sullivan (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Samuel B. Wringer, for appellees.

BOGGS, J. The appellees filed their bill in chancery in the circuit court of Cook county for a decree canceling certain alleged clouds on the title of the appellees, respectively, to seven lots in the city of Chicago, shown on a plat hereinafter set out. On the 24th day of March, 1893, Irene Poorbaugh, who was then the owner of a certain tract of land composed of adjoining parts of lots in the city of Chicago, resubdivided and platted the tract, as shown on the following plat:



She subsequently sold all of the lots to different purchasers, describing each lot according to the number given it on the plat, making no reference in any of the deeds to the 10-foot strip marked "Private Alley," as shown on the plat.

The contention of the appellant city is, that the respective owners of the various lots acquired title in fee to a lot 90 feet in length and only an implied easement in the strip designated "Private Alley" on the plat, based upon the representations of the plat,

and that the fee in the strip remained in said Irene Poorbaugh, the dedicator; that the purchasers of the lots, by an express agreement between themselves and by their acts, demonstrated, and intended by their acts to abandon the easement entirely, and appropriate the strip marked "Private Alley" to the exclusive individual use of the lot owners, respectively, each taking so much thereof as abutted on his or her lot; that the effect of the abandonment of the easement was to relieve the estate in fee in the strip which, as the city claims, rested in the dedicator, from the burden of the easement, whereupon the title in fee simple absolute rested in the dedicator, Irene Poorbaugh, and that she, together with her husband, after the abandonment of the easement, conveyed the strip of land to one Celia A. York, who caused the same to be platted as a public alley, and dedicated the same to the appellant city, and the dedication was accepted. The city, on this theory of the construction of the plat, claims to be the owner of the fee in the strip in trust for the use of the public. The position of the appellees is, that the respective conveyances made by Irene Poorbaugh of the different lots invested the grantees in such deeds with title in fee to a lot 100 feet in length, subject, as to 10 feet of the length thereof, to the easement of a private right of way or alley as laid off by the dedicator for the benefit of the owners of each of the other lots, respectively; that such easement was only for the enjoyment and benefit of the owners of the lots shown on the plat, and that it was their right and privilege to mutually abandon and abrogate the same; that they did so, by mutual consent and agreement, abrogate the easement, and that thereupon each lot owner became the owner in fee simple of the whole of his or her lot, being of the length of 100 feet, and that the conveyance executed by Irene Carpenter (née Poorbaugh), purporting to convey the 10-foot strip to Celia A. York, and the execution by said Celia A. York of the plat of the said 10-foot strip, and dedicating it to the appellant city as a public alley, constituted clouds on the title of the appellees as the owners, respectively, of the said 10-foot strip. The chancellor, on a hearing, sustained the contention of the appellees, and the city has prosecuted this appeal.

We think the conclusion reached by the chancellor correct. The dedicator owned parts of adjoining tracts or lots of land comprising a connected body 200 feet in width on Seventy-Sixth place and 100 feet in depth on Coles avenue. She caused the entire body of land to be platted. Whether the proper construction of the plat is that the lots were platted 90 feet in length, and the dedicator provided for the use of the owners of the lots a way over the remainder of the lands owned by her of the width of 10 feet, the title to which she reserved, or

whether the plat should be construed to show lots 100 feet in length, with the easement of a private way over the rear 10 feet of each lot, is the question to be determined. In construing the plat, the rule applicable in construing deeds applies, and any conflict appearing on the plat, and all doubts as to the meaning thereof, are to be construed most strongly against the dedicator and most favorably to her grantees. *Ely v. Brown*, 183 Ill. 575, 56 N. E. 181. In *Elliott on Roads & Streets* (section 119), the author says, that, in construing maps and plats, it is a safe general rule to resolve doubts against the donor, within reasonable limits.

The curved dotted line at the street corner of lot No. 7, and a like curved dotted line extending outward from the outermost corner of the strip marked "Private Alley," at the bottom of the plat, and the figures "100" between the points of these two curved lines, and like curved dotted lines and the figures "100" between them at the other side of the plat, demonstrate that the entire 100 feet is included in the plat, and indicate quite strongly that the lots were to be of the length of 100 feet. The numbers of the lots are placed in a space surrounded by continuous lines 90 feet in length and 27 feet in breadth, except lot 7, which is 38 feet in breadth, but at the end of each of the continuous dividing lines we find a dotted line extending from the continuous lines across the space marked "Private Alley." The outer boundary lines of lots 1 and 7, at the easterly and westerly margins of the plat, are continued by dotted lines across the respective ends of the strip. Had the dedicator intended to limit the length of the lots to 90 feet and to reserve to herself the fee in the 10-foot strip, burdened with the easement of the private alley, the dotted lines across the strip marked "Private Alley" and dividing that strip into as many different parts as there were lots shown on the plat, and of the same width as the lots, would not, it seems to us, have been marked on the plat. The dotted lines are, as we think the plat is to be understood, continuations of the lot lines, and indicate that the owner of each lot, respectively, has some individual interest in the portion included within the dotted lines of his lot as extended across the alley. They were not intended to indicate that the respective lot owners were entitled to the exclusive right of possession of that portion of the private alley between the dotted lines, for the alley, throughout its whole length and breadth, was clearly intended for the equal use of all of the lot owners. Yet the dotted lines were placed on the plat for some purpose and must be given some meaning. We entertain the view the dedicator intended by the use of the continuous lines to indicate those portions of the respective lots in which the lot owners had full and complete ownership, and an

Temple street between blocks 7 and 8, upon the west line of Walnut street, and said Temple street between blocks 7 and 8 is occupied by said mill ponds, with the exception of a strip some eight feet wide upon the north line of said street, which strip, together with the adjoining lands west of Walnut street in blocks 7 and 8, has been used in connection with the mill for pasturing stock and for agricultural purposes. The appellant is the owner of all of blocks 1, 2, 7, 8, and 9 of said addition, with the exception of the northeast corner of block 2 and the southwest corner of block 7. In 1908 the appellant filed a deed of vacation, under the statute, in the office of the recorder of deeds of St. Clair county, of all of blocks 7 and 8 and the west half of blocks 1 and 2, whereby it declared that portion of Mill addition to Urbana, including the streets and alleys, to be vacated. Prior to the commencement of this suit the appellant had been notified by the appellee to remove the fence and other obstructions from Temple street west of Walnut street, and suit had been commenced against it, and it was threatened with a prosecution under the ordinances of said village for obstructing said street. The question here presented for decision is whether the title to Temple street west of Walnut street, in Mill addition to Urbana, at the time of the commencement of this suit was in the appellant or the appellee, and whether the appellee had the right to require appellant to open the same to the public for travel, by requiring it to remove its fences, mill ponds, and other obstructions therefrom.

It is well settled in this state that the filing of a statutory plat, and its acceptance by the municipality, vest the legal title to the streets and alleys designated upon the plat in the municipality, and that a sale of lots by the proprietor in accordance with such plat entitles the purchaser to have the streets and alleys shown upon the plat remain open. In such case, however, in order to vest the title to the streets and alleys in the municipality, there must be an acceptance of the plat by the municipality. *Littler v. City of Lincoln*, 106 Ill. 353; *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191. In the latter case, on page 534 of 166 Ill., page 191 of 47 N. E., the court said: "Until acceptance of a proposed dedication by the municipal authorities of a city or town, although the original proprietor may be estopped to deny a dedication of the streets and alleys as against intervening rights, his acts in platting an addition to the city or town and acknowledging and recording such plat are in the nature of a mere offer to the municipality, and until the proper authorities accept the dedication they cannot be bound, by mandamus or otherwise, to open or improve the streets, and until such acceptance they can have no right in the streets, as trustees or otherwise, and that an acceptance of the dedication

cannot be presumed from mere proof of the execution and recording of the plat." It is contended that the village took possession of Temple street east of Walnut street, and that such act of the village should be held to be an acceptance on its part of the entire street. That result does not follow. *Jordan v. City of Chenoa*, supra; *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774. In the *Drexel* Case, on page 109, of 141 Ill., page 781 of 30 N. E., it was said: "It is also urged that the acceptance by the municipal authorities of the town of Lake View of other streets in said Hundley's subdivision is to be regarded as a constructive acceptance of a street over the strip of land in question. The rule, which seems to be abundantly supported by the authorities, is that, when a person in platting property maps out streets thereon, the authorities may accept them in whole or in part. An acceptance of a part is no acceptance of the whole." It is also said that said Mill addition is within the corporate limits of the village, and from that fact the village will be held to have accepted all the streets shown upon said plat. Such is not the law. *Russell v. Chicago & Milwaukee Electric Railway Co.*, 205 Ill. 155, 68 N. E. 727. In that case, on page 166 of 205 Ill., page 731 of 68 N. E., the court said: "It is said, however, by appellees that prior to the filing of the bill in this case Highland Park * * * extended its city limits by taking in the whole addition in which the avenue in question is located. The mere acceptance of the plat by the municipal authorities and the inclusion of the territory covered by the plat within the limits of the municipality was not an acceptance of the dedication of the streets and passageways shown upon the plat. The municipality still had the right to elect what streets shown upon the plat should become public highways and public charges upon the municipality with reference to their maintenance." The position is taken by appellant that no acceptance of said street having been shown prior to the execution and recording of said deed of vacation in 1908, the offer of dedication contained in the recorded plat was by the deed of vacation withdrawn, and the village could not accept the offer to dedicate subsequent to the date of said vacation deed. This position would be sound if the vacation of that part of the plat were valid. The deed of vacation covered all of blocks 7 and 8 and the west half of blocks 1 and 2. The appellant, however, did not own all of said block 7 at the time of the execution of said deed of vacation, and under the authority of *Littler v. City of Lincoln*, supra, and *Chicago Anderson Pressed Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756, its deed of vacation for that reason was invalid and did not have the effect to withdraw the offer of dedication made at

the time the plat was executed and recorded.

We think, however, this record shows conclusively that prior to the attempt, in 1902, to open Temple street west of Walnut street the village had abandoned that portion of the street by nonuser. The plat was made in 1854, and for about 50 years prior to the commencement of this suit Temple street west of Walnut street remained closed to the public. While the statute of limitations would not run against the village (*Russell v. City of Lincoln*, 200 Ill. 511, 85 N. E. 1088) during that time, the defense of equitable estoppel by reason of the abandonment consequent upon nonuser we think properly invoked by the appellant. The appellant and its predecessor in title, about the time the Mill addition plat was filed for record, commenced to improve the property adjacent to the west end of Temple street for milling purposes. A mill and other buildings were erected on the southwest corner of block 2, and upon the north half of block 7 two mill ponds were excavated, in which was collected the water used in the mill. These excavations were gradually extended north, and deepened, until they included substantially all of Temple street between blocks 7 and 8 and west of Walnut street. The premises west of Walnut street were fenced, and the public were excluded therefrom except through a gate. These conditions were acquiesced in by the village for so long a time that to require the appellant to now reconstruct its mill ponds and rearrange its yards, which would cost it a considerable amount of money, would clearly be inequitable. In *Jordan v. City of Chenoa*, supra, the alley in question had been fenced up by Jordan for more than 21 years. "He had trees growing in the alley, a house standing on a part of it, and a hedge fence growing across the end of it." The court reviewed the cases of *City of Peoria v. Johnston*, 56 Ill. 45; *Village of Winnetka v. Prouty*, 107 Ill. 218, and *Village of Auburn v. Goodwin*, 128 Ill. 57, 21 N. E. 212, and held that the city had by nonuser abandoned the alley, and that it was equitably estopped to open the same. Here the mill ponds of the appellant, found in the street in question, are more permanent in character than were the improvements in the *Jordan Case*, namely, the hedge fence and house and growing trees. We think this case falls within the rule announced in that case and many other cases decided by this court, and that in view of the long space of time which has intervened in this case between the filing of the plat of the Mill addition and the attempt to open said street, and in view of the improvements made upon said street by the appellant, the village of Freeburg should be held to be equitably estopped to claim title to said street.

The decree of the circuit court will therefore be reversed, and the cause remanded to

that court, with directions to enter a decree in accordance with the views herein expressed.

Reversed and remanded.

(217 Ill. 577)

STREATOR INDEPENDENT TELEPHONE CO. v. CONTINENTAL TELEPHONE CONST. CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—ESTOPPEL TO ALLEGE ERROR—ASSENT TO PROCEEDING.

Where defendant introduces evidence after motion to direct verdict was overruled, and does not renew such motion at the close of the evidence, the question whether the evidence tended to prove plaintiff's case cannot be reviewed.

2. CORPORATIONS—CONTRACTS OF PROMOTERS.

Where a telephone company received a telephone exchange, including additional lines, materials, and tools, after it was fully incorporated under a contract made before the organization of the company by its promoters, it is liable for the value of the property received.

3. WORK AND LABOR—ACTIONS.

In assumpsit for extra work, specifications of original contract are properly excluded.

4. WITNESSES—CROSS-EXAMINATION.

In a suit to recover the specific contract price for work done, a cross-examination into the cost of constructing the work is properly disallowed, where there was no direct examination on such question.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 949.]

Appeal from Appellate Court, First District.

Action by the Continental Telephone Construction Company against the Streator Independent Telephone Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

This was an action of assumpsit, commenced by the appellee against the appellant, Alfred W. Stromberg, and Charles W. Stiger, to recover a balance due upon account for extras, materials, labor, tools, etc., furnished by appellee to Alfred W. Stromberg and others, the promoters of the appellant corporation, in constructing a telephone exchange in the city of Streator, which telephone exchange, with its appurtenances, was turned over to the appellant after it was fully incorporated, and which account the appellant, after its organization, assumed and agreed to pay. The declaration consisted of the common counts. The general issue was filed, also a plea denying joint liability. At the close of the plaintiff's evidence, the defendant moved the court to peremptorily instruct the jury to return a verdict in its favor, whereupon the plaintiff dismissed as to Stromberg and Stiger, and the motion was denied. Thereupon the defendant introduced proofs in defense of the action, and the jury were instructed generally as to the law of the case upon behalf of both the plaintiff and defendant; but the motion for a peremptory instruction was not renewed on behalf of the defendant. The jury returned a

verdict of \$5,773.03 in favor of the plaintiff, upon which verdict, after a remittitur of \$477.70 had been entered by the plaintiff, the court rendered judgment in its favor for the sum of \$5,295.33, which judgment has been affirmed by the Appellate Court for the First District, and a further appeal has been prosecuted to this court.

Hosea W. Wells, for appellant. Warvelle & Clithero, for appellee.

HAND, J. (after stating the facts). It is assigned as error that the court erred in declining to take the case from the jury at the close of the plaintiff's evidence, and the defendant seeks by such assignment to raise in this court the question that the evidence, as a matter of law, does not tend to prove a cause of action against the defendant. This court has frequently held that, in order to raise the question of law in this court whether the evidence tends to support the plaintiff's cause of action, it is necessary that a motion for a peremptory instruction be made at the close of all the evidence, and that such motion, made at the close of the plaintiff's evidence, when evidence is afterwards introduced on behalf of the defendant, does not preserve such question for review; that by introducing evidence after such motion has been made and overruled the defendant waives his motion, and cannot have the benefit thereof, unless he renews the same at the close of all the evidence. *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Hewitt*, 202 Ill. 28, 66 N. E. 829; *Chicago Union Traction Co. v. O'Donnell*, 211 Ill. 349, 71 N. E. 1015. The question of law, therefore, whether the evidence tended to support the plaintiff's cause of action, is not presented for review upon this record, and cannot be considered by this court.

It is also assigned as error that the court misdirected the jury as to the law. The only criticism made upon the instructions given for the plaintiff, found in the original brief filed upon behalf of the appellant, is with reference to the fifth, which is to the effect that there is no evidence in the record upon which to base the same. That instruction informed the jury that if they believed, from the evidence, that the defendant assumed, after its complete organization, the obligations of its organizers for the building of its exchange, etc., then they should find the issues for the plaintiff. It appears from the undisputed evidence that, prior to the execution of the original contract for the construction of said telephone exchange, said Stromberg and others acting with him had taken steps to organize the appellant corporation and to obtain a franchise to construct said telephone exchange in said city; that while the organization of the corporation was in progress the promoters thereof entered into a contract with the appellee to construct said telephone exchange, and subse-

quently to install in connection therewith certain additional lines, which exchange and additional lines were installed and in operation and paid for by the promoters of the enterprise prior to July 1, 1901; that subsequent to that date, and at the request of Stromberg and the parties acting with him, appellee installed 53 additional lines at an agreed price of \$79 per line; that the exchange, including the additional lines, was operated by appellee in the name of the appellant corporation from July 1 to September 13, 1901; that on the last date the telephone exchange, including said additional lines and certain materials and tools, together with the earnings of the exchange from July 1st to September 13th, less operating expenses, was turned over to the appellant; that an account was subsequently rendered by the appellee to the appellant for the balance due it for the construction of said 53 additional lines and said materials and tools; that appellant made no objection to the account for some months, but, after several accounts had been rendered, claimed to be entitled to an offset for a small amount against the claim of appellee. This evidence fairly tended to show that the appellant received said telephone exchange, including said additional lines, materials, and tools, after it was fully incorporated. This case, therefore, differs from the cases relied upon by appellant, which were attempts to hold a corporation liable for debts created by its promoters, and not for the value of property which it had received after it was completely organized. We think the evidence sufficient upon which to base the instruction complained of.

It is further assigned as error that the court erred in excluding certain specifications as to the manner in which the work of erecting the telephone system, of which the extras sued for formed a part, was to be done. The specifications offered were not identified, appeared to have been mutilated, were unsigned, and showed upon their face they were to be used in the construction of a system other than the telephone system of appellant. The appellee sought to recover for work not covered by the original contract, and which the specifications, even though properly identified, did not apply to. We think the court did not err in excluding the same.

It is also urged that the appellant was unduly limited in its cross-examination of appellee's witnesses. The appellee sought to recover for erecting 53 extra lines of telephone at a contract price of \$79 per line. The appellant, when the witnesses of appellee who swore to the contract for erecting said extra lines at \$79 per line were on the stand, sought to cross-examine them as to the material which went into said lines and the cost of their construction. The suit was brought to recover a specific contract price for constructing said extra lines, and not to

recover the value of constructing the same. The appellee had not gone into the cost of construction, but relied upon an express contract price for each line. The appellant could not, upon cross-examination, therefore, inquire into matters pertaining to the cost of said lines; and the trial court did not err in limiting the cross-examination to matters properly brought out on the direct examination.

We find no reversible error in this record. The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(217 Ill. 471)

MALKAN v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INTOXICATING LIQUORS—MUNICIPAL REGULATION—DISCRETION OF CITY.

Starr & C. Ann. St. 1890, c. 24, par. 63, empowering city councils to license, regulate, and prohibit the selling or giving away of intoxicating liquors, leaves it purely discretionary with the city whether or not it will prohibit the sale of liquors or license and regulate the traffic therein.

2. SAME—LICENSES—CONCLUSIVENESS ON LICENSEE.

A dramshop keeper, who accepts a license embracing a provision authorizing its revocation by the mayor at his discretion, is bound by such provision.

3. SAME—REVOCATION OF LICENSE.

The act of the mayor of a city in revoking a liquor license on the ground that the licensee was running two dramshops under the same license was not arbitrary.

4. SAME—LICENSES—CONSTRUCTION.

A municipal license authorizing the maintenance of a saloon at a certain street and number does not entitle the licensee to run one saloon in the basement of the building and another entirely independent saloon, having a separate street door and no inside connection, on the first floor.

Appeal from Appellate Court, First District.

Action by Phillip Malkan against the city of Chicago and another. From a judgment of the Appellate Court, reversing a judgment for plaintiff against defendant city, plaintiff appeals. Affirmed.

This is an action of assumpsit, begun on October 30, 1900, in the circuit court of Cook county by the appellant against the appellee, to recover the sum of \$219.95 alleged to have been unlawfully exacted by appellee from appellant as a license fee for a certain basement saloon at 178 Quincy street, in the city of Chicago, from May 1, 1897, to October 8, 1897, by threatening to close up appellant's business at once unless he paid said license fee, which fee is alleged to have been paid by appellant under duress, and also to recover damages arising out of the alleged loss of money expended in fitting up said saloon, and for alleged decrease in the value of appellant's lease of said premises by reason of the closing of the basement saloon, which was closed up shortly after the payment of said fee. The suit was

originally brought against appellee, the city of Chicago, and one Joseph S. Martin, the city collector at that time. The declaration was demurred to, and subsequently amended on December 7, 1902. The plea of the general issue was filed by the defendant on December 9, 1902. The cause was tried before the court and a jury. At the close of the evidence of the appellant, the plaintiff below, the trial judge, at the request of the defendant gave an instruction in writing to the jury to find the issues for the defendant Joseph S. Martin, but refused to give a similar instruction in writing to the jury to find the issues for the defendant the city of Chicago. The latter instruction was refused, and exception was taken thereto by the city of Chicago. At the close of all the evidence the defendant below, the city of Chicago, submitted to the court a written instruction to the jury to find the issues for defendant the city of Chicago. This instruction was refused, and exception was taken to such refusal by the city. Thereupon the trial judge, on the motion of the present appellant, plaintiff below, instructed the jury to find the issues for appellant, plaintiff below, and assess the latter's damages at the sum of \$287.70, being said sum of \$219.95 and interest thereon, whereupon defendant below, by its counsel, then and there duly excepted. Accordingly the jury rendered a verdict on January 5, 1904, finding the issues for the defendant Joseph S. Martin, and finding the issues for the appellant, and assessing the latter's damages at the sum of \$287.70. An appeal was taken to the Appellate Court.

The Appellate Court has rendered a judgment, reversing the judgment of the circuit court without remanding the cause, and in its judgment making a finding of facts. The present appeal is prosecuted from such judgment of reversal entered by the Appellate Court; the latter court granting a certificate of importance. In the judgment of the Appellate Court, entered on April 10, 1905, after ordering that the judgment of the circuit court "be reversed, annulled, set aside, and wholly for nothing esteemed," the following finding of facts is made by the Appellate Court: "Appellee [the then appellee in the Appellate Court is the present appellant in this court] in February, 1897, rented the two-story and basement building, known as No. 178 Quincy street, in the city of Chicago, and fitted up two saloons therein; one in the basement and the other on the main floor. Each of these saloons had its separate entrance from the street. There was no way to go from one to the other of these saloons without going out into the street. March 16, 1897, appellee took out a city license to keep a saloon at that number. Immediately thereafter he operated and continued to run both of said saloons under this license. He was the sole owner and manager of these saloons. During the sum-

mer, or in the early fall, of 1897, appellee connected these saloons by an inside stairway. In October 1897, while appellee was still running both of these saloons, the city collector demanded of him that he pay a license fee from May 1, 1897, to the date of the demand, amounting to \$219.95, due and arrear, as was alleged by said collector, because appellee during that period of time had sold liquors in said basement saloon without license. The city collector threatened to close both saloons unless appellee paid said sum to the city collector."

Frank M. Cox, for appellant. Maclay Hoyne (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The city contends in this case that the appellant was running two saloons at No. 178 Quincy street in Chicago, the latter being a two-story and basement brick building, under one license; that one of these saloons was in the basement and the other on the first floor of the building; and that he had no right so to run the two saloons under one license, but should have taken out a separate license for each saloon—that is to say, a license for the saloon in the basement and another license for the saloon on the first floor of the building above the basement. On the other hand, the contention of the appellant is that the demand of the city for the payment of a double license—that is to say, for the payment of a license fee for the period from May 1, 1897, to October 8, 1897—for the saloon in the basement of the building, in addition to the license fee already paid for the saloon on the first floor of the building, was illegal, and that appellant, under the law, had a legal right to operate the two saloons under one license, so long as they were on the premises known as No. 178 Quincy street, and so long as appellant remained the sole owner and manager thereof. The question presented by the record, then, is: Did the city, in view of the statute and ordinances, have the right to exact from appellant two license fees, one for the saloon in the basement, and the other for the saloon on the first floor of the building; both saloons being located in the same building, and both used by appellant and under his sole ownership and management?

First. In the case at bar the Appellate Court has rendered a judgment reversing the trial court without remanding the cause, and has recited in its judgment the facts as found by it. Under section 87 of the practice act (Starr & C. Ann. St. 1896, c. 110, par. 88) its finding of the facts in controversy is different from the finding of the facts made by the trial court. Where the Appellate Court thus reverses the judgment of the trial court, and makes a finding of the facts in its judgment, such judgment is final and conclusive, so far as the Supreme Court is concerned, as to all matters of fact in controversy. "The de-

cision of the Appellant Court being conclusive on the questions of fact, we cannot review them on appeal." *Hancock v. Singer Manf. Co.*, 174 Ill. 503, 51 N. E. 820; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Schwartz v. Supreme Court of Honor*, 194 Ill. 344, 62 N. E. 777. Here the Appellate Court has found as matter of fact that the appellant fitted up two saloons in the two-story and basement building, known as 178 Quincy street; one in the basement, and the other on the main floor. It has also found as a matter of fact that each of these saloons had its separate entrance from the street, and that there was no way to go from one to the other of these saloons without going into the street. It appears that the saloon on the first floor and that in the basement were connected some time in the summer or early fall of 1897 by an inside stairway; but it nowhere appears that this inside stairway existed during the period beginning on May 1, 1897, for which the payment was required of appellant as back license for the basement saloon. Section 1178 of the city ordinances introduced in evidence provides that the license year shall be divided into three periods—the first being from May 1st to August 30th, inclusive, the second, from August 31st to December 30th, inclusive, and the third, from December 31st to April 30th, inclusive. That appellant had fitted up and was operating two saloons, instead of one, in the building in question, is a fact found by the Appellate Court; and its finding in regard thereto is conclusive upon this court.

Second. In *Sanders & Son v. Town Council*, 50 Ga. 178, it was held that the question whether two rooms in a particular house in which it is proposed to sell spirituous liquors are in truth two distinct places is a question of fact; and in that case the Supreme Court of Georgia said: "It is not clear to us that in this case there is not an effort to get permission to set up two liquor shops under one license. These two rooms, under the admitted facts, are so situated as, in a very fair sense, to make two different places. They open on different streets. There is no communication inside between them, and they are on different stories. * * * We think it was no abuse of the exercise of the sound judgment of the council to conclude that each was a distinct place, and that the fact of one firm being the owner of both did not alter the case. How much further, when the business should be opened, this distinctiveness would go, is tolerably evident. Perhaps they are to be visited by different classes of people, sell at different prices and different quantities of the same named liquor, opened at different hours, and have entirely different manners, customs, and practices. How far the admitted facts make these two rooms different places the council has determined as a question of fact. We see nothing in the case to justify the conclusion that this decision is an abuse of power."

Clause 46 of section 1 of article 5 of the Illinois act relating to cities and villages (Starr & C. Ann. St. 1896, c. 24 par. 63) confers upon the city council in cities the power "to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor, the license not to extend beyond the municipal year, in which it shall be granted, and to determine the amount to be paid for such license: * * * Provided, further, that in granting licenses such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses." Where the Legislature confers upon a city power to regulate, license, and prohibit the sale of intoxicating liquor, it is a matter purely discretionary with the city whether or not it will wholly prohibit such sale or license and regulate the traffic in it. Section 1180 of the city ordinances introduced in evidence provides that any license granted thereunder by the city may be revoked upon written notice by the mayor, whenever it shall appear to his satisfaction that the party so licensed shall have violated any provision of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid, and that, upon complaint to him by two or more persons that any place licensed as a saloon is a resort of disreputable persons, the mayor shall at once cause an investigation to be made as to such complaint, and, if found to be true, he shall forthwith revoke the license issued to any person or persons to keep such saloon, and, upon report to the mayor by the police department that any saloon is a resort of disreputable persons, the mayor shall at once revoke the license of the keeper of such saloon. The license issued to the appellant contained the provision that "this license, with all the rights under it, is subject to revocation at the discretion of the mayor, and this license, with all the rights under it, shall terminate absolutely upon the notice of said revocation being left at the bar, and the person to whom it is issued shall stand in the same position as if he had not taken out any license." Appellant accepted his license with knowledge that the ordinance of the city provided for the revocation of the same in the manner stated, and also accepted the license with the provision in it that it was subject to revocation at the discretion of the mayor. By thus accepting the license, he assented to its terms and conditions. The mayor, upon investigation, decided as a question of fact that the appellant was running two saloons, instead of one, under one license; and we are not prepared to say that, as he determined the question of fact in the manner stated, there was anything arbitrary in the act of revoking appellant's license. *Schwuchow v. City of Chicago*, 68 Ill. 444; *Wiggins v. City of Chicago*, 68 Ill. 372.

But whether or not the question of fact whether liquor was sold by the appellant in two places, instead of one, under one license,

may be determined by the mayor, or whether it is a question of fact to be determined by the court, or a jury acting under the instruction of the court, in either case the question of fact has here been determined adversely to the appellant. In *State v. Fredericks*, 16 Mo. 383, it was said by the Supreme Court of Missouri: "There was no dispute about the sale of intoxicating liquors. The only point was whether they were sold at one or two places, and therefore the instructions were worded in regard to this point only. Whether there was but one or two places was a matter of fact for the finding of the jury under proper instructions. They found there were two places, and, I think, very correctly. The instructions, given properly, put the question in issue before them, and the one refused was not calculated to aid or assist them in arriving at a more correct conclusion." Here the Appellate Court, differing from the trial court, has found as a matter of fact that there were two saloons, instead of one. Indeed, the appellant in his evidence speaks of the saloon in the basement and of the saloon on the first floor of the building as being two saloons. He says: "I opened both the basement saloon and the street-floor saloon at the same time, and continued to operate them until October 8, 1897." He also says: "My saloon on the first floor of 178 Quincy street and the saloon in the basement both had entrances on Quincy street."

Third. The fact being, then, that the appellant was actually running two saloons under one license at 178 Quincy street, one in the basement and the other on the first floor of the building, the question is whether there was anything in the license given him by the city which justified such conduct. His license is in evidence, and begins as follows: "By authority of the city of Chicago, license is hereby given to Phillip Malkan to keep a saloon or grocery at 178 Quincy street in the city of Chicago, and to sell, barter, give away, or deliver wines and other liquors, whether malt, vinous, or spirituous, in quantities less than one gallon in the place above designated, from the date hereof, * * * bonds having been filed pursuant to the laws of the state of Illinois and the ordinances of the city of Chicago in such cases made and provided, to be subject to such ordinances of the said city of Chicago as now or hereafter may be in force, and the laws of said state now or hereafter in force, in regard to the sale of wines and liquors," etc. License was thus given to appellant to keep a saloon or grocery at 178 Quincy street. The license was not to keep two saloons at that place. Therefore, under the terms of his license, as compared with the facts as proven, he was operating one of the saloons without a license.

Counsel for appellant, however, insists that, when the statute known as the "Drumshop Act" and the ordinances of the city confer the right to keep a saloon at a building

or house, the right is thereby conferred to keep any number of saloons in any number of rooms, provided all of the same are in that one building. Section 1 of the dramshop act thus defines dramshop: "A dramshop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon." 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 1587. It is said that, under the facts of the present case, the place where appellant had a right to retail liquors was not a room in the building known as 178 Quincy street, but the whole of the building at 178 Quincy street. The language, however, of the license is "a saloon." In *Schwuchow v. City of Chicago*, supra, this court, speaking through the late Mr. Justice Walker, said (page 447): "The license was to keep a saloon or grocery, and this latter term has generally been used by the General Assembly to designate a place where liquors are retailed to be drunk; and that is the general meaning applied to the word." That is to say, a saloon or grocery is the place, within the meaning of the law, where liquor may be sold, and not necessarily the building in which the saloon or grocery is located. Webster defines a saloon as "a large public room or parlor"; and he also defines it as follows: "Popularly a public room for specific uses, especially a barroom or grogshop; as, a drinking saloon," etc. In other words, the popular idea associated with the word "saloon" is that it is a room, rather than a building with several rooms. Webster also defines "dramshop" as "a shop or barroom where spirits are sold by the dram." The license issued to appellant provides that no concert, exhibition, ball, dance, or play shall be given or performed "in the same room where the liquors are sold," not in the building where liquors are sold. It is not necessary for us to decide whether, if the basement saloon and the saloon on the first floor of the building occupied by appellant had been connected by a stairway during the period for which the license fee was exacted, they might be regarded as one saloon, instead of two, because the facts as found here show that during the period in question they were not so connected; and not only so, but appellant had in each place a separate bar, a separate set of attendants, a separate stock of liquors, etc. He had on each floor a complete outfit of utensils and equipment for saloon purposes. Each floor had a separate entrance opening from the street, and on each floor appellant catered to a different class of customers. His license also provides that the notice of revocation, which the mayor is authorized to give, shall be left "at the bar," and not "at the bars." The license also quotes a part of the city ordinance, which provides that the licensee shall cause such license to be posted "on some conspicuous part of the room or bar kept or used for such purpose." The intention, by this phraseology, was evidently to designate one room or bar kept for the purpose of selling liquor, and not several rooms or bars.

Section 1175 of one of the city ordinances introduced in evidence provides for the issuance by the mayor of licenses "for the keeping of dramshops," and also provides that on Sundays the licensee shall keep closed "all doors opening out upon any street from the bar or room where such dramshop is to be kept." Here the dramshop is spoken of as being kept in a bar or room, and not in a building where there are several bars or rooms. Section 1176 of one of the ordinances introduced in evidence provides that the licensee shall not permit any liquor "to be sold or served in such dramshop or saloon by any female, unless," etc. Here the reference is not only to one dramshop and one saloon, but the words "dramshop" and "saloon" are used interchangeably as meaning the same thing. Section 1180 of the ordinances as introduced, which relates to the revocation of the license by the mayor, and which has been above quoted, speaks of "any place licensed as a saloon," thus clearly indicating that the place to be licensed is one saloon, and not a building in which a saloon is located. The same section also provides that, as to "any saloon" which is a resort of disreputable persons, the mayor shall at once revoke "the license of the keeper of such saloon"; using the singular, and speaking of one saloon. In section 7 of the dramshop act (2 Starr & C. Ann. St. 1896 [2d Ed.] p. 1592), rooms and cellars are spoken of as "places" where liquor is sold. It cannot, therefore, be said that, when appellant was authorized to keep a saloon at 178 Quincy street, the whole building was the place where he had a right to sell liquor; but the room where he had his bar and ran his saloon was the place where he sold liquor, within the meaning of "place," as used in the statute and city ordinances. In 17 *American and English Encyclopedia of Law* (2d Ed.) p. 237, it is said: "One license will not authorize the person or persons licensed to conduct the business in more than one place. A license is necessary for each place in which the business is conducted." *State v. Walker*, 16 Me. 241; *Commonwealth v. Estabrook*, 10 Pick. 293. In *Thomas v. Arie*, 122 Iowa, 538, 98 N. W. 380, the Supreme Court of Iowa said: "The only question presented for our determination is whether a person, having paid but one tax and having but one license, may keep for sale and sell intoxicating liquors in two different and wholly separate rooms in the same building. We are clearly of the opinion that such question must be answered in the negative. To hold otherwise would certainly violate, not only the spirit of the law, but, we think, the letter of the law. Section 2432 of the Code provides that 'every person * * * maintaining a place where intoxicating liquors are sold or kept with intent to sell, shall pay an annual tax,' etc. It must be manifest from our statement of the facts that the defendant is maintaining two places,

each independent of the other in every material sense necessary to be considered. The mere fact that by his license he is authorized to carry on business in the building mentioned cannot be construed to confer the right on defendant to cut such building up into separate rooms, the number to be limited only by the capacity of the building or the extent of the premises, and in each maintain an independent place for the sale of liquors." The Iowa case last mentioned seems to be on all-fours with the case at bar, and the doctrine of it commends itself to our approval. Indeed, there is nothing anywhere in the case to show that the city or its officials, when they granted the license to appellant to keep a saloon at 178 Quincy street, knew that he had a lease of the whole building. It appears from his evidence that he did have a lease of the whole building, including the basement and the two floors above the basement; but whether or not he communicated this fact to the city authorities when he obtained his license does not appear. In a large city like Chicago, where there are immense buildings in the business district, it cannot be assumed that a man who takes out a license to keep a saloon at a certain number intends to open any number of saloons in the building where such number is found.

Counsel for appellant relies upon several cases in other states which seem to hold views contrary to those here expressed. One of these cases is *City of St. Louis v. Gerardi*, 90 Mo. 640, 3 S. W. 408. The Missouri case is a case where the proprietor of a hotel was licensed to keep a dramshop; and that case holds that, where a dramshop is kept at a place designated in the license, the mere fact of the licensee erecting more than one bar at such place does not constitute a carrying on of business at more than one place, where the bars are directly connected by doorways on the same floor of a hotel, and are accessible to guests without going out of the hotel. There the bars were kept on the ground floor of the hotel, and screened off by partitions, having direct and immediate connection by doorways, all of which were accessible to the guests without going out of the hotel, and all of which bars were located on the premises occupied for hotel purposes and part of the Planters' House, which was one building and one place. There the main business of the licensee was that of running a hotel, and the keeping of the bars was merely incidental to the keeping of the hotel, but the facts are not similar to the facts in this case, where the license was to keep "a saloon"; that is, one saloon at one place. Moreover, the question to be determined involves the construction of language in the Chicago city ordinances, and in appellant's license, and in the Illinois dramshop act. The case of *Courtwright v. Common Council*, 96 Mich. 290, 55 N. W. 808, was also a case where bars were operated in a hotel,

and the decision follows the Missouri case already referred to.

For the reasons above stated, we are of the opinion that the judgment of the Appellate Court is right; and it is accordingly affirmed.

Judgment affirmed.

(217 Ill. 582)

EARP et al. v. LILLY.

(Supreme Court of Illinois. Oct. 24, 1906.)

1. APPEAL—REVIEW—EVIDENCE.

Whether there was any evidence to sustain plaintiff's action cannot be considered by the Supreme Court, where no motion was made to direct a verdict for defendant and exception reserved to the court's action thereon.

2. INTOXICATING LIQUORS—CIVIL DAMAGES—VERDICT.

In an action under *Starr & C. Ann. St. 1896, c. 43, par. 9*, § 9, against the keepers of dramshops, an instruction is not ground for reversal which states that the jury can find defendants all guilty or all not guilty, or some guilty and some not guilty, and that the suit against each defendant is a separate suit.

3. SAME—SALE TO HABITUAL DRUNKARD.

A sale to an habitual drunkard, or to a person when intoxicated, is a sale wantonly and willfully made, within the dramshop act, authorizing punitive damages.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 457.]

4. SAME—EVIDENCE.

Where plaintiff sued several dramshop keepers for selling liquor to her husband, evidence that he was drunk frequently, and drank liquor in the saloon of defendants while intoxicated, and was often drunk on the streets of the village, tends to show knowledge on the part of the saloon keepers that he was an habitual drunkard, so as to authorize an instruction as to punitive damages.

5. SAME—LIABILITY OF DEFENDANTS.

Under *Starr & C. Ann. St. 1896, c. 43, par. 9*, authorizing actions against saloon keepers severally or jointly for sale of intoxicating liquors to an habitual drunkard, the liability created cannot be apportioned among the defendants; but each one who assisted in bringing about such condition is liable for the acts of the others, who, by furnishing liquor to the husband, contributed to his condition.

[Ed. Note.—For cases in point see vol. 29, Cent. Dig. Intoxicating Liquors, § 486.]

6. SAME—EVIDENCE.

Where plaintiff sued saloon keepers, under *Starr & C. Ann. St. 1896, c. 43, par. 9*, for damages by sales of liquor to her husband, a letter to one of the defendants, in which plaintiff said that she did not object to an occasional drink, if he would drink and go about his business, can be considered only in mitigation of damages, and not as a bar to the action.

Appeal from Appellate Court, Third District.

Action by America D. Lilly against E. E. Earp and others. Judgment for plaintiff was affirmed by the Appellate Court, and certain defendants appeal. Affirmed.

Finn & McIntosh, J. C. Lee, and Sentel & Whitfield, for appellants. Robert M. Peadro and Edward C. & James W. Craig, for appellee.

HAND, J. This is an action on the case, commenced by the appellee against the appellants in the circuit court of Moultrie county, to recover damages to her property and means of support, under section 9 of the dramshop act (Starr & C. Ann. St. 1896, c. 43, par. 9), in consequence of alleged sales of intoxicating liquors made by the appellants to the husband of appellee. The declaration contained two counts. The first count alleged that the defendants were keepers of dramshops, and as such sold and gave to John P. Lilly, the husband of the plaintiff, intoxicating liquors, and thus caused him to be and become an habitual drunkard, etc., whereby the plaintiff was injured in her means of support; and the second count alleged, in addition to such facts, that said John P. Lilly, in consequence of said habitual intoxication, squandered a large amount of money and property belonging to plaintiff, and that she was thereby injured in her property. The general issue was filed, and a trial resulted in a verdict and judgment in favor of the plaintiff for \$2,500, which judgment has been affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

It is conceded by the appellants the evidence fairly tends to show that John P. Lilly, the husband of the appellee, was in the habit of getting intoxicated, and that the appellants sold or gave to him intoxicating liquors which caused, in whole or in part, his habitual intoxication; but it is said there is no evidence tending to show appellee has been injured in her property or means of support by reason of such habitual intoxication. The question whether the appellee was injured in her property or means of support in consequence of the habitual intoxication of her husband, produced in whole or in part by intoxicating liquors sold to him by the appellants, was a question of fact, affirmed on the part of the appellee and denied on the part of the appellants in the pleadings and upon the trial; and that question was decided in the trial court in favor of the appellee, and the judgment of that court has been affirmed by the Appellate Court, and the judgment of the Appellate Court is binding upon this court, as that question cannot be reviewed in this court upon this record in the manner in which it is framed. The question of whether there is any evidence in this record tending to show that appellee was injured in her property or means of support in consequence of the habitual intoxication of her husband can only arise in this court as a question of law, when it has been properly preserved for review in this court by a motion in the trial court to instruct the jury to return a verdict in favor of the defendants, and the action of the trial court in denying such motion has been preserved for review by proper exceptions. *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 346; *Joliet, Aurora & Northern Railway Co. v. Velle*, 140 Ill. 59, 29 N. E. 706; *Chicago &*

Alton Railroad Co. v. Gomes, 153 Ill. 208, 38 N. E. 651; *Pittsburg, Cincinnati, Chicago & St. Louis Railway Co. v. Hewitt*, 202 Ill. 28, 66 N. E. 829; *Chicago Union Traction Co. v. O'Donnell*, 211 Ill. 349, 71 N. E. 1015; *Streator Independent Telephone Co. v. Continental Telephone Construction Co. (Ill.)* 75 N. E. 546. No such motion was made in the trial court. The question of whether there is any evidence in this record tending to support the averment of the declaration that the appellee was injured in her property and means of support in consequence of the habitual intoxication of her husband, caused in whole or in part by the defendants, is not, therefore, preserved for review in this court upon this record.

It is urged the court erred in giving to the jury the first instruction offered on behalf of the appellee, which reads as follows: "The court instructs the jury that this suit is brought against the various defendants severally, and that the suit against each is a separate suit, and that your verdict must be based upon a preponderance of the evidence; but you can find the defendants all guilty or all not guilty, or find some of them guilty and some not guilty, as the evidence may show." While this instruction is inartificially drawn, we do not think it misled the jury. They doubtless understood therefrom that they might find a verdict for the plaintiff against all or any number of the defendants, or they might find all the defendants or any number of them not guilty, if the evidence justified such finding. They found against the appellants, and in favor of the other defendants. The giving of the instruction was not reversible error.

Complaint is also made that the court erred in giving the plaintiff's fifth and sixth instructions. The fifth defined exemplary or punitive damages, and the sixth informed the jury that, if they found from the evidence the plaintiff had sustained actual damages, then they might give her exemplary or punitive damages, if they found from the evidence the conduct of the defendants whom they found guilty had been wanton and in willful disregard of the plaintiff's rights. As we understand the position of the appellants, they do not claim either of said instructions is bad in form; but they contend they were improperly given, on the ground there was no evidence upon which to base them, as it is said only one or two of the defendants made sales to John P. Lilly with knowledge that he was an habitual drunkard, and that the guilty knowledge of the defendants making sales with such knowledge ought not to be imputed to the defendants who made sales to Lilly without such knowledge, which must be the result if exemplary or punitive damages were allowed, as the verdict and judgment must be a unit. We do not think the instructions bear the construction sought to be put upon them by the appellants. The sixth instruction clearly re-

quired the jury to find the conduct of all the defendants whom they found guilty to have been wanton and willful before they could allow exemplary or punitive damages. The evidence tended to prove that John P. Lilly was drunk frequently, that he frequented the saloons of the appellants, that he drank intoxicating liquors therein when intoxicated, and that he was drunk repeatedly upon the streets of the village in which he lived and in which the appellants lived and carried on the saloon business. This evidence, while not conclusive, was admissible, and tended to show the husband of the appellee was habitually drunk, and that such fact was known by the appellants. It also tended to show that he frequented and drank intoxicating liquors in the several saloons of appellants when he was intoxicated. The law forbids the sale of intoxicating liquors to an habitual drunkard or to a person when intoxicated, and a sale to such person is a sale wantonly and willfully made. *Kennedy Bros. v. Sullivan*, 136 Ill. 94, 28 N. E. 382. It was not necessary that the evidence upon the part of appellee show conclusively that sales of intoxicating liquors were made to her husband by all the appellants with the full knowledge that he was an habitual drunkard. If the evidence fairly tended to establish such fact, the appellee had the right to an instruction upon her theory of the case; that is, if sales of intoxicating liquor had been made to her husband wantonly and willfully by the appellants, she was entitled to exemplary damages. "Each party has the right to have the jury instructed upon his theory of the case, if it has a basis in the evidence upon which to rest." *Chicago Union Traction Co. v. Browdy*, 206 Ill. 615, 69 N. E. 570. The court did not err in giving said instructions to the jury.

It is urged the court erred in refusing to give to the jury appellants' third instruction. It appeared that the appellant Goldberg purchased and succeeded to the saloon business of appellant Monroe on the 10th day of May, 1904, some 2½ months prior to the bringing of this suit, and the court was asked to instruct the jury "that Goldberg is not liable in any greater amount than the amount of damages, if any is shown by the evidence, which said plaintiff suffered to her property or means of support between May 10, 1904, and the date of the commencement of this suit; and your verdict for damages in this case cannot exceed that amount." The declaration averred the appellants, who were dramshop keepers, had caused the husband of the appellee, by sales of intoxicating liquors to him, to be and become an habitual drunkard, whereby the plaintiff was injured in her property and means of support. The wrong complained of by the appellee was the making of her husband an habitual drunkard. The statute (section 9 of the dramshop act) provides that any per-

son injured in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person. It is apparent the liability created by said section for making an habitual drunkard of appellee's husband, and thereby injuring her in her property and means of support, cannot be apportioned between the several dramshop keepers who furnished the intoxicating liquors which made of him an habitual drunkard, but that each person who assisted in bringing about that habitual condition must be held, under the statute, liable for the acts of all persons who contributed, by the furnishing of intoxicating liquors, to that habitual condition in the husband. The court did not err in declining to give said instruction.

It appears that the appellee wrote a letter to appellant Goldberg, on or about the 10th day of May, 1904, which was introduced in evidence by the appellants, calling his attention to the condition of her husband, brought about by his excessive use of intoxicating liquors, and asking him to aid her in his reformation. She said in that letter: "I would not object to an occasional drink, if he would drink and go about his business." The appellant asked the court to instruct the jury, if the plaintiff gave permission to any one of the defendants to sell intoxicating liquors to her husband, and thereafter such defendants sold him intoxicating liquors which caused his habitual intoxication, in whole or in part, and which resulted in an injury to her property or means of support, plaintiff cannot recover. The court declined to give such instruction, but instructed the jury, at the instance of appellee, that, although they might believe the plaintiff wrote the defendant Goldberg that she did not object to his selling her husband intoxicating liquors occasionally, such fact would not bar her action; but, if such fact were proven by a preponderance of the evidence, it might be considered by the jury, together with the other evidence in the case, in estimating the damages of the plaintiff, if the jury believed from the evidence the plaintiff was entitled to recover damages. The letter, if the construction placed thereon by the appellants be conceded to be its true construction, could only be considered by the jury in mitigation of damages, and not in bar of the action. *Hackett v. Smelsley*, 77 Ill. 109. The court did not err in declining to give the instruction offered on behalf of the appellants, and in giving that offered on behalf of the appellee.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(217 Ill. 446)

MILLS v. LARRANCE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EXECUTION—EXCESSIVE LEVY—MALICE.

In an action to recover for excessive levy of execution, proof that the property levied on was of much greater value than the amount of the judgment, and that there was a bitter feeling between the parties, and that the judgment creditor urged the officer to levy on more property, is admissible as tending to show malice.

2. SAME.

Malice in alleged excessive levy of execution will not be inferred because the jury may believe that the levy was made on an unreasonable amount of property.

3. APPEAL—REVIEW OF EVIDENCE.

On appeal from the Appellate Court, the Supreme Court will not consider the preponderance of evidence.

4. EXECUTION—EXCESSIVE LEVY—INSTRUCTIONS.

In an action for damages caused by excessive levy of execution, an instruction that the creditor has a right to point out the goods he desires levied on, at his peril if he directs a levy on an excessive amount, is not prejudicial to defendant, where the court in another instruction requires specific proof of malice.

Appeal from Appellate Court, Third District.

Action by Oscar Larrance against William H. Mills. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

This was an action on the case by appellee against appellant, in the circuit court of Vermillion county, to recover damages for an alleged excessive levy on personal property. The original declaration contained three counts; but the second was dismissed, and the case tried on the first and third. The first averred that on October 16, 1900, the plaintiff possessed personal property of the value of \$3,000, and was indebted to the defendant in the sum of \$300.70 on two promissory notes; that the defendant, well knowing the premises, for the purpose of oppressing and wronging the plaintiff, on that day, by virtue of powers of attorney attached to said notes, without notice to plaintiff, procured judgment in the circuit court of Vermillion county against him for the sum of \$1,055, and in furtherance of said purpose placed an execution issued on such judgment in the hands of the sheriff of said county, and willfully and maliciously caused him to levy the same on all of said personal property, and to hold the same, by virtue of such levy, for a long time, to wit, three months. The third count is substantially the same as the first, with the additional averment that the plaintiff was entitled to a credit of \$700 on the two notes, and that the defendant willfully and maliciously procured a judgment to be entered in said circuit court upon said notes for the sum of \$1,055. The defendant filed a plea of not guilty, and the case has been three times tried in the circuit court of Vermillion county before a jury; the first resulting in a verdict and judgment for the plaintiff for \$4,000, which, on appeal to the

Appellate Court for the Third District, was reversed upon the ground that the damages assessed were excessive. 108 Ill. App. 356. The second trial resulted in a verdict and judgment for the plaintiff for \$3,000, which was reversed by the Appellate Court. 111 Ill. App. 140. The third trial resulted in a verdict for \$4,000 in favor of the plaintiff; but the presiding judge required the plaintiff to enter a remittitur of \$2,500, which being done, judgment was entered against the defendant for \$1,500 and costs of suit, which has been affirmed by the Appellate Court, and hence this further appeal.

D. D. Evans and Waldo Carl Evans, for appellant. R. W. Fisk, S. M. Clark, and Buckingham & Dysert, for appellee.

WILKIN, J. (after stating the facts). The usual motions to instruct the jury to find for the defendant were made upon the trial at the close of the plaintiff's evidence and at the close of all the evidence, both of which were overruled by the court. In the brief of points submitted by counsel for appellant 11 grounds of reversal are suggested, several of which attempt to raise questions not cognizable in this court, such as that the damages are excessive and the insufficiency of the evidence to prove malice. The substantial errors of law relied upon in the argument are that the trial court erred in refusing to instruct the jury to find for the defendant, and in the admission of incompetent evidence, and in the giving and refusing of instructions. In fact, the first of the above-named grounds of reversal seems to be the only one relied upon in the argument; that is, that the evidence wholly failed to prove malice upon the part of the defendant in causing the alleged levy to be made, and therefore the jury should have been instructed to find for the defendant.

It may be conceded that malice is the gist of this action, and we have no fault to find with the definition of malice adopted by counsel; but we cannot agree with the contention that neither express nor implied malice is shown by the evidence in this record. There can be no serious controversy as to the excessiveness of the alleged levy. Whether the judgment is considered at \$1,055, as originally entered, or at \$300.70, as subsequently reduced, the clear preponderance of the evidence is that the value of the property seized, such as horses, colts, cattle, corn, farm implements, etc., all of which was salable property, far exceeded in value either amount, and it was seized and held to satisfy the judgment. It is true the evidence is conflicting as to the participation of the defendant in causing the levy to be made; but it cannot be denied that there is testimony, especially that of the deputy sheriff who made the levy, that the whole of the property was seized by defendant's direct and express orders, which were to levy upon everything loose—the whole of the

property—and that he said, "Levy on all that stuff," and that the deputy sheriff, in obedience to such instructions, did make the levy; also that the defendant even urged the deputy to levy upon additional property belonging to the other defendant in the judgment, which he refused to do. The evidence also clearly shows that there was a bitterness of feeling between the parties, and the evidence in this record cannot be read without reaching the conclusion that the jury were fully justified in concluding that the levy upon all the personal property of the plaintiff was not prompted by an honest purpose to enforce the collection of defendant's judgment, but to harass and oppress his debtor.

Learned counsel say malice should not be imputed to the appellant in consequence of the levy of the execution, for the reason it is not shown by a preponderance of the evidence that he intentionally or wantonly participated in the act or knowingly approved it after its commission. If we were permitted to deal with the question of the preponderance of the testimony, we might possibly arrive at a different conclusion; but clearly that is not our province. We think the court properly refused to take the case from the jury.

It is said in this connection that neither count of the declaration charges an excessive levy; but this position we do not think tenable. It seems that the plaintiff offered in evidence the proceedings in the circuit court of Vermillion county upon which the judgment was obtained and on which the execution in question was issued, to which counsel for appellant say an objection was interposed and overruled. The proposition is that it was erroneous to put in evidence the entire proceeding in which the judgment of \$1,055 was reduced to \$300.70. While we do not regard that proof a necessary part of the plaintiff's cause of action, we are unable to see how its introduction worked any injury to the defendant. It cannot be said that that proceeding was so foreign to the present cause of action as to render it impertinent, and therefore incompetent. We do not think there was any reversible error in the rulings of the court in admitting the testimony.

The second instruction given on behalf of the plaintiff is not, in our opinion, an accurate statement of the law. It does not purport to apply the rule there announced to this case, but is rather an attempt to state an abstract proposition of law, and tells the jury that a plaintiff has the right to control an execution in his favor, and to point out to the officer the goods he desires levied on, "and if he does so point out goods to the officer, he does it at his own peril if he points out and directs a levy on an unreasonable and excessive amount of such goods." The latter part of the instruction could only be justified as a statement of a rule of law

applicable to this case upon the ground that malice could be implied from the directions to levy on an unreasonable and excessive amount of goods. The law makes it the duty of an officer holding an execution to levy the same upon a sufficient amount of property to satisfy the judgment, taking into consideration the fact that it may not sell for its full value at a forced sale, and if he fails to levy upon enough property to reasonably insure the satisfaction of the debt he is liable to the plaintiff in the execution for any loss thereby sustained. *French v. Snyder*, 80 Ill. 339, 83 Am. Dec. 193. Therefore the question as to how much property ought to be levied upon in a given case is one to be determined from all the facts and circumstances, and what might be honestly considered by one party a reasonable amount might to others seem unreasonable and excessive, so that malice cannot be implied from the mere fact that a jury might consider the amount unreasonable and excessive. The most, however, that can be said of this instruction is that, standing alone, it was calculated to mislead the jury to the prejudice of the defendant.

Turning to those given on behalf of the defendant, we find that the jury were most explicitly and positively instructed that malice must be proved. Among others we note the following: "Malice is the gist of this action, but there is no presumption that the defendant acted maliciously because the plaintiff has so charged in the declaration; but before the plaintiff is entitled to recover he must prove, by the preponderance of the evidence, that the defendant acted maliciously—that is, malignantly, with deliberate intention to injure." In the light of this language it cannot, we think, be fairly said that the jury were misled by the second instruction given at the instance of the plaintiff. The case is not one in which direct and positively conflicting rules of law are announced, so that it cannot be known which of the two the jury followed.

The contention that the court erred in refusing to give certain instructions is mainly based upon the theory that there is a variance between the allegation of the declaration and the proofs, and it is contended that the question of variance was here properly raised by the instructions refused. Conceding that the alleged variance was sufficiently pointed out in the refused instructions, we are unable to agree with counsel that there was a material variance. The contention seems to be that, inasmuch as both counts of the declaration aver that the plaintiff was indebted to the defendant on two promissory notes and the proof showed that one had been merged in the other, there is a fatal variance, because in such case the plaintiff was not indebted on two notes, but only on one. We do not regard the allegation as to the cause of action upon which

judgment was obtained and upon which the execution was issued as constituting the plaintiff's cause of action, and the statement that the indebtedness was upon two notes, instead of one, was not a material allegation.

Complaint is made of the refusal of other instructions; but we are satisfied that every substantial right of the defendant, under the law and the evidence, was protected by those which were given. It is also said that one of the attorneys for the plaintiff made prejudicial remarks to the jury. The court sustained the defendant's objection to the remarks, which was all it was asked to do.

Treating all the controverted facts in the case as being conclusively settled by the decision of the Appellate Court, as we must, and confining our investigation to the alleged errors of law only, we are satisfied that no reversible error has been shown, and the judgment of the Appellate Court must therefore be affirmed.

Judgment affirmed.

(217 Ill. 537)

BECHDOLDT v. BECHDOLDT et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. REMAINDERS—ACTIONS BY REMAINDERMAN—LIMITATIONS.

The statute of limitations cannot operate against a remainderman until the death of the life tenant.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, § 231; vol. 42, Cent. Dig. Remainders, § 16.]

2. HOMESTEAD—EXTENT OF RIGHT.

Under the act of 1857, the homestead right of a householder was only the exemption from judicial sale of the lot of ground and the building thereon occupied as a residence, to the value of \$1,000, and continued for the benefit of the widow and family of the householder until the youngest child came of age and until the death of the widow.

3. REMAINDERS—ACTION BY REMAINDERMEN—LIMITATIONS.

The heirs of a deceased landowner brought partition against the grantee in a quitclaim deed from the widow and her then husband, conveying all of the land of which the deceased died seised. The decree assigned to the defendant certain land "as his homestead, in lieu of other claims he may have in and to all of said lands." Held to give him an estate in the land for his own life, so that at his death a right of action at once accrued to the heirs of the deceased landowner.

Appeal from Circuit Court, Pike County; Harry Higbee, Judge.

Bill by Jacob P. Bechdoldt and others against William Johnson. Decree for defendant, and plaintiff Isaac A. Bechdoldt alone appeals. Affirmed.

A. G. Crawford and J. W. Stauffer, for appellant. Williams & Williams and Paul Grote, for appellees.

BOGGS, J. On the 12th day of October, 1904, the appellant and all of the appellees, except William Johnson, filed their bill in

chancery in the circuit court of Pike county, in which they alleged that they were the heirs of Frederick C. Bechdoldt, deceased, and as such heirs were seised in fee as tenants in common of the title to 55 acres of land in Pike county, specifically described in the bill, and prayed for a decree partitioning and allotting the same to them in severalty. The appellee William Johnson was made a defendant to the bill and filed his answer thereto. On a hearing the bill was dismissed for want of equity, and this appeal has been prosecuted by one only of the complainants in the bill; the other complainants being joined as appellees.

The answer of William Johnson averred that he purchased the land in the bill described on December 7, 1882, at a sale made by the master in chancery of Pike county, by virtue of a decree entered in a partition suit instituted between the heirs of one John Knox, deceased, which proceeding resulted in a decree ordering the premises to be sold, the premises being so situate that they could not be partitioned; that the decree found and recited that the said John Knox was at the time of his death the owner in fee simple of the title to said premises, and that no other person or persons had any interest or title in or to the said lands, or any part thereof, in possession, remainder, reversion, or otherwise; that he complied with the terms of the sale of said land, and on the 25th day of January, 1883, received a deed from the said master conveying the same to him; that on that day he entered into possession as the owner thereof and made thereon the actual residence of himself and his family, of which he was the head, believing in good faith that he was possessed of the sole title to the premises; that he retained the actual, open, adverse, undisturbed, and exclusive possession of the same, claiming as aforesaid to be the owner thereof, living thereon with his family as his residence for a period of more than 20 years prior to the filing of the bill against him. He invoked the defense of the provisions of section 1 of chapter 83, entitled "Limitations" (2 Starr & C. Ann. St. 1896, p. 2599), limiting the period within which an action for the recovery of lands could under such circumstances be brought to 20 years, and also invoked the benefit of the provisions of sections 4 and 6 of the same chapter.

Sections 4 and 6 are as follows:

"Sec. 4. Actions brought for the recovery of any land, tenements or hereditaments of which any person may be possessed by actual residence thereon for seven successive years, having a connected title in law or equity, deducible of record, from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the non-payment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution, or under any order, judgment or

decree of any court of record, shall be brought within seven years next after possession being taken, as aforesaid; but when the possessor shall acquire such title after taking such possession, the limitation shall begin to run from the time of acquiring title."

"Sec. 6. Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

On the hearing it was proven, without dispute, that said William Johnson received a deed from the said master in chancery on the 25th day of January, 1883, made in pursuance of a sale under said decree in the partition suit between the heirs of John Knox, deceased, conveying to him said lands, and that he on the same day entered into possession thereof as the owner and lived thereon with his family, claiming to be the owner thereof, and holding the open, actual, adverse, undisputed, and exclusive possession thereof from thence forward, and was still so residing on and in the possession of the land on the 12th day of October, 1904, when this suit was instituted against him. The chancellor sustained the defense of said Johnson and dismissed the bill.

The appellant, however, contends that the complainants in the bill became seised of the fee in remainder in said lands on January 10, 1863, subject to a precedent estate for and during the life of one Louisa Bechdoldt, their mother; that said Louisa survived until June, 1903, and then died, and that until the death of the said Louisa they were not entitled to make entry upon said land or to bring any action to recover the possession thereof; and that they brought the action within but little more than one year after the legal right to make entry or bring an action for the possession of said land accrued to them. The statutes of limitation sought to be invoked by the appellee Johnson do not have operation against a remainderman until the death of the life tenant. *Peterson v. Jackson*, 196 Ill. 40, 63 N. E. 643; *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445. The contention of the appellant is based on the following state of facts:

The lands in question, together with other lands not here involved, on the 10th day of July, 1863, belonged to one Frederick C. Bechdoldt, who departed this life on that day. He was the head of a family, and resided,

with the same, on the lands here involved. He left surviving him Louisa, his widow, and certain children. The title to the lands descended to such children, subject to the dower and homestead rights of said widow. The widow continued to reside on the lands with her children as the head of a family, and intermarried with one Albert Forkner, and on the 25th day of February, 1864, together with Forkner, her then husband, executed and delivered to John Knox a quitclaim deed purporting to convey to the said Knox all the lands of which her former husband died seised, including the 55 acres involved in this litigation, and about 180 or 190 acres of other land. Mr. and Mrs. Forkner removed to the state of California, taking the family with them, and made their permanent home in that state. John Knox then entered into possession of the land and continued to occupy the same as his homestead. In 1871 the adult heirs of the said Frederick C. Bechdoldt filed their bill in chancery in said Pike county circuit court against the minor heirs for a decree allotting and setting apart to them in severalty their respective interests in and to the lands of which the said Frederick C. died seised. John Knox was made a party defendant to the bill. In 1874 a decree was entered in the cause, which, after finding and reciting the death of Frederick C., and that the parties, except said John Knox, were his heirs, and owned the land of which he had died seised as tenants in common, recited and found "that he [said Forkner] and the said Louisa, in the year, to wit, on the 25th day of February, 1864, by quitclaim deed conveyed the said land to said John Knox, said defendant, who soon thereafter moved upon said land and has from thence continued to occupy the same as his homestead, * * * that the said John Knox has by his said purchase succeeded to the homestead rights of said Louisa, the said widow, and that said Louisa is not entitled to dower therein," and ordered and decreed that certain named persons be appointed commissioners "to go upon the said land and first assign to said John Knox his homestead therein, including the dwelling house, not to exceed in value \$1,000, by metes and bounds, and that they make division and partition of the residue of said lands according to the interest of the respective parties, as follows." An oath was administered to the said commissioners, requiring them to "go upon the land described in the order appointing us and assign to John Knox his homestead thereon." The commissioners reported "that we went upon said land, and that we set off and assigned to John Knox, as his homestead, the following lands, to wit: [Here follows the description of the lands involved in the suit at bar.] And we find the residue of the lands so circumstanced that they could not be divided." The report of the commissioners was approved, the lands not here involved being ordered sold, and as to the lands here in-

volved the court decreed as follows: "That the lands set off to said John Knox as his homestead, to wit [Here follows description], be, and they are hereby, assigned to said Knox as his homestead in said lands, in lieu of all other claims he may have in and to all of said lands." John Knox resided, with his family, on the lands so set off to him until January 29, 1879, at which date he died. He left children him surviving, but no widow. The appellee William Johnson intermarried with Margaret, a daughter of said Knox, and on the 5th day of October, 1881, said Margaret and her husband, the appellee Johnson, filed a bill in chancery in the circuit court of Pike county against the other heirs of said John Knox for a decree partitioning among the heirs of said John Knox, deceased, the real estate of which he died seised. This bill for partition alleged that said John Knox died seised of the title in fee simple to 198½ acres of land, consisting of different tracts described in the bill, among such tracts being the 55 acres involved in the suit at bar. A decree was entered finding that the premises were not susceptible of partition, and ordering that they be sold by the master. The lands were duly sold by the master, and the appellee Johnson became the purchaser of all of the tracts, including those here involved. He received a deed for all of the tracts so purchased on January 25, 1883, and then entered into possession as owner, residing thereon with his family, and remained, as before stated, in absolute, open, actual, adverse, and undisturbed possession from thence, and still is in possession. His right of possession or title was never questioned until the bill under consideration was filed—a period of more than 20 years. The decree under which he bought declared that John Knox, deceased, was seised of the title in fee to the lands, and that no person or persons other than the heirs of said John Knox had any interest, right, or title in them or any right therein, in possession, reversion, or remainder. Johnson bought the land from the master under the decree and in the actual belief that he would receive the absolute title in fee simple. His possession has been in good faith as being the real owner, and in that faith and belief he had resided upon the land as the home of himself and his family for more than 20 years, when this suit was brought against him.

The appellant contends that no other construction can be put upon the decree entered by the circuit court of Pike county in the case of the Bechdoldt heirs against John Knox than that it assigned the lands here in controversy to said John Knox as a homestead for and during the life of Mrs. Forkner, formerly Mrs. Bechdoldt. He seems to concede that such a ruling would have been erroneous, but insists that all of the parties complainant in the case at bar were bound by that decree, either as parties or privies, and after its rendition were possessed of an estate in remain-

der in the lands so assigned as a homestead, the precedent estate therein being an estate for the life of said Louisa M. Forkner, and that they had neither right of entry nor right to maintain an action until the expiration of the life estate; that is, until the death of Louisa M. Forkner. We do not think the decree in the case of the Bechdoldt heirs against John Knox is to be so construed. Under the act of 1857, which was in force at the time of the death of said Frederick C. Bechdoldt, the homestead right of the householder was but the exemption from judicial sale of the lot of ground and the building thereon occupied as a residence, to the value of \$1,000. The act provided that the exemption should continue for the benefit of the widow and family of the householder, some one of them continuing to occupy such homestead, until the youngest child should become 21 years of age and until the death of the widow.

The pleadings and all papers in the case of the Bechdoldt heirs against John Knox, as shown by stipulation of the respective parties, have become lost and mislaid, and could not be produced in proof. What interest, right, or equities John Knox claimed in all the lands of which Frederick C. Bechdoldt died seised does not appear; his answer having been lost. He had a deed purporting to convey him all of the lands owned by Frederick C. Bechdoldt, and he had possession of such lands for about 10 years when the decree was rendered, and it is clear from the decree that he set up some claims or rights or equities in and to all of the lands of which Frederick C. Bechdoldt died seised and that the court considered and adjusted said claims. The records of the court contained the decree in the case, the oath and report of the commissioners, and the order of the court approving the same. The decree recites that within about one year after the death of the said Frederick C. Bechdoldt, his widow, Louisa, who had continued to live in the family residence of her deceased husband, married Albert Forkner, and that she and her said husband executed a quit-claim deed, purporting to convey all of the lands of which her former husband died seised, to John Knox, and that John Knox then took possession of the land, and, to quote the words of the decree, "has from thence continued to occupy the same as his homestead." The court found that the effect of the acts and deed made by the widow was to extinguish her dower and to entitle the said John Knox to succeed to the homestead rights of said Louisa. The court knew that John Knox had then been living upon the land, claiming the right to occupy it all, for nearly 10 years before the rendition of the decree. It seems to be clear, therefore, that John Knox was claiming that he had become entitled to a homestead right in himself in all the land; and that he was also claiming other rights in the land

clearly appears from the decree of the court approving the report of the commissioners assigning to John Knox the premises here in controversy "as his homestead." In that order of approval the court adjudged and decreed that said tracts of land "be, and they are hereby, assigned to said John Knox as his homestead in said land, in lieu of all other claims he may have in and to all of said lands." It is plain that it was the intent of the chancellor to adjust all of the claims which said Knox asserted by reason of his conveyance from the widow, his occupancy of the land as a homestead of his own, improvements, if any, that he had made upon the land, and taxes paid, if any, during the 10 years he had occupied the land, by decreeing to him a homestead interest of his own in the land.

This view is further manifested by the directions given to the commissioners in the decree, viz., "to go upon the said land and first assign to John Knox his homestead, including the dwelling house, not to exceed in value \$1,000." The oath taken by the commissioners proceeded upon the same theory. They were sworn "to go upon the land and assign to John Knox his homestead therein." They reported that they had gone upon the land and had "set off and assigned to John Knox, as his homestead," the said land. The order of the court approving the report of the commissioners further evidences the correctness of this view. It decrees that "the lands set off to said John Knox as his homestead, to wit [describing the 55 acres here involved], be, and the same are, assigned to said John Knox as his homestead, in lieu of all other claims he may have in and to all of said lands." In no part of the decree in which reference is made to this homestead do we find any expression indicating any other intent than that of establishing an interest in John Knox in the nature of a homestead right in him, and that not only because he had succeeded to the homestead rights of Louisa and to be measured by her life, but "in lieu of all other claims he may have in and to all of said lands." If the court had intended to say that the homestead declared and assigned by the decree was that to which Louisa would have been entitled, had she not sold and abandoned the same, and that Knox should be entitled to enjoy Louisa's right of homestead, the decree could have been readily framed so as to express that intent; but the decree seems to have been constructed with an evident purpose to establish in John Knox a homestead of his own in the lands, in lieu of all other claims he was asserting to the land. An interest in land for the life of another person is esteemed of less value than if for one's own life. 4 Kent's Com. *28. The court, it seems plain, intended that the interest designed to be established by the decree in favor of Knox should be more than merely the enjoyment of the right to occupy

the land during the lifetime of Louisa, the widow, for the reason that that which the court gave him expressly declared it to be in lieu of all of his claims to all of the land. The court, therefore, intended to give him an interest or right of occupancy which should be available to him during all of his lifetime, of which he should not be deprived so long as he should live by the death of another. Years before the rendition of the decree, Louisa, the widow, had remarried and removed with her husband and her children to California, and had lost all right to have a homestead assigned to her; and the intention disclosed by the decree was to invest Knox with the right to occupy the premises to be assigned to him as a homestead so long as he should live and should continue to occupy the same, which might be lost or abandoned by him and would be extinguished at his death. It was not to be a descendible estate of inheritance, nor one which he could transfer or convey to another, as is to be clearly inferred by the designation of the interest as a homestead; such being an incident of the homestead right as it then existed.

The interest or right which inured to John Knox by virtue of said decree became extinguished at his death, and the right to maintain an action to recover the lands then arose and accrued to the appellant and the other heirs of the said Frederick C. Becholdt, deceased. This right of action became barred by the statute of limitations invoked by the appellee Johnson before the institution of the proceeding in chancery against him. The trial court, therefore, properly dismissed the bill, and that decree must be, and is, affirmed.

Judgment affirmed.

(217 Ill. 494.)

CHICAGO & A. RY. CO. v. JENNINGS.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. TRIAL—QUESTION FOR JURY—DIRECTING VERDICT.

The question of the credibility of plaintiff is for the jury, and the fact that she contradicted herself does not justify directing a verdict for defendant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 334, 335.]

2. RELEASE—FRAUD—EVIDENCE.

In an action for injuries received in a railroad collision, evidence held to show that plaintiff's signature to a release of damages was obtained by fraud.

3. EVIDENCE—HEARSAY.

A person receiving a message cannot prove the fact that the message was sent by another to him, where his testimony is based solely on hearsay statements of the person delivering the telegram.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1175.]

Appeal from Appellate Court, Third District.

Action by Lora M. Jennings against the Chicago & Alton Railway Company. Judge

ment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Kerrick & Bracken (F. S. Winston, of counsel), for appellant. Welty, Sterling & Whitmore, for appellee.

BOGGS, J. On August 20, 1901, an excursion train and a freight train, which the appellant company was operating on the line of its railroad, collided. The appellee was a passenger on the excursion train, and brought an action to recover damages for personal injuries alleged to have been caused by the collision. Judgment in her favor in the sum of \$2,500, entered in the trial court, was affirmed by the Appellate Court for the Third District on appeal, and the further appeal of the company has brought the record before us.

It is urged that the court erred in refusing to grant the motion of the appellant company to direct the jury to return a peremptory verdict in its favor. The grounds of the motion were, first, that there was no sufficient proof that the appellee received any injury as the result of the collision; and, second, that the appellant company pleaded and proved a valid release of all damages.

As to the first ground, it is conceded the appellee testified that she received injuries to her person by the collision; but it is said by counsel for the appellant she was discredited "by her own contradictory and unbelievable statements," and that the court should have so decided as a matter of law. We cannot assent to this view. It was for the jury to determine whether she was entitled to credit as a witness, and also to determine as to the weight of her evidence. In addition to this, hypothetical questions propounded to and answered by medical expert witnesses tended to show the appellee received injuries to her person by the impact of the trains.

As to the second ground of the motion, the appellee replied to the plea of release that her signature to the instrument purporting to be a release had been obtained by fraud and circumvention, and produced sufficient testimony tending to support the replication to justify the submission of that issue to the jury. The release produced in support of the plea consisted of several sheets of paper, which bore the signatures, together with the places of residence, of 140 persons, among them the signature of the appellee and her address. Above these signatures, on one of the sheets, appeared a release, reciting that, to quote therefrom, "the undersigned, for and in consideration of the amount set opposite our names and addresses, the receipt of which amount is hereby acknowledged, do release the Chicago & Alton Railway Company for any and all damages sustained by each of us (except for baggage) in collision at Prentice, Illinois." The amount set opposite the name of the appellee was two dollars, but it appeared that she did no more than to write her name and address, and that not

as a release of damages, but for other purposes hereinafter stated, and that the characters, "\$2," were afterwards written there without her knowledge or consent. A claim agent of the appellant company was on the train when the collision occurred. Testimony produced before the jury tended to show that after the excursion train had been put in motion and was proceeding on its way this claim agent came through the cars, and said, in substance, that the news of the collision would be printed in the newspapers, and that, if the passengers would give their names and addresses, he would answer all messages of inquiry that came for any of them; that the sheets of paper now claimed to constitute releases of damages by the 140 signers thereto were circulated through the cars and signed by the passengers, each also writing his or her address; that nothing was said to the appellee about a release of damages or payment of money, and no money was then paid to her; that some time after these signatures were so obtained the claim agent again passed through the cars and gave many of the passengers small sums of money, some one and some two dollars, saying that it was to defray their expenses while they were delayed by reason of the collision. The appellee received two dollars for such expense of delay. We have considered the testimony relating to the circumstances under which the signature of the appellee was obtained to the instrument sought to be availed of as a release, and find it amply warranted the submission of the question whether her signature was obtained by fraud and circumvention.

An alleged erroneous ruling of the court as to the admissibility of evidence relative to this issue may appropriately be here considered. The appellee, after testifying that, some hours after the papers which are relied upon as a release had been passed through the cars and the names and addresses signed thereto, the claim agent again came into the car in which she was seated, further testified as follows: "The first I saw he was in the front of the car, beginning to hand money out to the passengers. He had a handful of money. I heard him say something to the lady in front of me. Q. What did she say, and what did he say? A. She asked what it was for, and he said it was to pay the delay expenses. When he came to me he just handed me the two dollars. He didn't say anything to me. He told a man in the aisle it was for delayed expense. Q. Look at 'Exhibit A.' Opposite your name you see two dollars marked there. Did you put that there? (Objected to, for the reason it is not claimed she did.) A. No, sir; I don't know who did put it there. It wasn't there when I signed my name and address." A number of other witnesses who were passengers were permitted to testify that the claim agent passed through the car some time after the signatures were obtained, and made substan-

tially the same statements to them when he paid them the money which they received.

It is complained the court, on the objection of the appellee, refused to permit counsel for the appellant to ask Miss Walton, a witness produced by the company and who was a passenger on the excursion train, what the claim agent said to her or in her hearing as he passed through the train. In the further course of her examination Miss Walton was allowed to state fully and in detail all that the claim agent so said as he passed through the car, so far as she heard his statements; hence no injury occurred from the ruling referred to, and a discussion as to the correctness of the ruling would lengthen the opinion to no purpose.

We find no merit in the contention that the court erred in refusing to allow Mr. De Mange, when testifying as a witness in behalf of the appellant company, to state what Miss Grenburg, who came to Mr. De Mange as a messenger from Dr. Langstaff, said to him (De Mange). Mr. De Mange had been attorney for the appellant company, but severed that connection before appearing as a witness. Dr. Langstaff had testified as a witness in behalf of the appellee, and gave testimony tending to sustain the justice of her demand, and counsel for appellant contended he had sent Miss Grenburg to see De Mange, and directed her to tell him "that the plaintiff's case was a fraud, and that she had no valid claim against the Chicago & Alton Company." Dr. Langstaff was asked if he did not send this message by Miss Grenburg, and he answered that he did not. The appellee was in no manner bound by any statement made by Dr. Langstaff, and proof as to any message sent by him to Mr. De Mange was proper only as tending to impeach the testimony which Dr. Langstaff had given relative to the personal injuries of the appellee. It would, for such purpose of impeachment, have been proper for the appellant company, after having asked Dr. Langstaff if he did not send the message as claimed, to have proven that he did so send the message. But we find no such proof in the record. Mr. De Mange appeared as a witness, and, after testifying that a lady, presumably Miss Grenburg, came to his office and stated that she had a message to deliver to him from Dr. Langstaff, was asked by the counsel for the appellant company the following question: "What did this lady say to you?" and the court refused to allow him to answer. This ruling was proper for more than one reason. There was no proof that Dr. Langstaff had sent the message referred to, and that could not be proved by mere hearsay statements of the alleged messenger. That an impeaching statement was made by this witness sought to be impeached cannot be proved by hearsay. If it had been proved that Dr. Langstaff had directed Miss Grenburg to deliver the message re-

ferred to, proof with relation to it had no proper place in the case as substantive evidence against the appellee, but only as evidence tending to discredit Dr. Langstaff as a witness. It should, therefore, if proper at all, have been brought out by asking the direct impeaching question whether the lady witness, Miss Grenburg, said that Dr. Langstaff had directed her to say that "the plaintiff's case was a fraud, and that she [the plaintiff] had no valid claim against the Chicago & Alton Company," thus restricting the statement to the precise matter relied upon for the purpose of impeachment. The question as propounded, "What did the lady [Miss Grenburg] say to you?" might have brought out testimony which had no reference to the matter of impeachment of Dr. Langstaff, and which would be but mere hearsay as to the appellee, and for that reason wholly incompetent.

No complaint is made of the ruling of the court in the matter of instructing the jury, nor are any other errors of which we take cognizance urged by counsel. The major part of the briefs of counsel for the appellant is devoted to questions of fact which have been conclusively determined by the judgment of the Appellate Court.

The judgment must be, and is, affirmed.
Judgment affirmed.

(217 Ill. 504)

ILLINOIS STATE TRUST CO. v. ST.
LOUIS, I. M. & S. RY. CO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—REVERSAL OF CAUSE—EFFECT.

A general judgment of reversal and remand entirely abrogates the judgment reversed, and remands the cause for further proceedings precisely as if no trial had ever occurred, and authorizes either party on rehearing to introduce testimony in the same manner as if the case had never before been brought, except that no proceedings should be had or taken inconsistent with the legal principles announced in the opinion of the reversing court.

2. SAME.

A judgment of the Supreme Court, reversing a condemnation judgment and remanding the cause generally for a new trial, on the ground that it appeared from the proofs then in the record that a road purchased by petitioner, and on account of which it claimed the right to condemn the property in question, was parallel with a road previously run, does not preclude further proof on the retrial to show that the lines are not competing or parallel.

3. RAILROADS—PURCHASE OF OTHER ROADS—PARALLEL OR COMPETING LINES.

Under Laws 1890, p. 116, empowering foreign railroads to purchase the property of resident railroads, but providing that it shall not be construed to permit any railroad to purchase a parallel or competing line of railroad in this state, the line which the local railroad was empowered by its charter to construct, as well as the line which it had actually constructed, must be considered in determining whether such local railroad is a parallel or competing line with the foreign railroad which seeks to purchase the same.

4. SAME.

Laws 1899, p. 116, authorizes a foreign railroad to purchase property of a local railroad in certain cases, but provides that it shall not be so construed as to permit any railroad to purchase any parallel or competing line of railroad in the state. A foreign railroad reached the termini of a local road, but its line between such termini was much longer and more indirect, requiring a change of cars and ferrying. The foreign road ran no through trains between the termini of the local road, solicited no through business, and provided no terminal facilities at one terminus of such road; nor did it make any freight or passenger rates to compete with the local road. *Held*, that the roads were not parallel or competing lines, within the meaning of the statute.

Appeal from St. Clair County Court; John B. Hay, Judge.

Condemnation proceedings by the St. Louis, Iron Mountain & Southern Railway Company against the Illinois State Trust Company. From a judgment of condemnation, defendant appeals. Affirmed.

See 70 N. E. 357.

Wise & McNulty, for appellant. L. D. Turner, Forman & Whitnel, and Martin L. Clardy, for appellee.

BOGGS, J. This was a proceeding in the county court of St. Clair county by the appellee for the condemnation of a strip of land 100 feet in width belonging to the appellant, lying along and adjoining the original right of way of the St. Louis Valley Railroad Company. The cause was in this court at a former term (208 Ill. 419, 70 N. E. 357), and we then reversed the judgment of said county court awarding condemnation of the said strip, for the reason that the appellee company is a foreign corporation and therefore without authority to exercise the power of eminent domain in this state, unless so empowered by the act of the General Assembly approved April 21, 1899 (Laws 1899, p. 116), which enactment authorizes a foreign railroad corporation to purchase the property of a resident corporation of which such foreign corporation shall be in possession, and to exercise the powers, privileges, and franchises of the corporation whose property has been so purchased, including the power of eminent domain, if that power is necessary to enable it to acquire real estate necessary for the betterment, maintenance, extension, or operation of such railroad so purchased, or for the construction and maintenance of spurs, switches, side tracks, etc.; and we held that the appellee company was not then so empowered, for the reason said act further provided that it should not be construed to permit any railroad company to purchase any parallel or competing line of railroad in this state, and that it appeared from the proofs then in the record that the said St. Louis Valley Railroad Company, of which the appellee company claimed to be the owner by purchase in pursuance of the said act of April 21, 1899, and by virtue of which purchase it contended it acquired the right to

condemn the property in question, was a parallel or competing line of railroad of the appellee company. The cause was reversed and remanded generally, and has been re-docketed in the said county court and again heard, and judgment entered fixing the compensation for the land to be taken and the damages to land not taken at a total sum of \$7,000, and awarding condemnation upon payment of said sum. This is an appeal prosecuted to reverse this latter judgment of condemnation.

On the hearing, after the remandment of the case, being the hearing from which this appeal is prosecuted, the trial court, over the objection of the appellant company, permitted the appellee company to introduce testimony for the purpose of proving that said St. Louis Valley Railroad and the appellee railroad were not parallel and competing lines of railroad. The contention of the appellant company was that the judgment of reversal and remandment pronounced in this court on the former submission of the case was an adjudication of the question whether the said lines of railroad were parallel or competing lines, and that evidence directed to that question was inadmissible, for the reason the question had become *res judicata*. It is here urged the court erred in overruling this contention. The judgment entered in this court was that the judgment entered in the county court on the former hearing should be reversed and that the cause should be remanded. The remanding order was without any specific directions; that is, was general. The effect of that judgment was to entirely abrogate the former judgment of the county court, and to remand the cause to the county court for further proceedings precisely as if no trial had ever occurred, and on a rehearing to authorize either party to introduce testimony in the same manner as if the case had never before been tried, save that no proceedings should be had or taken inconsistent with the legal principles announced in the opinion rendered by this court. *Chickering v. Falles*, 29 Ill. 294; *Dinsmoor v. Rowse*, 211 Ill. 317, 71 N. E. 1003.

The parties at the last hearing in the county court entered into a stipulation of facts, agreeing "that complainant is a railroad corporation organized under the laws of the states of Missouri and Arkansas; that the St. Louis Valley is a railroad corporation under the laws of the state of Illinois; that it is a partially constructed railroad from Valley Junction, through the counties of St. Clair, Monroe, Randolph, Union, and Alexander, a distance of 120 miles, to Gale, and also a branch from Gorham, in Jackson county, in an easterly direction, 26 miles, to Busch, in Williamson county, Ill.; that petitioner on the 30th day of April, 1903, was in possession of said railroad lines in this state belonging to the St. Louis Valley Railway, and owned all of the capital stock of

said company; that said petitioner purchased in fee simple all of the said railroad of said company, together with all the rights, etc., used in connection therewith; that said sale and purchase were duly approved by the stockholders of the St. Louis, Iron Mountain & Southern Railway Company and of the St. Louis Valley Railway, at meetings held upon notice given as required by law; that said petitioner complied with all the requirements of the state of Illinois with reference to doing business in the state of Illinois as a railroad company, and especially with the requirements of an act approved April 21, 1899, being section 218 [page 1415] of the Revised Statutes of Illinois of 1901; that the question to be determined in this cause is whether the St. Louis Valley Railway in Illinois, and the St. Louis, Iron Mountain & Southern Railway in Missouri, are parallel or competing lines, or whether they will be, if the Valley Line shall be completed to Cairo, Ill.; that the other issue will be as to the amount of compensation to be paid by petitioner to defendant for the land actually taken, and damages to the land not taken." No complaint is made by either litigant as to the amount fixed by the judgment of condemnation to be paid as compensation for land taken and as damages to land not taken. The record presents but a single question, and that a question of fact—whether the line of railroad of the St. Louis Valley Railroad Company and that of the appellee company were parallel or competing lines of railroad. If so parallel or competing, the appellee company was without power to become the purchaser of the line of the Valley Railroad, and the act of April 21, 1899, conferred no power on the appellee company to exercise the right of eminent domain in this state.

On the hearing in the county court, when heard there for the first time, the only testimony on the question whether these lines of railroad were parallel or competing was that incidentally, rather than directly, given by 2 witnesses. No other witnesses then testified on the point. On the hearing in the county court which we are now called upon to review 22 witnesses were produced and gave testimony in behalf of the appellee company. None were produced in behalf of the appellant company. These witnesses expressed it to be their opinion that the St. Louis Valley Railroad Company as constructed to Thebes, when purchased by the appellee company, and the line of the appellee company, were not parallel or competing lines of railroad, and testified to facts on which they, respectively, based the opinion so expressed, and would not be, if the line of the Valley Railroad should be completed to Cairo. Among these witnesses were two who had served as members of the Interstate Commerce Commission of the general government, and another was

and had been the secretary of the said commission since its organization. Two others were members of the Railroad and Warehouse Commission of the state of Illinois, and two were ex-members of that commission. One other was a member of the Railroad Commission of the state of Missouri, and another was an ex-member of that commission. Among the other witnesses were large shippers of freight and grain, civil engineers, managers, superintendents, and other officials of various systems of railroads. We have carefully read the testimony of all of these witnesses, and after a thorough consideration of all the facts and circumstances disclosed in their testimony and by the stipulation of facts, in connection with the geographical facts of which judicial notice is taken, we have reached the conclusion that said lines of railroad were neither parallel nor competing lines.

The St. Louis Valley Railroad Company was organized under the laws of this state, with authority to construct a railroad from Valley Junction, a point six miles southeast from East St. Louis, to the city of Cairo, with a branch road extending in a northeasterly direction from Gorham, a town nearly equidistant between Valley Junction and Cairo, into the coal fields of Franklin and Williamson counties, in Illinois. The line of the Valley Railroad, authorized by its charter to be constructed from Valley Junction to Cairo, was located east of the Mississippi river, in the counties in Illinois bordering on that river, and in close proximity thereto. After the road had been completed on the line as so located from Valley Junction to Gorham, about 92 miles south from Valley Junction, the appellee company came into possession of the road, and afterwards purchased the same and completed the railroad to a point near the town of Thebes, which is about 20 or 22 miles up the river from Cairo. The distance from Valley Junction to Cairo is about 143 miles. The St. Louis Valley Railroad Company was granted chartered power to construct and operate a railroad to Cairo, and in determining whether the line of its road is either parallel to or competing with the line of appellee's railroad, the line which it possessed the power to construct and operate, as well as that portion of the line whereon a railroad has been built, enters into consideration. Between Valley Junction and the Union Station in St. Louis temporary arrangements have been effected by means whereof the trains on the Valley Railroad are enabled to reach that station. The main line of the railroad of the appellee company runs from St. Louis in a southerly or southwesterly direction to Texas. For some short distance out of St. Louis the line of the road is located near the west bank of the Mississippi river, but at Riverside it bears away from the river in a southwesterly

course, and when as far south as Thebes the main line of the railroad is about 50 miles west of Thebes, and is 60 to 70 miles from Cairo at the nearest point to that city. A branch line of appellee's road runs from this point so nearest to Cairo, to wit, Poplar Bluffs, in Missouri, to Birds Point, in Missouri, on the west bank of the Mississippi river, some 4 miles below Cairo, and from there the trains of the appellee company are transported by ferry to Cairo. The ferry is operated by another railroad company, and the appellee company owns neither tracks nor terminal facilities at Cairo. Beginning on the main line of appellee's road at Bismark, Mo., which is 48 miles west of the Mississippi river, the appellee company has another branch line of railroad which runs to Belmont on the west bank of the Mississippi river, some 25 or 30 miles south of Cairo. This branch line, at Delta, Mo., the nearest point to Thebes, the terminus of the Valley Railroad as actually completed, is 16 miles west of Thebes, and at Charleston, Mo., this branch line is about 16 miles west of Cairo. At Charleston the branch line from Bismark to Belmont crosses the branch line from Poplar Bluffs to Cairo. The evidence shows that no through trains are or were ever run on appellee company's road between St. Louis and Birds Point. Passengers could go from St. Louis to Birds Point by taking a train on the main line from St. Louis to Bismark and there alighting. They could there take a train on the Belmont branch of appellee's road, and alight therefrom at Charleston, from which point they could reach Birds Point by means of a train on the branch of appellee's road running between Poplar Bluffs and Birds Point. Freight would be transferred at the same point. Passengers and freight from Birds Point to St. Louis would pass over the same route and by means of the same changes of trains.

It appeared from the proofs that the line of the road of the appellee company in Missouri, because of the bluffs of the river, followed along the river bank from St. Louis until it passed below the bluffs, and then left the river and ran off to the southwest, and passed through the region of the Ozark Mountains, where many curves and high grades are necessary; that this line is nearly 50 miles longer than the distance from Cairo to St. Louis on the Illinois side of the Mississippi river; that at Birds Point the means of crossing the Mississippi river, a distance of about four miles, is very inconvenient, controlled by other companies, and expensive. The maximum grade of appellee's road in Missouri runs, as was testified to by civil engineers, at 100 feet to the mile. On the Valley Railroad the maximum grade is about 13 feet to the mile, with but few or no curves, and the means of transferring passengers and freight at St. Louis are much

superior and less dangerous and expensive than those at Birds Point. The Illinois Central Railroad Company and the Mobile & Ohio Railroad Company each operate through lines of railway from Cairo to St. Louis. These lines are direct, have superior facilities for crossing the river, and both roads operate through passenger and freight trains back and forth between Cairo and St. Louis. These lines are shorter than the indirect route that must be taken on appellee's lines of railway, and they are the competitors of each other, and of the boats on the river, for passengers and freight between Cairo and St. Louis. Under such circumstances it was entirely impracticable for the appellee company to attempt to compete for business either way between Cairo and St. Louis. Moreover, the proof shows that the appellee company did not attempt to compete for such business. It appeared the appellee company maintained an office in Cairo, and that it published a tariff rate from Cairo to St. Louis; but the testimony showed that the office was maintained there for the purpose of soliciting freight and passenger business for points southwest of Cairo, and the tariff of rates was published because the statutes so required. The general traffic manager of the appellee road testified that his instructions did not warrant their agent in Cairo to solicit business from that point to St. Louis; that the company did not solicit or encourage traffic either way between Cairo and St. Louis, and had never done so; that the appellee company recognized that it was commercially impossible for it to compete with the Illinois Central and Mobile & Ohio Railroads for business between those cities; and that the appellee company did not make a competing freight or passenger rate, or install through trains, or make any other effort to secure business between those cities. Representatives of the branch of the Illinois Central Railroad from St. Louis to Cairo testified that that road was the competing line with the Mobile & Ohio Railroad for Cairo and St. Louis business; that they did not regard, and have never regarded, appellee's road as a competitor; that in making rates for such business they would consult with the Mobile & Ohio Railroad officials and agree with them, but never with the officials of the appellee road, as it took no business between those points worthy of consideration. The general manager of the Mobile & Ohio Railroad testified that he had been in the service of that company for 28 years, and during that time the appellee's road in Missouri was never considered as a factor in the traffic between Cairo and St. Louis; that never, to his knowledge, had any train left Cairo for St. Louis, or from St. Louis for Cairo, over the appellee's road; that an office was maintained by the appellee company in Cairo for the purpose of securing business for points in Southwest Miss-

ouri, Arkansas, and Texas. The vice president of the appellee company testified that competition on the part of his road with the Illinois Central and Mobile & Ohio Railroads between Cairo and St. Louis was practically an impossibility; that the branch of the appellee's line from Poplar Bluffs to Birds Point was constructed as a part of the Southern system of its road for the purpose of securing and carrying to its main line freight and passengers at Cairo to be transferred to the Southwest, and that the branch was of no importance or consequence whatever for business to St. Louis; that the office was maintained in Cairo to secure business for the Southwest; that business from Cairo to St. Louis, or from St. Louis to Cairo, by way of the appellee's road was not and had not been sought for or expected, and was too rarely heard of to be considered by the officers of the company, and was not considered at all as a source of income to the company. The agent employed by the appellee company to solicit freight and secure business for that road in Illinois testified that he solicited freight to go to points on appellee's road in Missouri; that he had no instructions to solicit freight for Cairo, and did not think that he ever got a shipment for Cairo; that the Illinois Central and the Mobile & Ohio Railroads got all the business for that point; that the appellee company had no practical line for business to Cairo. Two witnesses who dealt largely in grain raised in Illinois near the bank of the Mississippi river testified that they shipped from St. Louis to Cairo by the Mobile & Ohio Railroad, and never by the appellee's road. The evidence demonstrated that the appellee railroad is not and was never a competing line for business between Cairo and St. Louis or St. Louis and Cairo.

It was also as clearly shown that the Valley Railroad, if completed no further than Thebes, would not be a competing line with that of the appellee company. Delta, Mo., on the Belmont branch of the appellee road, is the nearest point on any of appellee's lines to Thebes. The distance between these points is about 20 miles. The river and one of the lines of the Frisco System of railroads, which runs along the western bank of the river to St. Louis, and a branch line of the Illinois Central Railroad, which for some distance above Thebes is located between the Valley Railroad and the east bank of the river, are between Thebes and Delta. It is therefore apparent that competition does not and could not exist between the Valley Railroad at Thebes and the appellee railroad at Delta, 20 miles away. Competition at Thebes for St. Louis business would be the steamers on the river and the line of the Frisco System on the opposite shore of the river, and that of the Illinois Central Railroad before mentioned. From Delta the course of the Belmont branch of appellee's line is to the northwest, gradu-

ally increasing its distance from the river and from the line of the Valley Railroad and of the Frisco System until it intersects with the main line of appellee's road at Bismark, about 48 or 50 miles west of the river. At Riverside, north of Bismark, the line of the appellee's road, in order to avoid bluffs and hills, draws nearer to the river, and from thence into St. Louis passes along the more level ground that lies between the bluffs and the river. From Riverside to St. Louis, a distance of from 25 to 30 miles, the line of appellee's road in Missouri and that of the Valley Railroad in Illinois are more nearly together, being from 6 to 8 miles apart, the river intervening, and for a portion of the way two or more railroads intervene on the Illinois shore. A grain dealer who lives at Kimmswick, Mo., about 8 miles north of Riverside, testified that he had been in the grain business for about 20 years as a buyer and shipper of grain south of St. Louis on the Illinois side of the Mississippi river; that he had eight elevators along the line of the Valley Railroad in Illinois; that prior to the construction of the Valley Railroad the grain in that portion of Illinois was shipped by boat, and that none of it was ever brought across the river for shipment on the appellee's line of road; that he was, before the Valley Railroad was built, and still is, a shipper of wheat from St. Louis to Cairo, but never made a shipment on the appellee's road, and was never solicited to do so, although he did considerable business with the appellee road. Another grain buyer, who lives at Waterloo, Ill., testified that prior to the building of the Valley Railroad the products from the farms along and near the Mississippi river south of St. Louis, in Illinois, went to market by the river; that it was practically impossible to take them across the river and to the appellee's road for shipment, and that he never knew of any such products being so shipped; that the Valley Railroad is the competitor of the river boats and other lines of railroads in Illinois for the shipment of the products of the farms along and near the line of the Valley Railroad and the river; and that the appellee railroad in Missouri is not and never was a competitor for such trade.

It therefore very plainly appeared from all the testimony that the Valley Railroad, at either terminus or at any intervening point, was not and is not a competing line of road with that of the appellee, and is not a parallel line of road, either within the technical geometrical definition of the word "parallel," or within the more enlarged and practical meaning which, when the element of competition is present, should be given the term "parallel lines" as employed in the statute under consideration.

The judgment of the county court is correct, and is affirmed.

Judgment affirmed.

(217 Ill. 580)

KEELEY et al. v. SAYLES.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. REFORMATION OF INSTRUMENTS—MISTAKE IN DEED.

Where a deed, made under a contract of sale, by fraud or mistake covered property not within the contract or intended to be conveyed, and for which only the consideration provided for the smaller tract was paid, the court will reform the deed by striking out the property not intended to be conveyed.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, §§ 44, 45.]

2. SAME—LACHES.

Where the vendor of land, after discovering a mistake in the deed, delayed a year before filing a bill to reform it, there was no laches.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 120.]

3. SAME—PLACING GRANTEE IN STATU QUO.

Where a deed by fraud or mistake was made to cover a larger tract than intended by the parties, and no consideration was paid for such excess, on seeking to reform the deed the grantor need not offer to put the grantee in statu quo.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 83.]

Appeal from Circuit Court, Lake County; C. H. Donnelly, Judge.

Bill by Edward O. Sayles against Eugene M. Keeley and another. Decree for plaintiff, and defendants appeal. Affirmed.

In this case the original bill was filed on August 13, 1903, and the amended bill on October 12, 1903. The amended bill, filed by the appellee, Edward O. Sayles, in the circuit court of Lake county, sets forth the execution of a deed by appellee and his wife to the appellant Eugene M. Keeley on December 22, 1900, and prays that said deed may be set aside, so far as it conveys a part of the premises therein described, as a cloud upon the title of appellee, and that said deed may be delivered up to be canceled as to said premises. The bill also prays for "such other and further relief in the premises as equity may require and to your honor may seem meet." The appellants, Eugene M. Keeley and J. E. Kinsella, were made defendants to the bill, and answered the same, denying the material allegations thereof. When the cause was at issue, it was referred to a master in chancery, who took testimony and reported his conclusions. Exceptions to the report were overruled, and the court entered a decree granting the relief prayed by the bill. The present appeal is prosecuted from such decree.

M. Henry Guerin, for appellants. Charles Whitney and William C. Upton, for appellee.

MAGRUDER, J. (after stating the facts). The appellee owned a small piece of ground, amounting to .83 acres in quantity, being in the shape of a V or flatiron, east of the Chicago & Milwaukee Railroad Company,

and adjoining certain property known as P. J. Clark's 75 acres, which afterwards became the property of the appellant, Keeley, or the ice company, in which Keeley and Kinsella were interested and of which Kinsella was the president. On September 7, 1899, Kinsella, accompanied by a witness named Howard, visited appellee and his wife at their residence in Lake county, with reference to the purchase of this piece of land, containing about .83 acres. It lay between the icehouses or icehouse of the appellants and the railroad, and was desired by them for the purpose of connecting their icehouse property with the railroad. A written contract, dated September 7, 1899, was executed, which provided that Kinsella, as party of the first part, had entered into an agreement with Mr. and Mrs. E. O. Sayles, as party of the second part, to purchase a tract of land east of said railroad and adjoining said Clark property, and recites that the party of the first part paid over to the party of the second part the sum of \$25, and agreed to pay the party of the second part \$200 an acre for said parcel of land, described in the agreement as a V lying between the main track and the switch. The contract also provided that the purchase money was to be paid equally to Mr. and Mrs. Sayles, and the transfer to be made as soon as the property was surveyed; the party of the second part to give clear title. The contract was signed by Edward O. Sayles, Betsey Jane Sayles, and J. E. Kinsella, and witnessed by Edson C. Howard. Appellee also owned, in addition to the tract of land already mentioned, another piece of land, containing about 10.87 acres, adjoining the first piece already described. On December 22, 1900, the appellant Kinsella, a notary public by the name of Alexander Tweed, and one Peter J. O'Sullivan, the latter being conceded to have been an agent of the appellant Eugene M. Keeley, called at the house of Mr. and Mrs. Sayles and presented to them for execution a deed. Sayles and his wife supposed that this deed conveyed only the first tract, containing .83 acres, and that its execution was asked because of the contract of September 7, 1899, and in order to carry out the same. They signed the deed and acknowledged it before Tweed, and it was recorded on December 24, 1900. It was subsequently ascertained by the appellee, Sayles, that the deed not only conveyed the tract of .83 acres, but also the tract of 10.87 acres. The proof is quite clear that appellee and his wife never intended to convey the larger tract of 10.87 acres, but only intended to convey the smaller tract of .83 acres.

It is difficult to see how the insertion of the description of the larger tract in the deed was not the result either of fraud or mistake. When the contract was made on September

7, 1899, by Kinsella for the purchase from Sayles and his wife of the tract of .83 acres, the purchase was made upon the basis of a valuation of \$200 per acre, and \$25 only was paid in cash. The purchase price, therefore, for the .83 acres was \$166, and, after taking out the \$25 paid in cash, there remained due upon the purchase price the sum of \$141. The proof shows that the appellee was an ignorant man, able to write his name, but not able to read, except words of one syllable. His wife and daughter were present when the deed was executed, but the proof shows that the former did not read all of the description in the deed. While Kinsella and Tweed and O'Sullivan were present in the house of Sayles on the night of December 22, 1900, Kinsella stated that \$25 had already been paid upon the contract, and thereupon the remaining \$141 was paid over, one half of it to Sayles, and the other half to his wife. The amount thus paid was the exact consideration which, by the contract of September, 1899, was to be paid for the smaller tract. No other money was paid by either of the appellants to the appellee for the second tract. No contract was ever made by Kinsella or Keeley for the purchase of the larger tract from Sayles and his wife. No conversation was ever had between them in reference to the sale or purchase of the larger tract until after the execution of the deed of December, 1900. It is not claimed, as we understand the evidence, on the part of the appellants, that they ever paid a cent for the second or larger tract. The relief granted, therefore, was merely a reformation of the deed, by leaving out of it what was improperly in it, and what was never paid for by any portion of the consideration which passed between the parties.

Counsel for appellants says that one who seeks to rescind a contract or deed must put or offer to put the other party in statu quo. It was unnecessary here for Sayles to offer to pay anything to Keeley or Kinsella, because they were entitled to receive nothing, as no part of the consideration paid included or had reference to the larger tract. The doctrine that a vendor who seeks the aid of a court of equity to rescind a contract of sale must restore, or offer to restore, the cash payment that has been made, has no application here, because no cash payment was made for the larger tract. It is furthermore said by the appellants that, when Kinsella made the contract for the purchase of the land, he made it for himself, and not for

Keeley. The evidence, however, shows that Keeley and Kinsella were both interested in the ice company, which desired the use of the land owned by Sayles. The property upon which the icehouse stood, which was to be connected with the railroad by a right of way over the Sayles property, was owned by Keeley. O'Sullivan, who went with Kinsella and Tweed to obtain the deed, was the agent of Keeley, and stated that he went to procure the deed at the request of Keeley. There is no evidence that this contract was ever assigned by Kinsella to Keeley, but the contract was referred to by the parties when the deed was made, and Kinsella stated, when the sum of \$141, balance of the purchase money, was paid, that \$25 had already been paid upon the contract. In other words, the conduct of the parties, and all that was said and done by them on the night of December 22, 1900, when they procured the deed, showed that the contract and the deed were both executed and procured in the interest of Keeley, as well as of Kinsella.

It is charged that the appellee was guilty of laches in not filing the present bill sooner than he did. The discovery of the mistake or fraud, by which the description of the larger tract was inserted in the deed, was not made by Sayles until about September, 1902, and the original bill in this case was filed on the 13th day of August, 1903, within less than a year. Under the circumstances, we are of the opinion that the appellee was not guilty of laches. The proof does not show that these ignorant people were guilty of any lack of prudence or care in examining the deed when it was executed. The parties who came to them for a deed used language which led them to believe that they were executing a deed in pursuance of a contract already executed by them in good faith. It was not a case where a party was asked to execute a deed as an original transaction, but where a deed was asked for in execution of a contract previously entered into, and upon which money had already been paid. They were, therefore, not upon their guard, and not prepared to believe that any deception was intended.

Without further discussion of the evidence, we are satisfied that the decree of the court below was correct, and fully sustained and justified by the evidence in the case. Accordingly the decree of the circuit court of Lake county is affirmed.

Decree affirmed.

(217 Ill. 551)

HOME BUILDING & LOAN ASS'N v. McKAY et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. HOMESTEAD — LIABILITIES — PURCHASE-MONEY MORTGAGES.

Where a purchaser of property executes a mortgage to a loan association to secure an advance of the entire purchase price thereof, the entire interest of the purchaser is subject to the mortgage, and he cannot create a homestead estate as against the mortgagee by subsequently moving onto the property in accordance with a previous secret intention to make it his homestead.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Homestead, §§ 147, 152.]

2. EVIDENCE—HEARSAY—CONVERSATIONS.

A conversation between the purchaser of a house and the vendor, in which the latter stated that he intended to buy the house as his home, is not competent to establish a homestead as against a mortgagee who advanced the purchase money and did not hear the conversation.

3. BUILDING AND LOAN ASSOCIATIONS—LOANS—INTEREST.

Under 1 Starr & C. Ann. St. 1896, p. 1050, c. 32, par. 118, providing that no interest, premiums, fines, nor interest on such premiums that may accrue to homestead loan associations shall be deemed usurious, a loan association which complies with the provisions of the statute controlling the making of loans by such associations may lawfully contract for greater compensation for interest and premium for the use of its money than the legal rate fixed by the general interest laws of the state.

4. SAME—LOANS—COMPETITIVE BIDDING.

Under the homestead loan association act (Laws 1891, p. 89, § 8); requiring such associations to loan their funds to the highest bidder at stated meetings of the board of directors, it is not essential to the validity of a loan that more than one bidder be present at the meeting at which the loan is made, but only that opportunity shall be given for competitive bidding, and that priority or preference of loan shall be awarded to the highest bidder.

5. SAME—LOAN TO STRANGER—VIOLATION OF STATUTE—ESTOPPEL TO URGE DEFENSE.

A borrower from a building and loan association cannot, after receiving his loan and becoming a stockholder, defend a suit for foreclosure on the ground that the loan was in violation of statute, and not exempt from the usury law because he was not a stockholder when he made his bid, nor can a subsequent mortgagee set up such defense.

6. USURY—PLEADING—SPECIFIC ALLEGATIONS.

Usury must be specially pleaded, and the fact wherein it is alleged the usury charged consists must be specifically alleged in the answer setting up that defense.

Appeal from Appellate Court, Second District.

Bill by the Home Building & Loan Association against George D. McKay and others. From a judgment of the Appellate Court, affirming a decree in favor of defendants, plaintiff appeals. Reversed.

C. I. McNett (L. E. Emmons and E. L. Chapin, of counsel), for appellant. Sears & Smith and Theodore Worcester, for appellees McKay. Frank G. Plain, for appellee German-American Bank.

BOGGS, J. This was a bill in chancery filed by the appellant association to fore-

close a mortgage given to it by the appellees George D. McKay and Anna McKay, his wife. The German-American Bank held a mortgage which was subsequent in point of time of execution and recording to that of the appellant association, and was made a party defendant. The McKays answered, alleging that the appellant association contracted for and exacted usurious interest in the execution of the mortgage, and that the mortgaged premises were their homestead, and that the acknowledgment of the mortgage was taken by a notary public who was the owner of shares of the capital stock of the association, and that under the holding of this court in *Ogden Building Ass'n v. Mensch*, 196 Ill. 554, 63 N. E. 1049, 89 Am. St. Rep. 330, the mortgage did not become a lien on the homestead estate. The answer of the appellee bank contained like allegations as that of the McKays with reference to the homestead interest, averred that the mortgage to the appellant association was not a lien on that estate, and set up an indebtedness of the McKays to the bank and the execution by them of a mortgage on the premises to secure the indebtedness to the bank, and that such mortgage waived and relinquished the homestead estate of the debtors in due form of law, and was lawfully acknowledged and became and was the only lien on the homestead estate. The bank also filed a cross-bill asking for the foreclosure of its mortgage as against the homestead estate. On the hearing the defenses presented by the McKays and the contention of the bank were both sustained, and decree entered accordingly. On appeal the decree was affirmed by the Appellate Court for the Second District, and the further appeal perfected by the association has brought the record into this court.

The appellant is a homestead loan association organized under an act of the General Assembly of this state approved June 10, 1879. 1 Starr & C. Ann. St. 1896, p. 1045, c. 32, par. 108. The appellees McKay are husband and wife. The mortgaged property originally belonged to Ellen M. Danahy. It consisted of a lot and a part of another lot in the city of West Aurora, upon which was a dwelling house. The McKays contracted to buy the property from Mrs. Danahy at and for the sum of \$6,000, and procured the appellant association to loan them that sum of money to be secured by a mortgage on the premises; the McKays to become stockholders in the association in the same amount, and to repay the sum borrowed, together with interest and premiums thereon, in accordance with the by-laws of the association. Mrs. Danahy and the McKays appeared at the office of the appellant association. The former had in her possession a deed duly executed and ready to be delivered, conveying the property to George D. McKay. The bond or note to be given to the appellant association by the McKays for the sum of \$6,000 was ex-

ecuted by the makers, and a mortgage to secure the same was drawn up and signed and acknowledged by the McKays, who applied for and had issued to each of them 30 shares of the capital stock of the association. When the papers were completed, the secretary of the association, to whom the mortgage was delivered, drew the check of the association for the said sum of \$6,000, payable to the McKays. They indorsed the check and delivered it to the secretary, together with the assignment of their shares of stock. The secretary delivered the check to Mrs. Danahy and received from her the deed for the premises to George D. McKay. The secretary delivered both the deed and the mortgage to the recorder and caused the same to be recorded, and, when recorded, the instruments were returned to the secretary and by him placed in the vaults of the association, where they have since remained. Four days after the delivery of the deed by Mrs. Danahy and the execution and delivery of the mortgage to the appellant association, and after these instruments had been filed for record, the McKays removed from another dwelling house, which they occupied as tenants, into the dwelling house on the mortgaged property, where they have since resided.

The McKays, before the enactment of the act of May 15, 1903 (Laws 1903, p. 120), validating mortgages so defectively acknowledged as was the mortgage of the McKays to the association, executed the mortgage to the appellee bank, and legally therein waived and relinquished the homestead estate so far as the indebtedness to the bank was concerned. The contention of the bank is that this validating act was inoperative as against the lien of the mortgage given to it, and that its mortgage constituted the first lien on the homestead estate of the McKays in the premises. When the mortgage was executed and delivered to the association and filed for record, the premises were not in the possession of the McKays, nor had they ever been in the possession thereof. They testified that they bought the property with the intention of removing to it and making it their homestead, and within four days thereafter they did remove to and occupy the mortgaged premises as a residence. It is insisted that this intention, and their subsequent act of moving into the dwelling house on the mortgaged premises and occupying the same as a homestead, created in the McKays a homestead estate therein at the time of the execution of the mortgage to the association, and that the mortgage to the association, not having been so acknowledged as to legally waive and relinquish their homestead estate, did not constitute a lien thereon in favor of the association.

We find no proof in the record even tending to show that the appellant association, or any of its officers or agents, were advised or had knowledge that it was the intention of

the McKays to occupy the premises as their homestead. They had never been in possession of the property, nor had they done any physical act in and about the property denoting an intention to subsequently occupy the same. When the mortgage to the association was executed there existed only an undisclosed and unexecuted intention on the part of the McKays to subsequently occupy the premises which they were about to purchase. This secret and uncommunicated purpose was not, of itself, sufficient to impress the property with the character of a homestead estate as against the appellant association. The McKays executed the mortgage to induce the association to advance to them the money wherewith to enable them to buy the property, and it would be highly inequitable and unjust to hold that a secret and unknown intention as to the use they subsequently intended to make of the property could operate to defeat the lien of the mortgage by them voluntarily executed for the purpose, so far as the association knew, of creating a lien against the entire estate and interest which they were to receive by the deed from Mrs. Danahy.

Our statute creates the estate of homestead in the householder to the extent of \$1,000 in premises "owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence," and while, under some circumstances, the purchase of property with the intention of occupying it as a homestead, followed within a reasonable time by the actual occupancy thereof as a residence, has been held to create the estate of homestead even before there be an actual occupancy thereof, yet we are cited to no authority holding that such mere intention, not manifested or evidenced by some overt act and not disclosed, can impress the property so intended to be purchased for a homestead as against one whom such purchaser has induced to loan the money wherewith to buy the property, the repayment thereof to be secured by a lien of a mortgage which such proposed purchaser voluntarily executes, without communicating the bare secret intent on his part to subsequently occupy the property so to be purchased as a homestead. The property was not occupied by the McKays when the mortgage was executed, nor had they done any act affecting the physical character of the property whereby any intention to occupy the same was manifested, nor had they communicated to the appellant association their purpose and intent as to the subsequent use to be made of the property, and no release of any such proposed or intended homestead rights or interest was necessary to be inserted in the mortgage in order that the lien thereof might have full operation and effect against the entire estate of the mortgagors in the property. The true rule applicable in the state of case disclosed by this record is thus expressed in 15 Ameri-

can and English Encyclopedia of Law (2d Ed.) p. 579: "The intention must not be a secret and uncommunicated purpose, but must be shown by acts of preparation of a physical character, or by something equivalent. Mere intention of a man and wife to occupy premises purchased by the husband as their home, without any preparation to put such intent into execution, does not render the premises exempt as a homestead."

The court did not err in excluding the proffered proof that George D. McKay told Mrs. Danahy that if he purchased the property he desired to move there at once, in order to save paying another month's rent in the home he then occupied. This conversation was not in the hearing of any agent or officer of the appellant association, and as to it the conversation was mere hearsay and incompetent to be produced in evidence against it. We are therefore of the opinion that the chancellor erred in holding that the mortgage to the appellant association was not a lien against the entire estate of the mortgagors in the mortgaged premises.

We think the defense of usury was not sustained. The interest provided in the note secured by the mortgage given by the McKays to the appellant association was at the rate of 7 per cent. per annum, but a premium of $\frac{1}{24}$ of 1 per cent. was contracted to be paid monthly, and the premium and interest exceeded the legal rate. But the association, if it complied with the provisions of the statute controlling the making of loans by such associations, could lawfully contract for a greater compensation, by way of interest and premium, for the use of its money, than the legal rate fixed by the general interest laws of the state, without being exposed to the consequences attaching under such general interest laws to contracts for the payment of a rate of interest in excess of the legal rate. 1 Starr & C. Ann. St. 1896, c. 32, par. 118, p. 1050; Borrowers' Building Ass'n v. Eklund, 190 Ill. 257, 60 N. E. 521, 52 L. R. A. 637. The association had not adopted a by-law fixing a rate of interest and premium at which its funds should be loaned, and dispensing with the provisions of the body of section 8 of said chapter 32, requiring such association to loan its funds to the highest bidder at stated meetings of its board of directors, as it was empowered to do by the proviso to section 8. In the absence of such by-law it became incumbent upon the appellant association to make loans of its funds, at stated meetings of its board of directors, to the stockholders who should bid the highest premium for the preference or priority of a loan, as is required by the provisions of the body of said section 8. If the loan to the McKays was made in pursuance of these provisions of section 8, it is not to be deemed usurious, though the interest and premium contracted to be paid therefor exceeded the maximum rate of interest specified

to be exacted by the general interest laws of the state.

On November 30, 1896, a stated meeting of the board of directors of the appellant association was convened, and the following appears as a part of the record of the proceedings of that meeting, viz.: "Mr. George D. McKay appeared before the board and made a request for a loan; offered interest 7 per cent. and premiums seven twenty-fourths of 1 per cent. per month." This statement appears to have been interlined on the record of the proceedings of the board of directors, and such is conceded to be the fact. The secretary of the board testified that he wrote the record of the proceedings of the board, including the interlineation; that he interlined the statement in the record on the same evening or night of the meeting. He testified the interlined matter was correct and a truthful statement of what occurred; that the loan desired was for the full amount that the McKays were to pay for the property, and that the board considered seriously the question of requiring some additional security, for the reason the amount desired to be borrowed was the full amount of the purchase price of the property to be mortgaged; and that McKay made a strong personal plea to the board to accept his bid for the loan. James Walker and Eb Denney, members of the board of directors, testified that they were present at the meeting of the board; that McKay appeared before the board with reference to the loan. Mr. McKay, when first produced, denied that he was present at that meeting, but, when subsequently testifying, stated: "I testified before positively that I did not appear before the board of directors. Now I want to modify by saying that I do not recollect it. I am not positive about it. I have no recollection." There was no evidence tending to impeach the truthfulness of the record as interlined, and the oral testimony tended, by the clear weight thereof, to establish the truthfulness of the statement that Mr. McKay appeared before the board at a stated meeting and offered to pay the interest and premium as set forth in the note for the loan he desired. It does not appear that there were others who were present and bid, or desired to bid, for loans of the funds of the association; but we do not construe the statute to require that there shall be more than one bidder present at a meeting at which a loan is made, but only that opportunity shall be given for competitive bidding, and that the priority or preference of a loan shall be awarded to the highest bidder. If but one bidder for a loan appears before the board at any stated meeting, the board may lawfully accept his bid, and the contract will not be usurious, though the interest and premiums exceed the highest rate fixed by the general interest laws of the state.

Neither of the McKays was the owner of stock in the association at the time of the meeting of the board of directors, when George D. McKay made his application and bid for a loan. A loan made to one not a holder of stock in the association would be in contravention of the statute, and such a transaction would not be exempt from the implication of usury. But we think it is fairly to be assumed that one who appears at a meeting of the board of directors of an association and bids for a loan does so with full knowledge that he must become a stockholder before he can lawfully receive the funds of the association by way of a loan or advance, and that his bid is on that basis. If the loan is awarded to him, and he subsequently becomes a stockholder and receives the funds of the association as a loan to him in that capacity, he cannot be permitted to urge that he was not competent to bid for a loan at the time that he did so, and that this irregularity taints the loan with usury. The defense of usury is presented by the appellees McKay, and not by the bank. But we think it cannot be well advanced by either the McKays or the bank. The mortgage to the bank given by the McKays contains a clause declaring the loan in favor of the bank to be subject to a prior mortgage executed by the McKays to the appellant association. If the mortgage given to the appellant was legal and valid as between the McKays and the association, it would be equally legal and valid as against the bank. Whether a stockholder, when bidding for a loan, could object that a competing bidder was not a stockholder, and

therefore incompetent to bid against him, is not here presented for decision.

The appellees McKay executed the note and mortgage on the 18th day of December, and at the same time the association paid the money out of its treasury. The note and mortgage given by the McKays were antedated to the 23d day of November, and the note bore interest from that last-mentioned date. The suggestion the excess of interest thus received would constitute usury cannot avail. The statute provides that usury must be specially pleaded, and the fact wherein it is alleged the usury charged consists must be specifically alleged in the answer setting up that defense. *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Borrowers' Building Ass'n v. Eklund*, *supra*. That the notes given by the McKays were antedated is stated in the answer of the appellees McKay, but merely as a part of the history of the transaction. The facts specified as ground for the defense of usury are that the appellees McKay were required. "by the terms of said note, to pay 7 per cent. per annum as interest, $\frac{1}{32}$ of 1 per cent. per month premiums, and said fines, dues, penalties, and forfeitures," and in that the association has been guilty of contracting for and exacting usury. The appellees McKay must be restricted to the charge of usury specified in the bill.

The decrees of the city court of Aurora and the judgment of the Appellate Court affirming the same are each reversed, and the cause will be remanded to the city court of the city of Aurora, with directions to enter a decree in accordance with this opinion.

Reversed and remanded, with directions.

(217 Ill. 584)

PEOPLE ex rel. MURPHY et al. v. ATCHISON, T. & S. F. RY. CO. et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—STREETS—VACATION.

A city cannot lawfully vacate or permanently obstruct its streets and alleys for the benefit of a private individual or corporation.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 722, 1466, 1467, 1469.]

2. RAILROADS—ELEVATING TRACKS—POWER OF CITY.

Under Hurd's Rev. St. 1903, p. 291, c. 24, § 62, cl. 7, a city council can compel railroad companies to elevate their tracks within city limits, though because thereof certain streets must be vacated or changed, provided the streets are vacated according to law.

3. MUNICIPAL CORPORATIONS—VACATING STREETS.

Under Hurd's Rev. St. 1903, p. 1897, c. 145, § 1, a city council cannot vacate or permanently obstruct a street, even as a part of a general scheme for elevating railroad tracks, unless authorized by a three-fourths majority vote of the city council.

Appeal from Circuit Court, Will County; Dorrance Dibell, Judge.

Bill by the people, on the relation of David G. Murphy and others, against the Atchison, Topeka & Santa Fé Railway Company and others. Decree for defendants, and relators appeal. Reversed.

The city of Joliet is organized under the city and village act in force July 1, 1872, and the several amendments thereto. Its streets and avenues are laid off substantially east and west and north and south. The Chicago, Rock Island & Pacific Railroad crosses in a northeasterly and southwesterly direction most of the streets it intersects. The Chicago & Alton and Atchison, Topeka & Santa Fé Railroads pass through the city in a general northerly and southerly direction. The Elgin, Joliet & Eastern and the Chicago, Lake Shore & Eastern Railroads adjoin the Chicago & Alton on the east, and extend from the north city limits south to Van Buren street. The Michigan Central Railroad is about parallel with, and 1½ blocks southeast of, the Chicago, Rock Island & Pacific, extending from the eastern city limits, in a westerly direction, to Michigan street. The several streets and avenues crossed by the said railroads which run in a northerly and southerly direction, beginning on the north, are Columbia, Liberty, Irving, Ohio, Clay, Jackson, Benton, Webster, Cass, Clinton, Van Buren, Jefferson, Washington, Marion, and Osgood streets, Third avenue, (which has never been open for public travel across the railroads,) and Fourth and Fifth avenues. Those crossed by the Rock Island in its northeasterly and southwesterly course through the city, and beginning at the northeast, are Collins and Herkimer streets, Eastern avenue, Van Buren, Scott, Jefferson, Chicago, Washington, Ottawa, Joliet, and Des Plaines streets, and some other streets

west of the Des Plaines river, but outside of the district affected by the ordinance in question herein. In February, 1903, the city council of the city of Joliet passed an ordinance (No. 2,071) requiring all of said railroad companies to elevate their tracks by embankments and to construct and maintain suitable and ample subways at each of said streets for the safe passage under their tracks of the public travel. The companies failed to comply with that ordinance, and suits were brought by the city authorities against them, which were pending and undetermined when, on November 4, 1904, another ordinance, said to be, and which was in fact, a compromise between the city council and the railroad companies, was introduced in the city council and subsequently declared passed by the mayor. It is designated "Ordinance No. 2,160," and in this ordinance the area of track elevation is smaller than in the first ordinance, and instead of beginning north of Ohio street on the north, it begins at Jackson street, which, however, is preserved as a grade crossing, the grade of the same being raised about four feet. Proceeding south on the Alton and Santa Fé and other tracks running north and south, subways are provided as follows. At Cass, Clinton, Jefferson, Washington, and Osgood streets, and at Fourth and Fifth avenues, thus authorizing the obstruction of Benton, Webster, Van Buren, and Marion streets and Third avenue by embankments of earth, cinders, etc., upon which the elevated tracks were to be raised. Ordinance No. 2,160 authorized the Rock Island and Michigan Central to have a joint right of way northeast and southwest through the city, using substantially the present Michigan Central right of way from the east city limits west to Michigan street, an entirely new right of way from this point to the present Rock Island tracks, just west of Ottawa street, and then along the Rock Island right of way (as at present) through the city to the southwest, and on this new right of way required subways at Herkimer street, Eastern avenue, Michigan, Washington, Chicago, and Ottawa streets, and continued the use of the subway already existing at Des Plaines street, and therefore authorized the obstruction of Collins and Joliet streets.

The Attorney General, in the name of the people of the state, on the relation of David G. Murphy and a number of other resident citizens and taxpayers of the city, filed a bill in the circuit court of Will county against said railroad companies to restrain the construction and erection of permanent embankments across said several streets, alleging, among other things, that said last-named ordinance was not voted upon or passed by the city council, and was therefore void; that the city council had no legal right or authority to license or authorize the defendant railroad companies to permanently obstruct or encroach upon the said streets; that the

embankments authorized across said streets would constitute a purpresture and public nuisance and would permanently close and obstruct the same for their respective full widths, and that the same would be thereby rendered impassable for public travel; that the effect of carrying out the provision of said ordinance would be to vacate or close certain portions of said streets and avenues, and that under the statute a street or avenue can only be vacated or closed by a three-fourths vote of all the aldermen elected to the city council; and that if said Ordinance No. 2,160 was voted upon at all by the city council, a less number than three-fourths of the aldermen voted for the same. It is then alleged that the railroad companies are threatening to proceed to permanently close up and obstruct said streets and avenues by building upon their respective rights of way across the said streets and avenues permanent embankments of earth, cinders, etc., to the average height of 12 feet or more, and that they will do so unless restrained. The city of Joliet and county of Will were each afterwards made parties defendant on their own intervening petitions, and they, with the several railroad companies, filed answers, but prior thereto the complainant entered his motion for a temporary writ of injunction, which was heard on the bill and arguments of counsel, and denied. The answers are voluminous, but we do not understand them to dispute the material facts alleged in the bill, which we regard as important in the decision of the case. The cause was afterwards heard upon proofs presented. From the order and decree of the circuit court, denying the writ of injunction and dismissing the complainant's bill for want of equity, this appeal is prosecuted.

W. H. Stead, Atty. Gen., and W. H. Boys (J. W. Downey and Paul Moriarty, of counsel), for appellants. Robert E. Haley and James A. McKeown, for appellee city of Joliet. Benjamin S. Cable and Snapp, Heise & Dibell, for appellee Chicago, Rock Island & Pacific Railway Co. Winston, Payne & Strawn, J. L. O'Donnell, and P. C. Haley, for appellees Chicago & Alton Railroad Co. and Michigan Central Railroad Co. Knapp, Haynie & Campbell and J. L. O'Donnell, for appellees Elgin, Joliet & Eastern Railway Co. and Chicago, Lake Shore & Eastern Railway Co.

WILKIN, J. (after stating the facts). On November 4, 1904, the railroad committee of the city council, to which had been referred Ordinance No. 2,160, made its report, recommending "that the ordinance known as 'the track elevation ordinance' be adopted," and the chairman of the committee moved the adoption of the report. The vote was taken upon that motion, and, the city council consisting of 14 members, 8 votes were cast for and 5 against it (one alderman

being absent), whereupon the mayor declared the motion carried and the ordinance adopted. About one-half of the population of the city is located east of the Chicago & Alton and Santa Fé tracks, and must pass over some of the above-named streets in order to reach by direct travel the business part of the city, which is west of the tracks. The population is also about evenly divided by the Rock Island & Pacific tracks, extending in a southwesterly direction. Beginning on the north, Webster, Van Buren and Marion streets and Third avenue will be each permanently and completely closed by the embankments on the Chicago & Alton and Atchison, Topeka & Santa Fé, and Collins and Joliet streets will be closed by the embankment on the Rock Island and Michigan Central, if constructed, absolutely preventing all travel on said streets for at least the distance of the width of the embankments, and practically on the ends of the said streets between the embankments and the next cross streets; that is to say, those wishing to travel on either of those streets across the Chicago & Alton and Atchison, Topeka & Santa Fé tracks, from the east to the business part of the city, must, upon reaching Eastern avenue (the first north and south street east of the crossing), turn either north or south on that avenue and proceed to one of the streets provided with a subway, and thence over that street through the subway to the next cross street on the west (which is Scott), thence south or north back to the obstructed street, and on west to their destination. Otherwise expressed, we understand it to be admitted on behalf of the city and railroad companies that if the ordinance in question is carried out according to its terms and provisions, by the erection of the proposed embankments without subways at all of the said streets, it will permanently and completely prevent all public travel upon those streets; but their contention is that, because these obstructions can be avoided by diverting the travel over cross streets to those having subways, there will not be a legal closing or obstructing of the streets at which no subways are required to be constructed.

It is settled by the frequent decisions of this court that a municipality holds its streets and alleys in trust for the benefit of the public, and cannot lawfully authorize the vacation or obstruction of any of them for the use and benefit of private individuals or corporations. The authorities on this proposition will be found cited in the late case of *People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304. The city council is given power, by statute, "to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same." Hurd's Rev. St. 1903, p. 291, c. 24, § 62, cl. 7.

Under the power to alter and widen streets, we have held they may reduce their width for the benefit of the public by vacating parts thereof. *City of Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580, 46 Am. St. Rep. 311. Under the general supervisory power over their streets and alleys the city authorities may allow temporary obstructions of the same, so as to permit improvements thereon to be made or building materials to be temporarily stored for the erection of private buildings; and in the case of *World's Columbian Exposition Co. v. Brennan*, 51 Ill. App. 128, it was held the city authorities might lawfully authorize the temporary closing of a street for the purpose of enabling the exposition company to perfect its improvements and in the interest of the public safety. In all cases, however, where the closing of public streets and alleys has been justified, the obstruction has been temporary and more or less for the public benefit or safety. Therefore none of the decisions above referred to directly affect the questions here involved; the contention on the part of the defendants being that this is not an attempt to close the streets for the benefit of the railroad companies, but to compel them to elevate their tracks in the public interest, and incidentally authorizing them to obstruct the streets. The theory of the complainant's bill is that the permanent closing of the streets is, in part at least, for the benefit of those private corporations, and is not the mere exercise of the power of the city council to compel the elevation of railroad tracks; also, that the ordinance is, in effect, one to vacate public streets, and therefore not passed by the requisite statutory majority; and, finally, that the city council has no power to completely and permanently close up its public streets and alleys by an ordinance passed by its city council by less than three-fourths majority of all the aldermen elected in the city.

The dispensing with grade crossings at public streets is an improvement certainly to be most earnestly desired, and the elevation of railroad tracks cannot be regarded as other than a wise precaution against the destruction of life and property. It may also be conceded that, in carrying out a general plan to require railroad tracks to be elevated in a city like Joliet, some change in, or even the vacation or closing up of, some of the streets and alleys, may become necessary in order to effectually carry out the scheme. We do not question the power of municipalities to order railroad companies within their corporate limits to elevate their tracks across all public streets and alleys, nor that they may not, in order to carry out that policy, authorize the vacation, closing, or permanent obstruction of certain of its streets and alleys. The question here is, how must it be done? Has a bare majority of the city council power to do so by an ordi-

nance passed by less than a three-fourths majority vote of the city council? It is provided by section 1, c. 145, p. 1897, *Hurd's Rev. St.* 1903, "that no city council of any city * * * shall have power to vacate or close any street or alley, or any portion of the same, except upon a three-fourths majority of all the aldermen of the city * * * authorized by law to be elected; such vote to be taken by ayes and noes and entered on the record," etc.

It is insisted by the Attorney General that, while Ordinance No. 2,160 does not in terms propose to vacate or close streets, such is its plain import and direct effect, and we have been unable to discover satisfactory answer to that contention. The law will look to the substance, and not to the mere form, used in every such case. The city council cannot be permitted to do indirectly that which it has no power to do directly. The substance is not to be lost sight of in the mere use of words. *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934, 32 Am. St. Rep. 179. The proposition is so reasonable that, unaided by authority, no court could hesitate to adopt it. That the effect of the ordinance in question is to practically vacate and close up the streets for which no subways are provided admits of no doubt, nor is the fact disputed. In this connection we do not regard the question whether the title of the act quoted is broad enough to include the word "close" as at all material. Practically to permanently close up a street is to vacate it.

But suppose it be conceded that the ordinance is not to be construed as one to vacate parts of streets, the question still remains, has a city council power, even in the interest of the public safety, to authorize the permanent obstruction and vacation of its public streets and alleys without the requisite three-fourths majority of the city council? We repeat, the power of the city council to do what is here attempted is not doubted, provided it is done by an ordinance legally passed by a three-fourths majority vote; but we hold that it can do so only by an ordinance legally passed, vacating the streets or parts of streets and alleys sought to be permanently closed up and vacated. While this bill, being by the Attorney General, need not show an injury to private rights, still it is material to consider whether private citizens, situated as those here complaining, have not such an interest in each of the public streets of the city as will authorize them to insist, through the state's attorney or Attorney General, that the city council shall exercise the trust over the public streets and alleys reposed in it for the benefit of all the people, and prevent, much less authorize, their permanent obstruction or vacation unless the statutory majority shall concur therein. Each alderman sustains a trust relation to the public over the streets and alleys of the city. Less than a three-fourths majority of them cannot perform that

trust by allowing the streets to be vacated or permanently obstructed. The law has provided a method for the accomplishment of that which is here attempted; that is, by the adoption of an ordinance vacating the parts of the streets obstructed. It cannot lawfully be done by a different and unauthorized method. The passage of Ordinance No. 2,160 by a bare majority vote of the aldermen of the city was an unauthorized attempt to invade the rights of the citizens of the municipality. It cannot be said in answer to this position that the city may at some time in the future cause the obstructions to be removed or subways constructed in all the streets. The right to do this is reserved by the ordinance for the reason it is claimed that to do so is impracticable or impossible, in view of the location of side tracks on the present surface and the situation of various manufacturing establishments near the tracks.

Some reliance seems to be placed by counsel for the defendants below upon the case of *Summerfield v. City of Chicago*, 197 Ill. 270, 64 N. E. 490, and the later case of *Village of Winnetka v. Chicago & Milwaukee Electric Railway Co.* 204 Ill. 297, 68 N. E. 407. We do not understand these cases to in any way support the contention of counsel. In neither of those cases was there a closing or obstruction of the entire street or a claim of right to do so; but in the *Summerfield* Case only a small portion of the street was authorized to be used for the erection of walls to support the elevated structure, the railroad company agreeing to provide at its own expense, by condemnation of private property, a sufficient amount of ground to supply the place of the part taken, and the question there was whether a condemnation proceeding for that purpose could be maintained. The street remained open to public travel, notwithstanding the use of a part of it for the erection of the walls, and the case was held to be within the rule announced in *Doane v. Lake Street Elevated Railroad Co.* 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265.

In the *Winnetka* Case it was simply held that "the use of part of the street for street railway purposes is legitimate, and the municipal authorities, acting for the public, may authorize the construction of a viaduct for the tracks, even though it excludes the public to some extent from the use of that part of a street." To change a street, even though in doing so the public is excluded to some extent from parts of the same, is a very different proposition from that of a permanently closing up such a street. If the ordinance in question had provided that the streets for which no subways are authorized should be changed so as to connect with those left open, a different question would be presented. Each of the closed streets is left just as it was before—a street of the city, and yet not open to through or continuous travel.

We have read with care and interest the argument of counsel on either side of this case and the opinion of the learned circuit judge denying the writ, and are constrained to hold against the conclusion there announced. If it should prove difficult or impracticable to obtain a three-fourths majority vote of the city council in the adoption of a proper ordinance, that fact, if it exists, cannot affect this decision. It may also be remarked that there is nothing to show that the elevation of the railroad tracks over most, if not all, of the streets, could not be made without closing them, as was provided by the former ordinance. But that question cannot be of controlling importance now. If we are correct in the views herein expressed, a court of equity will grant the relief prayed. *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790, 69 Am. St. Rep. 257; *Cobb v. Com'rs of Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 63 L. R. A. 284, 95 Am. St. Rep. 258.

The decree below will be reversed, and the cause remanded to the circuit court, with directions to grant the prayer of plaintiff's bill.

Decree reversed.

(133 N. Y. 13)

THAYER v. UTICA KNITTING CO.

(Court of Appeals of New York. Oct. 24, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT—DISOBEDIENCE OF INSTRUCTIONS.

Where, in an action for injuries to a servant because, as was alleged, of improper directions given to him at the time he began to operate a machine, the evidence shows that the accident must have happened by the failure of the servant to follow the directions given, verdict for plaintiff must be set aside.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by James W. Thayer, by Charles Kilkeny, his guardian, against the Utica Knitting Company. From a judgment of the Appellate Division (90 N. Y. Supp. 1116, 98 App. Div. 633), affirming a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Reversed.

Frederick G. Fincke, for appellant. Thomas S. Jones, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury which occurred on the 24th day of April, 1902. The defendant was engaged in the manufacture of knit goods, and the plaintiff was one of its employes, engaged in operating a machine known as a "hydro extractor," but more commonly called a "whizzer," used for drying knit goods. The machine consisted of a perforated metal basket 40 inches in diameter, attached to a vertical shaft, which was connected by pulleys with the main shafting of the mill, by which it could be made to revolve at the rate of 800 revolutions a minute. The basket was surrounded by a stationary iron sheath, having a rim upon the top of 6 inches in breadth. The machine was set in motion by the pulling of a lever by the left hand of the operator when facing the machine, which shoved the belt upon the pulley, thereby starting the revolution of the vertical shaft and the basket attached to it. The goods would dry in about five minutes. The basket revolved from left to right. The plaintiff was an employé of the defendant, and had operated this machine from the 2d day of April, 1902, down to the date of his injury. On that occasion he had pulled the lever starting the machine, and before he had removed his hand therefrom the end of the goods, which had been placed in the basket, flew out, wound around his wrist, pulling his left arm in around the shaft, crushing it.

No claim is made but that the machine was of proper construction and in good order. The contention of the plaintiff is that his injury occurred by reason of the improper packing of the goods in the basket, and that this was occasioned through improper instructions that were given him at the time that he undertook the operation of the machine. Upon this branch of the case he testified that he commenced work on the morning of the 2d of April; that Nolan, the foreman, gave him

instructions how to operate the machine; that there were two pieces of cloth, consisting of knit light summer underwear, 50 or 60 feet in length, hitched together so as to make one continuous piece; that it was brought in from the dyeing room in a box on wheels, rolled up in front of the whizzer, the end put over a roller, and the cloth then pulled down into the basket and packed around "against the sides of the basket away from the central shaft, so that it left a little space around the shaft all the way through the pile." He further testified that he did the work while Nolan was standing by and giving him instructions how to do it; that after he packed the goods in the basket he wound the end around the shaft, saying: "After he told me to wrap it around I wrapped it around in his presence; wrapped it around three or four times. He then told me to shove it down; to shove it down as far as I could; to shove the cloth down and push the cloth which had been wrapped around the shaft down so it was in contact with the load." He also stated that he wound the cloth around the shaft from right to left while Nolan stood there, and that he had no accident until the 24th, and that on that occasion he loaded the basket in the same way that he had been instructed to do on the first occasion, but upon cross-examination he stated he wound the end of the goods around the shaft once or twice. There is a sharp conflict between the plaintiff and the defendant's witnesses. But, inasmuch as the jury have found a verdict in favor of the plaintiff, we must assume that they disbelieved the defendant's testimony upon this point, and that the instructions given to the plaintiff with reference to the manner of loading the basket and disposing of the end of the cloth was as is testified to by the plaintiff. The question then arises as to whether such instructions were proper and sufficient, and as to whether the accident could have occurred, had the plaintiff followed them.

Our examination of the record has disclosed no testimony showing that the instructions given to the plaintiff, as sworn to by him, were improper. Plaintiff's first witness upon the subject testified that he had never operated an extractor, but that he had seen one operated, and had observed the different ways in which the goods had been put in the basket, and had observed the operator wind the end of the goods around the shaft, and had also seen him put the end under the goods; that if the basket is filled, and the end wrapped around the shaft, it would have a tendency to fly out when the machine was first started, but after it had attained a high rate of speed the tendency would be to settle down in the basket toward the outer edge thereof; that he had seen the goods fly out, but could not remember of more than one occasion, and he did not testify as to the manner in which the goods were

packed on that occasion. He expressed no opinion as to the effect of starting the machine where the end of the goods had been wrapped around the shaft in the opposite direction from that which the shaft and basket revolved and had then been pushed down to the bottom of the basket. The plaintiff's other witness upon the subject had worked for the defendant less than two weeks operating the extractor. He testified that the goods flew out two or three times during that period, and on those occasions, he says, the goods unwound from the shaft. He did not testify which way the goods were wound around the shaft, but admitted that he wrapped the goods around the shaft at the top of the basket near the surface of the goods and then started the machine in motion. It does not appear that he pushed the end down into the bottom of the basket after wrapping it around the shaft. We thus come down to the testimony of the plaintiff, to which we have already called attention, from which it appears that the goods had not come out before the day of the accident, and in which he has conceded that the end of the goods might not have been wrapped around the shaft but once or twice.

On behalf of the defendant we have the testimony of an expert, who has called our attention to certain well-known scientific principles about which there can be no question. As soon as the revolution of the basket attained a high rate of speed the centrifugal force would operate upon the goods, carrying them laterally against the side of the basket. If the goods, some distance from the end, were wrapped around the shaft, and then the end left loose, the centrifugal force would throw it out horizontally from the place where it was wrapped around the shaft; but, if the goods were wrapped around the shaft and pushed down into the bottom of the basket, the centrifugal force would only carry the end against the surrounding goods. If the goods were wrapped around the shaft up to the end in an opposite direction from that which the shaft revolved, the friction of the surrounding atmosphere would, upon starting the machine, tend to draw the end around the shaft until this force was overcome by the greater centrifugal force; but if they were wound in the same direction that the shaft revolved they would at once unwind, leaving the end loose, so that it could readily fly out. It is thus apparent that if the goods were wound around the shaft in the same direction that it revolved, or if the goods were left on the top of the basket wound around but once or twice, without being pressed down to the bottom, the goods would have a tendency to fly out, and in such a case we can readily see how the accident to the plaintiff occurred. But if the goods were wound around the shaft to the end, and then such part was pressed down to the bottom of the basket, so that it was surrounded by the wet goods

filling the basket, it is not apparent how the accident could have occurred. Our conclusion, therefore, is that the instructions given to the plaintiff were proper and sufficient, and that the injury which he has received must have resulted through some neglect on his part to obey the instructions.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, VAN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment reversed.

(217 Ill. 458)

CHICAGO UNION TRACTION CO. v. ROSENTHAL.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS—WHO ARE PASSENGERS—QUESTION FOR JURY.

In an action to recover for injuries, where there was testimony that when the car on which plaintiff was riding stopped he put one foot on the ground and with the other on the footboard attempted to lift his little girl off the car, when it started suddenly, injuring him, the question as to whether he was a passenger was for the jury.

2. APPEAL—REVIEW—AFFIRMANCE.

Where the refusal of the trial court to direct a verdict was affirmed by the Appellate Court, its judgment will be sustained, if there is any evidence tending to establish the case made by the declaration.

Appeal from Appellate Court, First District.

Action by Isadore Rosenthal against the Chicago Union Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Cratty Bros., Jarvis & Latimer, for appellee.

RICKS, J. This was an action brought in the circuit court of Cook county by Isadore Rosenthal against the Chicago Union Traction Company to recover damages for personal injuries received while alighting from one of its street cars in the city of Chicago. The declaration consisted of two counts. The first count alleges that plaintiff became a passenger on a Milwaukee avenue car; that he signaled the conductor to stop the car at Wood street; that the car was caused to be stopped for the purpose of allowing passengers to alight, and "while the said plaintiff was using all reasonable care and caution to avoid the injury complained of, the said defendant, through its servant or servants, negligently and carelessly caused said car to be set in motion while the plaintiff was alighting from said car, and thereby the said plaintiff was then and there thrown," etc. The second count is substantially the same, except that it alleges that the plaintiff had with him his daughter, Esther

Rosenthal, a child four years of age, and that, while the plaintiff was attempting to alight with his daughter from the car, the defendant, through its servants, negligently and carelessly caused the car or train of cars to be set in motion, while the plaintiff with his said daughter was so alighting therefrom, and thereby the plaintiff was then and there thrown, etc. Upon a trial before the jury a verdict was rendered for \$2,500. A remittitur of \$1,000 was made and judgment entered for \$1,500, from which an appeal was prosecuted to the Appellate Court, where the judgment of the circuit court was affirmed, and this further appeal is now prosecuted to this court.

There is but a single question presented upon this record, and that is whether or not the peremptory instruction should have been given at the close of the plaintiff's evidence. The appellant's contention is that the declaration, alleging, as it does, that appellee was a passenger upon the car, is not sustained by the evidence, and insists that the evidence shows appellee had left the car and was not a passenger at the time of the accident in question. The only question, therefore, for us to determine, is whether or not there is any evidence in the record fairly tending to support the plaintiff's cause of action as laid in the declaration, and if, from the evidence, we find that fair-minded men might disagree as to the facts of the case as disclosed by the record, then it was not error to refuse the instruction; or, if we find any evidence in the record, standing alone, sufficient to sustain the cause of action as laid in the declaration, then it is not our duty to reverse the judgments of the appellate and trial courts.

The record discloses that appellee is a Hebrew, and does not speak the English language as fluently as some of his nationality do. The evidence at least fairly tends to show the following state of facts: On the day in question, which was a holiday for the Hebrews, being their New Year, appellee boarded a car at Roby street, transferred to Milwaukee avenue, paid his fare, and rode to Wood street, where he desired to get off the car. The car was full of passengers, and appellee was standing on the footboard on the west side or outside of the car, which was going down town, and his little girl four years old was sitting in a lady's lap in the seat next to him. At his signal the car stopped. He put his right foot on the ground and put his arm around the child to lift her off. His other foot he kept on the footboard. While he was in this position and in the act of getting hold of his child, and before he had time to alight with his child, the car gave a jerk, starting up suddenly, and he was thrown upon the ground and injured. Appellee testified: "Q. You say you were on the ground? A. One foot. Q. Then you say you got off on the ground and reached up after the child?

A. With one foot—with only one. Q. Then you had one foot back of the footboard? A. I said I went off the car with one foot. I said I went off with one foot. With the right foot I went on the ground, with my left foot I stayed on the car, and then I took the child from the lady's lap, and when I went to get off then the car jerked. That is what I mean." William H. Klein, a witness, further testified: "He took the girl just about the time the conductor rang the bell. He was standing on the ground by the car, one foot on the ground and one on the step, holding the handle with his left hand. He did not do any turning around. He stepped right off down with one foot and reached up after the girl."

We think the record at least fairly tends to show that appellee had not entirely left the car at any time, and we deem it unnecessary to discuss the question of whether or not he would have been a passenger had he at any time been entirely off the car and returned to get his child, as it is conceded if he was not at any time clear of the car he was a passenger. Nor is it necessary that the weight of evidence support the cause of action as laid in the declaration. The question of whether or not he had entirely left the car was one of fact, and under the instructions the jury found against appellant's contention, and the Appellate Court, by affirming the judgment as entered by the trial court, has necessarily found the facts the same as did the jury; and finding, as we do, that there is evidence to support these findings, under the law it is our duty to sustain the judgment of the Appellate Court, which is accordingly done.

Judgment affirmed.

(165 Ind. 672)

STAMETZ et al. v. MITCHENOR et al.¹

(No. 20,472.)

(Supreme Court of Indiana. Oct. 12, 1905.)

1. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

Where plaintiffs joined in a motion for a new trial after verdict against them, and all severally excepted to the order denying it, which similarly affected their interests, a joint assignment of error predicated on the ruling is sufficient.

2. WILLS—RESISTING PROBATE—CAPACITY OF TESTATOR.

Where the complaint alleged that a contract in writing made by decedent was of testamentary character and was executed with the formalities appropriate to a will, and denied the right of its admission to probate as a will on the ground of unsoundness of mind on the part of decedent and because of fraud and undue influence in procuring its execution, the cause of action stated was not one to rescind or cancel the contract, but to resist the probate of it as a will, and the test of mental capacity of decedent was that required of a testator, and not that required of a party to a contract *inter vivos*.

3. SAME—UNDUE INFLUENCE—RELATIONS BETWEEN TESTATOR AND BENEFICIARY.

The existence of friendly relations between a testator and the objects of his bounty does

¹ Rehearing denied.

not alone give rise to a presumption of undue influence, and such relations, when founded on kinship, afford a rational explanation of the generous provisions of a will made in favor of those who had the affections of the testator.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 383, 384, 390.]

4. APPEAL—REFUSAL TO GIVE INSTRUCTION—TIME TO REQUEST—RECORD.

Under the statute requiring a party requesting special instructions to present them to the court before the commencement of the argument, a party complaining of the refusal to give requested instructions must show affirmatively by the record that they were tendered to the court before the beginning of the argument, before the Supreme Court will hold that the refusal was error; and the practice of inserting a recital in the bill of exceptions that the party "at the proper time drew up in writing and presented to the court instructions," etc., in lieu of a statement of the facts, is disapproved.

5. TRIAL—INSTRUCTIONS—REFUSAL.

It is not error to refuse instructions covered by those given.

6. APPEAL—HARMLESS ERROR.

The error, if any, in permitting defendants in a suit to resist the probate of a will for undue influence to ask a witness if he, while the will was executed, noticed any sign of undue influence, was harmless, when plaintiffs by cross-examination could show the facts and demonstrate whether his answer was based on an opinion.

7. APPEAL—REVIEW—DENIAL OF NEW TRIAL.

Where, on the issue of the misconduct of a juror, based on his having, before the conclusion of the introduction of evidence, expressed his opinion on the merits to a third party, it was not shown that the alleged misconduct affected the result, and the juror denied having revealed his opinion in advance of the return of the verdict, and declared that he tried the case on the evidence, the court on appeal will not disturb the denial of a new trial on the ground of the misconduct.

Appeal from Circuit Court, De Kalb County; Wm. M. Brown, Special Judge.

Action by Zenith Stametetz and others against Benjamin Mitchenor and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

J. E. Rose, P. V. Hoffman, and C. S. Smith, for appellants. P. E. Pomeroy and E. V. Harris, for appellees.

MONTGOMERY, J. This action was brought by appellants to resist the probate of the will of Ann Maria Stametetz, on the ground that said will was executed by the testatrix while of unsound mind and that the execution of the same was procured by fraud and undue influence. The cause was tried by a jury, and resulted in a verdict for appellees. Appellants' joint motion for a new trial was overruled, and they severally excepted. Judgment was entered upon the verdict. All questions upon appeal are presented by the joint assignment that the court erred in overruling appellants' motion for a new trial.

Appellees insist that a joint assignment of error, based upon several exceptions to the ruling upon the motion for a new trial, presents no question. If separate motions for a new trial had been filed, and exceptions to

the court's rulings thereon taken by appellants severally, it is well settled that appellants could not join in assigning such error in this court. In this case appellants all joined in the motion for a new trial, and all excepted to the ruling thereon, but the record indicates an attempt to sever in reserving such exception. The assignment of error is predicated upon a ruling procured by the joint act of all the appellants, and a decision which affected in like manner all their rights and interests, and to which they all, though severally, excepted. These facts distinguish this case from those cited and relied upon by appellees, and in our opinion make the assignment of error sufficient. *Orton v. Tilden*, 110 Ind. 181, 10 N. E. 936; *Green v. Brown*, 146 Ind. 1, 44 N. E. 805.

The motion for a new trial was founded upon alleged errors of the court in giving instructions, in refusing to give instructions requested, and in permitting a witness for appellees to answer an improper question, and upon the alleged misconduct of a juror. Appellees challenge the sufficiency of appellants' brief in various particulars. A strict application of the rules would probably exclude some points in dispute from consideration, but it is manifest that appellants have made a good-faith effort to comply, and have substantially complied, with our rules in the preparation of their brief; and the defects suggested will be disregarded, without discussion in detail.

Preliminary to the consideration of instructions given and refused, it is deemed proper to say that this action was brought only to resist the probate of a will. In the second paragraph of complaint a certain contract in writing made by the decedent is charged to be of testamentary character and executed with the formalities appropriate to a will, and its right to be admitted to probate as a will is denied on the ground of unsoundness of mind on the part of the decedent and because of fraud and undue influence in procuring its execution. The action was in no sense one to rescind, annul, or cancel this contract. The test of mental capacity applicable to the decedent at the time of making her will and this testamentary contract, under the issues, was therefore that required of a testator, and not that applicable to a party to a contract *inter vivos*.

The only instructions given by the court of which complaint is made in appellants' brief under the head of points and authorities or in argument are Nos. 27 and 34. The objections of appellants to all other instructions given must be regarded as waived. Instruction No. 27 was as follows: "If you find from the evidence that the testatrix lived in the same dwelling house with the defendants, and was under the care and protection of the defendants, and close, friendly, and intimate relations existed between said parties when said will and con-

tract were made, such facts of themselves, unaided by other evidence, I instruct you, afford no reason whatever for presuming that the execution of the will and contract were procured by undue influence." Instruction No. 34 was to the same general effect. These instructions were clearly right. The mere existence of close and friendly relations between a testator and the objects of his bounty cannot alone give rise to a presumption of undue influence. Such relations, especially when founded upon kinship, rather afford a natural and rational explanation of the generous provisions of a will made in favor of those who had won and held the affections of a testator in his lifetime. *Goodbar v. Lidkey*, 196 Ind. 1, 35 N. E. 691, 43 Am. St. Rep. 293.

Appellants tendered a number of instructions to be given to the jury, all of which were refused by the court. The ground of the court's refusal is not made to appear. The special bill of exceptions recites that appellants "at the proper time drew up in writing and presented to the court instructions," etc. The statute requires a party requesting special instructions to present them to the court before the commencement of the argument. An appellant, complaining of the refusal to give instructions requested, must show affirmatively by the record that such instructions were tendered to the court in proper form before the beginning of the argument to warrant this court in holding that such refusal was error. *Puett et al. v. Beard*, 86 Ind. 104; *Craig v. Frazier*, 127 Ind. 286, 26 N. E. 842. The particular time in the progress of the trial at which such instructions were tendered should be made to appear as a fact, so that this court may be able to say whether or not they were presented within the time prescribed by law. *Orton v. Tilden*, 110 Ind. 181, 139, 10 N. E. 936. In this case we shall only express our disapproval of the use of the legal conclusion in lieu of the facts, and, in view of the conclusion reached, are not required to hold that the bill is insufficient in this regard.

The court, in a series of 41 instructions, informed the jury fully upon every phase of the law apparently applicable to the case. In these instructions the court defined the degree of mental capacity requisite to the making of a valid will in terms approved by this court in a number of decided cases. Appellants insist that instructions tendered, to the effect that at the time of executing the will and contract in question the decedent was required to possess such a degree of mental capacity as enabled her to understand and act with discretion in the ordinary affairs of life, should have been given. We have already stated that this suit is to resist the probate of a will, and does not involve any question to which such instructions would be applicable. The instructions given on its own motion by the court correctly

stated the law by which the jury, under the issues, should be governed in determining the mental condition of the decedent at the time of executing the writings assailed. We cannot within reasonable limits discuss each of the instructions tendered, but must be content with the general statement that the subject-matter of the greater number of them was fully covered by the instructions of the court, while others do not appear to be applicable to the issues, and others are palpably incorrect statements of the law. No error was committed in the refusal of the court to give these instructions.

Appellees were permitted, over appellants' objection, to ask a witness the following question: "Did you, during the time you were there, and while the contract and will were being executed, notice any signs of undue influence?" The form of this question is not to be commended, as the information sought might to some degree involve an opinion of the witness. The witness was not asked whether or not there was any undue influence used, but merely what, if any, signs of undue influence he saw or noticed. Appellants by cross-examination could exhibit the facts more fully, and demonstrate whether his answer was in any respect based upon an opinion. It is apparent that no harmful error was committed, if the ruling of the court in permitting this question to be answered was in any sense erroneous. *Taylor v. Pegram*, 151 Ill. 106, 37 N. E. 837; *Boyle v. State*, 105 Ind. 469, 5 N. E. 208, 55 Am. Rep. 218; *Barker v. Comins*, 110 Mass. 477; *Nash v. Hunt*, 116 Mass. 237.

It is charged in appellants' motion for a new trial, and the charge is supported by affidavits, that one of the jurors expressed his opinion upon the merits of the case to an outside party before the introduction of evidence had been concluded. This juror's affidavit was filed in opposition to the accusation; in which he explained the conversation mentioned and denied having revealed his opinion of the case in advance of the return of the verdict. In the case of *Harrison v. Price*, 22 Ind. 165, a similar occurrence was alleged as a cause for a new trial, and this court said: "We do not think any cause is here shown which would justify a court of error in reversing the judgment of the court which heard the evidence and was satisfied with the verdict." The general rule is that misconduct of a juror must be gross and clearly appear to have injured the complaining party, to justify the granting of a new trial. *Carnahan et al. v. Schwab et al.*, 127 Ind. 507, 26 N. E. 67; *Long et al. v. State*, 95 Ind. 481; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *DeHart v. Etnire*, 121 Ind. 242, 23 N. E. 77; *Flatter v. McDermitt*, 25 Ind. 328. It is also well settled that where a motion for a new trial is based upon the alleged misconduct of a juror, and the trial court hears evidence, either orally or by affidavits, touching

such misconduct, its conclusion upon conflicting statements will not be disturbed by this court upon the weight of such evidence. *Hinshaw v. State*, 147 Ind. 384, 379, 47 N. E. 157; *Louisville, etc., Ry. Co. v. Hendricks*, 128 Ind. 462, 23 N. E. 58; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *Epps v. State*, 102 Ind. 539, 556, 1 N. E. 491; *Long v. State*, 95 Ind. 481; *Weaver v. State*, 83 Ind. 289; *Holloway v. State*, 53 Ind. 554. It does not appear in any way that the alleged misconduct of this juror affected the result of the case or harmed appellants, and, upon the affidavit of the juror denying the fact and declaring that he fairly tried the cause and rendered his verdict entirely upon the law and the evidence, we cannot disturb the decision of the trial court in denying appellants a new trial upon the ground of misconduct of a juror.

No reversible error appearing from the record, the judgment is affirmed.

(166 Ind. 89)

WARNER v. MARSHALL et al. (No. 20,433.)¹
(Supreme Court of Indiana. Oct. 6, 1905.)

1. TRIAL—QUESTIONS OF FACT.

The question of the application of a description of land to its subject-matter is one of fact.

2. APPEAL—BILL OF EXCEPTIONS—SIGNING AND FILING.

When a party entitled to a bill of exceptions tenders a proper bill within the time allowed by the court, the duty of signing and filing the same rests with the judge, and the party is entitled to the benefit of his exceptions in the Appellate Court, although the bill was not filed within the time allowed.

3. CONTRACTS—VALIDITY.

A valid contract may be entered into by correspondence, and, if an offer be made by letter, it is presumed that the writer's intention to contract continues until the time when the contract may be closed by an acceptance.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 119, 120.]

4. SAME—PROPOSAL BY LETTER.

A proposal made by letter, when assented to by the recipient, becomes a promise, and, if accepted and acted on and of such character that such action is warranted, constitutes a contract, which is binding on the person at whose instance it was made.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 75, 119, 120.]

5. EVIDENCE—PAROL—CONSTRUCTION OF CONTRACT.

It is always competent, except to the extent that the statute of frauds enters into the question, to apply words of general description in a contract to the subject-matter by evidence of the situation and circumstances of the parties.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2116-2119.]

6. SAME—INTENT OF PARTIES.

The language of a written contract cannot be explained, or its construction affected, by evidence of the secret intention of one of the parties, differing from that fairly expressed by the language used and by his acts and declarations at the time.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 730; vol. 20, Cent. Dig. Evidence, §§ 2129-2131.]

¹ Rehearing denied.

7. VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION.

A widow who had been twice married, owned, among other property, an unsubdivided portion of an outlot, which had been acquired by her first husband, and on which she had built the house in which she resided and three other houses. When quite old, and without children or near relatives living, she visited a niece of her first husband, and after her return wrote, urging the niece, when the latter's mother no longer needed her care, to come and live with her, stating in the first letter: "I wish you to remember what I told you last summer, that the three lots in this half block that your uncle traded for are to be yours if you survive me, and I will deed them to you if you will come and live here and care for me and help me while I shall need your care and comfort. It includes this nice house, * * * and with the rest of this piece of property will make a rich provision for you, so you will not need to teach. * * *

A correspondence followed, which resulted in the acceptance of the proposal by the niece, and after the death of her mother she came to live with the aunt, and cared for her until her death some 3½ years later. There was nothing in the correspondence which indicated any change of intention on the part of the aunt in respect to the property which she proposed to leave to the niece; but during the time she made a will, by which she devised the niece only the house in which she lived and a part of the block on which it stood, which fact was not known to the niece at the time. She afterwards changed her will, leaving the niece other property entirely. *Held*, that the correspondence constituted a contract, which must be construed to cover the entire piece of property acquired by decedent's first husband, and that the niece, having fully performed the contract on her part, was entitled to a specific performance as against the devisees of the decedent.

8. SPECIFIC PERFORMANCE—DESCRIPTION OF PROPERTY.

A contract with respect to real estate may be specifically enforced in equity, where it is sufficiently definite in its description to enable the court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of law, what property was intended by the parties to be covered thereby.

9. SAME—PERFORMANCE BY COMPLAINANT.

Specific enforcement of a contract to convey or devise property to complainant, in consideration of her agreement to care for the promisor during the remainder of her life, will not be denied, where complainant has fully performed on her part, because the service actually rendered may not have been worth the value of the property; but the adequacy of the consideration is to be measured rather by the breadth of complainant's undertaking.

Appeal from Circuit Court, Vigo County; Jere West, Special Judge.

Action by Sara G. Warner against Buena V. Marshall and others. From the decree, plaintiff appeals. Transferred from Appellate Court, under section 1337u, Burns' Ann. St. 1901. Reversed, and decree entered for plaintiff.

R. B. Stimson and A. O. Harris, for appellant. Lamb & Beasley, for appellees.

GILLET, J. Action by appellant to enforce specific performance of an alleged contract for the conveyance of real estate and to quiet title. The property involved consists of the south three-fourths of the east half of outlot 16 of the town (now city) of

Terre Haute. The land has a frontage on Fifth street, extending north from Eagle street, a distance of 225 feet and 9 inches. The court below made a special finding, and stated a conclusion of law in appellant's favor as to the south 66 feet of said property. As to the balance of said property, the court's conclusion was adverse to her. The question is before us as to the correctness of the latter conclusion, and we are also called on to determine whether, under the evidence, appellant was entitled to such findings as would have required the stating of a conclusion of law in her favor as to the entire property.

It is insisted by appellees' counsel that the question of the application of a description of land to its subject-matter is one of fact, and that the findings do not show that appellant was entitled to any more of the real estate than was awarded to her. Counsel for appellees are correct in their first proposition (1 Jones, Real Property, § 339; Steigleder v. Marshall, 159 Pa. 77, 23 Atl. 240), and, as it does not appear that the findings contain the entire negotiation and correspondence relative to said real estate, we hold that appellant is not entitled to complain of a conclusion of law in appellees' favor as to the remainder of the property.

Before passing to the question of the evidence, we are required to consider the contention of appellees' counsel that the evidence is not in the record. This contention is based on the fact that it appears that the general bill of exceptions was filed three days after it was signed, and that the date of the filing was not within the time allowed by the court. Under the present practice it is not only the duty of the court or judge to sign the bill, but to "cause it to be filed." It was held in *La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805, upon a state of facts in regard to a bill substantially similar to that which is here involved, that the evidence was not in the record; but this holding was condemned in *Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12, as involving too narrow a construction of the statute. Mitchell, J., speaking for the court, said: "Where a party objecting has presented his bill of exceptions in proper form within the time allowed, he has complied with the letter and the spirit of the statute, and is entitled to the benefit of his exceptions." It was said by this court in *Vincennes Water Supply Co. v. White*, 124 Ind. 376, 24 N. E. 747: "When a party entitled to a bill of exceptions tenders the proper bill within the time allowed by the court, he has done his whole duty, and the duty of signing and filing same remains with the judge." See, also, *Creamer v. Sirp*, 91 Ind. 366; *Hamm v. Romine*, 98 Ind. 77; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 463; *Smith v. State*, 143 Ind. 685, 42 N. E. 913; *Robinson v. State*, 152 Ind. 304, 53 N. E. 223. We hold that the evidence is before us.

The facts as they appeared upon the trial

are as follows: In 1849, Cephas S. Holden traded for the real estate in controversy by the description first above given. He died intestate some three years later, the owner of said property, leaving his widow, Mary F. Holden, and their four children surviving him. The children died in youth, and said Mary F. Holden acquired their interests by inheritance. She afterwards married one Langford; the relation continuing until his death, which occurred in 1896. Mrs. Langford improved said property by building four houses upon it, and during her later years she had a considerable estate aside from that. She died in 1901. For some years preceding her decease she resided in the south house on said property, and she had for a housekeeper an aged and infirm woman, one Mrs. Ludlow. In her later years Mrs. Langford was without near relatives. She was laboring under the burden of age, and had a number of ailments. During the year after her husband's death she was very lonely and sorrowful. In the summer of 1896 she visited appellant, a niece of Cephas S. Holden, who lived in Colorado and supported herself and invalid mother by teaching and painting. During the spring and summer of 1897 there ensued the following correspondence between them:

"Terre Haute, March 15th, 1897.

"Dear Sarah: I am glad to hear that you and your mother are both well. I expected every mail that come that the sad news would also come too, but the Great Father did not so design it. Oh! Sarah, I do not want to disappoint you, but am rather fearful of the journey, and also of its being without a physician there, and we coming in there so entirely new to us that it will not be safe for us now at Georgetown. I was obliged to have a doctor twice as my heart was so affected. I was fearful that I could not do without one at Grand Lake, would so much like to be with you and your mother at Grand Lake, at least a large part of the time, if not all. * * * You cannot miss your husband who lived with you so short a time compared with mine, who lived with me some 33 years, nearly a lifetime, but who I must learn to live without now. Well, let me change the subject. The Young Men's Christian Endeavor Society of this part of the world are intending to get up an excursion to San Francisco for about \$50 the round trip, with the privilege of a three months' stay there, in July, if I am not mistaken, and I have some two or three families there that are writing me to come there and visit them. Now I have always wanted to see California and so many claim for it healthfulness equal to Colorado. * * * I would so much like to have you go on from Colorado with me, if I decide really to take the long trip. Well, if I was sure California would benefit me as much as Colorado did last fall I would not hesitate a moment. Sarah, I wish you to remember what I told you last summer, that

the three lots in this half block that your uncle traded for are to be yours if you survive me, and I will deed them to you if you will come and live here, and care for me and help me while I shall need your care and comfort. It includes this nice house that I want you to take good care of, but I think you deserve it more than any one else living, and, with the rest of this piece of property, will make a rich provision for you, so you will not need to teach. I shall not expect you to come while your mother needs your care and support, but I wish some of her other five children would offer her a home, so you might come soon; for I need you and I am so lonely and weak, and Mrs. L. is feeble too. * * * Now will close with love and best wishes, and remain, as ever, yours truly, from your aunt, Mary F. Langford."

"Grand Lake, Col., March 30th, 1897.

"My Dear Kind Aunt: Your welcome letter was received last week. I was glad to hear from you, but a little sorry that you might give up spending the summer and longer with me here. Yet I cannot blame you for not liking the idea of being so far from good, well-educated, practical physicians. * * * I have been thinking of that good society's trip to California next summer from your place, and, as you wish, would be glad to join you and go, too, from Denver, especially if you feel that I could be of real service to you. I for years have wished to see that beautiful state, and intended to go the first opportunity I had to do so. I also would be glad to meet you, and make the acquaintance of the good people of Terre Haute that I trust would compose the company, such as are your true friends. At least, since you again revealed to me the fact that I might some day have the old home property that you have improved, and the nice house in Terre Haute, I often find myself thinking of that place with a growing love; the beautiful spot where you have dwelt so many years, and your dear loved lost ones blossomed for a time, then left earthly for eternal joys. Such dear associations make the place dear and sacred to me, and, indeed, it will ever be, if I live to possess it, and I hope and pray that I may ever regard you with the truest and deepest gratitude, and, if ever nearer duties do not claim me, go to you and do for you everything in my power to truly bless you and try to carry out your wishes while you live, and, should I remain on earth longer than you, to carry out the same so far as you express them through my life. I feel that guarding and nurturing the buildings, trees, plants, etc., that you have reared and tended would be a double duty to me and you, and not forgetting the one who so kindly regarded me in the giving, and to also visit, with flowers, the tomb of the dear loved ones whose bodies are there consigned to Mother Earth. Aunt, there is not a day or a half a day that I do not think of Eugene as my kind brother-like cousin of my early childhood, and of your

Sarah as the sweetest of my girl cousins. Her ways were so noble and gentle. All the joys and blessings she would have had I shall regard as precious to me, I promise you. * * * Lovingly yours. Sarah."

"Terre Haute, June 23d, '97.

"Dear Niece: Your letter containing the sad news is at hand, and contents noted. While she that has departed has lived her full time out, but we cannot refrain from shedding the briny tear, as we feel that she can never return to us, though the time will come ere long that we may go to her. The thought of death to me is always sad, though I was not taken by surprise when the sad news reached me, for I was expecting it. Mrs. Ludlow has not been in good health for some months, and is looking badly, worse than I ever saw her. Her teeth have been ulcerating for a long time, but she had one extracted yesterday, and it seemed to have given her a little relief. We are boarding, and have been since we got home, as she did not seem well enough to do our little housework. * * * Now, when you get all your arrangements made, I shall expect you to come here to make your home. I should be only too glad could I see my way clear to come to Denver this summer again. I had intended to, but all seems against it. The city are now putting me to the cost of between \$2,000 or \$3,000, and I consider it as good as thrown away, for the houses will neither rent nor sell for more when done, and then I do not get the kind of paving we want either. And so much unnecessary expense. We did not have any need of asphalt paving, as our streets are so sandy they are never muddy much. * * * Do you still intend to attend the Normal School? Several of the students went home sick. It seems that I can't find much to say this time. Yours with love and sympathy. Lovingly yours, M. F. Langford."

"Terre Haute, July 4th, 1897.

"Dear Sarah: I have written to you once since the death of your dear mother. Did it reach you? * * * Do you think you can sell your houses there, or what will you do with them? And are you a good mathematician, and if so, why do you think it necessary for you to attend the Normal School now? * * * And when do you think you will be ready to come, or will you wait until the hottest weather is over? And how are you off financially? * * * Well, Mrs. Ludlow is not very well, and has not been for a considerable length of time. And as for myself, though not well, am considerably better than I was last spring, so must close with love and sympathy. Mary F. Langford."

"Terre Haute, August 1st, '97.

"My Dear Niece: I sit down this hot morning to write you a short letter. * * * Oh! how I wish I was in Denver now, but there is no hope, scarcely any change, when I am compelled to throw away about \$3,000 to satisfy the greed and ignorance of the men

that our city claims as intelligent voters, and the ones they put in power. * * * I have had my house here painted since I came home, and so may say it looks better now than it ever did before. You know it is to be yours if you survive me, and the lots, which is property worth at least \$10,000; but as your mother is now dead, I shall expect you to come and compensate me by staying while I need you. Mrs. Ludlow is not in very good health. I do not wish you to inform your sisters or brothers or any one of our understanding in this at present. Times are so hard, have never had so many vacant houses, and so long vacant as now, in my life before. Rents are away down too, and if people are dishonest they will not pay their rent; then low rents or none at all and lost time, and having so much destruction of it when in use constantly, cost to repair makes me sad to think of it, and then the percentage for collecting to add to it. If I could only attend to that myself I could save that much, but I cannot do it. You say you wish to remain there until the heated season is over. I would not wish you here now, as I should fear you would be sick, as your whole life has about been spent in cooler climates, but when it is safe to make the change. * * * Lovingly yours, by your auntie, Mary F. Langford."

"Grand Lake, Aug. 15th, 1897.

"My Dear Aunt Mary: Yours of August 1st was duly received, and has been neglected longer than I intended. I have not time to make a long reply now, as I am busy as ever or more so; but I presume you are looking for a message. I thank you for your kind assurance or promise to me for a future reward, and I subscribe to the terms. I shall try to deserve it all, and will come as soon as I can get necessary business attended to here. I presume you will let me collect some to pay my current expenses as you mentioned last year, and to take up a little normal work when you can well spare me; but I will not neglect you to do so, but I certainly would appreciate the opportunities that Edna gave up, if I had them. I will try to comply with your wishes, so far as you have expressed them about the matter. I do feel sorry for you. This is the place to summer and escape the intense heat you endure, and I hope you will be able to come to the 'Rockies' hereafter to summer, and not taxed as you have been of late. Yours lovingly, S. G. Warner.

"P. S. I have some painting of pictures to do—much of it that I might do now during tourist season—but I will only try to fill what orders that I have already promised, but I dearly love the work. Hoping that you are better than you were and kindly cared for by a loving Father. Sincerely, Sara."

Outlot 16, as laid out, had no interior lot lines, and it was never platted, but in an atlas published in 1874, which is shown to have

been in the home of Mrs. Langford, there is a plat of said city, wherein the east half of said block appears to be divided by lines running east and west into four lots of equal size. This fact was known to her at least as far back as 1887. It will be observed that in her letter first above set out she refers to the property in controversy as consisting of three lots. The fourth or north lot in the block she acquired from a third person and caused it to be separately inclosed. From Eagle street north to said last-mentioned lot there was no fence or other physical indicia of division as between the houses. Many years before the Holden residence had stood in the center, north and south, of the real estate which is here involved, and it afterwards was the habit of Mrs. Langford to refer to said real estate as the Holden home property. There is no evidence as to the value of said real estate in 1897, but witnesses called by appellees testified that it was worth (presumably at the time of the trial) from \$21,560 to \$22,060; said south house and 66 feet of ground being valued by said witnesses at from \$7,460 to \$7,900. August 3, 1897, Mrs. Langford made a will devising to appellant said 66 feet of land, and no more. As soon as she could arrange her affairs in the West, and but a short time after the exchange of said letters, appellant came to Terre Haute, and took up her residence with Mrs. Langford, and they continued to live together until the death of the latter. It appears from the evidence that Mrs. Langford had the house where she lived painted in the spring or early summer of 1897. She did not have any other house painted between the time she returned from the West and the fall of 1897. There is a great deal of testimony in the record as to the declarations made by Mrs. Langford during the years from 1897 to 1900 of her purpose to deed the Holden home property to appellant, or to "make her heir to it," in return for her services. To one witness she explained in 1898 that the real estate she intended to deed to appellant was property "Mr. Holden bought for a home. It consisted of three lots and four houses." Mary M. Patterson, an aged witness, who visited Mrs. Langford in 1897, testified that at that time said decedent told her that appellant "was going to stay with her as long as she lived," and that she (Mrs. Langford) intended to make appellant "heir to the Holden part of the estate." Another witness, Mrs. Boudinot, a woman 87 years old, testified that in the fall of 1897, shortly before appellant came to Terre Haute, she said to Mrs. Langford that she ought to have a nurse, "and," quoting the words of the witness, "she said: 'I am going to. I have sent for my niece, and she is coming. I have wanted her to come for a good while, but she had a mother and couldn't leave; but her mother's dead, and she's coming to live with me as long as I live.' And she says: 'I intend to repay her for her kindness; that she

shall have the Holden property.' That was her words." In August, 1899, Mrs. Langford executed a second will, revoking the will of August 3, 1897, and devising appellant a house and lot which was not a part of the Holden homestead. She omitted, by will or otherwise, to fulfill, in whole or in part, the promise in her letter of August 1, 1897. There is much evidence showing the faithful service which appellant rendered Mrs. Langford during the remaining years of the latter's life. For a time appellant attended school each day, as they had planned; but at the beginning of the third school year she gave up that work, at Mrs. Langford's request. The latter often referred to appellant as having been a daughter to her, and said that she did not know how she could get along without her. It is true there is testimony of her having made complaints to others concerning appellant; but these complaints, so far as sifted down, appear to have been those of a querulous invalid. Appellees' evidence shows that Mrs. Langford was very exacting, and that one of her complaints was that appellant was deceitful, since she had failed to resent words spoken to her by Mrs. Langford for the purpose of making her angry. Particularly upon the question of faithful service upon the part of appellant, but partially as evidence of Mrs. Langford's purpose in the correspondence above set out, attention may be called to a letter written by her September 24, 1899, to Mary M. Collins, in which are found these words: "Sarah does not attend the Normal this fall, for I have told her she will never need to teach, as I promised her property that will bring her more than her teaching if she stays with me while I live. It is property that came to me by her uncle. As she has shown me more love and attention than any of the Holdens now living, I feel she deserves it."

The finding of the court below on the subject of performance is: "That the plaintiff's mother died in June, 1897, and the plaintiff, as soon thereafter as she could make the necessary arrangements, to wit, on the 20th day of December [September?], 1897, came to the house of said Mary F. Langford, and there lived and cared for and helped and comforted her until her death, on February 11, 1901, and in all respects fully performed the conditions required of her in said letters above set out. That the said Mrs. Langford, without any cause on the part of the plaintiff, became dissatisfied with the plaintiff, and the companionship was not congenial or satisfactory to the said Langford, and at different times before her death she asked the plaintiff to leave her and return to her home in Colorado; but the plaintiff refused to return to her home, but patiently bore with the said Langford, and the said Langford at each time would become sorry of the language she had used, and would then become anxious that the said plaintiff remain with her, and the plaintiff, knowing and un-

derstanding her disposition, paid no attention to her dissatisfaction, and remained with her until her death, patiently performing and doing the duties required of her." This finding represents a successful effort to reconcile the whole evidence on the subject of performance, and as the motion for a new trial and the assignment of error based on the overruling of the same brings the case before us for final disposition, should the evidence warrant it, we hold (and that without hesitation in the light of the finding below) that the question of performance must be solved against appellees.

Evidence was offered by appellees that Mrs. Langford complained to others that appellant tormented her because she did not change the will of 1897, and a witness testified that Mrs. Langford said to her that Sara (appellant) was not satisfied with the will; that she wanted the well. The well was some 8 or 10 feet south of the second house, and was not on or near a lot line, were the property divided into three equal lots, as appeared in the atlas. It may be suggested in this connection that the declaration of Mrs. Langford was not evidence that appellant was in fact making any such claim. Indeed, the declaration was strictly "*res inter alios acta*." A witness on behalf of appellees, one Smallwood, a clerk in the office of the attorney who prepared the second will, testified that some two or three weeks before Mrs. Langford died, and also shortly afterwards, appellant made the statement to him that she was to have the property on the corner and the lot north. As to the latter words, the witness stated that he inferred that appellant meant the unoccupied space of 42 feet immediately north of the south 66 feet. He admits, however, that she said she had letters to show for her claim.

It is well settled that a valid contract may be entered into by correspondence. If an offer be made by letter, it is a legal intentment that the offer is constantly repeated, or, in other words, it is presumed that there is a continuation of the intention to contract, until the time when the contract may be closed by an acceptance. Chitty on Contracts (10th Am. Ed.) 10. When the person to whom a proposal is made duly signifies his assent thereto, the proposal becomes a promise. Pollock, Contracts, *6. In determining whether a letter contains a proposal, in the sense in which that word is used in the law of contracts, it is to be considered whether the terms in which the alleged proposal was made were such, in view of the circumstances connected therewith, as to warrant the other party in acting on it as on a real and intentional offer. 9 Cyc. 276. We have in Mrs. Langford's letter of March 15th, a statement of her willingness to deed the property in controversy to appellant upon the condition named therein, and the only reason for regarding the proposition as tentative was the writer's recognition of the fact that her plan

could not be consummated while the mother of appellant had need of her. Answering this letter, appellant revealed her appreciation of the proposal, and expressed her willingness to accept when circumstances permitted, by the words: "I hope and pray that I may ever regard you with the truest and deepest gratitude, and, if ever nearer duties do not claim me, go to you and do for you everything in my power to truly bless you, and try to carry out your wishes while you live." On June 23, 1897, appellant's mother was dead, and Mrs. Langford writes, "Now, when you get all your arrangements made, I shall expect you to come here to make your home," and she asks, "Do you still intend to attend the Normal School?" It is evident that at the time that this letter was written the writer looked forward with confidence to the consummation of her plan. In her next letter she asks: "Do you think you can sell your houses there, or what will you do with them? And are you a good mathematician, and, if so, why do you think it necessary for you to attend the Normal School now? * * * And when do you think you will be ready to come, or will you wait until the hottest weather is over? And how are you off financially?" Then comes the letter of August 1st, in which Mrs. Langford says: "I have had my house painted since I came home, and so may say it looks better now than it ever did before. You know it is to be yours if you survive me, and the lots, which is property worth at least \$10,000; but as your mother is now dead I shall expect you to come and compensate me by staying while I need you. * * * I do not wish you to inform your sisters or brothers or any one of our understanding in this at present. * * * You say you wish to remain there until the heated season is over. I would not wish you here now, as I should fear you would be sick, as your whole life has about been spent in cooler climates, but when it is safe to make the change." Tested by the standard which we have stated above, it will not do to say that the letter of August 1st did not amount to an offer. The writer held out a promise, attaching a condition thereto which meant to the other the abandonment of her place of residence and employment, and the taking up of the burden of ministering to an aged invalid for an indefinite period. To treat a proposition like the one under consideration, after it had been acted on, as not having been intended to affect rights, would be to impute to the writer an intent to mislead.

As to the matter of acceptance, it will be observed that appellant, after expressing her thanks for the "kind assurance or promise," says: "I subscribe to the terms, and will come as soon as I can get necessary business attended to here." True, appellant speaks of her assumption that she may be permitted to do some collecting to pay current expenses and to take up a little normal

work; but she writes as though these matters were understood, and as there was such a clear expression in her first letter of her desire abundantly to perform her part of the engagement, coupled with the assurance in her last letter that she would not neglect Mrs. Langford and would try to comply with her expressed wishes in the matter, we cannot think that their minds were apart at that time. It seems evident that there was no intent to postpone acceptance to negotiate further concerning the matters referred to, but rather to leave them to the reasonableness of Mrs. Langford, and therefore a present acceptance must be presumed. We may also say that the small liberties asked would not impinge upon the terms of Mrs. Langford's proposal. There is nothing in the letters to indicate that appellant was to come as a bond servant. On the contrary, it is evident that the elder woman contemplated that appellant should have some time to herself, that she should come as a social equal, and that she should take her place in the household as if she were a daughter, having both the privileges and the responsibilities which a due sense of the appropriate would suggest. Besides, it may be suggested that, appellant having performed, appellees, who stand in the place of Mrs. Langford, ought to be regarded as estopped from raising any question as to the meeting of the minds. The case is one of a proposal acted on, and this, in the circumstances, ought to be regarded as a sufficient acceptance. 9 Cyc. 257, 270.

It is insisted by appellees' counsel that the only offer which was accepted was the offer in the letter of August 1st, and that said letter cannot be made the basis of an agreement concerning the property described as "the lots," for the lack of a sufficient description. In *Key v. Ostrander*, 29 Ind. 1, 6, this court appropriated as part of the text of its opinion the following statement from the case of *Peck v. Mallams*, 10 N. Y. 509: "The general rule in regard to the construction of the description of the premises in a deed is one of utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated." To the same effect, *Hannon v. Hilliard*, 101 Ind. 310; *Roehl v. Haumesser*, 114 Ind. 311, 15 N. E. 345. It is not the office of a description to identify the land, but to furnish the means of identification. *Rucker v. Steelman*, 73 Ind. 396; *Scheible v. Slagle*, 89 Ind. 323; *Hannon v. Hilliard*, supra; *Trentman v. Neff*, 124 Ind. 503, 24 N. E. 895; *Collins v. Dresslar*, 133 Ind. 293, 32 N. E. 883; *Edens v. Miller*, 147 Ind. 208, 46 N. E. 526; *Elsea v. Adkins* (at last term) 74 N. E. 242. It is thoroughly settled that extraneous and parol evidence is competent to apply the terms of a deed to the subject-matter. *Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505; *Torr v. Torr*, 20 Ind. 118; *Guy v. Barnes*,

29 Ind. 103; Baldwin v. Kerlin, 46 Ind. 426; Indiana Central Canal Co. v. State, 53 Ind. 575; Roehl v. Haumesser, supra; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Elsea v. Adkins, supra. And see Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Clark v. Crawfordville Coffin Co., 125 Ind. 277, 25 N. E. 288.

Perhaps there might be no serious difficulty, under the rules of law, in reaching the conclusion that the description of the house was sufficient, on the principle that that is certain which can be rendered certain. But as to the property referred to as "the lots," if it be considered that that property does not appear by the letter of August 1st to be part and parcel of the property on which the house is situated, it is possible that without the preceding correspondence, and in the absence of proof that the writer did not own any other lots, the description is so far left without any external standard to be referred to that it would have to be held that the contract could not be enforced because of the statute of frauds. Doherty v. Hill, 144 Mass. 465, 11 N. E. 581. We are of opinion, however, that the whole correspondence may be looked to in determining the subject-matter of the negotiation. While there is no doubt that a distinction is to be observed between an agreement and a note or memorandum thereof, as those terms are used in the statute of frauds, yet such has been the holding of the courts concerning the removal of ambiguities in written instruments and the evidencing by writing of oral agreements as to warrant the assertion of Lord Ellenborough, in Shippey v. Derrison, 5 Esp. 192, that "the statute was only intended to protect persons from having oral agreements imposed upon them." It was said in Barry v. Coombe, 1 Pet. 640, 7 L. Ed. 295: "An examination of the cases on this subject will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. It is written evidence which the statute requires." While, of necessity, a contract which is oral can only be evidenced by a note or memorandum subsequently made, yet where the agreement is in writing there is no objection to the use of prior writings concerning the subject-matter, which are referred to in the agreement, for the purpose of clearing up that which is uncertain therein. Ryan v. United States, 136 U. S. 68, 10 Sup. Ct. 913, 34 L. Ed. 447; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Bauman v. James, L. R. 3 Ch. 508. In the case last cited it was held that an offer of the defendant to make a lease for 14 years "at the rent and terms agreed upon," which offer had been accepted, might be explained and taken out of the statute by a negotiation in writing, had some 6 months before, between the plaintiffs and the defendant's solicitors; it appearing that the parties had afterwards taken

up the negotiation without the intervention of said solicitors.

The requisite written evidence of the contract may be established through the medium of letters, as well as by more formal writings; it only being necessary that they should so refer to each other as to amount to written evidence of the transaction. Ryan v. United States, supra; Bauman v. James, supra; Ridgway v. Wharton, 6 H. L. 238; Kennedy v. Lee, 3 Mer. 451; Wood on Frauds, pp. 648, 658; Roehl v. Haumesser, 114 Ind. 811, 15 N. E. 345; Austin v. Davis, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456. It was said in the case last cited: "If a contract which comes within the statute of frauds can be extracted from correspondence between the parties on the subject of the contract, the statute is satisfied." Where the reference is very general, and therefore indefinite, parol evidence may be introduced to show what instrument was referred to. Ridgway v. Wharton, supra; Bauman v. James, supra; Cave v. Hastings, 7 Q. B. Div. 125; Long v. Millar, 4 C. P. D. 450; Shardlow v. Cotterell, 18 Ch. D. 280, s. c. 20 Ch. D. 90; Coupland v. Arrowsmith, 18 L. T. 755; Wills v. Ross, 77 Ind. 1, 40 Am. Rep. 279; Wood on Frauds, § 364; 2 Phill. on Ev. (3d Ed.) p. 298. According to Bauman v. James, supra, it is sufficient, although the writing does not contain an express reference, if it can be said in the light of the facts that the prior writing, and nothing else, could have been referred to. Even where there is no direct reference to a prior writing, and the connection is not shown by parol evidence, the character of the writings may still be such as to show upon their face, when placed in juxtaposition, that they are connected (Beckwith v. Talbot, 95 U. S. 289, 24 L. Ed. 496; Grafton v. Cummings, 99 U. S. 100, 25 L. Ed. 366); and we are of opinion that we are within the cases in holding that a reference in general terms to an agreement or understanding may in some circumstances be inferred to have had reference to the only written agreement or understanding which is produced on either side upon the trial. Western v. Russell, 3 V. and B. 187; Johnson v. Dodgson, 2 M. & W. 653 (opinion of Lord Abinger); Wood on Frauds, § 369.

The parol evidence in this case, and we refer especially to the testimony of Mrs. Boudinot in this connection, clearly removed all uncertainty as to whether the proposition related to the same property throughout. But the internal evidence of this fact which the correspondence contained is noteworthy. The parties thoroughly understood each other upon the conclusion of the preliminary correspondence. Mrs. Langford had proposed to convey "the three lots in this half block that your uncle traded for," and she particularized in describing it as "this nice house" and "the rest of this piece of

property." This reference appellant evidently understood, for she refers to what had been offered as "the old home property that you have improved and the nice new house." Although appellant's first letter cannot be regarded as an acceptance in law, yet it is clear from the letters of June 23d and July 4th that after the death of appellant's mother Mrs. Langford assumed that the conditional agreement had become absolute. This brings us to the letter of August 1st. It will be noticed that in this letter the writer introduces the offer by the words, "You know it is to be yours," while immediately after the making of the proposition she cautions appellant not to say anything "of our understanding in this at present." If we were to assume that between March 30th (the date of appellant's conditional acceptance) and August 1st there had been a different understanding reached, we should be compelled to indulge the supposition that the parties had opened up a negotiation concerning a matter that they were already at an understanding about, an understanding that was evidently satisfactory to both, and that Mrs. Langford had within a brief time learned to apply the familiar terminology, "the lots," in an entirely new way, and all of this without any suggestion in the evidence that there was such a correspondence, or any hint as to what portion of the property, if any, the old description had come to be applied. Appellant is not only entitled to appeal to all of these circumstances, but to the self-dis-serving statements of Mrs. Langford as to the nature of the agreement between them. Assuming, as we think we must do, that we have before us all the correspondence on the subject, we have only to say that to impute to Mrs. Langford an intent, in writing the letter of August 1st, to make any different offer than that which had its basis in what she refers to in said letter as "our understanding," would be to assume that she used language to conceal thought.

Counsel for appellees press upon our attention the fact that in said letter Mrs. Langford used the words, "which is property worth at least \$10,000." Could we have persuaded ourselves that the relative "which" referred to the whole property, we might have been able to hold that said letter contained a sufficient description under the statute of frauds, since it would suggest within itself the means of applying the description to the subject-matter; but it was this very doubt which required us to look to the prior correspondence to ascertain the intent. Of course, viewed as in the nature of a description, the words quoted, if inconsistent, would have to be rejected, as the least certain, under the rule "*Falsa demonstratio non nocet*," if we look to the prior correspondence to ascertain what real estate was to be conveyed. The philosophy of the doctrine referred to is thus stated by Prof. Wigmore:

"Just as we found that the omitted terms were not essential in applying the description, so we may find that some of the inserted terms are not essential. Each description of a single object must be conceived of as a single utterance, just as one cipher word may represent a message of forty words. We are doing it no violence by ignoring the nonessential terms; for neither the omission nor the insertion of nonessential terms alters its existence as a whole. By conceiving clearly the singleness of each description as a symbol of a single object, we appreciate that the imperfections of either omission or insertion do not destroy its character as a single effort at the designation of a single object. And so we come to the maxim, '*Falsa demonstratio non nocet*.'" 4 Ev. § 2476. The effect of the rule referred to, if we view the letter in question in the light of the correspondence preceding it, is well illustrated by *Parker v. Kane*, 22 How. 1, 16 L. Ed. 286, where, as will be seen, the court very closely confined the extrinsic evidence. It was there said: "The description of the property conveyed as lots Nos. 1 and 6 of the fractional quarter is a complete identification of the land, having reference to the official surveys of the United States, and according to which their sales are made. The more general and less definite description cannot control this; but whatever is inconsistent with it will be rejected, unless there is something in the deed, or the local situation of the property, or the possession enjoyed, to modify the application of this rule." See *Thayer v. Flinton*, 108 N. Y. 394, 15 N. E. 615.

The words concerning value, which are found in the letter of August 1st, do not, however, create the difficulty which counsel for appellee suppose. Indeed, we think that the difficulty practically disappears when we assume that the word "which" referred to its last antecedent, "the lots," considered apart from the corner house and the real estate immediately connected therewith. While the structure of the sentence makes this view permissible, the fact that Mrs. Langford at that time had in mind, as two separate ideas, the newly painted house and the lots, increases the probability that it was "the lots," or remaining property, which she regarded as worth at least \$10,000. Corroborative evidence of this is found in Mrs. Langford's first letter. It will be noticed that in that instance the writer, after describing the property as "the three lots in this half block that your uncle traded for," states that "it includes this nice house," and then, after interpolating two ideas, she speaks of "the rest of this piece of property." Again, it will be noticed that in said first letter mention is made of "this nice house," which the writer desires appellant "to take good care of," while it is after the reference to "the rest of this piece of property" that mention is made of "a rich provision" for appellant, so that

she "will not need to teach." This same idea may have induced the writer to speak of the value of "the lots" separately in her last letter. Assuming, as we think we have shown we may do, that the statement of value did not refer to the house and an appropriate amount of frontage going therewith, but to the property to the north of that, no necessary inconsistency appears in the statement that the rest of the property is worth at least \$10,000. As stated, the evidence of values which was received upon the trial related to the then present time. Mrs. Langford had reference, in using said words, to a time five years before, when, according to her letters, times were hard, rents were low, houses were long vacant, and tenants destructive and liable to be dishonest, and when she was being called on to make an outlay of \$3,000 for paving, which she thought would not add to the value of the property. Supposing that the paving was not at that time put down, or that the cost thereof was a charge against her frontage, discouraged with her investment, as she appears to have been, it is not strange that she stated in effect that \$10,000 was a minimum value for the property to the north. It is to be recollected, however, that, in exploring for the intent of Mrs. Langford, it is not her subjective intent which is to be sought after, but rather the fair meaning of her words, judged in the light of the surrounding circumstances; but of this subject we shall speak more at length in another connection.

As to the objection that the letter of August 1st contains a patent ambiguity, we deem it clear, notwithstanding the aphorism of Lord Bacon, that as the law is settled it is always competent (except to the extent that the statute of frauds may enter into the question) to apply words of general description to the subject-matter by evidence of the situation and circumstances of the parties. An ambiguity which vanishes, when viewed in the light of such explanatory testimony as is admissible under the rules of evidence, is not to be treated as vitiating the instrument. 1 Greenl. on Ev. §§ 297-300; Thayer's Prelim. Treatise on Ev. 425; Elliott on Ev. § 600; 2 Whart. on Ev. § 942; 2 Phill. on Ev. c. 7; Stephen's Dig. of Ev. art. 91; 1 Jones, Real Property, § 339; Pate v. Bushong, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287; Swett v. Shumway, 102 Mass. 365, 8 Am. Rep. 471; Hollis v. Burgess, 37 Kan. 494, 15 Pac. 536; Burgon v. Cabanne, 42 Minn. 267, 44 N. W. 118; Case v. Phoenix Bridge Co., 134 N. Y. 78, 31 N. E. 254, and many of the cases heretofore cited in the discussion of the sufficiency of the writing under the statute of frauds. Speaking with reference to Lord Bacon's distribution of ambiguities into patent and latent, the Supreme Court of the United States, in an early case, said: "It would be, perhaps, a more convenient and more intelligible distribution of the doctrine on this subject if

the cases were divided into positive, relative, and mixed; the positive corresponding to the patent, and the relative to the latent, ambiguities of the authors who treat of the subject. The mixed would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, also suggests the medium by which the ambiguity may be removed." *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295. This is such a case. In addition to the descriptive words, the writing advises us that the offer is really a restatement of what the letter terms "our understanding." That in such a case it is competent to identify and give in evidence a prior correspondence, in which the understanding was reached and is explained, does not admit of question under the authorities above cited.

We have already discussed the competency of evidence to connect the correspondence and to apply the description to the subject-matter; but some further discussion of the competency and effect of parol evidence seems necessary, in order that we may determine whether there is any evidence in support of the claim of appellee that the subject of the proposal did not include the whole property. And we have first to suggest in this connection that the letter of August 1st contained, as we have seen, a proposal; that is, it was written with a purpose to affect rights through the medium of a contract, and therefore belongs to that class of writings known as dispositive, as distinguished from casual. 2 Whart. Ev. §§ 920, 1083, note. As to that class of documents the law is strict that parol evidence cannot be received to contradict, vary, add to, or subtract from their terms. 2 Taylor on Ev. (Chamberlayne's Ed.) § 1132. Phillips says: "By the rule of common law, independently of the statute of frauds, parol evidence could not be received to contradict a written agreement; the written instrument must be considered as containing the true agreement between the parties, and as furnishing better evidence than any which can be supplied by parol. The reason assigned by Lord Coke against admitting parol evidence to contradict the terms of a deed is very general, and applies to the case of a written agreement, though writing may not have been absolutely necessary. 'It would be inconvenient,' he says, 'that matters in writing, made in consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by an averment of the parties to be proved by the uncertain testimony of slippery memory.'" 2 Evidence, 357. It was said in one case: "You cannot vary the terms of a written instrument by parol evidence. That is a regular rule; but if you can construe an instrument by parol evidence, when that instrument is ambiguous, in such a manner as not to contradict, you are at liberty to do so." *Goldshede v. Swan*, 1 Ex. 158. It is to be remembered that in a case of this kind, where the writing is merely

indefinite, the purpose of parol evidence should be exposition. As stated by Mr. Wharton: "The contract cannot be varied. Its obscure expressions may be explained, but this for the purpose, not of molding, but of developing, its true sense." *Ev.* § 946.

If we reason upon the assumption that the letter of August 1st was but a renewal of the proposition found in the letter of March 15th, and if we take counsel of the evidence, and of the nature of the correspondence, rather than of possible conjecture, that must be the conclusion, then we are at the end of the discussion, for the meaning is plain. The proposition is illustrated by the following observations of Mr. Justice Holmes: "I do not suppose that you could prove, for purposes of construction, as distinguished from avoidance, an oral declaration, or even an agreement that words in a dispositive instrument, making sense as they stand, should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote 400 feet it should mean 100 inches, or that Bunker Hill Monument should signify Old South Church." 12 Harvard L. R. 417, 420. See, also, *Morris v. Thomas*, 57 Ind. 316; *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; *Gardner v. Caylor*, 24 Ind. App. 521, 56 N. E. 134. Appellant's case was based on the theory that the correspondence contained the written agreement between the parties, and the parol evidence introduced on her behalf was largely directed to the establishment of this fact. If she established this proposition, and the fact of performance, she was entitled to recover, and, unless the evidence of appellees tended to break down her claim, a case would be presented in which there was no conflict in the evidence. As circumstances which they claim tend to negative appellant's case, appellees' counsel call attention to the words, in the letter of August 1st, "which is property worth at least \$10,000," to the testimony of the witness Smallwood, and to the will which was executed three days after said letter was written. We have already shown that it is not plain that said statement of value was obviously incorrect, if it referred to the lots to the north, and therefore we are of opinion that said statement cannot be treated as tending to show that the prior correspondence is not a memorandum of the agreement, because to do so would require that we should first infer that the statement related to all the property referred to in the letter of August 1st, and, building upon that premise, that we should further infer that there must have been some intervening agreement, because the property mentioned in the letter of March 15th was worth more than \$10,000. This is not a legitimate method of reasoning. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be shown to exist, and not merely be presumed. No inference of fact or law is reliable, if drawn from inferences which are uncertain.

United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761; *Young v. Montgomery*, 161 Ind. 68, 67 N. E. 684; 1 *Starkie on Ev.* 80.

As to the claim of the witness Smallwood, the question first arises as to how any application could be made of it which would not contradict the letter of August 1st. That letter described the property as "my house" and "the lots," and, as the evidence only reveals the existence of one interior lot line upon the vacant space to the north of Mrs. Langford's home, it appears to us that his testimony tends rather to contradict than to bring out the meaning of the letter of August 1st. The claim of said witness that he inferred that by the use of the term "the lot north" appellant referred to the 42 feet north of the south 66 feet is evidently based on the fact that the will of August 3, 1897, devised appellant said 66 feet; but it cannot be claimed that the north side of said last-named property was regarded by the parties as a lot line when the correspondence was had, and it must be remembered, as appellant stated to said Smallwood, that her claim was based on letters. But, as we have already shown, inferences cannot be based on inferences, and as the words used by appellant, "the lot north," properly described the whole of the Holden property to the north of Mrs. Langford's home, since the property was unplatted, we think that there cannot be built upon said witness' inference that appellant claimed less property the further inference that the proposition in the March 15th letter had in some way been modified before the letter of August 1st was written.

We come, now, to the consideration of the question as to whether said will can be considered as a side light upon the meaning of said letter. It is one proposition to show the situation of the parties and the circumstances attendant upon the making of a contract, or even their negotiation, in case of ambiguity, and it is quite another proposition to receive the subsequent *ex parte*, self-serving declarations of one of the parties thereto. It has been well stated that "the state of mind or intention of a person, being impalpable, can be ascertained only by means of outward expressions, such as words and acts. Accordingly the law judges of the state of mind or intention of a person by outward expressions only, and excludes all questions concerning intentions unexpressed. It imputes to a person a state of mind or intention corresponding to the rational and honest meaning, not only of his words, but of his actions as well; and where the conduct of a person towards another, judged by a reasonable standard, manifests an intention to agree in regard to some matter, that agreement is established in law as a fact, whatever may be the real, but unexpressed, state of his mind on the matter." *Clarke, Contracts*, 5; *Leake, Contracts*, 2. It was said by this court in *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354, that a contract

"may be interpreted by facts existing at the time it is used; but proving existing facts to aid interpretation is a different thing from proving mental intention of parties. The admission of such proof would open a wide door to perjury and fraud, while it is easy for parties, when making a contract in writing, to protect themselves from any wrong by making their contract explicit." See, also, 1 Greenl. Ev. 277; 2 Phill. on Ev. (8d Ed.) 282; Grant v. Grant, L. R. 5 C. P. 727; 9 Cyc. 578. In the leading case of *Shore v. Wilson*, 5 Scott (N. R.) 1037, which involved the meaning of certain old deeds, Lord Chief Justice Tindal, after speaking of the manner in which difficulties concerning the meaning and application of words in a contract might be cleared up by parol evidence, said: "But, whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed, and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to. It would be evidence which in most instances could not be met or counterbalanced by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed." Mr. Wharton says: "The mind changes rapidly. Caprice, or a new, though sudden, light, may bring about an immediate and real change in my purposes. Or, supposing my mind remains unchanged, to permit my private intention to overrule the natural and obvious meaning of my written engagement would be to give to secret mental reservations an ascendancy destructive of fair business dealing. And, even supposing there is no such taint possible, to permit the treacherous medium of memory as to conversation to supersede the more exact and authoritative medium of a written statement would be to subordinate the superior to the inferior mode of proof. For these and other reasons the courts have united, in the limitations to be hereafter expressed, in holding that the obvious meaning of a dispositive document cannot be varied by proof of the writer's intent." 2 Ev. § 936. Bearing in mind the proposition, laid down in an earlier portion of this opinion, that an offer in a letter is to be treated in law as being constantly held out until the time comes to close with it by an acceptance, it will be perceived that the testi-

mony as to the writer's intervening act could not affect the question. Besides, it would be most unjust to permit the will of August 3d—a document of which appellant seems to have had no notice before going to Terre Haute, and which, after it came to her knowledge, she often besought Mrs. Langford to change—to be regarded as any evidence of the meaning of Mrs. Langford's letter of August 1st. As applicable to such a case as this, we may well quote the following from the New York Court of Appeals: "Minds cannot meet when one keeps to itself what it means to do, nor can one party know that the other does not assent to a contract, the terms of which have been discussed and settled between them, unless dissent is made known. * * * That an act should be held to have or not to have effect, and one party to it to be bound or not, as the other party to it should, by his undiscussed purpose, have determined, is warranted by no sound principle." *Dillon v. Anderson*, 43 N. Y. 237.

The will does not even purport to speak the maker's intention of three days before, but, if it did, the declaration, as we have seen, would be inadmissible; for it is by words used in the making of the contract, viewed in the light of the circumstances, that the law, holding the party to resolute good faith, judges of his intent. The proposal in question was designed to operate *inter vivos*, and in the absence of a notice to appellant of its revocation before acceptance she was entitled to act upon the proposition extended to her on the assumption that Mrs. Langford's intent continued as before. It is not sufficient that proof of a fact lends a degree of probability as to the existence of the fact sought to be established. Rules of evidence must be general, and one of these rules, subject to exceptions as old and well-recognized as the rule itself, is that hearsay evidence is in its own nature inadmissible. *Mima Queen v. Hepburn*, 7 Cranch, 290, 3 L. Ed. 348. In this instance the supposed evidence stands condemned as a self-serving declaration, and as within none of the exceptions to the rule excluding hearsay. We may also remark, in passing, that we cannot understand how, in the light of the evidence, the will could be considered, practically speaking, as other than in derogation of what was denominated in the letter of August 1st as "the lots." Looking at the case broadly, we are unable to find any substantial basis of doubt as to the nature of Mrs. Langford's proposal. There was apparently one and the same proposition held out by her throughout the correspondence. The letters strongly tend to evince this fact, there is much parol evidence in support of it, and we find no evidence that can be applied in denial.

It is claimed on behalf of appellees that the contract is too uncertain to authorize a decree of specific performance. In this we think that counsel misapprehend the character of the uncertainties which constrain a

court to refuse such relief. The only reason for a distinction in the matter of certainty between actions for damages and suits for specific performance is that in actions at law, in which the remedy is negative in character, a conclusion may often be reached without any exact consideration of the terms of the contract, while the nature of the equitable remedy demands that the court should be able to determine what the contract was which it is asked affirmatively to enforce. Fry, Spec. Perf. (3d Am. Ed.) § 361. *Burke v. Mead*, 159 Ind. 252, 64 N. E. 880. We are confronted with no such difficulty here. As was said in *Colerick v. Hooper*, 3 Ind. 316, 318, 56 Am. Dec. 506: "Where a written instrument contains all the facts of a contract, except such as may legitimately be proved by parol evidence, where there is a written agreement, that instrument is sufficiently certain to be enforced."

Finally, appellees' counsel discuss, under what they term in their brief "Balancing the Equities," the question as to whether, in view of the short duration of appellant's service, it may be regarded as fair to award her the property in controversy. Mere inadequacy of consideration is not, in and of itself, a sufficient reason for refusing specific performance. *Hamilton v. Hamilton*, 162 Ind. 430, 70 N. E. 535. But we may remark, in passing, that the extent of the consideration, there having been performance, should be measured by the breadth of appellant's undertaking, rather than the fact that the actual service was only for about 3½ years. There are no circumstances of overreaching, or even of hardship, in the case. It was decedent's own proposal. She could not take her property with her, and she procured by her agreement a loving service that she stood greatly in need of.

In conclusion, we have to say that the case appears to us to be one in which we should, in addition to reversing the judgment, direct the entry of a decree as prayed. It is so ordered.

(165 Ind. 304)

CITY OF ELKHART v. MURRAY.

(No. 20,453.)

(Supreme Court of Indiana. Oct. 10, 1905.)

1. CONSTITUTIONAL LAW—CLASS LEGISLATION—STREET RAILROADS—REGULATION.

A city ordinance, providing that it shall be unlawful on and after a certain date to run any street car within the city without having securely fastened to its front end a proper automatic fender made by a particular fender company, or some other fender equally as good, to be approved by the common council or its street committee, was void for nonuniformity and as arbitrarily discriminating in favor of some manufacturers of fenders and against others.

Appeal from Circuit Court, Elkhart County; Joseph D. Ferrall, Judge.

Action by the city of Elkhart against Forrest Murray. From a judgment in favor of defendant, the city appeals. Affirmed.

rest Murray. From a judgment in favor of defendant, the city appeals. Affirmed.

John M. Van Fleet, for appellant. Perry L. Turner and Brick & Bates, for appellee.

MONKS, C. J. This action was brought by the city of Elkhart for the violation by appellee of an ordinance which provides that "it shall be unlawful on and after May 1, 1903, to run any street car within the limits of said city without having securely fastened to its front end, a Hunter automatic fender, made by the Hunter Automatic Fender Company, of Covington, Ky., or some other fender equally as good, to be approved by the common council or its street committee." The court below held the ordinance invalid and rendered judgment in favor of appellee.

There was no law in force in 1903, when said ordinance was passed, granting in express words to cities of the class to which appellant belonged the power to require street cars running within the city limits to be equipped with fenders. But, assuming that such power may be implied from those granted (*People v. Detroit United Railway*, [Mich.] 97 N. W. 38, 63 L. R. A. 746, 749, and cases cited), was said ordinance a reasonable exercise of that power? Such power, if possessed by the city, must be exercised by ordinance. The ordinance must contain permanent legal provisions operating generally and impartially upon all within the territorial jurisdiction of such city, and no part thereof be left to the will or unregulated discretion of the common council or any officer. If an ordinance upon its face restricts the right of dominion which the owner might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities, who may exercise it so as to give exclusive profits or privileges to particular persons. *City of Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180, and cases cited; *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, 8 L. R. A. 261; *Bessonies v. City of Indianapolis*, 71 Ind. 189; *City of Plymouth v. Schultheis*, 185 Ind. 339, 35 N. E. 12; *Mayor of Baltimore v. Radecke*, 49 Md. 217, 83 Am. Rep. 239, 244; *State v. Dering*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948, 952, 953; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 27, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, and authorities cited; *Noel v. People*, 187 Ill. 587, 591, 592, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238; *City of Chicago v. Trotter*, 186 Ill. 430, 438, 26 N. E. 359; *State v. Tennant*, 110 N. C. 609, 612, 613, 14 S. E. 387, 28 Am. St. Rep. 715, 15 L. R. A. 423, and cases cited; *Town of State Center v.*

Barenstein, 66 Iowa, 249, 23 N. W. 652; City of Jacksonville v. Ledwith, 26 Fla. 163, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558, and authorities cited pages 575, 576; City of Newton v. Begler, 143 Mass. 598, 10 N. E. 464; State v. Mahner, 43 La. Ann. 496, 497-498, 9 South. 480; May v. People of Colorado, 1 Colo. App. 157, 27 Pac. 1010.

In *Bessonies v. City of Indianapolis*, 71 Ind., at pages 197 and 198, this court said: "Without any provision as to the location or management of hospitals, the ordinance attempts to make it unlawful for any one to establish or conduct one without a license or permit from the common council and board of aldermen; and the granting or refusal of the license or permit is not governed by any prescribed rules, but rests in such case in the uncontrolled discretion of the common council and board of aldermen. It is apparent that under the ordinance, if valid, the common council and board of aldermen have the power to grant or refuse the license in any given case at their mere pleasure, and that no one can conduct or maintain a hospital within the city, however harmless or beneficial it might be, except by the consent of the common council and board of aldermen. It is not necessary to suppose that the common council and board of aldermen would abuse the power thus assumed by them to grant or refuse the license as they might think for the public good. It is sufficient to say that, if the ordinance is valid, the common council and board of aldermen have it in their power to grant one person a license and refuse another under the same circumstances. No law could be valid which by its terms would authorize the passage of such an ordinance. The twenty-third section of the Bill of Rights provides that 'the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.' What the Legislature cannot do directly in this respect, it cannot authorize a municipal corporation to do." In *City of Richmond v. Dudley*, 129 Ind. 116, 117, 28 N. E. 314, 13 L. R. A. 587, 28 Am. St. Rep. 180, this court said: "It seems from the foregoing authorities to be well established that municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and conditions, and must not admit of the exercise, or of an opportunity for the exercise, of an arbitrary discrimination by the municipal authorities between citizens who will so comply."

It will be observed that said ordinance requires the use of the particular fender described therein, or some other fender equally as good, to be approved by the com-

mon council or street committee. The ordinance, if valid, vests in the common council and street committee an arbitrary discretion, which they may exercise or not at their pleasure. They have the power to approve a fender for use by one street railroad company, and refuse approval of the same fender for use by another company, under the same circumstances and conditions. They also have the power to approve one or more fenders, and refuse approval of other fenders equally as good or better, whether made by the street railroad company or some one else, thus arbitrarily discriminating in favor of some manufacturers and against others. It is the fact that said officers have the power to do this, and not that they will do so, that renders said ordinance invalid.

Judgment affirmed.

(165 Ind. 208)

O'BRIEN v. KNOTTS et al. (No. 20,808.)

(Supreme Court of Indiana. Oct. 11, 1905.)

1. WILLS—ELECTION BY WIDOW.

Under the law as it stood in 1872, when a will devising realty in question was probated, a widow who was called on to elect between a testamentary provision and her statutory rights in her deceased husband's estate was required to signify her choice by some open avowal or affirmative act only when her aim was to accept the provisions of the will.

2. SAME—EVIDENCE.

On the issue of an election by a widow to take under a will, there must be some clear and positive evidence that the widow had consented to surrender her legal rights in the estate for the testamentary provision, or she will be adjudged as having elected to abide her rights under the statute.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2061.]

3. SAME.

In partition, evidence held to sustain findings that the widow of the common ancestor of the parties elected to take her statutory estate, instead of the amount devised to her.

4. VENDOR AND PURCHASER—PAROL SALE—EVIDENCE.

Evidence held to establish a parol contract by heirs to sell their interest to the widow of the decedent in consideration of her payment of the debts of the estate out of her separate property.

5. FRAUDS, STATUTE OF—SALE OF LAND—PAROL CONTRACT—PART PERFORMANCE.

Where a widow took actual absolute possession of every part and interest in certain real estate under an alleged parol contract of the heirs to surrender to her their interest in consideration of her paying the debts of the estate out of her separate property, which she did, and thereafter continued in possession undisturbed and made valuable improvements on the land, the contract was not within the statute of frauds.

6. TRIAL—OBJECTIONS TO EVIDENCE—MOTION TO STRIKE.

A motion to strike out all of the testimony of a witness in relation to a certain fact was objectionable for failure to point out with reasonable certainty the particular matter to which it was addressed.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 246.]

7. SAME—ESTOPPEL.

Plaintiff, after having examined a witness on a certain subject in the hope of receiving favorable testimony, is estopped to have the testimony which was unfavorable stricken out.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 177.]

8. EVIDENCE—ADMISSIONS—PRIVIES.

In partition, evidence of declarations by plaintiff's husband, since deceased, who, with others, was a devisee of the land subject to the payment of debts of the testator, concerning indebtedness against the land which the widow had agreed to pay under an alleged contract by which the heirs agreed to surrender their interests in the land to her, was admissible.

Appeal from Circuit Court, Tipton County; J. F. Elliott, Judge.

Suit for partition by Flora O'Brien against Eliza C. Knotts and others. From a decree in favor of defendants, plaintiff appeals. Transferred from Appellate Court under section 1337u, Burns' Ann. St. 1901. Affirmed.

Greenlee & Call and Coleman & Carter, for appellant. Gifford & Gifford and Beauchamp, Mount & Proctor, for appellees.

HADLEY, J. This is an action for partition, but the fundamental question involved is one of title in the appellant. On a general denial of the complaint, there was a trial by the court, and finding and judgment for appellees. The special finding discloses the following facts: Jonathan Jennings departed this life testate in 1872, leaving Margaret Jennings, his widow, and three children, namely, John T., Samuel, and the defendant (appellee), Eliza C. Knotts, née Jennings, as his only heirs at law. The testator at his death was the owner of 80 acres of land in Tipton county, and a small amount of personal property, all of which he bequeathed to his wife, Margaret, for life, with remainder in equal shares to his three children. The son Samuel died in 1883, leaving neither wife nor child. The son John T. in 1880 intermarried with the plaintiff (appellant), and in 1883 died, leaving no heirs but his wife and mother, Margaret Jennings. Appellant subsequently intermarried with O'Brien. Margaret Jennings died in 1902, leaving as her only heirs her daughter, Eliza C. Knotts, and Porter Nelson, with whom she had intermarried in 1888. At the death of the testator he was indebted in about the sum of \$2,000. The will was duly probated, but no letters were ever issued thereon and no administration thereunder. The widow, Margaret, was named as executrix, but never qualified. Said widow elected to take her rights in the estate under the law, and not under the will. When, as they did, the widow and her said children discovered that it would require all of said estate beyond the legal portion of the widow to pay the debts against the same, the children, the said John T., Samuel, and Eliza C. Knotts, entered into a parol contract with their mother, the said Margaret, whereby the latter assumed and

agreed to pay all of the indebtedness of the estate with her own separate means, and in consideration therefor the children, each for himself, agreed to execute to said widow a deed conveying to her all the right, title, and interest possessed in said estate. Under and in pursuance of the contract all of said children put their said mother in full, complete, and absolute possession of the land described in the complaint, and did then and forever after renounce any right or claim therein. The widow on her part paid of her separate property all the debts against said estate, amounting to about \$2,000, made lasting and valuable improvements at a cost and value of \$1,200, and held the absolute and undisturbed possession of the land in controversy until her death. Upon the foregoing facts the court concluded that the law was with the defendants, and, having overruled appellant's motion for a new trial, rendered judgment against her for costs, and she appeals.

Besides the overruling of her motion for a new trial, appellant assigns the court's conclusion of law as erroneous, but in her brief does not state the latter as a ground relied upon for reversal, nor refer to it in argument as being a misstatement of the law upon the facts set forth in the special finding. Under the waiver or implied concession, therefore, we are not called upon to consider the accuracy of the conclusion of law. The principal question in the case is the sufficiency of the evidence to sustain the finding. It is earnestly and ably contended by counsel that there was an absolute failure of legitimate evidence to sustain the findings (1) that the widow, Margaret Jennings, elected to take her interest in the estate of her deceased husband under the law; (2) the making of the parol contract of sale; and (3) that possession by the widow was taken under the contract.

1. Under the law as it stood in 1872, when the will was probated, a widow, who was called upon to elect between a testamentary provision and her statutory rights in her deceased husband's estate, as in this case, was required to signify her choice by some open avowal or affirmative act under the will only when her aim was to accept the provisions of the will. The rule was grounded upon the theory that, as the statute defined and fixed the rights of the wife in her husband's estate, she could not be divested of what the law gave her for another and different interest without her consent. So it was held, under the statute as then constructed and as it remained till 1885 (Acts 1885, p. 239, c. 103), that in the absence of some writing or declaration or affirmative act pursuant to the provisions of the will, indicating an acceptance of the will, the widow was presumed to have taken her rights under the law. In other words, in all cases of controversy there must be produced some positive, affirmative, and clear evidence that the widow had consented to sur-

render her legal rights in the estate for the testamentary provision, or she would be adjudged as having elected to abide her rights under the statute. *Wetherill v. Harris*, 67 Ind. 473; *Leach v. Prebster*, 39 Ind. 497; *Piercy v. Piercy*, 19 Ind. 437; *Wilson v. Moore*, 86 Ind. 244; *Wilson v. Wilson*, 145 Ind. 666, 44 N. E. 665. Under this rule of the law we are unable to say that the evidence was insufficient to justify the court in finding that the widow took under the law. There is no evidence that she ever uttered a word or did an act that indicated that she had accepted the provisions of the will. It is true that she was nominated as executrix, and that the will was probated, but there is no evidence that she procured or knew of the probate, or that she had any knowledge of her nomination, or even of the contents of the will. The evidence all shows that there was no regular settlement of the estate, either under letters testamentary or of administration, and that no such letters were ever issued. Besides, it appears without contradiction that after the death of her husband she and her children continued to reside on the farm. She assumed and continued to exercise absolute dominion over the property, real and personal, bought and sold personal property, repaired, ditched, fenced, cleared up ground, and made valuable and lasting improvements, disposed of growing timber, and rendered no account to her children or the court. But appellant argues that her possession and control was consistent and consonant with the provisions of the will, which gave her a life estate in all the property. Except the sale of the timber from the farm, this was perhaps true; but it was consistent in a broader sense with her claim of absolute ownership by purchase from her children. As we have seen, the widow could not be divested of her statutory rights without clear and satisfactory proof that, with knowledge of the provisions of the will, she voluntarily accepted the testamentary provision in lieu of the benefits provided by statute. Clearly, under the evidence and the rule of law prevailing at the time, we cannot disturb the court's finding that the widow took under the law.

2. The second finding objected to, to wit, the existence of a parol contract of sale between the mother and children, is not so clearly established. An apparently credible witness testified to hearing a conversation between John T. Jennings, former husband of appellant, and James Knotts, the husband of his sister, Eliza, the said John and Eliza being the children of said widow, in September, 1878, when Knotts and his wife were about leaving for Kansas to reside, in which conversation Jennings said to his brother-in-law, Knotts, "Jim, we ought to have made those quitclaim deeds to mother for the farm," and Knotts replied that he (Jennings) should make out the deeds and send them to

him, and he and his wife would sign them. Another witness testified that, while living on the farm about 1877, he constructed some tile ditches, and did some grubbing and other work for the widow on the place, and in the same period was told on the farm by John T. Jennings, while speaking of the farm and his mother's possible removal to Kansas, that she had the right to sell the farm; that the children had agreed to turn it over to her if she would settle the debts; that his mother wanted it in better repair and would have more done, but she had already paid out more money than the place was worth. Numerous other statements of John T. Jennings, who was the oldest child, were admitted, to the effect that he had no interest in the land, that the farm was his mother's, and that she had paid out about \$2,000 to save it. It was further in evidence that the widow in 1873, the year following her husband's death, received from her father's estate about \$2,000. Besides, it will be noted that appellant introduced no evidence whatever in contradiction of appellee's claim of a parol sale to the mother. So we have it shown by uncontradicted evidence that the widow, after the death of the husband, exercised absolute control and dominion over all the property of the estate, real and personal. The estate was indebted about \$2,000. There was no administration; no claims presented to the heirs; no creditor complaining in court or elsewhere. The statements of Thomas Jennings that his mother by contract with her children was to pay the debts and have the farm, and that she was not settling the estate under the will; the inheritance of the widow from her father's estate of enough money to pay the debts; the sale of growing timber; the making of permanent improvements of the value of \$1,200 by the widow, and her undisturbed possession for 30 years; and the natural inference that may be drawn from these several incidents—we think, warranted the court, in the absence of anything to the contrary, in finding that there was a contract of sale made in substance as stated in the finding. It is earnestly contended that the contract relied on, being oral, if made at all, was within the statute of frauds, and was not saved therefrom by the purchaser's subsequent possession, performance, and improvement. We are aware of the general doctrine which asserts that the possession of one tenant in common is the possession of all, and of the line of cases to which *Johns v. Johns*, 67 Ind. 440, belongs, which hold that a mere continuance in possession of a tenant in common or other person is not such a taking of possession under an oral contract as will rescue the case from the statute of frauds. But this case is distinguishable from the cases referred to, in that its facts go further than sanctioned by the general rule above referred to. Here it is shown that Mrs. Jennings under the contract which it is claimed she made with her children, took, not the con-

structive, but the actual, absolute possession of every part and interest in said estate, and continued undisturbed in the same, and that her grantees retired and continued to disclaim, especially the one under whom the appellant claims, any right or interest in the land. The character of the possession taken as here shown, the full payment of the purchase price, and the making of valuable and lasting improvements, we think, bring the case within the doctrine of *Peck v. Williams*, 118 Ind. 256, 15 N. E. 270, where it is said: "A contract of purchase thus made and carried into effect by possession and improvements made is taken out of the statute of frauds, and the state of the title and the possession of the purchaser are sufficient to put such a purchaser on inquiry."

8. Before the alleged sale of the land to their mother, the latter and her children continued to live together on the farm; all enjoying actual and equal possession of the common property. After the alleged sale, John T. married appellant, left the farm, and settled three miles away; his sister Eliza married and moved to the state of Kansas; and Samuel Jennings died. In addition to thus abandoning the farm to their mother, there is not a shadow of evidence that any one of the children ever thereafter claimed an interest in the land, or denied their mother's ownership, or did anything inconsistent with the sale. These things, we think, reasonably show that after the time of the sale, as claimed, there was at least a different and enlarged possession conferred upon the widow; that thereafter she held, not her undivided one-third part, but the absolute and exclusive possession of the whole estate. Here there is at least some legitimate evidence, both direct and inferential, and which is of a character to forbid us from holding that the court erred in its third finding. We cannot weigh the evidence.

In the progress of the trial, Mrs. Shepley, sister of Margaret Jennings, the widow, as a witness for appellees, testified that in 1872 and 1873 she (witness) and her sister, Margaret Jennings, each inherited from their father, a resident of Fayette county, Ind., about \$2,000, as follows: \$200 in personal property; \$200 from rents; \$1,400 from the sale of real estate received in partition, which she and her sister conveyed to Beeson in February, 1873; and \$200 interest accrued on purchase-money notes. On cross-examination the witness said that she did not see any money paid to her sister, but her sister told her that she received it, and she knew that she and her sister had the same interest and sold to the same man, and that she (witness) received \$1,400 principal for her share in the

land, and her sister got the same; and the cross-examination proceeded: "Did she tell you that she got the money? Ans. Yes, sir." Appellant's counsel moved the court "to strike out all the testimony of the witness in relation to the fact that her sister received any amount of money." The motion was properly overruled for at least two reasons: (1) Because it was too general. Such a motion, to be entertained, should point out to the court with reasonable certainty the particular matter, or answer, or part of answer, to which it is addressed. The trial judge should not have been expected to hunt through the long examination and sift out all expressions of the witness that related to the fact that the witness's sister received the money. *Wysor Land Co. v. Jones*, 24 Ind. App. 451, 56 N. E. 46; *Underhill on Ev.* § 368; 2 *Elliott on Ev.* §§ 832 and 884; 3 *Jones on Ev.* § 898. (2) The motion embraced some matter brought out by responsive answers to questions propounded by appellant's counsel, as indicated above. Appellant, having quizzed the witness in the hope of receiving favorable testimony, will not be heard on a motion to strike it out when it turned out to be unfavorable. *Ellinger v. Rawlings*, 12 Ind. App. 336, 40 N. E. 146; 3 *Jones on Ev.* § 898; *Underhill on Ev.* § 368.

In appellees' direct examination of B. F. Hines, the witness had spoken of an old friendship between him and John T. Jennings, when they were young men, and of a conversation between them in that period concerning the estate and his relations thereto; and then counsel addressed to him the following question: "What did he say at that time about any indebtedness against that place?" Appellant objected to the question on the ground that it called for hearsay. The objection was overruled. We think the evidence was not necessarily hearsay. John T. Jennings, with others, was a devisee of the land subject to the payment of debts. In a proceeding to sell the land to pay the debts of the estate, his admissions and declarations, against interest, concerning the existence of such debts would be competent evidence against him. Appellant, his wife and heir, has no greater rights concerning the same subject-matter, and is bound in the same way her husband would be bound if living. Furthermore, if John T. Jennings were now in court denying the contract of sale and the payment by his mother of the debts of the estate, evidence of his admissions would be unquestionably competent. Appellant, claiming only by inheritance from him, is governed by the same rights and limitations.

We find no error. Judgment affirmed.

(36 Ind. App. 405)

GRIFFIN v. MILLER. (No. 5,774.)(Appellate Court of Indiana, Division No. 2.
Oct. 31, 1905.)**APPEAL—REVIEW—PLEADINGS—OBJECTIONS
NOT MADE BELOW.**

Where the paragraphs of a complaint were not tested by demurrer in the trial court, and contained a statement of sufficient facts to bar another action for the same cause, it is sufficient when questioned for the first time on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1226-1233.]

Appeal from Superior Court, Marion County; John L. McMasters, Judge.

Action by William R. Miller against Jeremiah Griffin. From a judgment for plaintiff, defendant appeals. Affirmed.

Rochford & Coleman, and H. N. Spaan, for appellant. J. T. Lecklider and D. A. Myers, for appellee.

COMSTOCK, J. This case was tried upon the third paragraph of the complaint, the first and second having been withdrawn. The answer to said paragraph was a general denial. There was a trial by jury and a verdict and judgment in favor of the appellee in the sum of \$1,550.

The errors relied upon for reversal are: First, that the third paragraph of complaint does not state facts sufficient to constitute a cause of action; second, that there was error in overruling appellant's motion for a new trial. The third paragraph of complaint alleges in substance that the defendant, Griffin, is indebted to the plaintiff for money had and received, as principal and interest, in the sum of \$1,700; that on or about July 20, 1904, the plaintiff delivered to the defendant \$300 in cash, with instruction that he pay the said sum to the plaintiff's wife, and take her receipt therefor, and return the same to him, and that the defendant promised to pay the said sum of \$300 as instructed, and return to him a receipt as indicated; that on said 20th day of July the plaintiff and defendant went to the Merchants' National Bank in Indianapolis, and purchased a draft for the sum of \$1,300, which draft was made payable to the order of the defendant, in the name and style of Jerry Griffin, and that said draft was paid for out of money owned and belonging to the plaintiff, and was in fact purchased for the sole use and benefit of the plaintiff, and was then and there delivered to the plaintiff, but through oversight and inadvertence said draft was not indorsed by the defendant; that the plaintiff left for California on said date, and after his arrival there discovered that he could not procure the cash on said draft, for the reason that the same was payable to the order of the defendant, whereupon he mailed the draft to the defendant, to be indorsed and returned to him in California; that the defendant received said draft about August 1, 1904, but,

instead of indorsing and returning the same to plaintiff, the defendant procured the cash on said draft and appropriated the money to his own use, and has ever since said date refused to account for the same, though frequently requested and commanded to do so; that the defendant still holds said sum of \$300, received as aforesaid, and that he has not paid the said sum of money to the plaintiff's wife as he promised, and has refused to account for the sum of \$300, although frequently requested and commanded to do so.

It is conceded by appellant that that part of the paragraph in question, based upon the \$300 paid to appellant for the use of appellee's wife, is good; but he insists, that being true, that part of the motion for a new trial which alleges that the amount of recovery is excessive ought to be sustained. This disposes of the first specification of error, but it is proper to add that the paragraph in question was not tested by demurrer in the trial court, and it, containing the statement of sufficient facts to bar another action for the same cause, is therefore under numerous decisions good, when questioned for the first time upon appeal.

As to the second specification of error, we have read the evidence. Between that of appellant and appellee there is a conflict, upon which the jury have passed. They have given credit to the testimony of the appellee, and it affords ample ground for the amount of the judgment. The facts as they appear of record call for the assessment of damages in favor of appellee.

Judgment affirmed, and 5 per cent. damages assessed.

(36 Ind. App. 250)

ISPHORDING v. WOLF. (No. 5,450.)(Appellate Court of Indiana, Division No. 2.
Oct. 11, 1905.)**1. BROKERS—WRITTEN AUTHORITY—CORRESPONDENCE—CONSTRUCTION.**

A written contract to pay the broker a commission, required by Acts 1901, p. 104, c. 67, for a sale of real estate, was clearly shown by correspondence between a broker and his principal, who in one letter asked the broker what per cent. he would get and for all particulars, to which he replied, stating his commission specifically, whereupon the principal answered that she was sorry she had to let the property go for that price, but was anxious to sell, and inclosed an abstract for continuation.

2. SAME.

A broker's right to commission is complete on his procuring a person ready and willing to buy, regardless of a failure of the sale by the principal's refusal to convey.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Brokers, §§ 81, 94.]

3. HUSBAND AND WIFE—MARRIED WOMEN—CONTRACT FOR SERVICES.

A married woman has power to bind herself for the payment of broker's services rendered to her in the sale of her real estate, under Burns' Ann. St. 1901, § 6960, declaring that all the legal disabilities of married women to make contracts are abolished, except as otherwise provided.

4. SAME—SEPARATE PROPERTY—CONTRACT TO CONVEY—VALIDITY.

A married woman's contract, executed through a broker to convey her separate real estate, was sufficient to bind the proposing purchaser, though she had no power to convey the land without her husband joining in the conveyance.

Appeal from Circuit Court, Marion County; Henry Clay Allen, Judge.

Action by George Wolf against Anna M. Isphording. From a judgment for plaintiff, defendant appeals. Affirmed.

Barrett & Barrett and Powell & Smiley, for appellant. Edenharter & Mull, for appellee.

ROBY, J. Action by appellee; demurrer to complaint, for want of facts, overruled; answer in three paragraphs, demurrers to each of which were sustained, and general denial filed. The issue thus made was tried without a jury, and the general finding made for appellee, upon which judgment was rendered. No evidence was introduced upon the trial by appellant. The determination of the appeal depends upon a single proposition, which is variously presented; i. e., whether a written contract to pay commission is shown, conforming to the provisions of the act of March 5, 1901. Acts 1901, p. 104, c. 67.

Appellant, a married woman, residing in Cincinnati, was the owner of certain Indianapolis real estate, which she desired to sell. Appellee, a real estate broker, of Indianapolis, had endeavored to procure a purchaser for it. In this he was after some time successful, and submitted a proposition of purchase. If a written contract for the payment of commission exists, it is found in certain letters which passed between the parties in this action. On February 11, 1902, appellant wrote a letter as follows: "Mr. Wolf—Dear Sir: Your letter received. I find that you are right concerning the taxes; but I think, if we sell at that figure, he should assume those taxes. Mr. Isphording said we had to. It's just as you say. If we sell, we will avoid the taxes in April; also a new roof it needs now. So let me know by return mail what per cent. you get, and all particulars. Yours very respectfully, Mrs. R. C. Isphording. Best regards from Mr. Isphording." On the 18th, inst., he procured a written proposition from his customer, and notified appellant thereof, concluding his letter as follows: "As to my commission, it will be the customary one: On the first \$1,000, 4 per cent., or \$40.00. On the next \$2,000, 3 per cent., or \$60.00. On the balance \$8,500, 2 per cent., or \$170.00. Total sale, \$11,500. \$270.00, total commission. Mr. Langsenkamp's offer, of course, provides that you must deliver the property clear of any and all incumbrances. If you have an abstract to said real estate, you had better send it to me for continuation. If you have no abstract,

authorize me to have one made. At all events, advise me at once of your decision. Yours truly, [Signed] George Wolf." On the 21st, appellant wrote as follows: "Mr. Wolf—Dear Sir: Your letter of the 19th received. Sorry we have to let it go at that, but am anxious to sell now. Inclosed find abstract of title. I suppose it is necessary to hire an attorney to finish up matters. If so, we will hire a Mr. Hauck there, an acquaintance of ours. Expect to hear from you soon. Yours very truly, Mrs. R. C. Isphording. P. S. Sander and Recker have possession until March 10th." On the 25th she wrote the following letter: "Mr. Wolf—Dear Sir: I have had a better offer from a Cincinnati man by far than you could give. Will you please be kind enough to return abstract of title, and I will pay you for any trouble you went to. I am sorry, but you cannot blame under the circumstances. Please send by return mail, and oblige. Yours very truly,

Mrs. R. C. Isphording."

The subject-matter of the proposed sale is clearly shown by the correspondence, and includes a definite statement of the commission to be paid. The act of 1901 is as follows: "Section 1. Be it enacted by the General Assembly of the state of Indiana, that no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another shall be valid, unless the same shall be in writing, signed by the owner of such real estate of his legally appointed and duly qualified representative." Written evidence is required, where a commission for finding or procuring a purchaser of real estate is claimed. The statement made by appellee was assented to by appellant, and furnishes the sole measure of her liability. *Beahler v. Clark*, 32 Ind. App. 222, 227, 68 N. E. 613.

That a married woman has no power to convey her real estate, except her husband join in such conveyance, is beside the question. She has power to bind herself for the payment of services rendered to her. *Section 6960, Burns' Ann. St. 1901; Rosa v. Prather*, 103 Ind. 191, 2 N. E. 575; *Arnold v. Engleman*, 103 Ind. 512, 3 N. E. 238; *Young v. McFadden*, 125 Ind. 254, 25 N. E. 284. The contract was sufficient to bind the proposing purchaser, thereby securing to appellant the opportunity for which she sought.

The right to the commission was not dependent upon the consummation of the transaction by appellant, but became complete upon the procurement of a person ready and willing to buy. *McFarland v. Lillard*, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234.

The trial court did not err in overruling the demurrer to the complaint, in sustaining demurrers to the answers, or in overruling appellant's motion for a new trial.

Judgment affirmed.

(36 Ind. App. 313)

STAFFORD v. CONWELL (No. 5,708.)
(Appellate Court of Indiana, Division No. 1.
Oct. 13, 1905.)

COSTS ON APPEAL—LOSING PARTY.

An appellant, who dismisses his appeal after bringing the cause to the Appellate Court and causing the same to be placed on its dockets, on procuring a settlement out of court from the appellee, is the "losing party," within Burns' Ann. St. 1901, § 1337, imposing a docket fee of \$10 on the losing party.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 878.]

Appeal from Circuit Court, Howard County; J. F. Elliott, Judge.

Action by Lydia J. Stafford against William H. Conwell, administrator. From a judgment for defendant, plaintiff appeals. The appeal was dismissed, and plaintiff filed a motion to be relieved from the payment of the \$10 docket fee. Denied.

B. C. Moon, for appellant.

MYERS, P. J. A transcript of this case, on appeal from the lower court, was filed in this court May 1, 1905, and under the rules of the court the cause was submitted May 31st. August 25th appellant filed, omitting the caption, the following dismissal: "The above cause is dismissed." On September 6th she filed a petition and motion, of which she gave notice to appellee, asking to be relieved from the payment of the \$10 docket fee provided for under section 1337r, Burns' Ann. St. 1901, and which it is the duty of the clerk of this court to tax to the losing party as costs in each case, and collect if collectible, and pay the same into the state treasury. Appellant says, in support of her motion, "that after this cause was appealed to this court the defendant, appellee, paid to the plaintiff \$250 in settlement of her claim, and she dismissed her appeal." Appellant contends that because she received \$250 in settlement of her cause of action she was not therefore a losing party, and ought not to be taxed and required to pay a docket fee.

From an examination of the various legislative enactments on the subject of docket fees, it is evident that our lawmaking power intended that litigants should assist in paying the expenses of the judicial department of the state, and to that end assessed a docket fee in each case against the losing party. Appellant brought her cause to this court on appeal, and caused the same to be placed upon its dockets. This done, a docket fee at once accrued to the state, which, under our statute, is to be taxed against and paid by the losing party. When she dismissed her appeal, that was a disposition of the case in this court. The reason for her dismissal is a matter about which the court can have no concern. It may be true that the appeal aided in bringing about a compromise; but, as appeals can only be prosecuted in this court upon an assignment of error based upon a claimed erroneous ruling or decision of

the lower court involving a question of law, anything short of a confession of error by appellee or a decision of the court in her favor on the issue tendered by the appeal, in our opinion, would make her the losing party, and therefore liable for the payment of the docket fee—the test being the manner of the disposition of the case on appeal, and not the effect of the compromise made by the parties as to who lost or won thereby in a pecuniary way, which determines who shall be considered the "losing party" under the statute and liable for the payment of the docket fee.

Motion overruled.

(36 Ind. App. 253)

DOELL v. SCHRIER et al. (No. 5,534.)
(Appellate Court of Indiana, Division No. 2.
Oct. 11, 1905.)

1. INJUNCTION—CUTTING TIMBER NOT INCLUDED IN CONTRACT—COMPLAINT—ANSWER.

An answer which alleges that defendants cut and removed only trees which they had purchased of plaintiff, and that they did not cut or threaten to cut any trees other than those sold to them by plaintiff, is an answer to a complaint which alleges that plaintiff sold to defendants certain trees as described in the written contract of sale, and that defendants cut and removed other trees, to plaintiff's damage.

2. CUSTOMS AND USAGES—PLEADING.

A pleading which alleges that by general custom prevailing at the time of the making of a contract for the sale of timber a species of oak mentioned as burr oak was classed as white oak is not bad for failing to allege that the custom was known to both parties to the contract.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs and Usages, §§ 23, 24, 40.]

3. CONTRACTS—MUTUAL MISTAKE—PLEADING.

A pleading which alleges that certain timber was bought, and that by mutual mistake of the parties and of the scrivener the agreement specified only a part of the timber, sufficiently alleges that the mistake existed at the time of the making of the agreement.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 419, 1692.]

4. APPEAL—FINDINGS—EVIDENCE—REVIEW.

Acts 1903, p. 338, c. 193, requiring the Appellate Court to weigh the evidence, and to give judgment according to its clear weight, if it appear that the judgment is not fairly supported by evidence, does not require the Appellate Court to weigh the evidence, where, though conflicting, it supports the court's findings.

Appeal from Circuit Court, Jackson County; Thos. B. Buskirk, Judge.

Action by Elizabeth Doell against George R. Schrier and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. H. Endebrock and H. H. Prince, for appellant. Oren O. Swalls, for appellees.

COMSTOCK, J. The appellant, at the May term, 1903, of the Jackson circuit court, filed her complaint against the appellees, charging: That the appellant was the owner of certain real estate described in her complaint, situated in Jackson county, in the state of Indiana, and that on the _____ day

of March, 1902, she sold to appellees the following described timber, growing on said land, to wit: All the pin oak timber, all the hickory timber, and all the white oak timber measuring more than 50 inches in circumference 2 feet above the ground. That there is growing upon said land a large amount of young timber, which is thrifty and increasing in value. That there is also growing upon said lands a large amount of valuable red oak, burr oak, black oak, and other kinds of trees. That on the 3d day of April, and prior thereto, and since that time, appellant did wrongfully and without the license or consent of the appellant enter upon said real estate and cut down and remove therefrom and convert to their own use a large number of red oak, burr oak, black oak, sweet gum, and other trees not included in said written contract of sale; and appellees also cut down and removed from said lands a large number of thrifty growing trees measuring less than 50 inches in circumference 2 feet above the ground. That the timber so wrongfully cut and removed from said lands by said appellees is of the value of \$200, and the appellees are threatening to, and will if not restrained by this court, cut down and remove all of said growing timber. That the destruction of said trees would greatly and permanently injure the said real estate, and the appellant could not be compensated therefor in damages. The demand of said complaint prayed the court to grant a restraining order to prevent appellees from further cutting and removing said trees and timber. With said complaint and as a part of it is the said contract, as follows: "This agreement, entered into between Anna E. Sierp, party of the first part, and George R. Schrier and Thomas J. Stanfield, party of the second part, witnesseth that the party of the first part has this day sold to the party of the second part all the pin oak timber, all the hickory timber, and all the white oak timber measuring more than 50 inches in circumference 2 feet above the ground, on the following real estate in Jackson county, Indiana: West half of the southeast quarter of section 33, township 5 north, range 5 east. And the parties of the second part are given time until December 24th, 1903, to cut down and remove said timber from said real estate. In consideration, as payment for said timber, the parties of the second part agree to pay to the party of the first part the sum of \$1,220. In witness whereof, the party of the first part and the parties of the second part have hereunto set their hands and seals this

— day of March, 1902. Elizabeth ^{her}X
Sierp. George R. Schrier. T. J. Stanfield. ^{mark}X
On the 11th day of April, 1903, that being vacation of the Jackson circuit court of Jackson county, Ind., the regular judge of the Forty-Second judicial circuit granted

and filed a temporary restraining order, as prayed for in plaintiff's complaint. On the 2d day of May, 1903, appellant in vacation filed a second paragraph of complaint, containing about the same allegations as embodied in the first, with the additional allegations that the wrongful cutting was done by the appellees and by their agents and servants, and specifying that they had cut 68 pin oak trees, 6 white oak trees under size, 12 black oak trees, 6 burr oak trees, and 2 sweet gum trees.

The appellees' demurrer to each paragraph of complaint was overruled. The appellees answer jointly in three paragraphs: First. General denial. Second. Alleges that the appellees admit the cutting and removal from said land of white oak trees measuring more than 50 inches in circumference 2 feet above the ground, and hickory and other oak trees; but they aver that prior to cutting and removing of said trees and timber they had bought the same of appellant for \$1,200, and as a part of the agreement of sale and purchase of said timber appellees were given permission by plaintiff to enter said lands and to cut and remove said timber and trees at any time prior to the 24th day of December, 1903. And so appellees aver that said acts so done by them on the premises of appellant were all done with her full knowledge, consent, license, and permission, and they deny that they have cut, or threatened or expressed or entertained any intention to, cut in the future, any trees or timber upon said lands of the appellant other than those so bargained and sold by her to them and by her authorized to be cut and removed. The third paragraph of answer admits the cutting and removal from the lands of the appellant of the trees and timber mentioned in appellant's complaint, also sets forth a copy of the written contract, and further charges that appellees bought all kinds of oak trees on said land other than white oak measuring less than 50 inches in circumference 2 feet above the ground, and said agreement was intended to and did convey and authorize the cutting and removal of all such timber, but by inadvertence and mutual mistake of the parties, and a misunderstanding or a mistake on the part of the scrivener who drew said writing, the said agreement specified only pin oak and white oak trees, and in commercial circles and by general custom prevailing at the time of making said contract and ever since, in said community and elsewhere, the species of oak mentioned in the complaint as burr oak was and is classed and regarded as white oak; that all trees and timber so cut by them were cut and removed by virtue of said contract. Appellees also file cross-complaint, which alleges about the same facts contained in the second and third paragraphs of answer, and in addition to these allegations asks

a reformation and correction of the said written contract on account of the mutual mistake of the parties thereto.

Appellant demurred to the second and third paragraphs of appellees' answer, also to the cross-complaint, which demurrers and each of them were overruled, to which rulings of the court the appellant at the time excepted. The trial by the court resulted in a finding and judgment for appellees, and judgment against appellant for costs. The appellant assigned as error the action of the court in overruling her demurrer to the second and third paragraphs of appellees' answer to appellant's first and second paragraph of complaint, in overruling her demurrer to appellees' cross-complaint, in overruling her motion for a new trial, and that the decision of the court is not fairly supported by the evidence and is clearly against the weight of the evidence.

To consider these specifications in the order named, the second paragraph of the answer is claimed to be defective in this: that the appellant's complaint is based upon a written contract, and the answer upon an oral contract without mentioning the written contract. Said second paragraph alleges, in substance, that appellees cut and removed only trees which they had purchased of appellant and which they removed with her permission, and they deny that they cut, or threatened or entertained any intention to cut, any trees or timber upon the lands of appellant, other than those bargained and sold to them by her and by her authorized to be cut and removed. We think this answer meets the complaint. The objection to the third paragraph of answer is: First, that it charges that "in commercial circles and by general custom prevailing at the time of making said contract and ever since, in said community and elsewhere, the species of oak mentioned in the complaint as burr oak was and is classed and regarded as white oak"; that this answer, to be good, should state and allege that this custom and usage was known to both parties to the contract, and especially to the appellant at the time she entered into the written contract. In answer to this objection we think it sufficient to say that the parties are presumed to know general usage and custom. The second objection to said paragraph is that it states: "That the defendants in fact bought all kinds of oak on said lands other than white oak measuring less than 50 inches in circumference 2 feet above the ground. Said agreement was intended to and did authorize the cutting and removal of all such timber, but by inadvertence and mutual mistake of the parties, and a mistake or misunderstanding on the part of the scrivener who drew said writing, the said agreement specified only pin oak and white oak trees." That the answer should

have stated that this intention to which appellees desired the contract to be made conformable continued concurrently down to the time of the execution of said written contract. The answer alleges that certain timber was bought, but by mutual mistake of the parties and of the scrivener the agreement specified only a part of said timber. It states that by mutual mistake the agreement specified certain things. That in effect says that such mistake existed at the time the agreement was made. The same objections substantially are made to the cross-complaint that are made to the third paragraph of answer, and what we have said to the said paragraph is applicable to the complaint. There is no error in the action of the court upon the demurrers to the paragraphs of answer and to the cross-complaint.

The remaining claim of appellant for the reversal of the judgment discussed is that "the finding of the court is not supported by the evidence and is clearly against the weight of the evidence." It is contended by the appellees that the evidence is not properly in the record, and that therefore this claim of appellant cannot be considered. Whether the evidence is in the record or not we do not decide. We have, however, read it, and the able argument of counsel for appellant thereon, with interest. We find a conflict, but cannot say that any material allegation of the appellee's answer or cross-complaint is without support, and, as it has been recently held by the Supreme and this court in several cases that even under the act approved March 9, 1903 (Acts 1903, p. 338, c. 193), the evidence will not be weighed upon appeal, the judgment must be affirmed.

(36 Ind. App. 269)

STATE ex rel. MILLICE v. PETERSEN
et al. (No. 5,449.)

(Appellate Court of Indiana, Division No. 1.
Oct. 11, 1905.)

1. PLEADING—CONSTRUCTION—DEMURRER.

While a pleading is to be construed most strongly against the pleader, when its language is uncertain, rendering its theory obscure, yet if, on giving the language a fair construction, the complaint states facts sufficient to constitute a cause of action, it will not be demurrable, because so constructed as to render it difficult to determine the theory intended.

2. SAME—SINGLE PARAGRAPH—THEORY—SEPARATE ACTIONS.

While a complaint in a single paragraph can contain but a single theory, to be determined from its leading allegation, it is not demurrable for want of facts because more than a single cause of action is stated in such paragraph.

3. GUARDIAN AND WARD—ACCOUNTS—SETTLEMENT—ADJUDICATION.

An order settling a guardian's final account and discharging him, while impervious to collateral attack as to all matters included in the report, does not constitute an adjudication as to any matter not included in the final settlement.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, §§ 542-544.]

4. SAME—DIRECT ATTACK—FRAUD—MISTAKE.

A direct attack on a guardian's final account for fraud or mistake of fact may be made either on the final settlement of the guardian or within three years after such settlement has been acted on.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 533.]

5. SAME—COMPLAINT.

A complaint by a ward against her guardian and his bondsmen, filed within three years after settlement of the guardian's final account, alleged that the guardian had in his hands \$660.38 when he filed his report in 1892; that at that time he claimed that plaintiff's mother had overdrawn her account with him as her agent in the sum of \$200, which sum he appropriated to his own use from the money in his hands belonging to plaintiff, and received a credit therefor in his 1892 report; that his final settlement was made on the basis of \$460.38 due to plaintiff on May 19, 1892, instead of \$660.38, and that he had never accounted for the difference. *Held* that, under Burns' Ann. St. 1901, § 2685, cl. 4, requiring every guardian at the expiration of his trust fully to account for and pay over to the proper person all of the estate of his ward remaining in his hands, the complaint stated facts justifying the vacation of the final settlement.

Appeal from Circuit Court, Fulton County; O. F. Montgomery, Special Judge.

Action by the state, on relation of Minnie Millice, against Frederick Petersen and others. From a judgment in favor of defendants, relator appeals. Reversed.

I. Conner, for appellant. Holman & Stephenson, for appellees.

MYERS, P. J. This cause comes to this court on the single question of the sufficiency of the amended complaint to state facts sufficient to constitute a cause of action against either of the appellees, defendants in the court below. The substance of the complaint may be stated as follows: On September 7, 1886, the appellee Frederick Petersen by the Fulton circuit court was appointed guardian of the plaintiff, an infant 11 years old April 30, 1886, and a child of John F. Fromm, deceased. On the same day Petersen filed his bond, with the appellees William J. Leiter, Frederick W. Bosenberg, and Valentine Zimmerman as sureties, conditioned according to law, and which bond was thereupon approved by the court. This bond is made a part of the complaint by exhibit. That as such guardian he took possession of the property of this appellant, and on May 22, 1890, as such guardian, he made his first current report to the court, showing a balance in his hands in favor of this appellant of \$441.00. That said guardian made a second current report May 19, 1892, "at which time and in which report the said defendant had a balance in his hands in favor of said relatrix of \$660.38." That at the time of filing said last report and for some time prior thereto said Petersen was the agent of Elise W. Fromm, widow of said John F. Fromm. It is averred: That on the day of filing said last report Petersen made

"a pretended settlement with the said Elise W. Fromm, and he then falsely and wrongfully claimed that she had overdrawn her account as against him as her agent, and to equalize and to balance up her account, as he claimed, the said Petersen falsely and wrongfully charged and received a credit in his report of May 19, 1892, as against the said relatrix, whereby her account as of that date was falsely and wrongfully reduced from \$660.38, the true amount, to \$460.38." That said Petersen, as such guardian, filed no other report until May 10, 1902, at which time he made a final report, carrying forward in this report the balance as shown by his last current report of \$460.38, "when in truth and in fact he should have carried forward to her credit \$660.38, so that in said final report, so called, the mistake in the report of May 19, 1892, is maintained. That said sum of \$200, with interest," was not, nor has any part thereof, been paid to his said ward. Said final report was approved by the court, and said guardian discharged. "That the relatrix was not present or in any way represented at the time either of said reports was acted on, and continuously from May, 1901, to the present time relatrix has been a nonresident of the state of Indiana." It is averred that by reason of the mistake aforesaid relatrix has sustained damages in the sum of \$381.61, together with 10 per cent. thereon, making a total of damages in the sum of \$418.77, for which and all proper relief she prays judgment.

The question of determining the relief authorized by the averments of this complaint is the principal and controlling question for our consideration; for, in our opinion, if the facts averred do not state a cause of action as a direct attack on the guardian's final settlement, the complaint does not state a cause of action. Appellees insist that this is an action on the guardian's bond, and nothing more. If their contention is correct, then the judgment of the lower court must be affirmed. It has been held by this court that a pleading is to be construed most strongly against the pleader when its language is uncertain and ambiguous, rendering its theory obscure (*Heintz v. Mueller*, 19 Ind. App. 240, 49 N. E. 293); but if, upon giving the language a fair construction and from the nature of the facts averred, the complaint states facts sufficient to constitute a cause of action, it will not be held bad for want of facts, because so constructed as to render it difficult to determine the theory intended by the pleader. The remedy is a motion to make more certain, and not a demurrer. *Scott v. Cleveland, etc., Ry. Co.*, 144 Ind. 125, 129, 43 N. E. 133, 32 L. R. A. 154. The complaint in this case contains but a single paragraph, and under the rule laid down in the case of *Cleveland, etc., Ry. Co. v. Stewart*, 24 Ind. App. 374, 56 N. E. 917, "only one theory can be

contained in a single paragraph," and that theory is to be determined "from its prominent and leading allegation." *Richardson v. League*, 21 Ind. App. 429, 52 N. E. 618; *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604; *Hanover, etc., Co. v. Johnson*, 26 Ind. App. 122, 57 N. E. 277; *Boyd v. Bloom*, 152 Ind. 152, 52 N. E. 751. But it must be borne in mind that the word "theory," as here used, does not apply to the exclusion of additional causes of action, which may be stated in a single paragraph of complaint. The rule, therefore, is that the pleader cannot rest upon more than one theory in stating his cause of action in a single paragraph, yet he may state more than one cause of action in such paragraph, and it will withstand a demurrer for want of facts; the remedy being, in case more than one cause of action is stated, a demurrer for a misjoinder or a motion to separate into paragraphs. *Mark v. North*, 155 Ind. 575, 57 N. E. 902. No such demurrer or motion has been filed, and we are therefore left to the consideration of the question raised by demurrer for want of facts.

It appears from the allegations of the complaint that a final settlement was made, which was approved by the court and the guardian discharged. This report still stands. The law is well settled by a long line of decisions in this state that such action by the court upon the final settlement of the guardian is an adjudication of the matters included in such report, and is conclusive upon all the parties interested until set aside by direct proceedings for that purpose, and cannot be attacked in a suit on the bond, or in any other manner collaterally. *Horton v. Hastings*, 128 Ind. 103, 27 N. E. 338; *State ex rel. v. Parsons*, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430; *Carver v. Lewis*, 104 Ind. 438, 2 N. E. 705; *Castetter v. State*, 112 Ind. 445, 14 N. E. 388; *State ex rel. v. Kelso*, 94 Ind. 587. It is also the law that as to all matters not included in such final settlement there is no adjudication, "and it is not necessary to set aside such report in order to attack the transaction." *Taylor v. Calvert*, 138 Ind. 67, 83, 37 N. E. 531, 536, and cases cited. In our opinion, under the averments of the complaint, this case does not come within the latter line of cases, for the reason that it appears from the complaint that the guardian, by his current report of 1892, did refer to and have allowed him as a credit said sum of \$200 out of the money then in his hands belonging to relatrix. The matter of this credit being before the court, it must be presumed that the court, in acting upon the report, did its duty and took an account of the receipts and expenditures thus reported by such guardian, and verified the same by vouchers or proof of correctness, as required by section 2685, cl. 3, *Burns' Ann. St.* 1901. But, until the final settlement was made and the guardian discharged, the entire trust was

in fieri. Current reports of a guardian are considered prima facie correct, and are prima facie evidence of the facts and matters therein included when approved by the court; but until final settlement and discharge of the guardian such reports are under the control of, and may be set aside, corrected, or modified by, the court to which such guardian reports. *State ex rel. v. Wheeler*, 127 Ind. 451, 26 N. E. 552, 1008; *Duckworth v. Kirby*, 10 Ind. App. 139, 37 N. E. 729.

A direct attack on account of fraud or mistake of fact may be made on the final settlement of a guardian within three years after such settlement has been acted on, and the setting aside of such settlement opens up the entire estate for examination and investigation by the ward, and the court may make such corrections as may have crept into the proceedings of the guardian, shown to be grounded on fraud or mistake of fact. *State ex rel. Little v. Parsons*, supra; *Horton v. Hastings*, supra; *Briscoe v. Johnson*, 73 Ind. 573. In the case at bar it appears that the final settlement was acted upon by the court May 10, 1902, and this suit begun February 11, 1903. Therefore, this suit having been brought within the time allowed for a direct attack on the final settlement, do the facts averred show fraud or mistake of fact on the part of the guardian in the administration of his trust? If so, and the question of joining an action attacking such final settlement with an action on the guardian's bond having been affirmed by our Supreme Court in the cases of *State ex rel. v. Peckham*, 136 Ind. 198, p. 206, 36 N. E. 28, and *State ex rel. Little v. Parsons*, supra, it should be held sufficient to require appellees to answer. As bearing upon the duties and absolute good faith required of a guardian in the management of his trust, it is said in the case of *Slauter v. Favorite*, 107 Ind. 291, 4 N. E. 880, 57 Am. Rep. 106, that "a guardian is bound to make full disclosure to the court of his transactions, and the law requires of him the exercise of the utmost good faith. He must not conceal any material fact, nor untruthfully represent any matter to the court. * * * A duty rests upon the guardian to make no statement that he does not know to be true, and to conceal nothing materially affecting his trust of which he has knowledge. The necessity for a strong and stern application of the rule to cases like this is obvious, for the court must act upon the statements of the guardian, and there is no adverse party to challenge their truth. If the statements are not true, the order of the court rests on the wrong of the party who made it, and he can take no advantage of his own wrong." What does this complaint show on the question of fraud or mistake of fact? (1) That the guardian had in his hands, of the money belonging to relatrix, \$660.38, when he filed his report in 1892. (2) At that time he claimed that Mrs. Fromm had over-

drawn her account with him as agent in the sum of \$200. (3) That he appropriated to his own use the sum of \$200, money belonging to his ward, and applied it in reimbursing himself as agent, in settlement of the overpayment by him made as agent to his principal, Mrs. Fromm. (4) That he received credit for the \$200 so paid in his report of 1892, reducing the estate of his ward to \$460.38. (5) That his final settlement was made on the basis of \$460.38 due his ward May 19, 1892, instead of the true amount, \$660.38. (6) That he has never accounted to his ward for said sum of \$200.

Section 2685, cl. 4, makes it the duty of every guardian "at the expiration of his trust fully to account for and pay over to the proper person all of the estate of said ward remaining in his hands." Can it truthfully be said that this guardian has executed his trust faithfully and honestly, and has accounted to his ward for all money received by him, in the face of the averments of this complaint, showing such misapplication of such funds and his neglect to account for the same in his final settlement? We think not.

The court, in passing upon his final settlement, necessarily had to rely upon the representations and knowledge that the various reports of the guardian furnished. The action of the court was unquestionably based upon the information thus obtained; and, as the "law required of him the exercise of the utmost good faith," anything short of true information will to that extent remove the foundation upon which the court's order rests. As said in the case of *Stark v. Starr*, 1 Sawy. (U. S.) 15, Fed. Cas. No. 18, 307: "Good faith is the opposite of bad faith, and bad faith and fraud are synonymous." If the guardian in this case misapplied the funds of his ward, as here charged, in the payment of a claim in no way chargeable to his ward's estate, it was a wrongful disposition of that much of the trust funds, and he should be held accountable. The facts averred, in our opinion, furnish ample cause for setting aside the final settlement. It is not contended, nor do we believe there is any ground for holding, that the complaint does not state a good cause of action on Petersen's bond, if the final settlement is set aside. The complaint is not a model pleading by any means, but under our present view of this case it contains sufficient facts to call for an answer from appellees.

Appellees have called our attention to the ruling of the court on the demurrer and exception taken, as also appellant's assignment of error, and contend that there is no basis for an inquiry by this court, and for this reason the judgment should be affirmed. We have carefully examined the record on this contention of appellees, and after due consideration have concluded that the point is not well taken. In our opinion, appellees' demurrer should have been overruled.

Judgment reversed.

(36 Ind. App. 276)

WHINERY v. BROWN. (No. 5,408.)

(Appellate Court of Indiana, Division No. 1.
Oct. 12, 1906.)

1. APPEAL—COMPLAINT—SIGNATURE BY ATTORNEY—MOTION TO STRIKE—REVIEW.

Where the complaint as set out in the record was signed by plaintiff's attorney, and the record did not disclose that it was not signed when filed, as required by Burns' Ann. St. 1901, § 361, no error was shown in the refusal of the trial court to strike the complaint because not subscribed as required by such section.

2. ATTORNEY AND CLIENT—MONEY RECEIVED—ATTORNEY'S LIEN—ACTIONS.

The lien of an attorney on money in his hands belonging to his client for services rendered in obtaining the same being a mere claim to the equitable interference of the court for his benefit, such right to a lien does not necessarily and of itself prevent an action by the client to recover the fund.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 274.]

3. SAME—DEMAND.

A suit cannot be maintained against an attorney to recover money in his hands belonging to his client until after demand and refusal.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 279.]

4. SAME—EVIDENCE.

In an action against an attorney to recover money in his hands belonging to his client, evidence held to warrant a finding that a demand had been made and payment had been refused before suit brought.

5. SAME—CONTRACT FOR CONTINGENT FEE—VALIDITY.

A contract by an attorney to collect a claim for damages for his client for the sum of \$10 if \$50 was recovered, and if more the fee should be in proportion, made in good faith, without fraud or imposition, was valid.

[Ed. Note.—For cases in point see vol. 5, Cent. Dig. Attorney and Client, §§ 328, 329, 351.]

6. CHAMPERTY AND MAINTENANCE—ATTORNEY'S SERVICES—CONTRACT.

A contract between an attorney and client by which the former was to receive a contingent fee, the size of which was dependent on the amount recovered, was not champertous, nor void for maintenance.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Champerty and Maintenance, §§ 22-39.]

7. ATTORNEY AND CLIENT—SERVICES—VERDICT.

In an action to recover money in the hands of an attorney, plaintiff alleged a contract for his services for 20 per cent. of the amount recovered, and that the recovery was \$100, and demanded a judgment for \$80. Defendant filed a cross-complaint, denying such contract, and alleging a contract for a reasonable fee, which the proof showed to be \$35. The jury returned a verdict in favor of plaintiff for \$100, and in favor of defendant on the cross-complaint for \$25. Held, that the verdict in favor of defendant amounted to a finding that the contract was for a reasonable fee, and hence such verdict was not sustained by the evidence.

Appeal from Superior Court, Lake County;
H. B. Tuthill, Judge.

Suit by Edwin T. Brown against William J. Whinery. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition.

Wm. J. Whinery and L. L. Bomberger, for appellant. J. G. Ibach, for appellee.

ROBINSON, J. Suit by appellee for the recovery of money. The first paragraph of complaint avers that appellee employed appellant to prosecute a claim for damages, and that appellant collected \$100, which he retains and refused to pay over on demand. In the second paragraph it is averred that appellee gave appellant, for collection, a claim for damages, and at the time it was agreed that for collecting the same appellee "was to pay the defendant the sum of \$10 if \$50 was recovered, and if more was recovered a fee should be paid to this defendant in the same proportion," that appellant collected \$100 and is entitled to retain \$20 therefrom according to the agreement, and that appellee has demanded \$80, which appellant refused to pay, and asks judgment for that sum. As the record comes to this court, there was no error in refusing, on motion, to strike out the complaint because not subscribed as required by section 361, Burns' Ann. St. 1901. The complaint set out in the record is signed by appellee's attorney, and the record does not disclose that it was not signed when filed.

Against the court's ruling upon the demurrer to the first paragraph of complaint, it is argued that, as an attorney has for his fees an equitable lien upon money collected for a client, the pleading should show that provision had been made for such fees. "The lien which an attorney is said to have is merely a claim to the equitable interference of the court for his debt, when he finds that his client is about to deprive him of it," said the court in *Koons' Adm'r v. Beach*, 147 Ind. 137, 143, 45 N. E. 601, 46 N. E. 587. Whether appellant has any valid claim on the fund would be matter of defense or counterclaim. The money sought to be recovered is averred to have been paid to appellant for the use of appellee. He is entitled to recover the whole sum as his property, unless appellant defends against the action. The right to a lien upon the fund does not necessarily and of itself prevent an action for the fund. The right to the lien may be asserted, or it may be waived; and, if asserted, it is not necessarily any more than a partial defense to the action.

There was no error in overruling appellant's written request that the jury be instructed to return a verdict in his favor at the close of appellee's evidence. It is argued that this request should have been granted, because there was no evidence introduced by appellee to show a demand before suit was brought. Appellee testified that he employed appellant to bring an action, and, in answer to what he would charge, appellant said that if he collected \$50 he would charge \$10, or if he collected more the charge would be in proportion; that the witness suggested that they have the agreement in writing, but appellant said it was unnecessary; and that appellant collected \$100, none of which he had paid to appellee.

On cross-examination the witness testified that there was nothing said about whether appellant was to have nothing if he collected nothing. Redirect examination: Afterwards appellant told appellee that he got the money the night before. "He said: 'I have been to some expense trying to settle this.' 'Well,' he said, 'is \$40 too much?' I said: 'Yes.' He said: 'We might just as well settle it here.' 'Will take \$35.' I said: 'You will not.' I says: 'If you will give me \$75 of it, we will settle it.' 'Oh no!' He couldn't think of such a thing. So I went out." Chester Brown testified that he was present when the agreement as to the charges was made, and that the agreement was as testified by the above witness. It is well settled that a suit cannot be maintained against an attorney to recover money alleged to be in his hands until after a demand and a refusal to pay on the part of the attorney. *Pierse v. Thornton*, 44 Ind. 235; *Heddens v. Younglove*, 46 Ind. 212; *Claypool v. Giah*, 108 Ind. 424, 9 N. E. 382. But we think the court might properly conclude from the above evidence that a demand had been made before suit was brought. The reason of the rule requiring a demand is that it would be inequitable to subject a defendant to litigation without first giving him an opportunity to comply with the plaintiff's claim without the annoyance and expense of a suit. The reason of the rule fails in the light of the above evidence. The evidence shows more than merely the collection of the money and that it was not paid. By necessary implication from the conversation related by the witness there was a refusal to pay.

That part of the seventh instruction set out in appellant's brief might be objectionable, if standing alone; but, when the whole of the instruction is considered, it is not open to the objection urged against it. Applying the well-settled rule that an instruction is to be considered as a whole, and not in detached portions, there was no reversible error in giving the instruction.

The remaining questions argued by counsel go to the sufficiency of the evidence. Appellant answered the complaint by general denial, and in a second paragraph of answer alleged that appellee was to pay him a reasonable sum for his services; that a judgment for \$100 was recovered, which appellant had received from the clerk; that \$40 is a reasonable fee; a tender of \$60 and \$2.80 costs; and the payment of the \$62.80 to the clerk. Appellant also filed a cross-complaint, asking judgment for \$100 for services performed by him at appellee's special instance and request. The jury returned a verdict in appellee's favor for \$100, and also in appellant's favor on his cross-complaint for \$25. The court rendered judgment in appellee's favor for \$100 and costs, and a judgment in favor of appellant against appellee for \$25. The evidence introduced by appellant, and not dis-

puted, shows that appellant's services were reasonably worth from \$35 to \$50. The testimony of appellee shows that the contract was for a contingent fee. Counsel for appellant argue that, as the compensation agreed upon was contingent upon the successful result of the suit, the agreement cannot be enforced, and that the measure of damages is, not the contingent fee, but the reasonable value of the services rendered—citing *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797. But in that case there was a contract for a contingent fee, and the complete performance of the attorney's services had been rendered impossible or prevented by the client. In permitting the attorneys to recover for their services, it was held under the facts in that case that the measure of damages was the reasonable value of the services rendered, and not the contingent fee. But we do not understand that case to hold that a contract for a contingent fee is not enforceable on the sole ground that it is for a contingent fee. In the *French Case* the attorneys recovered nothing, but had rendered services, and did not continue in the case because the client would not consent or permit them to do so. In the case at bar appellant rendered the services and succeeded in obtaining a judgment. The evidence whether there was or was not such a contract was conflicting, but there is evidence that there was. The contract is not champertous (*Coquillard's Adm'r v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362); nor is it void for maintenance (*Quigley v. Thompson*, 53 Ind. 317). Champertous agreements cannot be enforced in this state, but the rule declared in *Scobey v. Ross*, 13 Ind. 117, has been restricted and modified. See *Quigley v. Thompson*, supra; *Board, etc., v. Jameson*, 86 Ind. 154; *Stotsenburg v. Marks*, 79 Ind. 193; *Allen v. Frazee*, 85 Ind. 283; *Hart v. State ex rel.*, 120 Ind. 83, 21 N. E. 654, 24 N. E. 151; *Cleveland, etc., R. Co. v. Davis*, 10 Ind. App. 342, 36 N. E. 778, 87 N. E. 1069; *Tron v. Lewis*, 31 Ind. App. 178, 68 N. E. 490, and cases cited.

While the propriety of contracts for contingent fees has been vehemently debated, yet, when such contracts are fairly made between counsel and clients, made in good faith, and free from fraud and imposition, they are not illegal, and are as obligatory as between other parties. It may and does happen that persons who have rights, but no means to pursue them, are obliged to resort to this means of procuring legal redress. And it is the duty of the courts to carefully scrutinize such contracts to see that no improper advantage is taken either of the ignorance or necessity of those who enter into them, and if it appears that they are obtained by any undue influence of the attorney over the client, or by fraud or imposition, or that the compensation is clearly excessive, the party aggrieved will be protected. The fact that the practice of stipu-

lating beforehand for professional fees, contingent on the result of the litigation, is sometimes abused, and exposes the profession to misapprehension and illiberal remark, is not sufficient excuse for refusing to enforce such a contract, when characterized throughout by "all good fidelity to the client." See *Taylor v. Bemiss*, 110 U. S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64; *Dockery v. McLellan*, 93 Wis. 381, 67 N. W. 733; *Perry v. Dicken*, 105 Pa. 83, 51 Am. Rep. 181; *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983; 3 Am. & Eng. Ency. L. (2d Ed.) 440; *Newkirk v. Cook*, 17 Ill. 449; *Winslow v. Central Iowa R. Co.*, 71 Iowa, 197, 32 N. W. 330; *Christie v. Sawyer*, 44 N. H. 303; *Clay v. Ballard*, 9 Rob. (La.) 308, 41 Am. Dec. 328; *Weeks on Attorneys* (2d Ed.) 726; *Tron v. Lewis*, 31 Ind. App. 178, 68 N. E. 490, and cases cited. No claim is made that the contract for the contingent fee in this case was unfair, or that it was tainted with any fraud or imposition, or that the compensation is excessive. Such a contract is enforceable.

But there was a verdict in appellant's favor on his so-called cross-complaint, which was in reality a counterclaim for the reasonable value of his services. The effect of the whole verdict is a verdict in appellee's favor for \$75, which would be an allowance of \$25 for services. But it affirmatively appears from the verdict that the jury found for the appellant upon his counterclaim that the contract between the parties was that appellant was to receive what his services were reasonably worth. Under the evidence the jury was not authorized to fix this amount at less than \$35. The judgment follows the verdict, and the effect of the judgments rendered is a judgment in appellee's favor for \$75. This is \$10 more than the evidence authorizes. If appellee will remit \$10 of this judgment within 30 days from this date, the judgment will be affirmed; otherwise, reversed.

(36 Ind. App. 310)

GEORGE et al. v. ROBINSON. (No. 5,419.)
(Appellate Court of Indiana, Division No. 2.
Oct. 13, 1905.)

1. NEW TRIAL—GROUNDS.

Assignments that the court erred in overruling defendants' motion to find for them on plaintiff's evidence, and on all the evidence, that the finding and judgment was not sustained by the evidence, nor by sufficient evidence, and that they were contrary to law, and contrary to the law and the evidence, were proper grounds for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 135-142.]

2. SAME—WAIVER—MOTION IN ARREST.

The filing of a motion in arrest of judgment is a waiver of the motion for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 13.]

3. JUDGMENT—MOTION IN ARREST—DEFECTIVE PLEADING.

While a judgment will be arrested on a proper motion, if there is no substantial cause

of action stated, if the pleadings contain a defective statement of a substantial cause of action, the defect is curable error, against which a motion in arrest cannot avail.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 476.]

4. PLEADING—ERROR CURED BY JUDGMENT.

Where, in an action for services, the complaint stated a substantial cause of action on which judgment could be rendered, and the reply contained allegations of fraud barring a special defense of settlement pleaded in the answer, which facts were sufficient to bar another action for the same cause, any defects in the reply were cured by the finding and judgment.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1482.]

Appeal from Superior Court, Marion County; Jas. M. Leathers, Judge.

Action by Charles M. Robinson against Isaac L. George and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Salem D. Clark, for appellants. Spahr & Estabrook, for appellee.

COMSTOCK, J. Appellee sued appellants for work and labor done at their instance, and request in the sum of \$284, and interest. A bill of particulars was filed with the complaint. Appellants answered by a general denial. The appellant Isaac L. George for answer alleged that after the plaintiff's cause of action accrued, and before action was brought, defendant delivered to plaintiff, and plaintiff received in full satisfaction of said cause of action, the defendant's promissory bank note. To said paragraph of answer appellee replied, admitting the delivery of said note, but alleging that he was induced to accept the same by reason of false and fraudulent representations made to him by said Isaac L. George, which representations are particularly set out in the reply; that said Mrs. Isaac L. George was a party to said fraudulent representations, and connived with her husband to cheat and defraud the plaintiff out of his claim; that said Isaac L. George at the time and ever since has been wholly insolvent; that plaintiff was willing and ready to deliver up said note, and asks that the same may be canceled. The sufficiency of the reply was not questioned by demurrer. A trial by the court resulted in finding and judgment in favor of appellee and an order for the cancellation of the note executed to the appellee.

The appellants assign as error: First, the court erred in overruling defendants' motion to find for defendants on the evidence submitted by the plaintiff in the trial of the above cause; second, the court erred in overruling defendants' motion to find for the defendants on all the evidence; third, the finding and judgment of the court is not sustained by sufficient evidence; fourth, the finding and judgment of the court is not sustained by the evidence; fifth, the finding and judgment is contrary to law; sixth, is contrary to law and the evidence; seventh, the

court erred in overruling appellants' motion in arrest of judgment. All of the foregoing specifications of error, except the last, were properly made causes for a new trial. The motion was overruled. This action of the trial court is not assigned as error. The motion in arrest of judgment is a waiver of the motion for a new trial.

It only remains, therefore, to consider the action of the court in overruling appellants' motion in arrest of judgment. The defendants moved the court in arrest of judgment for the reason that the plaintiff's reply to defendants' second paragraph of answer does not state facts sufficient to constitute a reply to defendants' answer. It is a well-recognized rule that, if it appears that there is no substantial cause of action, upon proper motion judgment will be arrested, since such a defect cannot be cured by verdict or judgment. It is equally well settled that a defective statement of a substantial cause of action is curable error, against which a motion in arrest of judgment cannot avail. 2 Enc. Pleading & Prac. 798, 799. The complaint stated a substantial cause of action upon which judgment could be rendered. The reply avoids the answer by alleging fraud. It states facts connected with and relating to the facts set out in the complaint, and the court finds that the allegations of the complaint and reply to the answer of the defendants are true in substance and in fact. The averments of fact are sufficient to bar another action for the same cause. Any defects in the reply were cured by the finding and judgment. Upon the record a correct conclusion appears to have been reached.

Judgment affirmed.

HOOD v. BAKER. (No. 5,427.)¹

(Appellate Court of Indiana, Division No. 1. Oct. 12, 1905.)

1. COURTS—CAUSES APPEALABLE TO SUPREME COURT—CONSTRUCTION AND VALIDITY OF STATUTES.

Acts 1901, p. 566, c. 247, § 8, providing that cases involving the validity of a franchise, ordinance, or statute, or the construction of a statute, which would be otherwise unappealable by virtue of sections 6 or 7 of the act, shall be appealable directly to the Supreme Court, is applicable to civil causes mentioned in Acts 1903, p. 280, c. 156, amending section 6 of the act of 1901, and providing that no appeal shall be taken to the Supreme or Appellate Court in any civil cases where the amount in controversy, exclusive of interest and costs, does not exceed \$50.

2. APPEAL—AMOUNT IN CONTROVERSY.

Where the sum recovered by plaintiff, exclusive of interest and costs, does not exceed \$50, and he is satisfied with his judgment, and there is no set-off or counterclaim, the amount so recovered must be deemed, on defendant's appeal, as the "amount in controversy," within the meaning of Acts 1903, p. 280, c. 156, amending Acts 1901, p. 566, c. 247, and providing that no appeal shall be taken in any civil case where the amount in controversy, exclusive of interest and costs does not exceed \$50.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 219, 220.]

¹ Superseded by opinion, 76 N. E. 242.

3. COURTS—CAUSES APPEALABLE TO SUPREME COURT.

Under the express provisions of Acts 1901, p. 566, c. 247, § 8, cases involving the validity of a franchise, ordinance, or statute, or the proper construction of a statute, which would be otherwise unappealable under section 6 of the act, prohibiting appeals in civil cases where the amount in controversy does not exceed \$50, are appealable directly to the Supreme Court, and for the purpose of presenting the specified matters only.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Courts, § 586.]

4. MORTGAGES—PRIORITIES—SCHOOL FUND MORTGAGES.

A purchaser of land at a sale under a school fund mortgage takes title superior to liens for unpaid taxes which have accrued after the execution of the mortgage and which are due at the date of the sale.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 946.]

5. SAME—PAYMENT—DUTY TO RELEASE—ACTIONS FOR PENALTIES.

Burns' Ann. St. 1901, § 1105, authorizing the recovery of a penalty by a mortgagor, where the mortgagee refuses to release the mortgage of record, "when the debt or obligation which the mortgage was made to secure shall have been paid, lawfully tendered, or discharged," being penal in its nature, must be strictly construed, and in order to entitle the mortgagor to the prescribed penalty, it is not enough that the mortgagee owe him a duty to release the mortgage of record and obtain a decree for the satisfaction thereof, but it must further appear that the debt or obligation has been paid, lawfully tendered, or discharged.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 932.]

6. COURTS—RULES—APPLICABILITY.

While the rules of the Appellate Court are the same as the Supreme Court, so far as applicable, yet in a particular case pending in either court the rules of court applicable thereto are for the purposes of that case the rules of the particular court in which the cause is pending.

7. SAME—BRIEFS—COURT RULES.

Where a cause appealable directly to the Supreme Court has been appealed to the Appellate Court, the latter court will leave to the Supreme Court the decision of the question whether appellant's brief complies with rule 22 of the Supreme and Appellate Courts (55 N. E. v.), prescribing what appellant's brief shall contain.

Appeal from Circuit Court, Jay County; H. C. Fox, Special Judge.

Action by David V. Baker against William H. Hood. From a judgment for plaintiff, defendant appeals. Transferred to Supreme Court.

J. F. La Follette, for appellant. D. T. Taylor, for appellee.

BLACK, J. The appellee sued the appellant to recover a penalty of \$25 for alleged refusal, neglect, and failure of the appellant to release a certain mortgage of record, and to recover reasonable attorney's fees, under section 1105, Burns' Ann. St. 1901; Acts 1893, p. 64, c. 58. There was an answer of general denial. The court found, upon trial before it, in favor of the appellee, and on June 15, 1904, judgment was rendered in favor of the appellee against the appellant for \$25 penalty and \$25 attorney's fees and costs. The same

day the appellant's motion for a new trial was overruled. The transcript of the record, with the assignment of errors, was filed in this court August 11, 1904.

The statute of March 9, 1903, amending section 6 of the act of March 12, 1901 (Acts 1901, p. 566, c. 247), concerning appeals, etc. (Acts 1903, p. 280, c. 156), provides: "No appeal shall hereafter be taken to the Supreme Court or Appellate Court in any civil case where the amount in controversy, exclusive of interest and costs, does not exceed \$50.00, except as provided in section 8 of this act." Section 8 of the act of 1901 provides: "Every case in which there is in question, and such question is duly presented, either the validity of a franchise or the validity of an ordinance of a municipal corporation or the constitutionality of a statute, state or federal, or the proper construction of a statute, or rights guaranteed by the state or federal Constitution, and which case would be otherwise unappealable [unappealable] by virtue of section 6 or section 7, shall be appealable directly by the Supreme Court, for the purpose of presenting such question only." Section 7 of that act related only to appeals in criminal cases of misdemeanors, and as amended by the act of 1903 above mentioned it still relates only to such cases. Section 8 of the act of 1901 (Acts 1901, p. 566, c. 247) is applicable to civil causes mentioned in the amended section 6 above quoted. Russell v. State, 161 Ind. 481, 68 N. E. 1019. As the amount recovered by the plaintiff, exclusive of interest and costs, did not exceed \$50, and he is satisfied with the judgment, and there was no set-off or counterclaim, that sum must be regarded on appeal by the defendant as the amount in controversy, within the meaning of section 6 as amended. Knowlton v. Smith, 163 Ind. 294, 298, 71 N. E. 895. Therefore the cause is not within the jurisdiction of this court. If any of the matters specified in section 8 of the act of 1901 be in question, and such question be duly presented, the cause, being otherwise unappealable by virtue of section 6 as so amended, would be appealable directly to the Supreme Court for the purpose of presenting such question only.

Section 1105, Burns' Ann. St. 1901, above mentioned, provides: "That any person, firm, society, association, or corporation being the owner or holder of any mortgage recorded in the state of Indiana, or any administrator, executor, guardian, trustee, or other person whose duty it shall be to release any mortgage so recorded, who shall refuse, neglect, or fail to release such mortgage of record within ten days after having been requested so to do, when the debt or obligation which mortgage was made to secure, shall have been paid, lawfully tendered or discharged, and such person, firm, society, association, corporation, administrator, executor, guardian, trustee or other person shall have been requested in writing to release the same, shall forfeit any pay to

the mortgagor or person having the right to demand the release of such mortgage, the sum of twenty-five dollars, which sum may be recovered by suit in any court of competent jurisdiction, together with reasonable attorney's fees incurred in the collection of said penalty." The only matter which the appellant seeks to present on appeal is the question whether or not the appellee was entitled to recover under the evidence, from which it appeared that in 1896 Ida L. Baker and her husband, the appellee, executed a mortgage to the state of Indiana, for the use of the common school fund, on a certain town lot in this state, which we will designate briefly as "Lot 23," to secure the payment of \$900, according to a note whereby Ida L. Baker promised to pay that sum to the mortgagee for such use on or before September 9, 1901. The auditor of Jay county, March 24, 1902, the mortgage being due and unpaid, duly sold the premises under the mortgage to Aurelia B. Hood, wife of the appellant, for \$1,171.15. Afterward, April 1, 1902, the appellee executed to William H. Hood, the appellant, the mortgage mentioned in the complaint on certain real estate in Jay county, which we may designate as "Lot 257," duly recorded on the date of its execution, which mortgage contained the following language: "Whereas, William H. Hood has purchased at auditor's sale, under school fund mortgage," said lot 23, "and the mortgagor herein has agreed with said mortgagee, if he would purchase said real estate at such sale, and in consideration of the conveyance to him of the above described real estate, to protect said Hood in the way of senior liens on said lot 23, senior to said school fund mortgage: Now, if said Hood shall be compelled to pay any taxes or other liens on said lot 23 that are now assessed and standing against the same, then this mortgage shall secure, cover, and include the same. This mortgage is to secure and indemnify said Hood from loss in the event he is compelled to pay said taxes or other liens, and the same shall be due and payable from said Baker as soon as said Hood has been compelled to pay the same, and shall be collectible without relief from valuation or appraisalment laws; and the mortgagor expressly agrees to pay the sums of money above secured without relief from valuation or appraisalment laws. In witness whereof," etc. At the date of the auditor's sale there were due and unpaid, and then in the hands of the treasurer of the city wherein said lot 23 was situated, certain taxes on that lot, and there were due and unpaid taxes on the same property for state and county purposes, on the duplicate in the hands of the county treasurer, all which taxes had accrued after the date of the execution of the school fund mortgage. It did not appear from the evidence that any of these taxes had been paid. There was proof of service more than 10 days before the commencement of this action

of a written request from the appellee to the appellant to release of record within 10 days the mortgage of the appellee to the appellant; it being stated in the notice that "the debts or debt and obligation to secure which said mortgage was made have been lawfully discharged and paid." There was also evidence that in an action brought by the appellee against the appellant it had been adjudged that the mortgage of April 1, 1902, had been fully discharged, and the same was adjudged fully released, and the clerk of the court was directed to enter satisfaction thereof and a release of record thereof. And there was evidence of the entry of such release by the clerk January 20, 1903. The certificate of the clerk and the recorder that no conveyance of or incumbrance on the land so mortgaged to the school fund had been made, committed, or suffered by the mortgagor, or any person under whom she held title, so as in any manner to impair the validity of the mortgage, all of which fully appeared from an examination of their respective offices, and also the affidavit of Ida L. Baker that she was the legal owner of the premises mentioned in the mortgage and that there was no incumbrance or better lien either in law or equity that she knew of or believed on the land, and showing the derivation of her title, were in evidence, as were also the affidavit of the school fund appraisers, and, next, the auditor's certificate of acknowledgment and an affidavit of Ida L. Baker, sworn to before the auditor, showing her coverture and her ownership of the real estate in fee simple, that the money loaned was for her own separate use, interest, and business, etc.; all these items of evidence bearing the date of the mortgage. There was also evidence of the recording of the mortgage, and of the recording of the auditor's conveyance, and of his notice of the sale. The real estate mortgaged to the school fund was the property of the wife of the appellee, and the mortgage was given to secure her own debt. The mortgage of the appellee of April 1, 1902, was executed, not to the purchaser at the auditor's sale, but to her husband, the appellant. The evidence tended to show that the wife of the appellant took title under the school-fund mortgage, superior to all liens and incumbrances. *State ex rel., etc., v. Jones*, 95 Ind. 175; *Stockwell v. State ex rel., etc.*, 101 Ind. 1; *McWhinney v. City of Logansport*, 132 Ind. 9, 31 N. E. 449; *Fisher v. Brower*, 159 Ind. 139, 64 N. E. 614; *McElwaine-Richards Co. v. Gifford*, 159 Ind. 534, 65 N. E. 576.

It has been held that the statute (section 1105, Burns' Ann. St. 1901) under which the appellee recovered judgment in this case, being a penal statute, must be strictly construed. *Osborn v. Hocker*, 160 Ind. 1, 66 N. E. 42; *Southern Indiana, etc., Ass'n v. Doyle*, 26 Ind. App. 102, 59 N. E. 179; *Studebaker Brothers Mfg. Co. v. Morden*, 159 Ind. 173, 64 N. E. 594. To entitle the plaintiff in

such a case to recover the penalty, "the debt or obligation, which mortgage was made to secure, shall have been paid, lawfully tendered or discharged." Though the defendant owe the plaintiff a duty to release the mortgage of record and obtain a decree for the satisfaction thereof, it does not necessarily follow that the penalty may be recovered, unless it may properly be said that the facts indicate that, within the meaning of the penal statute strictly construed, "the debt or obligation which the mortgage was made to secure" has been "paid, lawfully tendered or discharged." The question whether the facts in this case show that a debt or obligation to secure which the appellee's indemnifying mortgage was made had been "paid, lawfully tendered, or discharged" before the bringing of this suit seems to be involved, and there seems to be in the case a question as to the proper construction of the penal statute.

It is earnestly insisted on behalf of the appellee that the appellant has not sufficiently complied with the requirements of rule 22 of this court (55 N. E. v), prescribing what the brief of the appellant shall contain. While the rules of this court are the same as those of the Supreme Court, so far as applicable, yet in a particular case pending in either court the rules of court applicable thereto are for the purposes of that case, the rules of the particular court in which the cause is pending. The rule relating to the contents of the appellant's brief is one intended in part to subserve the convenience of the court to which the appeal belongs and in which the cause is decided on appeal. That the appeal in this cause is not within the jurisdiction of this court is certain. It has been sought to present a question such that, if it is involved and properly presented, the cause is within the jurisdiction of the Supreme Court. It seems proper to leave to that court the decision of the question whether or not its rule relating to briefs of appellants has been sufficiently observed. It is ordered, therefore, that the cause be transferred to the Supreme Court.

(37 Ind. App. 44)

WILSON v. POWELL. (No. 5,425)*

(Appellate Court of Indiana, Division No. 2.
Oct. 13, 1905.)

BOUNDARIES—LOCATION OF CORNERS AND LINES—CONCLUSIVENESS.

Burns' Ann. St. 1901, § 8024, provides that the owner of land who desires to establish any corner or line thereof may have the same surveyed. Section 8030 provides that the survey shall be prima facie evidence in favor of the corners and lines established, but an appeal may be taken to the circuit court within three years, and the court may replace the survey. An owner of land requested the adjacent landowner to agree to a survey to determine the boundary line. The latter agreed, and the county surveyor surveyed the lands in the presence of both parties and located the corners thereof. A record of the survey was made in a field book kept in the surveyor's office, but was not put in the surveyor's record. No appeal was taken from the

survey. *Held*, that the survey was conclusive on the landowners, and a subsequent survey could not be had to determine the corners and lines independent of the former survey, but only for the purpose of ascertaining the lines and corners previously fixed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 273.]

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

Proceedings by Winfield Powell for a survey of lands and the establishment of a boundary line between his land and the land of Martha A. Wilson. From a judgment sustaining the correctness of the survey, Martha A. Wilson appeals. Reversed.

James E. McCullough and Wm. C. Welborn, for appellant. Mason & Jackson and Marsh & Cook, for appellee.

ROBY, J. Appeal by Martha A. Wilson to the circuit court of Hancock county from a survey made by the county surveyor of said county. The trial court made a special finding of facts and stated its conclusions of law thereon, to each of which an exception was reserved by the appellant. Judgment was rendered, in accordance with the conclusion, sustaining the correctness of the survey appealed from, and confirming the same.

It is conceded that the facts were correctly found. They are to the effect that the parties were in 1876 the owners, as tenants in common, of 100 acres of land in Hancock county, which was then partitioned between them; a proceeding for that purpose having been instituted in the circuit court. Commissioners set off to appellant her portion of said land by the following description: "Commencing at the southeast corner of the southwest quarter of said section; thence north, along the middle dividing line, 110 rods; thence west, 80 rods; thence south, along the line parallel with said middle dividing line, 110 rods, to the section line on the south of said section; thence east, on said line, to the place of beginning." The north line of the land thus described became the partition line between said lands. In 1879, with the assistance of two of the commissioners to partition, the boundary was determined and a fence built upon it by the parties. In 1892 appellee requested appellant to agree to a survey of their said lands for the purpose of determining the true line between them. The appellant agreed thereto, and the county surveyor surveyed said lands in the presence of both of said parties and located the corners thereof, placing stones at the east and west ends of the division line, as located by him, according to the description heretofore set out. Said corner stones have since remained unchanged. The corner on the west side of appellant's line was placed 111 rods 25½ links north of the southwest corner thereof, and the one on the east side 110 rods 25½ links north of the southeast corner of said land. Parties at once moved the fence to the line thus surveyed.

* Rehearing denied. Transfer to Supreme Court denied.

and no appeal was ever taken from such survey, and such line was recognized as the correct one until shortly before the survey from which this appeal is taken. On February 23, 1903, appellee served a written notice upon appellant, pursuant to which the county surveyor of said county made a survey of said lands and fixed the east and west ends of the boundary line in dispute 110.875 rods north of the south line of appellant's land.

The determination of the appeal, then, depends upon the effect of the survey had in 1892. A record of this survey was made in a small book, designated as a "field book," kept in the surveyor's office, but was not put in the "surveyor's record." It is not contended that such survey was not a valid official survey, but the conclusions are supported by the contention that, as a matter of law, it is but prima facie evidence, whether appealed from or not. The statute provides that the owner of land, who desires "to establish, relocate or perpetuate any corner thereof, or in the same section or line thereof," may have the same surveyed and located. Section 8024, Burns' Ann. St. 1901. It is further provided that "the survey of such surveyor shall be prima facie evidence in favor of the corners so established and the lines so run; but an appeal may be taken to the circuit court within three years and said court may replace such survey." Section 8030, Burns' Ann. St. 1901. It has been uniformly held that an official survey is, in accordance with the terms of said statute, prima facie correct during the three years within which an appeal may be taken, and, if not appealed from, it is after that time conclusive upon the owners of the land. *Mull v. Orme*, 67 Ind. 95; *Herbst et al. v. Smith*, 71 Ind. 44; *Grover v. Paddock*, 84 Ind. 244; *Hunter et al. v. Elchel et al.*, 100 Ind. 463; *Waltman v. Rund*, 109 Ind. 366, 10 N. E. 117; *Sinn v. King*, 181 Ind. 183, 31 N. E. 48. A subsequent survey cannot be had to determine the lines and corners previously established, independent of the former survey, but only for the purpose of ascertaining the lines and corners as previously fixed. *Herbst v. Smith*, 71 Ind. 44. These propositions apply to the facts found, and are inconsistent to the conclusions stated. This is regrettable, in that the surveyor, acting in 1892, did not establish the line and corners, as should have been done. If the survey by the county surveyor, made in accordance with the terms of the statute, is ever to be regarded as conclusive, it must be so regarded in this case. The declaration that after three years such a survey becomes conclusive has been so often made, and prescribes so clearly with legislative intent, as to foreclose discussion. That there should be any uncertainty on the subject is due to language used by the courts in a different class of cases, which, disassociated from the facts under consideration, carry a different meaning from that intended. The

vocation of a surveyor is limited to the ascertainment of definite lines. He may ascertain where the lines and corners specified in the description of the given tract of real estate actually are. He does not have power to determine what the terms of such description ought to be. Where the line lies, and where its corners are, is a question, and on which the surveyor, on account of his superior facilities for so doing, may be called upon to officially determine. What the lines and corners are is a matter of law, which courts can alone declare. *Ayers v. Huddleston et al.*, 30 Ind. App. 242, 66 N. E. 60. In instances where the party in possession has held beyond the lines specified in his deed until such possession has ripened into title, it has uniformly been held that a survey does not operate to deprive him of the title thus acquired. *Logsdon v. Dingg*, 32 Ind. App. 156, 69 N. E. 409; *Webb v. Rhodes*, 28 Ind. App. 393, 61 N. E. 735. No question of prescriptive title arises in the case at bar. The facts found also differentiate from those in which parties estopped themselves by their acts from asserting the true line. *Gullett v. Phillips*, 153 Ind. 227, 54 N. E. 804. The language used in *Spacy v. Evans*, 152 Ind. 431, 52 N. E. 605, has manifest relation to cases in which the question of title is at issue.

It follows that the court erred in its conclusions of law. Judgment is reversed. Cause remanded, with instructions to restate conclusions of law in accordance herewith.

(189 Mass. 373)

TURNER v. TURNER.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 21, 1905.)

MARRIAGE—CAPACITY OF PARTIES—FRAUD—VOID MARRIAGE—VALIDATION.

Rev. Laws, c. 151, § 6, provides that if a person during the life of a husband or wife, with whom marriage is in force, enters into a subsequent marriage, and the parties thereto live together as husband and wife, and such subsequent marriage was entered into by one of the parties in good faith, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, etc., be held to have been legally married from and after such time. Held, that where libellant married her husband in good faith, believing that he had not been previously married, as he fraudulently represented, when in fact he then had a wife living, of which libellant knew nothing until after the divorce and death of such former wife, she was not thereafter entitled to maintain a bill to declare her marriage a nullity.

Case Reported from Superior Court, Worcester County; Frederick Lawton, Judge.

Libel by Mary L. Turner against Truman C. Turner to annul marriage. In the superior court a decree was entered dismissing the libel, and the case was reported to the Supreme Judicial Court. Libel dismissed.

W. A. Gile and C. S. Dodge, for libellant.

HAMMOND, J. This is a petition for nullity of marriage. At the hearing it appeared that at the time of the marriage, which occurred September 16, 1897, the libelee had a wife then living. Subsequently to this marriage the first wife obtained a divorce from the libelee, and in January, 1899, she died. In his application for a license for the second marriage, the libelee asserted that this was to be his first marriage, and the libelant entered into the marriage in good faith, without knowledge of the former marriage, relying upon the representation of the libelee that he was then to marry for the first time. The parties continued to live together as husband and wife in good faith on the part of the libelant until March, 1904, when the libelee deserted her and had continued such desertion up to the time of the hearing. The libelant did not know of the prior marriage, nor of the divorce or death of the former wife, until after the desertion; nor did she live with the libelee as wife or cohabit with him after she learned of his prior marriage. There have been no children by this second marriage.

The main question is whether the marriage, although illegal at the time it was solemnized, became legal by virtue of Rev. Laws, c. 151, § 6. This statute, which is a continuation of St. 1895, p. 476, c. 427, is as follows: "If a person, during the lifetime of a husband or wife with whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents." The case is within the literal terms of the statute, namely, a marriage illegal by reason of the existence at the time of a former wife of the husband, but nevertheless entered into in good faith on the part of the wife, who has no knowledge of the prior marriage, the removal of the impediment by the death of the former wife, and a living together as husband and wife in good faith on her part for five years thereafter.

It is argued by the libelant that the statute is not applicable when one of the parties to the marriage has been induced to enter into it in good faith by fraudulent representation on the part of the other as to the existence

of the impediment arising out of the former marriage, and, moreover, that the petitioner cannot be said to have lived with the husband in good faith after the impediment was removed, as she was not aware of the existence of the impediment until after the husband had left her, and she did not thereafter live with him. While one of the objects of the statute is to protect persons who enter into the marriage relation in good faith, the broad general purpose of the statute is to provide against illegitimacy of children and to protect the public interests. Its purpose is to provide that the marriage ceremony, illegal at first by reason of the existence of an impediment, shall be regarded as taking place at the time the impediment is removed, and as covering all marital relations thereafter assumed in good faith. It is immaterial whether the removal of the impediment is known or unknown. Whether known or not, the marriage ceremony becomes operative upon the removal, if the parties continue to live together as husband and wife in good faith at least on the part of one of them. Such a construction of the statute is not only in accordance with its plain reading, but it carries out the real bona fide intention of the innocent party to contract a valid marriage. Upon the removal of the impediment and the subsequent cohabitation in good faith, the relation becomes such as the innocent party supposed it to be. And such a relation, thus once sanctioned in the law, legitimatizes the children and leads to the protection of the moral welfare of the community.

The fraudulent representation as to the existence of the impediment is not ground for nullity. It is unnecessary to enter into a discussion of the question as to what kind of fraud is ground for nullity. See *Reynolds v. Reynolds*, 8 Allen, 605; *Smith v. Smith*, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440. The statute contemplates that there may be a fraudulent representation as to the existing impediment, and that in many cases only one of the parties enters into the marital relation in good faith, and yet it expressly declares that if, after the impediment has been removed, the parties continue to live together as husband and wife in good faith on the part of one of them, the marriage is valid. It is manifest that at the time the marriage becomes valid under the statute the fraudulent representation as to the former existence of the impediment, which has ceased to exist, is not a representation affecting the capacity of the fraudulent party then to enter into the marriage. To hold that, after the marriage has become valid under the statute, the defrauded party, upon a subsequent discovery of the original fraud, shall have the right, because of such fraud, to avoid the marriage at his or her election, is to defeat the very object of the statute.

Libel dismissed.

(189 Mass. 361)

O'CONNOR v. NEW YORK, N. H. & H. R. CO.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)**RAILROADS—CROSSING ACCIDENT—"LOOK AND LISTEN"—EVIDENCE.**

Where, in an action for death at a private railroad crossing, the only evidence that deceased looked and listened before starting to cross was that a witness saw deceased's cart turn and pause slightly for a few seconds, and then drive onto the crossing, and the train that killed deceased must then have been in full sight, the evidence was insufficient to establish that plaintiff's intestate was in the exercise of due care at the time he was killed.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1146.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Catherine R. O'Connor, as administratrix, etc., against the New York, New Haven & Hartford Railroad Company. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

Henry E. Cottle, Mark N. Skerrett, and Warren T. Bartlett, for plaintiff. Arthur P. Rugg, for defendant.

HAMMOND, J. This was an action of tort, brought by the plaintiff as administratrix of the estate of Jeremiah S. Sullivan, under Rev. Laws, c. 111, § 267, to recover damages for his death. The crossing was a private one. Sullivan had crossed it with his team twice a day almost daily for several months prior to the accident. The evidence fails to show what care he took before crossing. It was dark at the time of the accident. It was his duty to look and listen before crossing, and it is not shown that he did either. The only possible piece of testimony upon which it could be argued that he did either is that when turning to cross the track, and while very near it, a witness, who at some distance was watching the team as it went along, testified that he saw the cart turn, "and there was a slight pause, not a very great pause, say a few seconds." It then "came along, and it came right on the crossing." The train which killed him must then have been in full sight, and it seems incredible that, if the pause was for the purpose of looking and listening, the intestate, who was a workingman 63 years of age, active and apparently in the full possession of his faculties, should have failed to discover the presence of the train. It is simply mere conjecture as to whether this pause was anything more than that which naturally would be incident to the act of turning a sharp corner, or to some purpose other than that of looking and listening. It cannot be said that the evidence concerning the accident was such as to meet the burden of proof incumbent upon the plaintiff to show that her intestate was in the exercise

of due care. See *Tully v. Fitchburg Railroad*, 134 Mass. 499; *Shea v. Boston & Maine Railroad*, 154 Mass. 31, 27 N. E. 672.

The conclusion to which we have come renders it unnecessary to consider the other grounds of defense.

Exceptions overruled.

(189 Mass. 220)

CAWLEY v. JEAN.(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 17, 1905.)**1. VENDOR AND PURCHASER — CONTRACT TO CONVEY — CONSTRUCTION — DESCRIPTION OF PROPERTY.**

Where a contract to convey land described as "the land and building thereon situate on the west side of the Concord river in said Lowell," bounded on the east by the river, on the west by the "location of the Lowell & Andover Railroad," etc., the agreement was for the conveyance of the land bounded on the west by the railroad location and the building on that land, and not the building and the land under it.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 331, 338; vol. 48, Cent. Dig. Vendor and Purchaser, §§ 93, 94.]

2. SAME.

Where plaintiff contracted to convey certain land and building thereon on the west side of the Concord river in L., bounded easterly by the river, westerly by the location of a railroad company, and northerly by C. street, such description did not include a bulkhead attached to the building covering an area way leading into the cellar constructed into a 10-foot strip of land, which was a part of the railroad location between the building and a fence erected on the railroad's right of way, nor such 10-foot strip itself.

3. SPECIFIC PERFORMANCE — DEFENSE — MISTAKE.

That defendant, through an honest mistake not attributable to his own negligence, thought that he was buying more land than the agreement covered, is a defense to a bill for specific performance.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 155-159.]

4. SAME—BURDEN OF PROOF.

In a suit for specific performance, the burden is on defendant to make out a defense that, through an honest mistake not attributable to his negligence, he believed he was buying more land than the agreement covered.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 383.]

5. SAME—PROOF OF TITLE.

In a suit for specific performance, a deed of the land in controversy to plaintiff, signed by C. as executor and trustee under the will of N. C., on which deed was written an assent and quitclaim under seal, purporting to be signed by 10 persons, described as "all the heirs, devisees, legatees, next of kin, and all persons interested in the estate of N. C., deceased," and evidence that plaintiff had ever since claimed title to the land, without proof of the will of the testator, that it had ever been admitted to probate or any action taken to bar assets from debts, or that the heirship of the persons signing the deed had been established, was insufficient to establish plaintiff's title to the land.

6. APPEAL—RULINGS—EXCEPTIONS—REVIEW.

Where, in a suit for specific performance, exception was taken to the ruling that plaintiff derived a good and sufficient title to the premises described in a deed admitted in evidence, such ruling affected a final decree in favor of plain-

tiff, and was therefore open to review on an appeal from such decree, as authorized by Rev. Laws, c. 159, § 28, without an appeal from the order overruling defendant's exceptions.

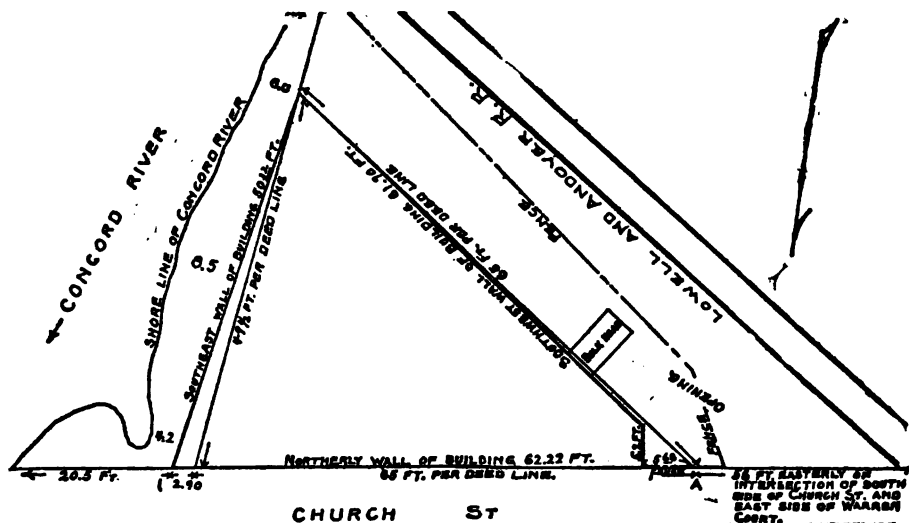
Appeal from Superior Court, Middlesex County.

Bill by one Cawley against one Jean for specific performance of a contract to purchase real estate. A decree was rendered in favor of plaintiff, and defendant appeals. Reversed.

Edward I. Baker, for appellant. Nathan D. Pratt and John J. Devine, for appellee.

LORING, J. This is a bill in equity for

pany, bounded and described as follows: Beginning at a point on the southerly side of Church street, which is 56 feet easterly of the intersection of the southerly side of said Church street and the easterly side of Warren court; thence easterly, along the southerly side of said Church street, 65 feet, to the line of Concord river; thence southerly, along the line of said river, 49½ feet, to land of the Lowell & Andover Railroad; thence along the land of said Lowell & Andover Railroad, 65 feet, to the point of beginning." This land is shown on the following plan:



the specific performance of a written agreement contained in a lease whereby the defendant agreed to buy the property let on the expiration of the term created by the lease. There was a cross-bill alleging that the agreement had been procured by the fraud of the plaintiff in the principal suit, and praying that it be delivered up and canceled. The case went to a master, who reported that both the bill and cross-bill should be dismissed. Exceptions to the report were taken by both parties. The exceptions of the plaintiff were sustained, and those of the defendant overruled by the superior court. From this order no appeal was taken. Subsequently a final decree was entered directing the defendant to specifically perform the agreement and dismissing the cross-bill. From this decree the appeal was taken which is now before us.

It appears from the master's report that in 1878 the Middlesex Company conveyed to one Nathan Crosby the following lot of land: "A certain lot of land in said Lowell, situated on the southerly side of Church street, and easterly of the land of the Lowell & Andover Railroad, containing 1,430 square feet, as shown by a 'Plan of Middlesex Company Land Taken by the Lowell & Andover Railroad,' in possession of said Middlesex Com-

pany. What are called the deed lines on said plan are the lines given by the distances stated in the deed. In 1878 a building was erected on said land, which is still standing and is the building here in question, except that the bulkhead shown on the plan was built in 1895. A deed of this land to the plaintiff was made in 1890, the description being the same as in the deed to Crosby. The report states that: "At the time the plaintiff received the deed last mentioned, and for eight or nine years prior thereto, a fence stood on the land on which the Lowell & Andover Railroad was located, distant about 10 feet from, and nearly parallel to, the southwesterly side of said building, and extending from a point a foot or two northwest of the Concord river, for about 60 feet; thence turning and extending to Church street in a nearly northerly direction, and intersecting Church street at a point about 10 feet west of the building; thence turning and running along the line of Church street to the northwesterly corner of the building. The tracks of the Lowell & Andover Railroad are, and were at the time the plaintiff received the deed last mentioned, on the southwesterly side of said fence; the rail nearest thereto being some 7 or 8 feet distant therefrom. * * * In 1895 the plaintiff made an en-

trance into the basement of the building on the southwesterly side, by cutting an opening in the foundation wall about 4 feet wide and 8 feet deep, and made an area by removing the adjacent soil for a distance on the land of the Lowell & Andover Railroad of about 7 feet in length, 4 feet in width, and 7 feet in depth. This area was covered by a wooden bulkhead, attached to the building, covered with a heavy trapdoor, and extending to about 1 foot above the level of the land adjacent. A wooden door opened into the basement. I find as a fact that said bulkhead is a part of said building."

In 1896, the plaintiff fitted up the building on the land as a steam laundry, and occupied it as such for nine months. After that it was vacant until it was let by word of mouth to the defendant for the same purpose on October 21, 1901. On March 8, 1902, this oral lease was put in writing and contained the agreement here sued on. The premises let by this indenture of lease were "the land and building thereon situate on the west side of the Concord river in said Lowell, bounded easterly by said river, westerly by the location of the Lowell & Andover Railroad, and northerly by Church street, being a triangular lot, together with all fixtures and machinery to said Cawley belonging in said building." The agreement contained in said lease to buy these premises was in these words: "And said Jean agrees at the expiration of the term hereinafter limited to buy the aforesaid real and personal property of said Cawley for the entire price of \$7,000." The lease expired on April 21, 1903. On April 18th the defendant was informed that the building covered more land than the plaintiff owned, and on April 20th he told the plaintiff of this, and offered to carry out the agreement if the plaintiff would "give him enough land to cover the building." This the plaintiff refused to do. On May 23d the plaintiff tendered a deed and bill of sale. The land covered by this deed is described as in the deed of it to the plaintiff and in that to the plaintiff's grantor. The defendant said he would take the deed if the plaintiff would "deed him more land." The plaintiff said that all he could give him was what was described in the deed. Thereupon the defendant refused to accept the deed and bill of sale, and on June 23d he vacated the premises. No question was raised as to the machinery. In his report the master states that the defendant set up in defense that there were three parcels of land not covered by the building: (1) The triangular strip on the east, measuring 290 feet at its base on Church street; (2) the land under the eaves on the west, which protruded 23 inches over the division line; and (3) the land under the bulkhead. As to the first, the master found that the land of the plaintiff went to the river, because monuments control distances; as to the second, that the plaintiff had an easement acquired by prescription; and as

to the bulkhead he found "that the plaintiff has at no time possessed any title to or easement in the land under said bulkhead, which bulkhead I find, as above stated, to be a part of said building. And I find and rule that by reason of the plaintiff's inability to convey said land, or any easement therein, the defendant is under no obligation to perform said agreement of purchase. I find that the use and enjoyment of said bulkhead, and the land thereunder, was a material inducement to the entering into of said agreement on the part of the defendant."

The defendant in his answer set up a false and fraudulent representation by the plaintiff that he owned all the land covered by the building and the 10-foot strip shown on the plan east of the fence there shown. On this the master made the following finding: "In regard to the allegation of fraud, I find that at the time of entering into the oral arrangement of October 21, 1901, the defendant believed that the plaintiff owned all the land covered by the building, and the 10-foot strip of land extending from Church street to the Concord river, but that such belief was not induced by any statement or conduct of the plaintiff on which the defendant had a right to rely, but was caused by the appearance of the building and its surroundings. I find that the plaintiff said or did nothing to prevent the defendant from ascertaining the amount of land which the plaintiff owned, and that the defendant was negligent in not examining the title and making a survey of the premises. I find that this belief of the defendant as to the plaintiff's ownership continued at least up to March 8, 1902. If, in view of my other findings, the belief of the defendant as to the plaintiff's ownership of said 10-foot strip, or of any part thereof, is material in any aspect of the case, and if the burden rests upon the plaintiff of proving that the defendant had actual knowledge or actual notice of the plaintiff's want of ownership in said 10-foot strip, or in any part thereof, I find that such burden had not been sustained, and that the defendant had no such knowledge or notice until April 18, 1903. If the burden rests upon the defendant of proving his ignorance of such want of ownership, I find that such burden has not been sustained, and that on March 8, 1902, at the time of the execution of said written agreement, he was informed and knew that the plaintiff did not own said 10-foot strip or any part thereof. I find, if material, that the defendant did not at any time have knowledge or notice that the plaintiff had built and was maintaining said bulkhead without right on land not owned by him, but, on the contrary, at all times believed that said bulkhead had been rightfully erected and maintained, and, upon complying with said written agreement of October 21, 1901, he could continue to use and enjoy said bulkhead without lawful hindrance on the part of any person whatsoever."

No appeal having been taken from the order overruling the defendant's exceptions, they are now before us, except so far as the final decree is erroneously affected by their having been overruled. Rev. Laws, c. 159, § 26. The principal attack on the final decree made by the defendant is that the defendant did not own the bulkhead, nor the 10-foot strip between the building and the fence on the west, and that the defendant honestly thought that he did. As matter of construction of the agreement, it is the land bounded on the west by the location of the railroad and the building on that land which the plaintiff agreed to sell and the defendant to buy, not the building and the land under it. The land and the building thereon does not include the bulkhead or the 10-foot strip. See, in this connection, *Crosby v. Parker*, 4 Mass. 110; *Wood v. Commissioners of Bridges*, 122 Mass. 394. But if the defendant, through an honest mistake not attributable to his own negligence, thought that he was buying more than the agreement covers, that is a defense to a bill for specific performance. *Western Railroad v. Babcock*, 6 Metc. 346, 352. *Old Colony Railroad v. Evans*, 6 Gray, 25, 36, 66 Am. Dec. 394; *Boynton v. Hazelboom*, 14 Allen, 107, 92 Am. Dec. 738; *Chute v. Quincy*, 156 Mass. 189, 30 N. E. 550. See, also, in this connection, *Spurr v. Benedict*, 99 Mass. 463. The burden is on the defendant to make out this defense. *Western Railroad v. Babcock*, 6 Metc. 346, 352; *Chute v. Quincy*, 156 Mass. 189, 191, 30 N. E. 550. So far as the defense founded on the 10-foot strip goes, the master has found that, if the burden was on the defendant of proving his ignorance of the plaintiff's want of ownership, it was not sustained. This is, in substance, a finding that the defendant did not prove that there was such a mistake.

As to the defendant's having mistakenly thought that the bulkhead was to be his, the findings of the master are not altogether clear to us. He has found in terms "that the defendant did not at any time have knowledge or notice that the plaintiff had built and was maintaining said bulkhead without right on land not owned by him, but, on the contrary, at all times believed that said bulkhead had been rightfully erected and maintained, and that upon complying with said written agreement of October 21, 1901, he could continue to use and enjoy said bulkhead without lawful hindrance on the part of any person whatsoever"; and it would seem that he made this finding without regard to the burden of proof. He had previously found that, if the burden was on the defendant as to "the belief of the defendant as to the plaintiff's ownership of said 10-foot strip or any part thereof," it was not made out; and it is a fact that the bulkhead was built on part of the 10-foot strip. Whatever may be the true interpretation of these two findings, the finding "that the de-

fendant was negligent in not examining the title and making a survey of the premises" must be taken to be decisive, if the case is to be finally disposed of on this record. It does not appear from the master's report what, if any, use had been made of the bulkhead in the past, or whether there was any way leading to and from it. In short, we do not know the evidence on which this finding of the master was made. The negligence in not finding out as to the title to the 10-foot strip would seem to cover the bulkhead, which is a part of that strip of land. But we are of opinion that the plaintiff did not go far enough in showing that he had a good title to the land to be conveyed by him. Had the plaintiff shown that the title which Nathan Crosby got in 1878 had come to the plaintiff, it might perhaps have been sufficient. Without expressing a final opinion on that point, it is enough to dispose of this contention that there was no sufficient evidence of the fact that the plaintiff got Nathan Crosby's title. The plaintiff went no farther than to put in a deed "purporting to be signed by Stephen M. Crosby, executor and trustee under the will of Nathan Crosby, on which deed was written an assent, release, and quitclaim under seal, purporting to be signed by 10 persons, described as 'being all the heirs, devisees, legatees, next of kin, and persons interested in the estate of Nathan Crosby, late of Lowell, deceased.'" In addition he proved that "the plaintiff has ever since claimed title, and now claims, except as against this defendant, title under said Stephen Crosby deed to the premises described therein." There was no proof showing what the will of Nathan Crosby was, or that it had been admitted to probate, or of any action taken under it to bar the assets being taken for Nathan's debts, and no proof that the 10 persons signing the deed were in fact all the heirs, devisees, legatees, next of kin, and persons interested in his estate, as they described themselves to be. This is not enough. See *Chauncey v. Leominster*, 172 Mass. 340, 52 N. E. 719.

This objection was taken at the trial: The title of the plaintiff was put in issue by the answer. The master in his report found and ruled that by a proper construction of the Middlesex Company and the Crosby deeds "the plaintiff derived a good and sufficient title to the premises therein described." An objection was taken to this ruling, and an exception founded on that objection. The exception to this ruling should have been sustained. Although no appeal was taken from this interlocutory, it affects the final decree, and so was open on an appeal from that decree, by force of Rev. Laws, c. 159, § 26. *Parker v. Flagg*, 127 Mass. 28. See, also, *Burnett v. Commonwealth*, 169 Mass. 417, 48 N. E. 758. There is nothing in the decision in *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 435. Whether the case shall

be sent to the master for further hearing is for the superior court.

Decree disaffirmed, and such further order or decree to be entered as seems to the superior court in accord with equity and good conscience.

(189 Mass. 214)

CURRIER v. WILLIAMS.

(Supreme Judicial Court of Massachusetts. Suffolk. Oct. 16, 1905.)

1. INSOLVENCY—PROCEEDINGS—DEBTS — DISCHARGE.

Where plaintiff, to whom defendant was indebted, declined to accept certain land in payment of the debt, but agreed to give defendant credit for the net proceeds of a sale of the land, which had been conveyed to plaintiff, on said indebtedness, defendant agreeing to pay plaintiff any balance that might be due to him on the indebtedness after crediting such net proceeds, the effect of the agreement was that the original debt remained due, but not presently payable, and, said debt being provable in insolvency proceedings, as authorized by Gen. St. c. 118, § 25, it was barred by defendant's discharge.

2. EXCEPTIONS, BILL OF—AMENDMENT.

A party may be allowed to amend his bill of exceptions and state more accurately an exception stated by him in the bill within the time allowed for filing the bill, but he cannot add an exception by amendment not originally stated.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exceptions, Bill of, §§ 106-111.]

Case Reported from Superior Court, Suffolk County; Jas. M. Morton, Judge.

Action by one Currier against one Williams on two sealed instruments. On report from superior court. Judgment for defendant.

H. T. Richardson, for plaintiff. Roger F. Sturges, for defendant.

LORING, J. This case comes up on a report. It appears that in November, 1876, the defendant owed the plaintiff \$3,500, being the balance due upon a contract for mason work upon the Hotel Brunswick, in Boston. It also appears that before Exhibit A was executed, to wit, November 8, 1876, "the defendant offered the lots of land referred to in the contract in payment of the account due, which the plaintiff declined to accept." Thereupon the defendant caused two mortgages, one on each lot, amounting together to the amount due, to be assigned to the plaintiff under the agreement stated in Exhibit A, which, after reciting the debt and the assignment of the two mortgages, provides: "First. That whenever said Currier shall sell or assign one or both of said mortgages, which he is at liberty to do at any time, upon consulting said Williams, he shall give to said Williams credit for the net proceeds of such sale on his aforesaid indebtedness. Second. Said Williams agrees that he will pay to said Currier, any balance that may be due to said Currier on his aforesaid indebtedness after crediting the net proceeds of said sales. Third. Said mortgages are sold absolutely by said Williams to said Currier, and the amount be paid therefor by said Currier shall be

computed and ascertained as aforesaid." Nine months later, to wit, on August 17, 1877, Williams caused the fee in the two lots subject to these two mortgages to be conveyed to the plaintiff, and Exhibit B was executed, which, after reciting the conveyance and the surrender by the plaintiff of the mortgage notes to the mortgagor, who conveyed to the plaintiff the equity at the defendant's request, provided as follows: "Said Henry B. Williams, in consideration thereof and of other sufficient consideration to him paid by said Currier, the receipt whereof is hereby acknowledged, hereby covenants and agrees to and with said Currier, and his heirs, legal representatives, and assigns, that whenever said Currier shall sell said property, which said Currier is at liberty to do at any time as aforesaid, he will pay to said Currier any balance that may remain due on his aforesaid indebtedness of \$3,500, after deducting all sums received by said Currier from the sale of said property. Said Williams further agrees that he will pay all taxes levied on said property, and will also pay to said Currier semiannually, at the rate of 6½ per cent, the interest on his said indebtedness of \$3,500. This agreement is made for the purpose of providing for the payment of any balance due from said Williams to said Currier." Exhibits A and B were written on one double sheet of paper. It also appears that on February 21, 1879, the defendant filed a petition in insolvency, and that on September 26, 1879, a discharge was granted to him for all debts due on said February 21, 1879. The plaintiff offered to show in rebuttal that the defendant willfully and intentionally omitted the plaintiff's name from his schedule of creditors in said insolvency proceedings and the address of the plaintiff, and placed in said schedule a fictitious debt to the plaintiff of \$25.68, and that he, the plaintiff, had no notice of the insolvency proceedings until more than two years after the defendant's discharge and took no part therein. This offer was stated to be made, "not for the purpose of seeking to invalidate the fact or regularity of the defendant's discharge, but only for the purpose of avoiding its effect as to the plaintiff in the action at bar. The court rejected this offer of proof, and the plaintiff duly excepted, but this exception was not included in the plaintiff's bill of exceptions filed in this case, and it is included in this report against the objection of the defendant, and is only to be considered if the plaintiff is entitled to have his exception heard."

We are of opinion that the debt due the plaintiff is barred by the defendant's discharge in insolvency. If the land was conveyed as security for the debt, in spite of the provision in Exhibit A that "said mortgages are sold absolutely by said Williams to Currier" (as some of my brethren think), the discharge in insolvency is plainly a bar. If, on the other hand (as others of us think),

the result of Exhibits A and B was not to make these two parcels of land security for the debt, the discharge in insolvency is still a bar. If it was not by way of security, it was a conveyance to Currier by Williams of the fee in these two lots of land, which was absolute and final on the part of Williams, and was accepted by Currier in payment for the debt, so far as it went; that is to say, to the amount realized when the two lots were sold. The parties might have provided that the conveyance of the land should be coupled with an agreement by Williams to make the plaintiff good against loss if the land did not realize the amount of the debt. Had they done so, the discharge would not have been a bar. In that case, until the land was sold, it would be altogether contingent whether there was a debt or not. In such a case the discharge is not a bar. *French v. Morse*, 2 Gray, 111; *Morton v. Richards*, 13 Gray, 15; *Deane v. Caldwell*, 127 Mass. 242; *McDermott v. Hall*, 177 Mass. 224, 58 N. E. 695; *McIntire v. Cottrell*, 185 Mass. 178, 69 N. E. 1091; *Harmon v. McDonald*, 187 Mass. 578, 73 N. E. 883.

But that is just what the plaintiff and defendant did not do in the case at bar. Currier did not agree to take the land in payment. He introduced evidence that he "declined to accept" the land on those terms. What he did agree to was that he would "give to said Williams credit for the net proceeds of such sale on his aforesaid indebtedness." In the words of the first agreement of Exhibit A. Williams did not agree to pay to Currier such sum as would make the defendant whole in case the land sold for less than the amount of the debt. What Williams did agree to do was to "pay to said Currier any balance that may be due to said Currier on his aforesaid indebtedness after crediting the net proceeds," in the language of the second agreement of Exhibit A; and, in the language of Exhibit B, that "whenever said Currier shall sell said property, which said Currier is at liberty to do at any time as aforesaid, he will pay to said Currier any balance that may remain due on his aforesaid indebtedness of \$3,500 after deducting all sums received by said Currier from the sale of said property," and that he will pay to said Currier semiannually, at the rate of 6½ per cent., the interest on his said indebtedness of \$3,500." The effect of these stipulations is that the original indebtedness was to remain due, when the land was sold the net proceeds were to be credited, and until it was sold the original indebtedness was not payable, because the amount paid by the conveyance of the two lots of land had not been ascertained. Until then the debt was due, although not payable, and was provable as such, under Gen. St. c. 118, § 25.

By the terms of the report the rejection of the offer of proof in rebuttal "is only to be considered if the plaintiff is entitled to have his exception heard." A party may be allow-

ed to amend his bill of exceptions to state more accurately an exception stated by him in his bill within the time allowed for filing a bill, but not to add an exception not originally stated in the bill of exceptions. See *Dorr v. Schenck*, 187 Mass. 542, 73 N. E. 532, where the earlier cases are collected. We do not intend to intimate that there was anything in the exception in question under St. 1879, p. 572, c. 245, § 4.

The entry must be: Judgment for the defendant.

(189 Mass. 247)

COMMONWEALTH v. SISSON (two cases).

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 17, 1905.)

1. FISH—PROTECTION—FISH AND GAME COMMISSIONERS—ORDERS—CONSTRUCTION.

An order of the fish and game commissioners, finding that the discharge of sawdust from defendants' mill into a certain river materially injured the fish therein, which were of sufficient value to warrant protection, and prohibiting the further discharge thereof, constituted a special, and not a general, regulation for the protection of such fish.

2. SAME—STATUTES—VALIDITY.

Rev. Laws, c. 91, § 8, providing that the fish commissioners, on determining that the fish in a particular stream are of sufficient value to warrant protection, may prohibit or regulate the discharge of sawdust into the stream, materially injuring the fish, and order the owner or tenant to abstain from further discharging sawdust into the stream, constituted a valid exercise of legislative power.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fish, §§ 16-18.]

3. SAME—ORDERS—PRESCRIPTIVE RIGHT—NOTICE—HEARING.

Where fish and game commissioners ordered defendants to refrain from discharging sawdust from their mills into a certain river, after finding that such discharge was detrimental to the fish therein, which were of sufficient value to warrant protection, as authorized by Rev. Laws, c. 91, § 8, it was immaterial that defendants had discharged sawdust into the stream for 30 years, and that the order was made without notice to defendants or an opportunity to be heard.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fish, §§ 16-18.]

Exceptions from Superior Court, Berkshire County; John C. Crosby, Judge.

Complaints by the commonwealth against Henry D. Sisson and against Frank Sisson, for violation of an order of the fish and the game commissioners prohibiting the discharge of sawdust into the Konkapot river. The superior court ordered verdict for the commonwealth in each case, and defendants bring exceptions. Overruled.

John F. Noxon, for the Commonwealth.
Herbert C. Joyner and H. M. Whiting, for defendants.

LORING, J. These are two complaints, one against each defendant, charging them severally with permitting sawdust to be discharged into the Konkapot river, on March 29, 1905, in violation of an order made by the

fish and game commissioners, under Rev. Laws, c. 91, § 8, dated August 1, 1904. The order, after reciting the authority given by the act, and stating that the mill here in question owned by the defendants had been examined by the board, and that it had been determined by the board that the fish in the brook are of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injures the fish therein, directs the defendants (1) to erect a blower or take other means approved by the commissioners to prevent the discharge of sawdust from said mill into said brook directly or indirectly, and (2) not to accumulate a pile of sawdust on the bank of the brook, so that it may be liable to fall into the stream or be swept away by a rise of water. At the trial it was proved that this order was served on the defendants on or before July 1, 1904, and that the defendants continued to discharge sawdust into Konkapot river up to the time these complaints were instituted. It also appeared that there were edible fish in the river at the time the board passed the order in question.

The defendants offered to show, in substance, that the commissioners in making the order did not act on sworn evidence or personal knowledge as to the fish or the sawdust; that in the spring of 1905 the defendants asked for a hearing, which the commissioners denied; that the mill has been used as it is now used for more than 30 years under a claim of right, and that the right was admitted by the next mill owner below; and, finally, that a compliance with the order as to a blower would impair the efficiency of the mill about 25 per cent, that the sawdust could not be sold, and to cart it away would entirely destroy the value of the land for mill purposes. This evidence was excluded and an exception was taken. The defendant then made the following six requests for rulings, to wit: "First. That the act of the commissioners on fisheries and game, by which they determine that the fish in any brook or stream are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust from any particular sawmill materially injuring such fish, is a judicial act, which can be lawfully performed only after the hearing of evidence bearing upon the questions involved, viz., the value of the fish in such brook or stream and the effect of such sawdust as injuring such fish. Second. That the order in this case, having been passed by the commissioners without hearing any evidence, and without any knowledge by them of the value of the fish in the stream or the amount of water in the stream, or the amount of sawdust that is discharged by defendants' sawmill into the stream, is not a lawful order under the statute, and is not binding upon the defendants. Third. That the defendants and the predecessors in

title, having been discharging sawdust from their sawmills for more than 20 years consecutively under a claim of right into the Konkapot river, have acquired by prescription a title to such right, and such right is their property, of which they cannot be deprived without compensation. Fourth. That section 8 of chapter 91 of the Revised Laws makes no provision for compensation to the owner of a sawmill who is forbidden by an order of the commissioners to discharge sawdust into a brook or stream, and said statute is therefore unconstitutional and void so far as these defendants are concerned. Fifth. That this order of the commissioners so interferes with the use of the property of the defendants as to amount to a taking of such property for public use, and the order is void, as no compensation to defendants for such taking is provided by the order, or by the statute under which the order is made. Sixth. That this order of the commissioners so interferes with the use of the property of the defendants as to seriously damage, impair, or injure such property, and the order is void, as no provision is made, either in the order or the statute under which the order is created, for compensating the defendants for such damage, impairment, or injury to their property."

The defendants' grievance is that by an order of the board of fish and game commissioners they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood as they and their predecessors in title have conducted it for 30 years last past, that from this decision there is no appeal, and that not only was the order made without a hearing, but, when a hearing was asked for by the defendants, it was denied. Their contention is, first, that under the act they had a right to be heard at the trial in the superior court on the questions of fact determined by the board; second, that they could not be deprived by the board of their prescriptive right to discharge sawdust into Konkapot river without being heard and by a finding not made on sworn evidence; and, third, that under any circumstances this right cannot be taken without compensation being made therefore. In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was a judicial action; and, in connection with this argument, they rely on the distinction pointed out in *Salem v. Eastern Railroad Co.*, 98 Mass. 431, 96 Am. Dec. 650, between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth, or cause of sickness dangerous to the public health and to make

an order for the removal of it. The former, being a rule for all, is legislative in character; the latter, being a determination as to a particular thing, resulting in an order to the owner of it to do a specified act, is judicial in character. For a later case, where it is pointed out that similar legislative and judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693.

We agree with the defendant's counsel as to what the order here in question is not. We agree that it is not a general regulation. What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot river, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that, because it is not a general regulation, it is a judicial action. The question to be decided here does not depend upon a choice between the two classes dealt with in *Salem v. Eastern Railroad*, 98 Mass. 431, 96 Am. Dec. 650, and in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, and for these reasons: We are of opinion, in the first place, that it is within the power of the Legislature to protect and preserve edible fish in the rivers and brooks of the commonwealth, and for that purpose, if they think proper, to forbid any sawdust being discharged into any brook containing such fish. The right to run a sawmill on the bank of a brook or a river is, like all rights of property, subject to be regulated by the Legislature, when the unrestrained exercise of it conflicts with other rights, public or private. See *Commonwealth v. Alger*, 7 Cush. 53, 54; *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 580. The defendants' contention that they have a prescriptive right to discharge sawdust into the river, even if it kills or injures the fish therein, which prescriptive right cannot be taken away or impaired without compensation being made therefor, means this, and nothing more: Where the Legislature, up to the passage of the act here in question (St. 1890, p. 106, c. 129), had not regulated the business of sawing wood on the banks of streams having in them edible fish, and where, in the absence of such regulation, the defendants had discharged sawdust into the stream for 30 years, the people have lost the power to regulate the conflicting rights of sawmills on the bank of the stream and to preserve fish in the stream itself. The statement of the proposition is enough to show that there is nothing in it. The decision in *Attorney General v. Revere Copper Co.*, 152 Mass. 144, 25 N. E. 605, 9 L. R. A. 510, relied on by the defendants, is confined to the gaining of prescriptive rights

with respect to property owned by the public under a statute of limitations, which puts the property rights of the public on the same basis as those of individuals.

We are of opinion, in the second place, that in case the Legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river on the one hand, and of the public, on the other hand, to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation of the discharge of sawdust. The right of the Legislature to delegate some legislative functions to state boards was considered by this court in *Brodbyne v. Revere*, 182 Mass. 598, 66 N. E. 607. And, further, in case the Legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could, in our opinion, leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights. The power thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors, the board of inland fisheries, in prescribing the details of the construction of the fishways to be constructed in dams where by law fishways have to be maintained. See St. 1866, pp. 231, 232, c. 238, §§ 2, 6; St. 1867, p. 741, c. 344; Pub. St. 1882, c. 91, § 4. See, also, 3 Province Laws, 1745-46 (State Ed.) c. 20, p. 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what times the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid. The result is that in our opinion the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the Legislature itself, and no more than in case of the Legislature itself is it bound to act only after a hearing, or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the Legislature in enacting a statute, and, being legislative, it is plain that the questions of fact passed upon by the Legislature in adopting the provisions enacted by them can-

not be tried over by the court. This court has been recently asked to try over the expediency of compulsory vaccination in an action under a statute requiring it. *Com. v. Jacobson*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935. On its declining to do so an appeal was taken to the Supreme Court of the United States, and its refusal to do so was held to be correct. *Jacobson v. Mass.*, 197 U. S. 11, 25 Sup. Ct. 358, 49 L. Ed. 643. See particularly page 30 of 197 U. S., page 363 of 25 Sup. Ct., 49 L. Ed. 643. See, also, *Devens, J.*, in *Train v. Boston Disinfecting Co.*, 144 Mass. 531, 11 N. E. 929, 59 Am. Rep. 113.

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for 30 years by a board who have not heard evidence and have refused the defendants a hearing, that the action of the board is final, and that no compensation is due to them. This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under section 113, c. 75, Rev. Laws, forbidding privies within a specified distance from its shore; and, if the defendant had a privy there for 30 years, his right to maintain it would cease, although the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded, under section 118, to investigate this particular privy, the defendant would have been entitled to a hearing, and, on appeal, to a jury, as provided by section 119. Again, take, for example, the regulation of a local board of health in question in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113, requiring all rags arriving at the port of Boston from any foreign port to be disinfected at the expense of the owner before being discharged. The power of the local board of health to declare these rags a nuisance per se, so as to impose upon the owner without trial the expense of disinfecting them, was established by this court in that case. Had the local board undertaken to investigate the particular rags in question in *Train v. Boston Disinfecting Co.*, under their jurisdiction to inquire into sources of filth, and they had been authorized under that act to abate the nuisance if they found the rags to be a nuisance, by ordering them to be disinfected at the expense of the defendant, they would have had to give the defendant a hearing on notice, and from their decision the defendant would have had a right to a trial by jury. That is what was decided in *Salem v. Eastern Railroad*, 98 Mass. 431, 96 Am. Dec. 650. That is to say, on the one hand, where the law is general and the question is whether under it the defendants

are committing a nuisance, the facts are determined by judicial action; on the other hand, the determination of the same facts is legislative in case the Legislature decides to make the thing a nuisance per se. And where it is legislative it is final, and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due.

The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the Legislature, if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy. For similar cases, where the use which can be made of property has been left to the final determination of boards, see *Newton v. Joyce*, 166 Mass. 83, 41 N. E. 116, 55 Am. St. Rep. 385; *Com. v. Roberts*, 155 Mass. 281, 29 N. E. 522, 16 L. R. A. 400. See, also, in this connection, *In re Wares, Petitioners*, 161 Mass. 70, 36 N. E. 586. The difference between the majority and the minority of the court in *Miller v. Horton*, 152 Mass. 540, 26 N. E. 100, 10 L. R. A. 116, 23 Am. St. Rep. 350, was on the construction of the act there in question.

Exceptions overruled.

(189 Mass. 246)

CARPENTER v. ALLEN.

(Supreme Judicial Court of Massachusetts.
Berkshire. Oct. 17, 1905.)

USE AND OCCUPATION—TENANCY BY SUFFERANCE—STATUTES—APPLICATION.

Rev. Laws, c. 129, § 3, providing that tenants by sufferance in possession of land shall be liable to pay rent for such time as they may occupy or detain the same, has no application where the tenant has not occupied with the express or implied assent of the plaintiff or one under whom plaintiff claims.

Exceptions from Superior Court, Berkshire County; Ellisha B. Maynard, Judge.

Action by Arthur P. Carpenter against Robert Allen. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

Earl D. Getman and John F. Manning, for plaintiff. Mark E. Couch and Clarence P. Niles, for defendant.

LORING, J. This is an action for use and occupation of a house and land belonging to a wife, brought against the husband by one to whom the wife had given a written lease for the purpose of collecting rents. The husband and wife occupied the premises until the wife left the husband, and he with his family continued to occupy the premises after his wife left. Before giving the lease to the plaintiff the wife demanded possession of the premises of the defendant, and he refused to surrender them to her. Thereupon the lease to the plaintiff was made on May 11, 1903, and on May 16, 1903, the lessee gave the husband notice to quit in two days. To this the

husband paid no attention. The rent claimed is from May 11, 1903, to May 11, 1904. The jury were directed to find for the defendant.

The ruling was right. Rev. Laws, c. 129, § 3, providing that tenants at sufferance in the possession of land shall be liable to pay rent therefor for such time as they may occupy or detain the same, does not apply where the tenant has not occupied with the assent, express or implied, of the plaintiff or one under whom the plaintiff claims. That was decided in *Merrill v. Bullock*, 105 Mass. 486, to be the true construction of the statute. That construction has been acquiesced in by the Legislature for 35 years, and has been followed in later cases. See *Central Mills Co. v. Hart*, 124 Mass. 123; *Kirchgassner v. Rodick*, 170 Mass. 543, 49 N. E. 1015.

Exceptions overruled.

(189 Mass. 329)

LINDSEY et al. v. FABENS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1905.)

1. EXECUTORS—SALES UNDER ORDER OF COURT—ACTIONS TO SET ASIDE—RIGHT TO SUE.

Where the probate court authorized the sale for the payment of debts of land of a decedent devised to his widow for life, the fee of which passed as undivided property to his heirs, and a sale was made and a deed executed to the purchaser, who took possession, the deed conveyed the title to the land, and if valid gave the purchaser a title paramount to both life estate and estate in remainder, and if invalid the wrong was then committed against both, entitling the remaindermen to proceed to have it avoided without waiting for the death of the life tenant.

2. SAME—LACHES.

The land of a decedent passed under his will to his widow for life, and the remainder passed as undivided property to his heirs. Pursuant to the order of the probate court, the land was sold for the payment of the debts of decedent, and the purchaser took possession. The remaindermen waited more than 28 years before attacking the sale on the ground of fraud, though 10 years before they had knowledge of the situation. The suit attacking the sale was begun about 8 years after the death of the life tenant, and about 16 months after the death of the purchaser. *Held*, that the suit was barred by laches.

Appeal from Superior Court, Suffolk County.

Bill by N. Allen Lindsey and others against Mary P. Fabens, administratrix of William C. Fabens, deceased, and others. From a decree dismissing the bill, complainants appeal. Affirmed.

This was a bill to have declared void an executrix's sale and conveyance of real estate, the legal title to which was in the defendant. The real estate was the property of Ambrose Allen, and was sold in 1875 under an order of the probate court to pay the debts and charges of his estate.

In the superior court the plaintiffs' bill was dismissed, and plaintiffs appealed.

Ethelbert V. Grabill, for appellants. Nathl. N. Jones, Chas. K. Darling, and Robt. M. Mahoney, for appellees.

HAMMOND, J. Upon the death of Ambrose Allen in 1873 his widow became seised under his will of a life estate in the land in question, while the remainder in fee passed as undivided property to his heirs at law; both estates being subject, of course, to the rights of creditors of the deceased. The probate court authorized the sale of the land for the payment of the debts of the deceased, and in full compliance with such authority and with the forms prescribed by the statutes the sale was made to William C. Fabens, and a deed of the land, dated August 7, 1875, was delivered to him by the executrix, acting under this authority. Under this deed Fabens took possession, and ever afterwards held the estate. This deed conveyed the legal title to the whole land, and, if valid, gave to Fabens a title paramount both to the life estate and the estate in remainder. Its validity is now attacked by the plaintiffs upon the ground of fraud; but the master has found no fraud, except that which arises in law from certain facts set forth in the report concerning the arrangement made between the executrix and the purchaser with reference to the sale and concerning the relation sustained between them. We have not found it necessary to go minutely into the various questions raised by the exceptions to the master's report, because we think that the plaintiffs have been guilty of laches, that the defendant's ninth exception that such laches was a bar to this action should be sustained, and that the decree dismissing the bill should be affirmed upon that ground.

The injury of which the plaintiffs complain was committed by the deed of August, 1875. This bill was filed March 5, 1904, more than 28 years after the act complained of. It is to be noted that this is not an act of a tenant for life, made in derogation of the title of the remainderman, as, for instance, a deed in fee simple by the tenant for life. Such a deed would operate only to convey the life estate of the grantor, and would have no legal effect whatever upon the title of the remainderman. His title is in no way affected. No harm is done to him until after the termination of the life estate. If the grantee then asserts a claim under the deed to the estate in remainder, the harm to the owner of such estate begins. Then comes for the first time the attack which the remainderman should heed. But in the case at bar the attack was made upon the estate in remainder when the deed was delivered to Fabens. The deed purported to convey a title paramount, not

only to the life estate, but also to the estate in remainder, and, if executed according to law, actually had that effect. The wrong, if any, was committed then. The deed conveyed the legal estate, and there was outstanding in the tenant for life and the remaindermen the equitable right to have it avoided for fraud, if fraud there was. For this purpose it was not necessary for the remaindermen to wait until the termination of the life estate. Whatever may have been the rights of the parties to take proceedings at common law, it is clear, that at any time within the 28 years and more during which the plaintiffs and their predecessors in title have waited this suit could have been brought, and, unless barred by laches, the rights of the parties could have been settled.

The facts found by the master show that this inactivity was not due to lack of knowledge of the situation. Ten years before this bill was filed, namely, in February, 1894, at a trial of a real action brought by the heirs of Ambrose Allen against the said William C. Fabens to recover this land, the main facts now relied upon by the plaintiffs to show constructive fraud were disclosed upon sworn testimony. It would be difficult to conceive of a case where a better knowledge of the situation could be shown. Even after the death of the life tenant, which occurred on February 24, 1901, the plaintiffs waited. Still 2 years and 8 months passed before the death of Fabens, which occurred October 24, 1903, and again the plaintiffs waited 16 months more. The master has found that "why this suit was not brought within the two years and eight months between the death of Margaret Allen and the death of William C. Fabens did not appear." More briefly stated, it appears that by this bill the plaintiffs seek to avoid for fraud a transaction nearly a generation old, although at least for more than 10 years they have known the facts as they now appear, and they have waited until the parties to the transaction have both died. Such laches should be in equity a bar to the bill. The plaintiffs must be remitted to their remedies at law, if any they have.

Decree affirmed.

(189 Mass. 344)

H. H. FRANKLIN MFG. CO. v. LAMSON & GOODNOW MFG. CO.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 19, 1905.)

1. SALES—WARRANTY—CONSTRUCTION.

Where plaintiff warranted certain metallic cylinders to "finish sound," such was an express warranty only that the shells should, when finished, be free from cracks and air holes, both obvious and hidden.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 783, 792.]

2. SAME—IMPLIED WARRANTY.

Where plaintiff agreed to manufacture for defendant certain hollow metallic cylinders warranted to "finish sound," and it appeared that defendant knew more of the purpose for which the cylinders were intended than plaintiff did, there was no implied warranty that they should be suitable for the use intended.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 772-773.]

3. SAME—BREACH OF WARRANTY—RECOUPMENT—BURDEN OF PROOF.

Where, in an action for the price of certain metallic cylinders manufactured for defendant, the latter sought to recoup damages alleged to have been sustained by an alleged breach of warranty that the cylinders should "finish sound," the burden was on the defendant to show that the troubles experienced by it in using the cylinders furnished were attributable to the defects against which there was a warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1258-1260.]

Exceptions from Superior Court, Franklin County; Frederick Lawton, Judge.

Action by the H. H. Franklin Manufacturing Company against the Lamson & Goodnow Manufacturing Company to recover the price of certain castings called shells. In the superior court a finding was made in favor of plaintiff for \$945.07, with interest from March 31, 1898, to the date of the finding, and defendant excepted. Exceptions overruled.

Dana Malone, for plaintiff. Fredk. L. Greene and Wm. A. Davenport, for defendant.

HAMMOND, J. This is an action to recover the price of certain hollow metallic cylinders, called "shells," sold by the plaintiff to the defendant. The answer sets up among other things that the shells were not such as were called for by the contract, and seeks also to recoup in damages. The case is before us upon exceptions taken at the trial before a judge sitting without a jury.

At the trial the judge found as follows: "I find no sale by sample. I find from the order and acceptance an express warranty that the shells should 'finish sound.' Without ruling on the question whether this express warranty excludes any implied warranty as to quality and fitness, I rule that no such implied warranty arises from the circumstances and relations of the parties, and I find no other warranty than as above stated. I rule that the phrase 'finish sound' means that the shells shall, when finished (nickel-plated and polished), be sound; that is, free from cracks and air holes, both obvious and hidden. The defects complained of by the defendant are the just mentioned cracks and air holes, both obvious and hidden, variation in size of threads, variation in thickness of barrel, in threads that stripped in using, and great variation in toughness and sustaining and resisting power of the shells by reason of the existence of some of

these things and by reason of difference in the alloy. Complaints of some or all of these defects were made continually so long as the shells continued to be sent, and of those sold by the defendant many were returned to it by its customers as broken or useless. What proportion were broken or rendered useless, or were defective on account of the defects warranted against, and how many by the defects not warranted against, I am, on the evidence, unable to find. I am not satisfied but that substantially the whole trouble was caused by the inherent unfitness of the metal itself. I find no variation in the alloy but that which was authorized or assented to by the defendant. The obvious cracks and air holes could have been detected readily by inspection. Many of the shells known by the defendant to be defective were nevertheless used by the defendant. Hidden cracks and air holes could have been detected, but the test necessary to detect would have added materially to their expense. I am not satisfied, however, that such hidden defects existed to any material extent, or that they were to a material extent the cause of the breakages. I find that the shells whose price is sued for were accepted by the defendant."

We are of opinion that the judge has rightly ruled as to the meaning of the phrase contained in the contract, "Castings are to finish sound," and that under the facts disclosed that is the only express warranty, and that there was no implied warranty arising from the relations and circumstances of the parties that the shells should be suitable for the use intended. Of that the defendant knew much more than the plaintiff would have known, and there is nothing to show that it relied upon the plaintiff in this matter. The defendant accepted the goods. The findings of the judge as to the cause of the troubles experienced by the defendant in using the shells dispose of the question of recoupment. Upon this question the burden was on the defendant, and it failed to show that those troubles were attributable to the defects against which there was a warranty.

Exceptions overruled.

(139 Mass. 284)

NATIONAL COAL TAR CO. v. MALDEN & MELROSE GASLIGHT CO.

(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 17, 1905.)

1. SALES—CONTRACT—BREACH—RECEIPT AND DELIVERY.

Where plaintiff contracted for one-half of defendant's coal tar product, to be delivered into tank cars belonging to and sent by plaintiff, who was to remove the tar in such quantities as would leave in defendant's tanks on the 1st of each month not exceeding 60 days' make, plaintiff was not in default for failure to send cars for the receipt of tar from defendant's tanks during a period of nine months, in the absence of notice by defendant that there was tar in the tanks which plaintiff was required to remove under the contract.

75 N.E.—40

2. SAME—DAMAGES.

In an action for breach of a contract for the sale of tar, for which there was no market at the place of delivery, plaintiff's measure of damages was the difference between the contract price plus the freight from the place of delivery to the nearest market and the market value at such market.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1174–1182.]

Appeal from Superior Court, Middlesex County.

Bill by the National Coal Tar Company against the Malden & Melrose Gaslight Company. From a final decree overruling plaintiff's exceptions to a master's report, and finding for plaintiff on the report, both parties appealed. Affirmed.

Boyden, Palfrey, Bradlee & Twombly, for plaintiff. Wm. P. Martin, for defendant.

MORTON, J. This is a bill in equity to restrain the defendant from selling coal tar in violation of its contract with the plaintiff, and for the assessment of damages. The contract was dated January 14, 1902, and was for two years from January 1, 1902, with a privilege of renewal for two years more, and has been so renewed. The plaintiff was to have one-half of the product, with restrictions upon the defendant as to the sale of the other half. The tar was to be delivered by the defendant into tank cars belonging to and sent by the plaintiff, and the plaintiff was to remove it at such times and in such quantities as would leave in the tanks of the defendant on the 1st day of the month not exceeding 60 days' make, subject to the exception that the tar which the defendant was at liberty to sell to other parties was not to be included in such make. The master found that the defendant did not perform its contract for the year 1902, and assessed the damages in the sum of \$1,173. This was upon a basis of \$3 a barrel for the tar, which the master found was the market price in Boston and vicinity and in the vicinity of Malden. The master also made certain other findings which show, as the defendant contends, that the plaintiff is not entitled to recover. There were exceptions by the plaintiff to the master's report, which were overruled, and a decree was entered for the plaintiff for the amount of the damages as found by the master, less the freight. Both parties appealed.

We take up the defendant's contention first. The circumstances as found by the master relating to this branch of the case are in brief as follows: According to the contract, as already observed, the plaintiff was required to take away the tar contracted for by it at such times and in such quantities as would leave in the defendant's tanks on the 1st day of any month not exceeding 60 days' make, not including in such make what the defendant was at liberty to sell to other parties. No tar was taken away by the plaintiff between the 1st day of March and

November 29, 1902, and the plaintiff did not send or offer to send during that time to the defendant any cars to remove the tar, of any, to which it was entitled. The defendant contends that it was not in default until the plaintiff had performed or offered to perform its part of the contract, and that this action cannot be maintained by the plaintiff because of its failure to send or to offer to send cars to remove the tar, and that it had a right to sell the tar as it did to other parties. The tar which the defendant was at liberty to sell to other parties and that to which the plaintiff was entitled was all mingled together in the defendant's tanks. The master found that on the 1st days of April, May, June, July, and November there was on hand in the defendant's tanks more than one-half of 60 days' make. The plaintiff contends that this finding is not correct, according to the figures and tables appended to the report and according to a just construction of the contract. We do not stop to inquire whether it is or not. We assume, in the defendant's favor, that it is. The master also finds that during this time the defendant did not notify the plaintiff that it had on hand 60 days' make, or request the plaintiff to send to it any cars for the delivery of tar. He finds, still further, that the defendant's office was called up by telephone by the plaintiff several times during the summer, and inquiry was made if they had tar and could load a tank car, and reply was made on the several occasions, according to the nature of the inquiry, that they had none, that they could not load a car, and that the treasurer was away, and they could not tell. About November 29, 1902, the plaintiff sent a tank car which was filled and delivered and thereafter cars were sent and filled and delivered, without any objection, so far as appears, on the part of the defendant. We think it plain that the finding by the court, which there must have been, that there was no such default on the plaintiff's part as would prevent it from recovering, was right. The condition of the tanks was within the exclusive knowledge and control of the defendant. The plaintiff had no right to enter the defendant's premises to examine them. From the nature of the case it could not know until informed by the defendant that there was tar for delivery, and therefore it was not in default in failing to remove the tar, or in sending or offering to send cars for its removal in the absence of such notice. *Barnes v. Parker*, 8 Metc. 134; *Hayden v. Bradley*, 6 Gray, 425, 66 Am. Dec. 421; *Makin v. Watkinson*, L. R. 6 Eq. 25; *Benjamin on Sales* (6th Ed.) 524. Even if the plaintiff was required to send cars, or to offer to send cars, as a condition of recovery we are not prepared to say that the inquiries made by it and the replies received would not justify a finding that it had done all that was necessary. There is nothing to show

that the plaintiff waived performance. On the other hand, it might well be argued, if necessary, that the defendant, by delivering tar in November and thereafter without objection, had waived any prior breach by the plaintiff.

The plaintiff contends that the freight should not be deducted. The rule is that the market price at the time and place of delivery furnishes the measure of damages for the nondelivery of merchandise which the defendant has contracted to sell and deliver, and that, if there is no market for the article at the place of delivery, the value at the nearest market governs, with the increased expense, if any, of transportation thereby caused to the buyer. *Shaw v. Nudd*, 8 Pick. 9; *Bartlett v. Blanchard*, 13 Gray, 429; *Saunders v. Clark*, 106 Mass. 331; *Grand Tower Co. v. Phillips*, 23 Wall. 471, 23 L. Ed. 71; *O'Hanlon v. Great W. Ry. Co.*, 6 B. & S. 484; *Furlong v. Polleys*, 30 Me. 491, 1 Am. Rep. 635; *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30; 1 *Sedgwick on Damages* (8th Ed.) § 246; *Benjamin on Sales* (6th Ed.) 899. The master has found the market price in Boston and vicinity, and in the vicinity of Malden, but not in Malden. He has also found that the only tar for sale in Malden during the time of alleged nonperformance was the defendants' tar, and that the rate of freight from between Boston and Malden and other points nearest to Malden where tar could be obtained was 15 cents a pound. The defendant having neglected or refused to deliver tar as required by its contract, and there being no other tar than its tar for sale in Malden, it follows that the plaintiff would have been entitled to supply itself at the place nearest to Malden where it could do so at the market price then prevailing, which, as the master has found, was at the rate of \$3 per barrel. It does not appear that the plaintiff would have been subjected to any increased expense for transportation by reason of the default of the defendant. On the contrary, in order to get the tar to the nearest market, so as to realize its market value there, it would have been obliged to pay freight at the rate of 15 cents a barrel in addition to the cost of the tar at Malden. All that the defendant was bound to do was to deliver the tar at Malden. To arrive, therefore, at a just estimate of the plaintiff's damages, the freight should be added to the contract price, and the difference between the cost as thus ascertained and the market value would constitute the measure of the plaintiff's damages. *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34; *McDonald v. Unaka T. Co.*, 88 Tenn. 38, 12 S. W. 420; *Hendrie v. Neelon*, 12 Ont. App. 41; *Cockburn v. Ashland Lumber Co.*, 54 Wis. 619, 12 N. W. 49; *Harris v. Panama R. R. Co.*, 58 N. Y. 660. This was the principle adopted by the court, and was correct.

Decree affirmed.

(139 Mass. 238)

MILLS et al. v. POTTER et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 18, 1905.)**1. CORPORATIONS—REORGANIZATION BY BOND-
HOLDERS—ACCOUNTS OF COMMITTEE OF RE-
ORGANIZATION—SETTLEMENT.**

Where, in a suit by a committee representing the bondholders of a corporation for an allowance of their accounts for moneys paid and services rendered as trustees in the foreclosure of the mortgage securing the bonds, purchasing the corporate property, and transferring it to a new corporation, no exception was taken to the report of the master finding in favor of the committee, except by a person who since the foreclosure became a holder of a bond, and the other holders of bonds were satisfied with it and the decree affirming it, the decree should not be reversed, unless it plainly violates the legal rights of the excepting bondholder.

**2. SAME—REORGANIZATION PLAN—ACCEPT-
ANCE BY BONDHOLDERS.**

The holders of bonds of a corporation provided for the appointment of a committee to reorganize the corporation and assess the bondholders ratably for expenses incurred. The committee submitted to the bondholders a plan of reorganization, which stated that it was necessary to raise a specified sum for expenses and improvements of the property, and which provided for an assessment on the bondholders to raise the sum. *Held*, that the plan of reorganization became binding on the bondholders, at least after their acceptance of the plan by the payment of the first subscription called for under it.

**3. SAME—COMMITTEE OF REORGANIZATION—
BREACH OF TRUST—COMPENSATION.**

The holders of the bonds of a waterworks company appointed a committee, with power to take any action which the bondholders might deem necessary, to borrow money and pledge for the repayment thereof any of the securities, to purchase at the foreclosure sale the mortgaged property, to assess the bondholders ratably, to allot to the holders their proportionate interests in the securities of a new corporation organized to take the property acquired at the foreclosure sale, and to supply defects in the plan for the reorganization of the company. The committee purchased the corporate property at the foreclosure sale and organized a new corporation, to which it was conveyed. The committee did not immediately distribute the stock of the new corporation among the bondholders, but caused the directors to make a new contract with the municipality and to obtain a new water supply, and to issue bonds for a specified sum secured by a mortgage on the corporate property. The validity of the foreclosure and the title of the corporation were in litigation for about a year and a half after the foreclosure. *Held*, that the committee, acting in good faith and for the best interests of the bondholders, were not chargeable with a breach of trust, such as to preclude them from recovering compensation for their services and expenses.

Appeal from Supreme Judicial Court, Suffolk County.

Suit by Frederick H. Mills and others against Frederick H. Potter and others. From a decree for plaintiffs, defendant Francis appeals. Affirmed.

Anson M. Lyman and Loton D. Jennings, for appellant. Robert Homans, for appellees Mills and others. Choate, Hall & Stewart, for appellees Potter and others.

KNOWLTON, C. J. The plaintiffs are a committee representing bondholders of the Adrian Waterworks Company, whose bonds were secured by a mortgage upon the property of the corporation. The mortgage has been foreclosed, and a new corporation has been organized under the name of the Adrian Water Company, to which the property of the former corporation, which was bought in by the plaintiffs at the foreclosure sale, has been conveyed. This bill was brought to obtain an allowance of the accounts of the plaintiffs for moneys paid, expenses incurred, and services rendered in the performance of their duties as trustees, and an order directing the distribution of the stock of the new corporation and a discharge from their trust.

The case was referred to a master, who found for the plaintiffs upon all material points. No exceptions were taken to his report, nor any objection made to the decree which is founded upon it, except by one of the defendants, who, since the foreclosure, has succeeded to the title of the holder of one of the bonds. The bonds were all of the denomination of \$1,000, and they were 200 in number, making the mortgage indebtedness \$200,000. One hundred and sixty-eight of these bonds were deposited under the agreement with the plaintiffs, to be held and represented by them for the benefit of the owners. The defendant Francis, who afterwards became the owner of one of these bonds, filed numerous exceptions to the master's report, and appealed from the final decree which overruled these exceptions. So far as appears, all the other bondholders are satisfied with the report and with the decree of the single justice founded upon it. A majority of them have appeared before us by counsel and have asked that the decree be affirmed, alleging that the exceptions taken by the appellant are frivolous, and evidently intended for delay, and that delay will be injurious to the rights and interests of everybody else affected by the litigation. Under these circumstances the decree should not be reversed, unless it plainly appears to be in violation of the legal rights of the appellant.

It will serve no useful purpose to consider in detail the 34 exceptions of the appellant to the master's report. The general objections to the conduct of the plaintiffs, as trustees, may be considered briefly. At the time of the sale under the mortgage, an appeal from the decree of the Circuit Court of the United States, which ordered the foreclosure, was pending before the Circuit Court of Appeals, and after the final decision of that court the case was taken to the Supreme Court of the United States, and was pending there until February 27, 1899. The decree of foreclosure was entered by the Circuit Court on July 20, 1897, and the sale was made later in the same year. The plaintiffs, who purchased the plant for the bondholders, conveyed it to the Adrian Water Company, the new corporation organized in the interest of

the bondholders, on January 8, 1898. At this time there was a contract between the former corporation and the city of Adrian, which the corporation had failed to perform for want of an adequate water supply and for other reasons, and the new corporation was not in a position to perform or enforce the contract, or to avail itself of it in any profitable way, without entering into new negotiations and materially changing its terms. The efforts of the former corporation, the Adrian Waterworks Company, and of its predecessor, the Adrian-Michigan Waterworks Company, which previously had been wound up, showed that it was impracticable to continue business successfully without obtaining a new and independent water supply. The master has found, in substance that the plaintiffs have acted in good faith and, in the exercise of a sound discretion, for the interests of the defendants, and that their efforts have been beneficial to the bondholders.

The most important objections of the defendant Francis to their management of the trust are that they did not immediately distribute the stock of the new company among the bondholders, and that they caused the directors of the new corporation to make a new contract with the city of Adrian, and to obtain a new water supply and to issue bonds to the amount of \$50,000 at one time and \$10,000 at another time to pay expenses; each issue being secured by a mortgage upon the property of the corporation. Under the findings of the master it is not contended that this was not beneficial to the bondholders; but it is contended that it was unauthorized and in violation of their trust. It is true, as contended by the defendant Francis, that the original authority of the plaintiffs is found in the bondholders' agreement, and that such an agreement should be construed strictly; but there is much in the situation of the parties and of their property that is peculiar. Plainly it was expected that the plaintiffs would organize a corporation, if they thought it expedient so to do, and that this would involve the election of officers, with authority to manage the affairs of the corporation.

The bondholders' agreement contained, among others, the following provisions: "(6) The committee is empowered to take any action under said agreement, or otherwise, which the bondholders might have taken, and to make such use or disposal of the deposited securities, and to do such things hereunder, as it may deem necessary or advisable. The committee may, for any purpose of this agreement, borrow money and pledge for the repayment thereof, or for any purpose hereof, any or all of the deposited securities, and shall have a lien thereon, and on any other assets coming into its hands, for compensation, and the expenses and liabilities incurred by the committee hereunder. * * * (7) The committee, in its discretion, may purchase at the foreclosure sale the property covered by the mortgage for any

price not exceeding the principal and interest then accrued and unpaid on all the bonds secured by the mortgage, and any cash payment required to be made for the property to cover the expenses of the trustee and its counsel, legal and other expenses of the court; and, for the purpose of making any such cash payment required at the foreclosure sale, the committee may assess the certificate holders ratably, and have a lien upon the certificate holders ratably, and have a lien upon the interest represented by the certificates for any unpaid assessments, or may borrow money for any such purpose, or for the purpose of otherwise carrying out the provisions of this instrument, and may pledge for the repayment of any moneys so borrowed, any of the bonds and coupons deposited hereunder, or any other assets in the hands of the committee. In case any certificate holder shall fail to pay any assessment provided for in this paragraph, the said committee may sell out the deposited bonds and coupons at such time or place as it may deem advisable, giving 10 days' notice thereof. * * * (9) The committee shall, after the payment of the expenses of foreclosure and all expenses incurred by the committee and its compensation, allot to the certificate holders their proportionate interests in the securities of any new company which may be organized by the committee to take over the property acquired at the foreclosure sale, in case of purchase. (10) The committee shall, prior to the conveyance of any purchased property to the new company, submit to the certificate holders a detailed plan of reorganization, which shall be binding upon all said holders, unless the holders of the majority in interest of the outstanding certificates shall, within 30 days, file with the trust company their written dissent from said plan. It is understood and agreed that, should the new corporation be formed, it shall be within the power of the committee to give to the city of Adrian such portion of the stock of such new company as may be agreed upon by the committee and the city authorities; but such disposition of the stock or any portion thereof in such new company is wholly within the discretion of said committee. * * * (12) The committee may supply any defects or omissions in this plan, which it shall deem necessary to be supplied in order to enable it to carry out the general provisions of the plan, and with the consent of a majority in interest of the outstanding certificates may take any action, other than as provided for in this plan, which the committee shall unanimously determine to be for the benefit ratably of all the certificate holders, and thereupon all the certificate holders shall be bound by such action."

In the plan of reorganization, which was submitted to the bondholders in pursuance of this agreement, is a statement that the committee finds it necessary immediately to raise the sum of \$20,000; and that it may be necessary to raise the further sum of \$20,000

"for expenses of foreclosure and sale and for needed improvements to the property to such extent as may be necessary." It then provides for an assessment upon the bondholders to raise these sums. There is another sentence that refers to the fact that money "may be needed for improvements of the plant." This plan also contains these statements: "It is difficult at this time to submit a further and more detailed proposition than is given above, for the reason that, until the committee obtain possession of the property, it cannot be told with certainty what is the best disposition to be made of it. Under some circumstances it may be best to dispose of it to the city of Adrian. (6) The committee reserves the right given it, in the agreement above mentioned, to borrow such sums of money as it finds necessary and pledge therefor the securities in its hands." A circular accompanying this plan was sent to each bondholder, in which the plaintiffs say: "It is difficult to tell exactly what securities we can place upon the property, and we think it is only necessary for us to say at this time that the bondholders contributing their assessment will be given a prior lien for money contributed, if the ownership of the property continues in the hands of the committee or the associated bondholders." Also: "It is well known by all persons interested in the property that certain improvements in the water supply are needed at Adrian," etc. Also: "If the committee become the purchasers of the property and continue to own it, or to own the stock in the corporation organized for that purpose, it will be necessary to expend more money, which is as yet indeterminate, in the improvement of the water supply."

This plan of reorganization, which was authorized by the original agreement, and which became binding upon bondholders, at least after their acceptance of it by the payment of the first subscription called for under it, plainly contemplated the holding of the property by the plaintiffs for a reasonable time and the expenditure of money for improvements. Moreover, the validity of the foreclosure and the title of the corporation were in litigation for nearly a year and a half after the foreclosure. That money for these improvements might be raised by the plaintiffs, if necessary, by giving security upon the property in their hands, was expected. That the plaintiffs might hold the stock of the new corporation for the benefit of the bondholders, for a reasonable time after its organization, with a view to the promotion of their common interests, was also contemplated. We see nothing in the action of the plaintiffs in reference to the new contract of the corporation with the city of Adrian, or the procurement of a new water supply and the issue of securities to pay for it, which constitutes a breach of trust. Something of this kind seems to have been necessary in order to accomplish the general purpose of the bondholders in their reorganization. The

committee was authorized by the original contract, not only to supply defects or omissions in the plan to carry out its general provisions, but, with the consent of a majority in interest, to take any action which they should unanimously determine to be for the benefit ratably of all the certificate holders. The failure to provide for continued litigation involving the title for a long time after the foreclosure, while important action for improvement of the plant was imperatively necessary, might well be deemed a defect or omission in the plan; or, if the action of the plaintiffs was "other than as provided for in this plan," the consent of the majority in interest of the holders of the outstanding certificates, in connection with the payment of both assessments upon 164 of the bonds, and with the other facts that appear in the case, might well be inferred. In the circular sent to the several bondholders, in connection with the call for the second assessment, was this statement: "Until the actual cash cost of the improvement is ascertained and the expenses of the committee have been fixed, it is impossible to determine the exact amount of securities which will be issued on the plant. As said before, the cost of improvements will exceed the amount now called in." The payment of the second assessment was made after this, and it indicated consent to the issue of securities by the plaintiffs.

Our conclusion as to the conduct of the plaintiffs in these important particulars goes far towards settling all the other questions in the case. We have no doubt of the right of the plaintiffs to make the assessments that they made. What we have said sufficiently disposes of exceptions 1, 2, and 9; also of exceptions 4, 5, 6, 7, and 8.

It is contended that the raising of money by mortgage was such a violation of the agreement to give bondholders a lien for the assessments paid as should deprive the plaintiffs of all rights. But the stipulation about liens was indefinite, with expressions of doubt as to how it could be carried out. We are of opinion that it was so far modified by the other provisions of the arrangement that the making of the mortgages cannot be treated as a breach of trust which deprives the plaintiffs of their right to have compensation and to be reimbursed for their expenses. Under the peculiar circumstances of this case, the fact that one of the plaintiffs was a member of a firm to which commissions were paid for the sale of the bonds does not affect the right of the plaintiffs to have these payments allowed. *Turnbull v. Pomeroy*, 140 Mass. 117, 8 N. E. 15.

The failure of the master to compel the witness Jordan to answer the hypothetical question put by the defendant Francis was not an error. As the question was framed, and in view of the statement of the witness, it was in the discretion of the master to leave it unanswered.

Decree affirmed.

(189 Mass. 263)

TURNERS FALLS FIRE DIST. v. MILLERS FALLS WATER SUPPLY DIST.

(Supreme Judicial Court of Massachusetts. Franklin. Oct. 19, 1905.)

1. WATERS—SUPPLY TO MUNICIPALITY—CONTRACT—CONSTRUCTION.

Where defendant municipal corporation contracted with plaintiff for a supply of water throughout its district, as authorized by St. 1896, p. 103, c. 150, § 3, and at the time the contract was made defendant's territory was all located within the town of M., and the contract called for a supply of water only for use within such limits, the contract was not modified, so as to require plaintiff to furnish water outside those limits, by St. 1902, p. 414, c. 500, authorizing defendant to extend its boundaries to include additional territory in another town; the statute containing no reference to the contract, or anything to indicate that the Legislature had knowledge of its existence or intended to act thereon.

2. INJUNCTION—THREATENED INJURY.

Where defendant municipal corporation was using and threatening to use water belonging to plaintiff in a way which made it difficult, if not impossible, for plaintiff to determine how much was being wrongfully used, or to interrupt the wrongful use without breaking its contract to supply original territory, plaintiff was entitled to relief by injunction; its remedy at law being inadequate.

3. EQUITY—BILL—DEMURRER—LACHES.

A bill in equity is not demurrable on the ground of laches, unless laches appear from the averments of the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 498.]

Appeal from Superior Court, Franklin County.

Bill by the Turners Falls Fire District against the Millers Falls Water Supply District. A demurrer was sustained to the bill, which was dismissed, and plaintiff appeals. Reversed and demurrer overruled.

Fredk. L. Greene and Wm. A. Davenport, for appellant. Dana Malone and Jas. J. Leary, for appellee.

KNOWLTON, C. J. The plaintiff is a municipal corporation, organized under St. 1886, p. 213, c. 266, and the defendant is a similar corporation, organized under St. 1896, p. 101, c. 150. Acting under the authority of section 3 (page 103) of the last-mentioned statute, the plaintiff made a contract in writing with the defendant to supply it with water for use throughout the district, to be paid for at a certain price per 1,000 gallons. When this contract was made the territory of the defendant was all within the town of Montague, and the contract calls for a supply of water only for use within the limits of the district. Neither the plaintiff nor the defendant had any legal right to supply water to be used outside of the town of Montague. *Smith v. Stoughton*, 185 Mass. 329, 70 N. E. 195. Under St. 1902, p. 414, c. 500, the defendant was authorized to extend its limits so as to include certain designated territory in the town of Erving. The limit of the defendant's district having been so extended,

the defendant extended its water pipes into the town of Erving, and has since been using water furnished by the plaintiff to supply inhabitants of that town. The bill is brought to enjoin the defendant from using the water to supply that part of the district which was added under St. 1902, p. 414, c. 500. From a decree sustaining the defendant's demurrer, and dismissing the bill, the plaintiff appeals.

No one would contend that the contract, when executed, gave the defendant any right to water, except for use in the district as it then was. The territory for which the water was to be supplied was fixed definitely by the contract, and it includes no part of the town of Erving. The defendant's contention is that, when its territory was enlarged, the contract was also enlarged, so that the plaintiff is obliged to furnish water for use in another place. There is nothing in the contract itself on which such a contention can be founded, for its language does not indicate that the enlargement of the district to include a part of another town was then thought of. The question is, therefore, whether the statute changed the contract, so as to put an additional burden upon the plaintiff. This question may be divided into two parts: First, whether it was within the constitutional authority of the Legislature so to change the contract; and, secondly, whether the statute purports to change it.

It is in the power of the Legislature to change the boundaries of counties, towns, and cities, and, incidentally to the exercise of this power, to make provisions for the transfer of property and the payment of debts by such corporations. *Stone v. Charlestown*, 114 Mass. 214. While the pecuniary interests of the taxpayers may be affected to some extent by legislation of this kind within the limits of constitutional authority, it is at least very doubtful whether the Legislature could constitutionally increase the contractual obligation of a municipal corporation which had agreed to furnish water to another similar corporation, by extending the boundaries of the latter into another town and providing that the contract should apply to the additional territory. Const. U. S. art. 1, § 10. Without intimating that the statute before us would be constitutional if it made such a provision, we are of opinion that it was not intended to affect the rights of either party under the contract. It contains no reference to the contract, and there is nothing in it to indicate that the Legislature had any knowledge of the contract. If it were intended to change the contract and put an additional burden on the plaintiff, we should expect to find a plain provision to that effect. In section 2 authority is given to issue bonds "for the purpose of enlarging and extending its waterworks." In this there is no implication that it could

enlarge and extend them, otherwise than by making new arrangements to that end, including provisions for an additional supply of water. The defendant is continually using and threatening to use water belonging to the plaintiff in a way that makes it difficult, if not impossible, for the plaintiff to determine how much is wrongfully used, or to interrupt the wrongful use, without breaking its contract as to the supply for the original territory. This entitles the plaintiff to equitable relief. The remedy at law would be inadequate.

The defendant contends that the demurrer should be sustained on the ground of laches, but the bill does not show laches. It is only when laches appears upon the averments of the bill that a demurrer can be sustained on this ground. It may be that there are good reasons why the plaintiff should not be charged with neglect in not having brought its suit earlier.

Decree reversed. Demurrer overruled.

(189 Mass. 277)

MOODY v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. CARRIERS—CARRIAGE OF PASSENGERS—SAFE PLACE TO ALIGHT.

A railroad company, which for the purpose of permitting its passengers to alight from its trains provides safe means of egress and a safe and convenient place on which to alight, performs the duty imposed on it by law of using the highest degree of care consistent with its undertaking, and no question of degree of care arises.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1224, 1230-1233.]

2. SAME—ASSISTANCE BY CONDUCTOR—REASONABLE CARE.

Where a passenger did not need assistance in alighting from a train, but the conductor undertook to assist him in compliance with the rule of the company requiring conductors to render assistance to passengers boarding or alighting from trains, the company was liable only for the failure of the conductor to exercise reasonable care under the circumstances.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1224, 1230-1233.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by one Moody, administrator, against the Boston & Maine Railroad. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

E. H. Vaughan and Henry B. Montague, for plaintiff. Chas. M. Thayer and Alex. H. Bullock, for defendant.

LORING, J. This case is here on two exceptions taken by the plaintiff to the charge to the jury. It was an action at common law for injuries and suffering caused by an injury on August 25, 1903, from which the intestate died on April 17, 1904. The plaintiff, a married woman weighing about 180 pounds, was a passenger on a train to Boston, arriving between 11 and 12, noon.

She had with her, in addition to one other child, a boy aged two, which, owing to infirmity, had to be carried. She came onto the platform to leave the car in which she had been, with this child of two on her right arm, holding him in place with her left hand, in which she had also a shopping bag. Her story is that, as she stepped from the lowest step on to the platform, the conductor, who was standing there, put his right arm under her right elbow, but let go of her, and she fell heavily to the platform, and that he said it was his fault; that he ought not to have let go of her. The conductor's story is that he asked her to allow him to take the baby, to which she said, "No"; that he then put up his hands to assist her, when she fell, pitching him out of the way; and that she said she tripped.

After telling the jury that the duty of the defendant as a carrier of passengers to the plaintiff as a passenger "was to use the highest degree of care consistent with the undertaking, the running of its train, the motive power used, and other things," the presiding judge went on to say that: "Ordinarily, * * * if a railroad company, for the purpose of permitting its passengers to depart from its train, provides safe means of egress and a safe and convenient place upon which to alight, that accomplishes and fulfills the duty which the law imposes upon it. I say ordinarily. Of course, the situation must be changed by what in fact appears or was reasonably excepted by those having the management of the trains. That degree of care is governed and is affected by what the defendant, through its servants, either knows or ought to know. If you are coming down from your place of residence to-day, and getting off at Lincoln Square, being in your ordinary health, unincumbered, and being physically and mentally reasonably sound, and arriving at Lincoln Square, and the steps of the car on which you are riding are safe, ample, and adapted to permit you to step in safety, and the distance is such between the lower step and the platform that you can easily accomplish it, you would be likely to say that was a fulfilling of the duty which the railroad company owes to you." It is stated in the bill of exceptions that "the plaintiff duly excepted to so much of the charge as stated that, if the defendant provides safe means of egress and a safe and convenient place to alight, that fulfills the duty imposed by law." The judge went on to say that while this is ordinarily so there may be mental infirmity, physical incapacity, or peculiar conditions which ought to give notice to the carrier that there was danger in the passenger's alighting unless something else was done. In case there was nothing specially calling for extra attention, any neglect on the part of the conductor "would not be negligence on the part of a defendant so far as the obligation as a common carrier of passengers is concerned."

But if "the situation was such that, reasonably caring for the safe alighting of a passenger, it was obligatory upon him as representing the defendant to aid her, then in aiding her the road is held to the highest degree of care." He then took up the following rule of the defendant railroad: "Rule No. 584. Conductors and brakemen will always step down onto the station platform, at stations where trains stop, and render proper assistance to passengers taking or alighting from the cars, and brakeman will not give the conductor the all right signal until they have again boarded the train, and looked through the cars to see that there are no more passengers to leave, and return to the station platform." Speaking of this rule, the presiding judge said: "It further provides that he shall aid passengers to alight. It, as I recall it, makes no exception. It leaves nothing to the judgment of the conductor as to the degree and extent of that assistance. But if this conductor, acting within the scope of his employment by the railroad, his employer, and under and by virtue of that rule, starts to assist a passenger off, not requiring assistance otherwise, as I have illustrated before, if he enters upon that employment, or that particular part of the duty of his employment, under that rule, then he is held to the exercise, and the defendant corporation is held to the exercise, of reasonable care in performing properly the duty which it assumes."

1. As to the first exception: What the plaintiff complains of in his argument is not what he put forward as his objection to this part of the charge. What the defendant has argued is that the jury were told that in furnishing proper egress from the car on which a passenger is carried the carrier is not bound to use the highest degree of care, but ordinary care only. The objection the plaintiff made to this part of the charge was "that, if the defendant provides safe means of egress and a safe and convenient place to alight, that fulfills the duty imposed by law." If the means of egress are in fact safe, no question of the degree of care arises.

2. The second exception, as we construe the bill of exceptions, is to this: After telling the jury that the defendant was bound to assist a passenger in alighting, if his appearance was such as to indicate to a servant exercising the highest degree of care that she needed assistance, and, if assistance was required, that it had to be rendered with the highest degree of care, the presiding judge told them that in a case where they found under the preceding instruction that the plaintiff did not need assistance, and where in spite of that the conductor in fact undertook to assist her in compliance with a rule of the defendant, the defendant was liable for reasonable care only. We are of opinion that the plaintiff has no ground of complaint. In a case where, although the highest degree of care does not require that

a passenger should receive assistance, the conductor attempts to assist her because of a rule of the defendant, he is doing something which neither the law relating to carriers nor the contract between the passenger and the carrier requires him to do. If the conductor exercises reasonable care under those circumstances, the plaintiff cannot complain.

Exceptions overruled.

(189 Mass. 231)

HARRINGTON v. HARRINGTON.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. JUDGMENT—RES JUDICATA.

Where the probate court, on a petition by a wife for separate support and for the custody of the children, which alleged that the husband was guilty of lewd conduct toward a domestic in his employ, found that the wife was living apart from her husband for a justifiable cause, but not sufficient to justify a permanent separation, and directed that she should have the custody of a child until further order of the court, and that the husband should pay for the support of the wife and child a specified sum, the determination of the probate court was a final adjudication of the matter alleged in the petition, with the exception of the custody of the child, expressly reserved for further consideration, and is as conclusive as a judgment at law.

2. HUSBAND AND WIFE—SEPARATE MAINTENANCE—CUSTODY OF CHILDREN—AUTHORITY OF COURT.

Where the probate court, on a petition by a wife for separate support and for the custody of the children of the parties, grants the wife separate support and awards to her the children, subject to further orders of the court, a subsequent order as to the custody of the children is under the authority conferred by Rev. Laws, c. 153, § 87, giving the probate court jurisdiction over the custody of children in case the parents live separately.

3. JUDGMENT—RES JUDICATA.

An order of a probate court on a petition by a wife for separate maintenance is conclusive in a bill for divorce on all matters put in issue or necessarily involved and actually determined on the hearing on the petition, but not in regard to matters not then in controversy and not heard and determined.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1250, 1251, 1263.]

4. SAME.

A petition by a wife for separate support charged the husband with lewd and lascivious conduct toward a domestic. She filed specifications charging lewd conduct and cruelty, consisting of lewd acts in her presence toward the domestic. The specifications did not charge adultery. The court found that the wife was living apart from her husband for a justifiable cause, not justifying a permanent separation. Held, that the adjudication of the court on the petition for support was not a bar to a subsequent bill for divorce on the ground of adultery.

Report from Supreme Judicial Court, Worcester County; Wm. Cushing Wait, Judge.

Libel for divorce by Sarah A. Harrington against James L. Harrington. The libel was dismissed, and the cause was reported to the

Supreme Judicial Court. Cause ordered for trial.

Franklin Freeman, for libelant. C. E. Tupper, for libelee.

LORING, J. This is a libel for divorce, brought by the wife for the adultery of the husband, in which the judge ruled that the libelant was barred by proceedings in the probate court for separate support, and reported the case for the consideration of this court. The petition for separate support was filed April 24, 1900. It alleges the three grounds for separate support specified in the statute (now Rev. Laws, c. 153, § 33), to wit: (1) Failure without just cause to furnish suitable support for her; (2) desertion; and (3) that she is living apart from her husband for justifiable cause. After alleging these three grounds in the order above set forth, the petition goes on in these words: "And she herein sets forth the following specifications, to wit: That the said James L. Harrington, against your petitioner's most earnest and solemn protests, has been guilty of grossly lewd, wanton, libidinous, and lascivious conduct, actions, and behavior toward one Helen Harrington, a domestic in his employ, with whom he became improperly familiar to such an extent as to become wholly unbearable by your petitioner, and to seriously affect and undermine her health." On this petition an order was made on the 4th day of April of the following year, 1901. In that order it was found by the court "that said petitioner at the time of filing of this petition was, and ever since has been, living apart from her said husband for justifiable cause, but that said cause does not justify a permanent separation of the parties," and it was ordered that the petitioner have the custody of the youngest of the four children, a boy, Harold by name, then one year and ten months old, and that the husband pay to the wife, "for the support of herself and said minor child, the sum of \$100 forthwith and the further sum of \$25 on the 1st day of May next." This order was made "without prejudice to the right of either party to have a further order or decree relative to the custody of said minor children and their support at any time after said May 1st." On June 24, 1901, a further order was made, dealing with the custody of the minor children not disposed of in the order of the 4th day of April. In that order it is found "that said petitioner is actually living apart from her said husband," and it is ordered that the petitioner have the custody of Harold, and also of a daughter, Ruth, then seven years old, and that the husband pay to the petitioner, "for the support of said minor children, the sum of \$25 forthwith and the further sum of \$16 on the 1st day of each and every month hereafter until further order of said court." From the second order an appeal was taken to the superior court,

and the order was affirmed. No appeal was taken from the first order. The report states that "it was agreed by the parties that on April 24, 1900, libelant filed in the probate court for the county of Worcester, against the libelee, a petition for separate support and the care, custody, and maintenance of their children, * * * charging the libelee with adultery, and filing specifications thereof substantially the same as those filed in the libel for divorce, and that in the probate court the libelant introduced, among other competent testimony, evidence in support of all said charges, and the libelee introduced evidence in denial thereof and substantive evidence of a condonation, which was contradicted."

There is no question as to the law, but there is a difficulty arising from contradictory statements in the report as to what was before the probate court. It is plain that the order of the probate court, made on April 4, 1901, was a final adjudication of all matters stated in the petition, with the exception of the custody of the minor children after May 1, 1901. That was in terms reserved for further consideration. The subsequent order as to the custody of the children was manifestly made under what is now Rev. Laws c. 153, § 37, giving the probate court jurisdiction over the care, custody, education, and maintenance of the children in case "the parents of minor children live separately." It is also plain that an order of the probate court on a petition for separate maintenance, while unrevoked, is a bar to the same extent as a judgment in an action at law. *Miller v. Miller*, 150 Mass. 111, 22 N. E. 765; *Watts v. Watts*, 160 Mass. 464, 465, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509. That is to say, the order on the petition for separate support was binding and conclusive here, in the libel for divorce, on all matters shown to have been put in issue or to have been necessarily involved and actually tried and determined, but not in regard to matters not then in controversy and not heard and determined, although it is conclusive so far as the final disposition of the prior cause of action is concerned. It was so laid down in *Watts v. Watts*, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509, and it was in accordance therewith held in that case that a husband could maintain a libel for the adultery of his wife after a decree of the probate court adjudging that she was justifiably living apart from her husband. If in the case at bar the wife in fact undertook to substantiate the allegation that she was justifiably living apart from her husband by proving his adultery, she is now barred, and the ruling was right. She is now barred, for the adjudication of the probate court was that at the time of filing the petition on April 24, 1900, and from that time to the date of the order, April 4, 1901, the wife had been living apart from her said husband for a

justifiable cause, "but that said cause does not justify a permanent separation of said parties." If the wife under her petition undertook to prove adultery, that is a finding that adultery was not made out, but that some other cause was made out justifying her in living apart for a time, which time apparently ended on May 1st.

The statement of the report that the petition for separate support was a petition "charging the libelee with adultery" is contradicted by the petition itself, which is set out in full in the report. That is a petition not charging him with adultery, but with "grossly lewd, wanton, libidinous, and lascivious conduct, actions, and behavior toward one Helen Hannington, a domestic in his employ, with whom he was improperly familiar to such an extent as to become wholly unbearable by your petitioner, and to seriously affect and undermine her health." It is stated in the report that in the probate court the wife filed specifications thereof (i. e., adultery) substantially the same as those filed in the libel for divorce, and that "in the probate court the libellant introduced, among other competent testimony, evidence in support of all said charges, and the libelee introduced evidence in denial thereof and substantive evidence of a condonation, which was contradicted." We assume in favor of the libelee that there were specifications filed in the probate court in addition to those set forth in the body of the petition for separate support. What were they? The report states that they were "substantially the same as those filed in the libel for divorce." In the libel for divorce now before us there were originally eight specifications filed. After the libelee filed his answer, two further specifications were filed. Seven of the original eight charge lewd conduct with the Helen Hannington with whom the adultery now in question is charged to have been committed, and the eighth is a specification of cruel and abusive treatment, consisting in the perpetration of a great number of acts of lewd conduct with the Hannington woman in the presence of his wife, "against her will," and "against her special request not to do so." It is true that, if all the facts of lewd conduct specified were true, the inference that adultery had been committed would have been well-nigh irresistible. But the specifications do not of themselves, nor by reference to the allegations of the petition of which they are the specifications, charge adultery. If these were the charges on which evidence was introduced in the probate court, the fact of adultery was not there put in issue. In addition to the original eight specifications filed in the libel for divorce now before us, there were two added by amendment after the libelee's answer was filed. These two charge adultery. But the report states that in the libel now before us the "libellant charged adultery and cruel and abusive treat-

ment, and filed specifications which were identical as to both offenses charged." The specifications which are "identical as to both offenses charged" are the first eight only.

In view of this statement, and of the other contradictory statements of the report above mentioned, we are of opinion that, as matter of construction of this report, the "charges" in support of which the libellant introduced evidence in the probate court did not include the charge of adultery. No charge of adultery was made in the petition for separate support. No charge of adultery was made in the specifications, assuming that there were specifications there in addition to those set forth in the body of the petition, if the specifications there were the same as the eight originally filed here. As we have said, we are of opinion that, as a matter of construction of the report now before us, the specifications there are to be taken to be the same as the eight originally filed here. If this is not so, and the ninth and tenth specifications filed here were in fact filed there, that fact may be shown at the trial.

Case to stand for trial.

(139 Mass. 275)

GORHAM, v. MILFORD, A. & W. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. STREET RAILROADS—INJURIES TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence in an action against a street railroad company for the death of a person who was struck by a street car examined, and held not to prove decedent's freedom from contributory negligence, notwithstanding the motorman's negligence just before the accident.

2. SAME—BURDEN OF PROOF.

In an action against a street railroad company for the death of a person who was struck by a car, plaintiff has the burden of proving that decedent was in the exercise of ordinary care, though the motorman was negligent just before the accident.

[Ed. Note.—For cases in point, see vol. 44. Cent. Dig. Street Railroads, § 228.]

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Bridget Gorham, administratrix, against the Milford, Attleboro & Woonsocket Street Railway Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

J. B. Ratigan and J. E. Swift, for plaintiff.
W. Williams, J. C. F. Wheelock, and G. B. Williams, for defendant.

KNOWLTON, C. J. The plaintiff's intestate, while walking along a road in the evening, was run over and killed by one of the defendant's electric cars. We will assume, in favor of the plaintiff, that there was evidence from which the jury might have found that the motorman was negli-

gent just before the accident in being engaged in conversation with a passenger who sat near him on the front seat. The question before us is whether there was any evidence that the plaintiff's intestate was in the exercise of due care. He was familiar with the road on which the car was running, and he knew of the existence of the track and the use of it by electric cars. There was no sidewalk, and no regular path on the road. The track was on the right-hand side of the road as the plaintiff's intestate was facing, and the wrought portion, where pedestrians and ordinary vehicles were accustomed to pass, was on the left. The evening was dark, and the car carried a headlight and other lights, which were said by some of the witnesses to be dim. When last seen, a short time before the accident, the plaintiff's intestate was walking on the left of the track, about 2 feet from it. Although, according to the testimony, he had three drinks of beer that evening, witnesses who saw him testified that he was perfectly sober. The last witness who saw him before he was struck was called by the plaintiff, and testified that he met him in the road and had a short conversation with him, and then passed on, leaving him walking in the opposite direction, about 2 feet from the track. He also testified that the coming car was "plain to be heard" at that time, and that he afterwards walked on about 150 feet from the place where he met the deceased, and there met the car going at the rate of 12 or 15 miles an hour in the same direction as the deceased.

In regard to the conduct of the plaintiff's intestate after he parted from this witness, we have no evidence. There is nothing to show that he was in the exercise of due care. If he was reasonably attentive to what was going on, and thoughtful of the dangers of the situation, it would seem that he easily could have kept out of the way of the car. We should expect him to hear and see the approaching car. There was plenty of room for him to stand or walk in safety. If he was walking in the same line where the witness last saw him, a step to the left would have put him out of danger. The burden was upon the plaintiff to prove that her intestate was in the exercise of due care, and the judge rightly ruled that this burden was not sustained. *Cox v. South Shore, etc., Railway Company*, 182 Mass. 497, 65 N. E. 823; *Dooley v. Greenfield, etc., Street Railway Company*, 184 Mass. 204, 68 N. E. 203; *Mathes v. Lowell, etc., Street Company*, 177 Mass. 416-420, 59 N. E. 77; *Gleason v. Worcester Consolidated Street Railway Company*, 184 Mass. 290, 68 N. E. 225; *Itzkowitz v. Boston Elevated Railway Company*, 186 Mass. 143, 71 N. E. 298.

Exceptions overruled.

(189 Mass. 270)

DOLPHIN v. WORCESTER CONSOL. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. CARRIERS—STREET RAILROADS—INJURIES TO PASSENGERS—RULES—NEGLIGENCE.

Where plaintiff's intestate, while sitting in an open electric car, was thrown therefrom as it was being driven around a curve at a high rate of speed, and while a wooden rail intended for the protection of passengers, running along outside of the stanchions, was up, and the company had provided by rule for a speed not exceeding three miles an hour on curves, the company was not guilty of negligence in failing to adopt a rule requiring the rail on the outer side of curves to be down when its cars are rounding such curves; the rails being intended only to prevent passengers from leaving the car on the inner side, where there are double tracks.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1202-1204.]

2. SAME—REQUEST TO CHARGE—GROSS NEGLIGENCE.

In an action for injuries to a passenger, a request to charge that the duty of exercising the highest degree of care is incumbent on the defendant, and any failure on the part of its servants to exercise that degree of care is "gross negligence," was properly refused, as a failure to exercise the highest degree of care constitutes slight negligence only.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1087, 1327.]

3. NEGLIGENCE—GROSS NEGLIGENCE.

A request to charge that the term "gross," in the term "gross negligence," when used with reference to the degree of care required and not fulfilled, is merely an expletive, when the degree of care required is the very highest, was properly refused, since under such circumstances the term implies a gross failure to exercise that degree of care.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1087; vol. 37, Cent. Dig. Negligence, §§ 15, 374.]

4. CARRIERS—DEGREES OF NEGLIGENCE.

There are degrees of negligence in an action against a carrier for the death of a passenger, under Rev. Laws, c. 111, § 267, providing that if a corporation operating a railroad, by reason of its negligence or by reason of the unfitness or gross negligence of its agents or servants while engaged in its business, causes the death of a passenger, etc., it shall be punished by a fine not less than \$500 nor more than \$5,000, which shall be paid to the executor or administrator, etc.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1085, 1087, 1327.]

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by John Dolphin, as administrator, etc., against the Worcester Consolidated Street Railway Company. A verdict was rendered in favor of defendant, and plaintiff brings exceptions. Overruled.

Edwd. J. Melanefy, John H. Mathews, and Thos. A. McAvoy, for plaintiff. T. H. Dewey, Chas. O. Milton, and Chandler Bullock, for defendant.

LORING, J. This is an action of tort, under Rev. Laws, c. 111, § 267, for the death of a passenger on a street railway.

The plaintiff's case was that, while sitting in an open electric car, his intestate was thrown out by the car being driven round a curve at a high rate of speed, while a wooden rail was up which runs along the outside of the stanchions supporting the roof of the car, and which is lowered to prevent passengers getting off or raised to allow them to do so. It appeared that the curve was a very sharp one, having a radius of 53.5 feet, and was in the busiest part of the town of Clinton; also, that the track was a single track. It also appeared that the conductor did not warn the intestate not to get off. The plaintiff put in evidence the following rules of the defendant railway:

"Rule 99. The speed of cars on sharp curves, frogs, switches, and cross-overs must not exceed three miles per hour."

"Rule 44. Conductor's signal to stop car, except in cases of emergency, must be given by him in ample season to allow motorman to make such stop at the nearest stopping place."

"Rule 41. Three bells—to stop instantly."

"Rule 43. * * * Exercise especial care for women, children, infirm or aged persons."

"Rule 34. Conductors. Notify passengers desiring to leave car not to do so until the car has come to a full stop, and then from the right-hand side only. Extreme care in this respect is necessary on open cars, as there is great danger in leaving the car from the left-hand side."

One of the plaintiff's witnesses testified that the car at the time of the accident was going around the curve at the rate of five or six miles an hour.

The defendant's case was that, after giving a signal to stop the car at a stopping post beyond the curve, and while the car was going 3 to 3½ miles an hour, the plaintiff's intestate got down on the running board and stepped off the car, with her back to the front of it.

The plaintiff asked for the following rulings: "(1) If the jury find from all the evidence that the plaintiff's intestate left or was thrown from the car in consequence of the negligence of the defendant corporation, and came to her death by reason of that negligence, and also find that she was at fault, and that the want of care on her part contributed to her injury, nevertheless the plaintiff may recover. (2) If the jury find that the defendant corporation should have provided barriers to prevent passengers from alighting from the left side of the car at this particular place, and did not do so, or if, having provided such barriers, that the defendant corporation failed to instruct its servants to so place them as to guard against

and prevent any possible danger, so far as practicable, then the corporation was negligent, and the plaintiff may recover, if the jury consider her death attributable to such neglect. * * * (6) When the duty of exercising the highest degree of care is incumbent upon the defendant, any failure upon the part of its servants to exercise that degree of care is gross negligence. (7) The term 'gross,' in the allegation 'gross negligence,' when used with reference to the degree of care required and not fulfilled, is merely an expletive, when the degree of care required is the very highest. (8) There are no degrees of negligence."

The plaintiff excepted to the refusal of the court to give the rulings requested, and to such parts of the charge as were in conflict with them. The defendant had a verdict, and the case is here on these exceptions.

1. The court was right in refusing to give the first and second rulings asked for. There was no evidence of negligence on the part of the corporation. The plaintiff's argument here is that the injury would not have happened, as he claimed it happened, if the railing had been down. That may be conceded. But that is not the question. The question is whether it was negligence on the part of the corporation to have failed to adopt a rule requiring the rail on that side of the car, which is on the outer side of the curve, to be put down, when one of its cars is going around curves like the curve here in question. The corporation had provided by rule for a speed not exceeding three miles an hour on sharp curves. It is manifest that the rails in question were intended to prevent passengers from leaving a car on the inner side, where there are double tracks. In our opinion there is no such probability of a passenger's being thrown bodily out of his seat while the car is going round a curve as to require the corporation, in the exercise of the highest degree of care, to adopt a rule which should insure his being held in his seat by physical force. *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, 2 N. E. 97, and *Id.*, 141 Mass. 463, 5 N. E. 804, cited by the plaintiff, does not help him.

2. The judge was right in refusing to give the sixth ruling asked for. A failure to exercise the highest degree of care is slight negligence.

3. The seventh ruling requested was wrong. The term "gross negligence," in a case where the degree of care due is the highest degree of care, means that there has been a gross failure to exercise that degree of care.

4. There are degrees of care in cases under *Rev. Laws, c. 111, § 267*, by force of that act. Exceptions overruled.

(189 Mass. 285).

MATTHEWS v. CARLTON.(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)**1. LANDLORD AND TENANT—CREATION OF RELATION.**

Where defendant orally agreed to hire a tenement of plaintiff, beginning on the 1st day of July following, his act in moving a part of his goods into the tenement in June with the consent of the tenant then in possession, and subsequently removing them before the 1st of July, did not constitute him a tenant of plaintiff, nor affect his rights or liabilities under the oral agreement.

2. STATUTE OF FRAUDS—SALE OF INTEREST IN LAND.

An oral agreement to hire a tenement by the month beginning at a future date is within Rev. Laws, c. 127, § 3, declaring that no estate or interest in land shall be assigned, granted, or surrendered unless by writing or operation of law, and is also within Rev. Laws, c. 74, § 1, cl. 4, requiring contracts for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them to be in writing, etc.; and no action can be maintained for the enforcement thereof.

3. LANDLORD AND TENANT—ACTION FOR RENT.

An action for rent cannot be maintained where the relation of landlord and tenant never existed between the parties and defendant never entered into occupation, actual or constructive, of the premises.

Appeal from Superior Court, Worcester County.

Action of contract by Robert F. Matthews against Herbert E. Carlton. Judgment was rendered for defendant upon agreed facts, and plaintiff appealed. Affirmed.

John H. Mathews, for appellant. Rufus B. Dodge and Wm. J. Taft, for appellee.

KNOWLTON, O. J. This case comes before us on an agreed statement of facts, by which it appears that, in the early part of June, 1904, the defendant "orally agreed to hire a tenement of the plaintiff * * * at \$25 per month, beginning on the 1st day of July, 1904." The tenement was then occupied by a tenant, who was to hold it until July 1, 1904, and who paid the plaintiff his rent up to that date. With the consent of this tenant, who was then occupying the tenement, the defendant moved a part of his goods into the tenement. The tenant afterwards moved out, and the defendant moved other goods in, but subsequently, before the 1st day of July, moved all the goods out and notified the plaintiff that he should not take the tenement. The question is whether the defendant is liable to the plaintiff for rent for the month of July. His moving a part of his goods into the house in June, with the consent of the tenant then in possession, and his subsequent removal of them before the expiration of the term of the tenant, does not affect his rights. He was not in possession under his contract with the plaintiff, and he never became a tenant of the plaintiff. He never entered under his agreement, but, on the contrary, before the time when his term

MASS. DEC. 73-77 N.E.—29

was to begin he gave the plaintiff notice that he should not enter.

By Rev. Laws, c. 127, § 3, it is provided that an estate or interest in land, created without an instrument in writing signed by the grantor or his attorney, shall have the force and effect of an estate at will only, and that "no estate or interest in land shall be assigned, granted, or surrendered, unless by such writing or by operation of law." The oral agreement, therefore, gave the defendant no estate or interest in the land, and under this section, as well as under Rev. Laws, c. 74, § 1, cl. 4, no action could be maintained for the enforcement of it.

The plaintiff's declaration contains two counts—one for so-called rent or for use and occupation, and the other for damages for a breach of the oral agreement. The first count cannot be maintained, because the relation of landlord and tenant never existed between the parties. The defendant declined to become the plaintiff's tenant before the time fixed for the beginning of the term. There can be no liability of this kind without an occupation by a tenant, actual or constructive, as well as a contract, express or implied. *Rogers v. Coy*, 164 Mass. 391, 41 N. E. 652; *Bacon v. Parker*, 137 Mass. 309-312; *Central Mills v. Hart*, 124 Mass. 123; *Leonard v. Kingman*, 136 Mass. 123; *Merrill, Adm. v. Bullock*, 105 Mass. 486; *Eastman v. Anderson*, 119 Mass. 526-531; *Larkin v. Avery*, 23 Conn. 304. The second count is upon an agreement which is within the statute of frauds. Rev. Laws, c. 74, § 1, cl. 4; *White v. Wieland*, 109 Mass. 291; *Parker v. Tainter*, 123 Mass. 185. Judgment for the defendant.

(189 Mass. 280)

TRACY v. GINZBERG.(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1905.)**1. INTOXICATING LIQUORS—LICENSES—ASSIGNABILITY.**

A license to sell intoxicating liquor, the issuance of which is authorized by Rev. Laws, c. 100, is a mere personal privilege, and is not assignable or transferable by the holder.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, §§ 108-112.]

2. SAME—FUTURE LICENSES—PREFERENCE.

Rev. Laws, c. 100, § 20, amended by St. 1902, p. 122, c. 171, authorizing the refunding of a part of the money paid for the liquor license if the licensee dies before the expiration of the term and giving the license board authority to issue another license of the same kind for the remainder of the period, when the license is surrendered and canceled before the expiration of the term, does not give to the holder of a license any right with reference to the granting of future licenses after the expiration of the term.

3. BANKRUPTCY—LIQUOR LICENSES—TRANSFER—PROCEEDS.

Where, under the custom of the Boston police commissioners to recognize the right of a liquor licensee to nominate as an applicant for a new license a successor to his business, a bankrupt's liquor license was transferred to his successor by the bankrupt's trustee, the

amount paid for the transfer and to obtain the nomination of the bankrupt and his trustee for a new license, was not property received by the trustee to the use of one whose principal had advanced money to pay for the license, but was properly held by the trustee for distribution among the bankrupt's creditors.

Appeal from Supreme Judicial Court, Suffolk County.

Bill by Robert J. Tracy against Albert A. Ginzberg to recover the price received by defendant for the sale of a liquor license as money received to plaintiff's use. From a decree dismissing the bill, plaintiff appeals. **Affirmed.**

Thos. J. Barry and H. J. Jaquith, for appellant. A. W. Putnam, for appellee.

KNOWLTON, C. J. The money which the plaintiff seeks to recover was received by the defendant as a trustee in bankruptcy on account of a privilege which the board of police commissioners of Boston allowed to the bankrupts as the holders of two liquor licenses which were in force at the commencement of the proceedings in bankruptcy. The plaintiff contends that he is entitled to the money as the assignee of the interest of the bankrupts in the licenses and as a joint licensee with them; his name being joined with theirs in the licenses, not because he was a partner in the business which they were conducting, but to furnish security for money that his principal had advanced to pay for the licenses. A license to sell intoxicating liquor, under Rev. Laws, c. 100, is a personal privilege, which may be valuable as property, in a certain sense, for the personal use of the holder, but which is not assignable or transferable by him in any way. Rev. Laws, c. 100, § 20, provided for refunding a part of the money paid for a license, if the licensee died before the expiration of the year for which the license was granted, and this section was amended by St. 1902, p. 122, c. 171, giving authority to the licensing board to issue another license of the same kind for the remainder of the year, when the license is surrendered and canceled before the expiration of its term. It was also further amended by St. 1905, p. 134, c. 206. In such a case the board may, in its discretion, give a certificate to the party who holds the first license, entitling him to have a part of the fee proportionate to the unexpired term of the license returned, by the treasurer of the city or town, from the fees thereafter received by him for licenses to sell intoxicating liquors. But the statute gives the holder of a license no right in reference to the granting of a future license after the expiration of the term for which he is licensed.

It appears from the evidence and the findings of the judge in this case that the police commissioners of Boston have been accustomed to recognize to some extent the position of a holder of a license who wishes to go out of business, and to transfer the property used in the business, as entitling him to nom-

inate as an applicant for a new license of the same kind, in the same place, a successor to his business, whose application will be considered and passed upon by the board. In like manner the board has been accustomed to consider an application for a license, made on a nomination by a bankrupt or by his trustee, if it is understood that everything received as a consideration for the nomination will be distributed pro rata among the creditors. But the board has never been accustomed to recognize in any way assignments of licenses as security, or otherwise than in connection with a nomination of a successor by one going out of business. Because of this practice of the police commissioners, such a nomination in the city of Boston, under favorable conditions, has come to be recognized there as having a substantial pecuniary value. Because money can be obtained for it, although it gives one no legal rights, and is simply a recommendation to the favorable consideration of the board, the court of bankruptcy will compel a bankrupt to sign a release of his license, so that the trustee may obtain what he can, for the possible succession, for the benefit of the creditors. In *re Fisher* (D. C.) 96 Fed. 89; *Fisher v. Cushman*, 103 Fed. 860, 43 C. C. A. 381, 51 L. R. A. 292; *Schaefer Brewing Co. v. Moebs*, 187 Mass. 571, 73 N. E. 858. But the value of the release is recognized as depending wholly upon the practice of the police commissioners, and because there is no legal right to assign the privileges of such a license, and the police commissioners refuse to be bound by assignments or to recognize at all assignments for security, the court holds that a holder of an assignment for security has no rights under the assignment. In *re McArdle* (D. C.) 728 Fed. 442.

The recognition by the police commissioners of a nomination for appointment is necessarily subject to a variety of conditions, which the law imposes upon them in the performance of their official duties. When an application for a new license is made, they must determine whether the interests of the public require that a license should be granted for the sale of liquors in that place for another year. This involves, to some extent, the question of how many licenses should be granted. By the statute the number that may be granted is limited, but the board is not required to grant the whole number that the law permits. In any year, as the time comes for granting new licenses, the board may determine that the interests of the public require a diminution of the number, or they may determine that, if the number remains the same, it is better that the business should be discontinued in a certain place and licensed in other places. If they determine that the place, as compared with other places, is suitable, they may find that the applicant is not a trustworthy and fit person to be licensed. These and perhaps other considerations illustrate the fact that neither the

application of the licensee for a renewal of his license at the expiration of the year, nor his nomination of a successor as an applicant for a license, if he wishes to go out of the business, has any binding force, or gives any legal right as against the licensing board. They must perform their duties as public officers, acting in the interest of the people.

In the present case the release or assignment of the licenses by the bankrupts to one who wished to obtain licenses for the next year induced him to pay the trustee in bankruptcy \$3,000. The money so received was not for any property owned by the plaintiff. It was for a position before the police commissioners, from which the payor had reasonable ground to expect their favorable action. The plaintiff could not control this position, or do anything that would induce the payment by O'Hearn of the money which the defendant received. Upon the facts shown, the board of police commissioners did not consider the insertion of the plaintiff's name in the original license as affecting their right to issue new licenses. It is plain that they were right as regards the licenses for the ensuing year. Whether they were right or not in regard to the plaintiff's relation to the old licenses is immaterial; for it is plain that the money received by the defendant was not paid on account of the plaintiff's interest, but on account of what the defendant did in enabling O'Hearn to obtain the new licenses.

Decree affirmed.

(189 Mass. 273)

CARVILLE v. COMMONWEALTH.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. EMINENT DOMAIN—WATER SUPPLY—JURY TRIAL.

Where a petition for the assessment of damages for the taking or injuring of his land in the taking of the waters of the Nashua river for metropolitan water supply, as provided by Pub. St. Supp. 1895, c. 488, §§ 14, 15, giving the petitioner a right to trial by jury at his election, the report of commissioners finding that petitioner was not entitled to damages should be entirely disregarded in passing on petitioner's motion for a trial by jury.

2. SAME.

Where a petition for the assessment of damages for the taking of petitioner's real property for metropolitan water supply reservoir, as amended, alleged the taking of real estate and an injury to petitioner's real estate entitling him to the appointment of a commission to assess damages, as provided by Pub. St. Supp. 1895, c. 488, § 14, petitioner, on being dissatisfied with the commissioners' report, was entitled as of right to a trial by jury, under section 15, declaring that the water board, or any person whose property is taken or injured by the taking of the water, if dissatisfied with any determination of damages made by any commission, may claim a trial by jury to determine such damages.

3. SAME—COMMISSIONERS' REPORT—ACCEPTANCE.

The acceptance of a commissioners' report finding that petitioner was not entitled to dam-

ages by the court, in the absence of a waiver, did not preclude the allowance of petitioner's motion for a jury trial, filed not later than the succeeding term after the filing of the report.

Exceptions from Supreme Judicial Court, Worcester County; John Lathrop, Judge.

Petition by Clarence Carville against the commonwealth of Massachusetts to recover damages for property taken by the metropolitan water board. The petition was referred to commissioners, whose report that petitioner was not entitled to damages was accepted by the court; and from an order denying petitioner a jury trial on appeal he brings exceptions. Sustained.

Wm. A. Gile, for petitioner. A. W. De Goosh, for the Commonwealth.

KNOWLTON, C. J. The question before us is whether the petitioner is entitled to have a trial by jury upon his petition, brought under Pub. St. Supp. 1895, c. 488, § 14, as amended by St. 1901, p. 438, c. 498, to recover damages for property taken by the metropolitan water board for the Wachusett reservoir. The petition was referred to commissioners, who made a report that the petitioner was not entitled to damages. This report was afterwards accepted by the court. If the findings of the commissioners are correct, there are several grounds, either of which would preclude the petitioner from recovery. Some of these relate to matters in regard to which it hardly seems possible that there can be any dispute, such as the time of the taking of the real estate under the right of eminent domain, and the conveyance by the petitioner to the commonwealth of his icehouses, which are matters of public record. Although the report was in evidence at the hearing, the petitioner contends that in passing upon this motion the findings of the report should be entirely disregarded, even if they are of a kind which seems to make it almost certain that, upon a trial before a jury, the undisputed facts would compel the direction of a verdict for the respondent. If the petition states a case which, under Pub. St. Supp. 1895, c. 488, §§ 14, 15, may be the subject of a trial by jury, at the election of the petitioner, we think the petitioner's counsel is technically right in this contention. It has been decided that these sections give petitioners such a right in cases where real estate is taken for the reservoir, or entered upon or used, or is injured by the taking of the waters of Nashua river. In cases where real estate is only indirectly decreased in value by the legislative act, or the doings of the water board under it, or where there is an injury to an established business, the petitioner has no right to appeal from the decision of the commissioners to a jury. *Sawyer v. Com.*, 182 Mass. 245, 65 N. E. 52, 59 L. R. A. 726; *Fairbanks v. Com.*, 183 Mass. 373, 67 N. E. 335.

The petition, with the several amend-

ments to it, states a taking of real estate and an injury to the petitioner's real estate, which entitled him to the appointment of a commission under Pub. St. Supp. 1895, c. 488, § 14, and now entitle him to a trial by jury under section 15. It does not state the date of the taking of the real estate, nor other matters relied upon by the commonwealth as a defense to the petition. Upon the face of the petition, therefore, inasmuch as the petitioner is not bound by the report, he has a right to present his case before a jury.

The commonwealth contends that the acceptance of the commissioners' report prevents the allowance of the petitioner's motion. But we are of opinion that, in the absence of a waiver, the petitioner has a right, at the term on which the determination of the commissioners is filed in court, or at any time before the expiration of the succeeding term, to claim a trial by jury. See *Wyman v. Eastern Railway Company*, 128 Mass. 346. Exceptions sustained.

(189 Mass. 366)

WEBBER LUMBER CO. v. SHAW et al.
(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

1. TAXATION—ASSESSMENT—PRIMARY LIABILITY—LIEN.

Where a tax is assessed to plaintiff as the owner of certain land, plaintiff is primarily liable for the tax; the lien being a mere security for its payment.

2. SAME—SALE OF LAND SUBJECT TO TAX.

Where, after the assessment of certain land to plaintiff, it was sold on mortgage foreclosure subject to the tax, plaintiff could not restrain the tax collector from collecting the tax from him.

3. SUBROGATION—PAYMENT OF TAX.

Where land on which taxes were assessed to plaintiff was sold on foreclosure subject to the tax, plaintiff, on being compelled to pay the same, was entitled to subrogation to the rights of the collector as against the purchasers.

Case Reserved from Superior Court, Worcester County; Chas. A. De Courcy, Judge.

Bill by the Webber Lumber Company against Charles E. Shaw and others for subrogation to the rights of the tax collector of the town of Clinton with reference to certain taxes assessed on real estate purchased at foreclosure sale by defendants French and Bowers. On reserved case. Dismissed as to defendant collector, and judgment for plaintiff as to the other defendants.

C. A. Batchelder, for plaintiff. Henry H. Fuller, Harold L. French, and Amos T. Saunders, for defendants.

HAMMOND, J. On May 1, 1904, when the tax in question was assessed, the land was owned by the plaintiff, subject to two mortgages given by some former owner. The tax was assessed to the plaintiff as the owner of the land, and, while there was a lien upon the land, the plaintiff was prima-

riarily liable for the tax. The lien on the land was simply security for its payment, as stated by Shaw, C. J., in *Hayden v. Foster*, 13 Pick. 492, 495. The purpose of giving such a lien "seems to have been to provide a further and additional security in the form of a real pledge for the payment of taxes on real estate. It is a remedy super-added to those of demand, distress, and imprisonment," and of action of contract.

At the time of the foreclosure the plaintiff was no longer the owner, having conveyed its interest to another corporation. Under the terms of the foreclosure sale the land was sold subject to the tax in question. It is to be taken that the price paid at this sale was not the value of the land, but the value less the tax. After the sale the purchaser had land upon which was a lien for the payment of this tax. If the plaintiff paid the tax, the lien would be discharged and the purchaser would hold the land free from the incumbrance, and in that way would get a greater estate in the land than that for which he paid. The plaintiff, therefore, is placed in a situation where it may be compelled to pay money, the result of which payment is to release the purchaser's property from a valid incumbrance, and this, too, when to do so will give the purchaser something for which he has not paid. As between the plaintiff and the purchaser, no duty rests upon the plaintiff to discharge that lien; but, on the contrary, that duty rests upon the purchaser. To compel the plaintiff to pay this tax is to compel it to pay twice—once when the property was sold, and once to the collector. This it should be relieved from.

The only question is as to the form of relief. In proceeding to collect by suit, the defendant Shaw, as collector of taxes, is doing only what he has the legal right to do. He is a public officer, the tax is valid, and it is important, in the public interests, that taxes should be speedily collected. Moreover, in this commonwealth, it is the general rule that equity will not lie to restrain the collection of a tax. *Greenhood v. MacDonald*, 183 Mass. 342, 67 N. E. 336. He cannot be restrained in this suit. As to him the bill is to be dismissed, with costs.

But there is no difficulty in granting relief as against the other defendants who were the purchasers of the land. The lien upon the land has not yet expired. Upon the payment of the tax by the plaintiff, which it offers in the bill to do, it should be subrogated to the claim of the collector, and the land should stand charged with the payment to the plaintiff of the amount for which there is now a lien upon it.

The result is that as to Shaw the bill should be dismissed, with costs, and as to the other defendants there is to be a decree for the plaintiff; and it is so ordered.

(165 Ind. 440)

HICKS v. STATE. (No. 20,499.)

(Supreme Court of Indiana. Nov. 2, 1905.)

1. TRIAL—OBJECTION TO EVIDENCE—SUFFICIENCY.

An objection to evidence on the ground that it is incompetent, irrelevant, and immaterial, and throws no light on the issues in the case, is too general to present any question on appeal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 199.]

2. WITNESSES—CREDIBILITY—MENTAL COMPETENCY.

Proceedings on an examination by a commission as to the sanity of a person, for the purpose of determining whether she was a proper subject for admission to an insane hospital, are not admissible as evidence to affect the credibility of the person as a witness in a criminal case.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1101.]

3. SAME — IMPEACHMENT — CONTRADICTIONARY STATEMENTS—CORROBORATION.

Where a witness is contradicted, by way of impeachment, by evidence of statements different from those testified to, the party calling the witness may prove statements made in harmony with those made at the trial.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1260.]

4. SAME.

The rule authorizing a party calling a witness who has been impeached by proof of contradictory statements to prove statements in harmony with the testimony given only authorizes the admission of proof of such statements as are in harmony with the part of the testimony contradicted by the alleged contradictory statements shown in evidence.

5. SAME.

Where a witness for the state, on a trial for homicide, who testified that he was present at the trouble between defendant and decedent, and saw defendant fire the fatal shot, was impeached by witnesses testifying that they had heard the witness state that he was not present at the time of the trouble and at the time the shot was fired, the state was entitled to prove that he had made statements that he was present, but could not prove his statements, giving an account of what was said and done during the difficulty.

Appeal from Criminal Court, Marion County; Freemont Alford, Judge.

Ella Hicks was convicted of murder in the second degree, and she appeals. Reversed.

Henry Seyfried and Charles J. McGroarty, for appellant. C. W. Miller, Atty. Gen., C. C. Hadley, L. G. Rothschild, and W. C. Geake, for the State.

MONKS, C. J. Appellant was found guilty of murder in the second degree upon an indictment charging her with murder in the first degree. The only error properly assigned and not waived calls in question the action of the court in overruling appellant's motion for a new trial. Complaint is made of the rulings of the court in admitting certain evidence over the objection made by appellant that the same "was incompetent, irrelevant, and immaterial, and throws no light on the issues in the case." It has been uniformly held by this court that such

grounds of objection stated in the trial court were too indefinite, uncertain, and general to present any question. *Musser v. State*, 157 Ind. 423, 430, 431, 61 N. E. 1, and cases cited; *Mortgage Trust v. Moore*, 150 Ind. 466, 470, 50 N. E. 72.

Counsel for appellant insist that the court erred in refusing to permit them to read in evidence the proceedings of an examination by a commission as to the sanity of a witness on behalf of the state, instituted in 1899 before Justices Smock and Lockman, of Marion county, Ind., for the purpose of determining whether or not she was a proper subject to be admitted to the Hospital for Insane for treatment. These proceedings were offered in evidence as affecting the credibility of said witnesses, and were properly excluded. *Naanes v. State*, 143 Ind. 299, 303-305, 42 N. E. 609; *Goodwin v. State*, 96 Ind. 550, 564.

Kate McCotter, a witness for the state, testified that she was present at the trouble between appellant and Joseph Iddings, the deceased, and saw appellant fire the fatal shot which caused the death of said Iddings, and gave an account of all that occurred at the time. On cross-examination, she was asked by counsel for appellant if she had not stated to certain persons, naming them, that she was not present when the trouble between appellant and Iddings occurred; that she was not present when the shot was fired and Iddings was killed. She answered that she had not made said statements. To impeach said witness, appellant called witnesses who testified that they heard the witness McCotter make said statements. In rebuttal, the state, to support said witness, proved by an employé in the coroner's office all the evidence given by said Kate McCotter at the coroner's inquest, including not only her testimony that she was present at the trouble between appellant and Iddings, and when the fatal shot was fired, but, over appellant's objection, what she testified was said and done by appellant and the deceased at the time he was killed. "It is settled law in this state that in cases where a witness is contradicted by evidence of statements different from those made at the trial, and the contradiction is by way of impeachment, the party by whom the witness was called may prove statements made about the time the contradictory statements are alleged to have been made in harmony with those made by the witness at the trial." *Coffin v. Anderson*, 4 Blackf. 395, 398, 399; *Dalley v. State*, ex rel., 28 Ind. 285; *Brookbank v. State*, ex rel., 55 Ind. 169, 172; *Carter v. Carter*, 79 Ind. 466; *Dodd v. Moore*, 92 Ind. 397, 398; *Hodges v. Bales*, 102 Ind. 494, 500, 1 N. E. 692; *Hobbs v. State*, 133 Ind. 404, 407, 408, 32 N. E. 1019, 18 L. R. A. 774; *Hinshaw v. State*, 147 Ind. 334, 372, 47 N. E. 157; 2 *Elliott on Evidence*, §§ 991, 994; *Ewbank's Indiana Trial Evidence*, §§ 158, 166. This rule, however, does not authorize the admis-

sion of all prior statements of the witness in harmony with his testimony at the trial, but only such as are in harmony with the part of his testimony which has been contradicted by the alleged contradictory statements given in evidence. Evidence of such contradictory statements and such consistent statements of a witness not a party can only be considered for the purpose of determining the credit to be given to the evidence of such witness, and cannot be regarded as otherwise affecting the issues in the cause. *Davis v. Hardy*, 76 Ind. 272, 281; *Allen v. Davis*, 99 Ind. 216, 217. While to sustain the witness McCotter the state was entitled, under the rule stated, to prove that she made statements that she was present, or to the effect that she was present, when the trouble occurred between appellant and Iddings and at the time he was killed, and that she saw and heard the same, the state was not entitled to prove that part of her testimony at the coroner's inquest, or that part of her statements, if any, made elsewhere in which she gave an account of what was said and done during said difficulty.

Other questions are argued, but, as they may not arise on another trial of this cause, they are not considered.

Judgment reversed, with instructions to sustain appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

(185 Ind. 339)

STATE v. SUTHERLIN. (No. 20,655.)

(Supreme Court of Indiana. Oct. 24, 1905.)

1. CRIMINAL LAW—APPEAL BY STATE—NOTICE.

Burns' Ann. St. 1901, § 1955, and Acts 1905, p. 656, § 325, authorize an appeal by the state from a judgment quashing or setting aside an indictment or information and section 1960 and Acts 1905, p. 656, § 330, require the service of written notice of appeal stating that the appellant, i. e. the state of Indiana, appeals from the judgment, etc. *Held*, that a notice properly entitled, and notifying defendant's attorneys that the subscriber, "the prosecuting attorneys," had appealed from the judgment of the F. circuit court "in the above entitled action made and entered" on a date specified, etc., amounted to a notice that the state, through its proper official, had appealed from the judgment rendered in the cause in question, and was therefore sufficient.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2722.]

2. SAME—FILING.

Under Burns' Ann. St. 1901, § 1962 (Acts 1905, p. 657, § 332), providing that an appeal by the state in a criminal case shall stand for trial after filing the transcript and notices of appeal, requires that the notices be filed with the clerk of the appellate tribunal, and not with the clerk of the court from which the appeal was taken.

3. SAME—ASSIGNMENT OF ERRORS—SIGNING.

An assignment of errors being one of the essential steps in the procuring of an appeal by the state in a criminal case, such assignment was not objectionable because signed by the proper prosecuting attorney instead of the At-

torney General; though the latter had exclusive charge of the case after reaching the Supreme Court.

4. SAME—TRANSCRIPT—MARGINAL NOTES.

Where, on appeal by the state in a criminal case, the marginal notes on the transcript, required by the Supreme Court rule 8 (55 N. E. iv), were sufficient to serve the purpose intended, the appeal would not be dismissed because they were not as full as they should have been.

5. JURY—COMMISSIONERS—DE FACTO OFFICERS.

Under Burns' Ann. St. 1901, § 1449, requiring jury commissioners to take an official oath to honestly perform their duties "during their term of office," and section 1456, declaring that any person appointed a jury commissioner who shall "fail to take upon himself said office," etc., shall be guilty of contempt of court, a person appointed a jury commissioner is an "officer" whose acts are protected by the de facto doctrine.

6. SAME—QUALIFICATIONS—COLLATERAL ATTACK.

Burns' Ann. St. 1901, § 1449, authorizes the appointment of jury commissioners, and section 1456 disqualifies persons interested in a cause pending in the county court, triable by jury, during the calendar year succeeding his appointment. Sections 1450 and 1452 provide for the preparation of jury lists and the drawing of grand and petit juries, and section 1457 provides a per diem compensation for such commissioners. *Held* that, where a jury commissioner was appointed in good faith in the belief that he was qualified, he was a de facto officer, whose acts were not subject to collateral attack by plea in abatement to an indictment found by a grand jury drawn to an indictment ground that he was disqualified to serve.

Appeal from Circuit Court, Floyd County; Wm. C. Utz, Judge.

Ulysses G. Sutherland was indicted for murder in the first degree, and from an order overruling the state's demurrer to defendant's plea in abatement the state appeals. Reversed.

C. W. Miller, Atty. Gen., Geo. B. McIntyre, Jewett & Jewett, and P. B. May, for the State. Alexander Dowling, Stotsenburg & Weathers, and John W. Gaither, for appellee.

JORDAN, J. An indictment was returned by a grand jury of the Floyd circuit court at its March term, 1905, whereby appellee, Sutherland, was charged with the crime of murder in the first degree. A warrant was issued, and he was arrested on May 5, 1905, and was held to answer the accusation. Prior to the return of this indictment, he had not been charged before any court or officer with the crime in question. At the first opportunity afforded him, he filed a plea of abatement, whereby he sought to quash and set aside the indictment in dispute, solely on the ground that James W. Dunbar, one of the two jury commissioners appointed by the Floyd circuit court on December 15, 1904, was at the time of his appointment as such jury commissioner ineligible or disqualified to be appointed, and so continued to be by reason of his being a stockholder and a director of the Southern Indiana Traction Company, a corporation against which certain suits triable by a jury were at the time of

his appointment pending for trial in said Floyd circuit court. The plea of abatement discloses that said Dunbar and the other jury commissioner acting in that capacity on March 6, 1905, selected the jurors who constituted the grand jury for said court for said March term, 1905, which grand jury, as shown, found and returned the indictment against appellee. The state demurred to the plea in abatement for insufficiency of facts. The demurrer was overruled, to which an exception was duly reserved, and, the state having elected to stand upon its demurrer, the court sustained the plea in abatement, and rendered a judgment in favor of appellee, quashing and setting aside the indictment in controversy. From this judgment the state appeals to this court, and assigns as error that the court erred in overruling the demurrer to the plea in abatement.

At the very threshold we are confronted with appellee's motion, made on special appearance, to dismiss this appeal for the following reasons: "First. It does not appear that notice of an appeal by the state was given to the appellee or to the clerk of the Floyd circuit court, where the judgment was rendered. Second. No assignment of errors has been filed. Third. The supposed assignment of errors filed with the transcript was not signed by the Attorney General, nor by any person authorized by law to represent the state in this cause at the time the said pleading was filed. Fourth. The appellant has not caused marginal notes to be placed on each page of the transcript in their appropriate places, as required by rule 8 of this court (55 N. E. iv)."

After the judgment of the lower court, there is set out in its order book the following entry, which is embraced in the transcript in this appeal:

"And now comes George B. McIntyre, prosecuting attorney, and files notice of appeal from the judgment of the Floyd circuit court, to Ulysses G. Sutherlin, and to Alexander Dowling, Stotsenburg & Weathers, and John W. Gaither, attorneys for said defendant, notice of appeal to Charles B. Scott, Clerk of the Floyd circuit court, and also a praecipe for transcript for appeal to the Supreme Court, which notice is as follows: 'State of Indiana v. Ulysses G. Sutherlin. To Ulysses G. Sutherlin, Alexander Dowling, Stotsenburg & Weathers, and John W. Gaither, attorneys for defendant: Take notice that I, George B. McIntyre, Prosecuting Attorney of the 52nd Judicial Circuit, have appealed from the judgment of the Floyd Circuit Court in the above-entitled action, made and entered in said court on the 24th day of May 1905. George B. McIntyre, Prosecuting Attorney.'

"'Notice of the foregoing appeal and service and receipt of a copy thereof are hereby acknowledged this 24th day of May, 1905. A. Dowling, Attorney for Defendant.'"

A notice addressed to the clerk of the low-

er court is contained in this entry, and is in the same words and figures as the notice to appellee. It was served on the clerk on May 24, 1905, and the service thereof duly acknowledged by that official. The transcript and the assignment of errors were each filed in the office of the clerk of the Supreme Court on May 29, 1905.

The objection interposed by appellee's learned counsel to the notices in controversy is that they do not allege, as required by the statute, that the state of Indiana has appealed, but merely aver that "I, George B. McIntyre, Prosecuting Attorney of the 52nd Judicial Circuit, have appealed," etc. It is therefore argued that the notices fail to show that the state has appealed from the judgment. This contention, to say the least, under the circumstances, is highly technical, and we cannot yield to it our concurrence.

The Criminal Code, as enacted by the Legislature of 1905, was in full force and effect at and prior to the time of the taking of this appeal, and possibly its provisions govern therein, unless it can be said that the repealing section of the statute of 1905, pertaining to criminal procedure and public offenses requires a holding that the Criminal Code of 1881 must control. But it is wholly immaterial which of these Codes govern, for the reason that, so far as their provisions are applicable to the question as here presented, they are substantially alike. Section 1955, Burns' Ann. St. 1901, authorizes an appeal by the state from a judgment quashing or setting aside an indictment or information. Section 325, Acts 1905, p. 656, authorizes an appeal from a judgment quashing or setting aside an indictment or affidavit. As a material step in taking an appeal, the state is required to serve a written notice upon the clerk of the court wherein the judgment was rendered, stating that the appellant, i. e. the state of Indiana, appeals to the Supreme or Appellate Court, as the case may be, from the judgment, and a similar notice must be served upon the defendant or his attorney. See section 1960, Burns' Ann. St. 1901; section 330, Acts 1905, p. 656. The statute declares that an appeal, if the court is in session—that is, the court to which the appeal is taken—shall stand for trial immediately after filing the transcript and notice of appeal. See section 1962, Burns' Ann. St. 1901; section 332, Acts 1905, p. 657. It will be observed that at the head of the notices in question the cause is entitled, and the day upon which the judgment in the cause entitled was rendered by the Floyd circuit court is stated. It is true that each notice states that "George B. McIntyre, Prosecuting Attorney of the 52nd Judicial Circuit," he being the proper prosecuting attorney, has appealed, instead of stating in *hac verba* that the state of Indiana or the appellant has or had appealed. While the notices in this respect were not a literal compliance with the statute, still they were

certainly sufficient to subserve the purpose thereof by warning or notifying both the clerk and appellee that the state, through its proper official, had appealed from the judgment which was rendered in the cause in question. This is the only reasonable interpretation that can be placed upon or accorded to the notices in controversy. Both appellee and the clerk must have known, or at least they must be presumed to have known, that under the statute the state was the only party that could prosecute an appeal from the judgment to the Supreme Court, and that, under the circumstances, what was meant and intended by the statement that the prosecuting attorney appealed was that the appeal was to be taken by that official in the name of and on behalf of the state of Indiana, of which he was the duly constituted representative.

The insistence of appellee's counsel that the notices of appeal must be filed with the clerk of the court in which the judgment was rendered, and embraced in the transcript as a part of the record of the proceedings in the lower court, is not tenable. An appeal in a criminal case is not required to be taken in term time, and giving the required notices cannot be said to be a necessary proceeding in the lower court to be shown by its record. They are not required to be filed with the clerk of that court, but, together with the proof of service, are to be filed with the clerk of the court to which the appeal is taken, and they properly become a part of the record of the case in the higher court. It will be noted that section 1962, Burns' Ann. St. 1901, and section 332, Acts 1905, p. 657, each provide that the appeal shall stand for trial after filing the transcript and the notices of the appeal. This provision clearly contemplates and requires that the notices are to be filed with the clerk of the appellate tribunal. In *Beggs v. State*, 122 Ind. 54, 23 N. E. 693, this court held that giving the notice of appeal after the day on which the transcript was filed, but within the time allowed for taking the appeal, while not a literal compliance with the statute, was, nevertheless, a substantial conformance thereto. We conclude that the appeal notices herein are substantially sufficient.

The assignment of errors is signed by the proper prosecuting attorney. It is insisted, however, by appellee that this official was not, under the law, authorized to subscribe the assignment. It is argued that his powers are confined to the circuit court or courts of his judicial circuit, and that the Attorney General is the only officer who is empowered to subscribe the assignment of errors in a cause in which the state of Indiana has appealed to the Supreme or Appellate Court. The reason assigned for the contention is that when an appeal in a criminal case reaches the Supreme Court, it is then under the sole control of the Attorney General. It is true that in a criminal cause, when an ap-

peal taken either by the state or the defendant has once reached the appellate tribunal, then, so far as the state is concerned, the case passes under the control of the Attorney General, and by virtue of the statute he becomes the exclusive representative of the state therein. *State ex rel. v. Jamison*, 142 Ind. 679, 42 N. E. 350, and cases there cited; *State v. Sopher*, 157 Ind. 360, 61 N. E. 765. An assignment of errors, however, is one of the essential steps in taking or perfecting an appeal to this court. Hence, the appeal cannot be said to have been fully taken or to have reached the appellate tribunal until all of the essential steps required to perfect it have been taken. *Elliott's App. Proc.* § 284. The appeal, therefore, in this case, had not, in a legal sense, fully reached the Supreme Court until the assignment of errors therein had been made and filed. That the prosecuting attorney under the law is impliedly, if not expressly, empowered to do, all and singular, that which is necessary to take and perfect an appeal on the part of the state either to the Supreme or Appellate Court cannot be successfully controverted. In fact his authority to subscribe the assignment of errors in appeals taken by the state was fully affirmed and sustained by this court in *State v. Sopher*, supra. In this latter case we held—and properly so, we think—that it would suffice if either the prosecuting attorney or the Attorney General subscribed the assignment of errors. It is argued, however, by counsel for appellee that because the appeal in the latter case was taken, under section 1915, Burns' Ann. St. 1901, upon a question reserved by the state under the third subdivision of section 1955, Burns' Ann. St. 1901, the decision therein is not applicable to a case where the appeal is taken from a judgment quashing and setting aside an indictment. This distinction is without force, for the power of the prosecuting attorney to sign his name to the assignment of errors, and to take all other essential steps to perfect an appeal on the part of the state, does not depend upon any particular subdivision of the above section, but in reason it must be held that such authority on his part extends to all appeals authorized to be taken by the state in a criminal prosecution. *State v. Sopher*, supra.

In respect to the fourth ground assigned for dismissing the appeal, it may be asserted that an examination of the transcript discloses that counsel for appellant have endeavored to comply with the rule of this court in regard to marginal notes; and, while the latter are not as full as they might be, nevertheless, in consideration of the fact that the record herein is short, they serve the purpose intended within the meaning of the rule, and, under the circumstances, afford appellee no grounds for dismissing the appeal. It follows that none of the grounds assigned

for dismissing this appeal is sustained, and the motion is therefore overruled.

The next question presented by the state is, did the court err in holding appellee's plea of abatement sufficient on demurrer? His counsel contend that, under the facts therein alleged, it is disclosed that the grand jury which found and returned the indictment against him was selected by a jury commissioner, who, under the provisions of the statute, was ineligible and disqualified to serve as such commissioner, by reason of his interest in suits pending in the Floyd circuit court against the corporation mentioned; such interest arising out of the fact that he was a stockholder thereof, and a member of its directory, and so continued to be at the time of the selection of the grand jury. The determination of this question requires an examination of the statute relative to the appointment and duties of jury commissioners.

Section 1449, Burns' Ann. St. 1901, empowers the circuit court during the last term beginning in each calendar year to appoint for the next ensuing year two persons as jury commissioners, who shall be freeholders and voters of the county of opposite politics to each other, one of whom shall be a resident of the town or city in which the court is held. They are by the provisions of the above section required to take the oath of office therein prescribed, that they will honestly perform the duties of jury commissioners during their terms of office. Section 1456, Burns' Ann. St. 1901, provides that "no person shall be appointed a jury commissioner who at the time is a party to or interested in a cause pending in the county [court] which may be tried by a jury to be drawn during the calendar year next succeeding his appointment." The section further provides that any jury commissioner who shall fail to accept said office shall be deemed guilty of contempt of court, etc. Section 1450, Burns' Ann. St. 1901, provides that the jury commissioners immediately after their appointment shall, from the names of the legal voters, etc., on the tax duplicate of the county for the current year, proceed to select and deposit in a box furnished for that purpose the names, written on separate slips of paper, etc., of twice as many persons as will be required by law for grand and petit jurors in the courts of the county for all of the terms of such courts to commence within the next ensuing calendar year. Section 1452, Burns' Ann. St. 1901, provides that within a period of not more than one week preceding the commencement of the term of any criminal, or circuit court in the event there is no criminal, court, the clerk of the court shall, after well shaking the jury box, open it, and draw therefrom six names of competent persons, who shall be summoned as the grand jury for such ensuing term. A similar provision is made for drawing the names of persons who are to serve

as petit jurors. Section 1457, Burns' Ann. St. 1901, among other things, fixes a per diem to be paid the said commissioners as a compensation for their services.

There are no facts alleged in the plea in abatement to show that the grand jurors who returned the indictment in question did not possess the qualifications required by law, or that the method of selecting and drawing them as such jurors was not in strict compliance with the law relative thereto, save and except the point made as to the incompetency of the jury commissioner herein in question. The sole proposition presented and argued by appellee is that, by virtue of the fact that Dunbar, the commissioner, was at the time of his appointment a stockholder of the corporation against whom actions were then pending in the Floyd circuit court, he was thereby wholly disqualified and incompetent to be appointed, and that, under the express provisions of the statute, the judge of the Floyd circuit court was forbidden to appoint him, and that consequently his act in selecting the grand jurors in question was illegal and wrongful, and subjected the indictment returned by that body to be quashed and set aside. It will be noted that the selection of the grand jurors in this case was an official act or function, to be performed by the jury commissioners, and that this duty had been fully discharged by the two jury commissioners prior to the beginning of the term of court at which the grand jury that returned the indictment was impaneled.

Under the facts in this case, by reason of the conclusion which we have reached, we pass without deciding the question as to whether Dunbar, by reason of his being a stockholder of the corporation against which the suits were pending in the Floyd circuit court, was, within the meaning of the statute, thereby rendered ineligible or disqualified for the appointment of jury commissioner. It is not shown that the judge of the court in appointing the commissioner in question knowingly intended to disregard the provisions of the statute, for it does not appear that he at the time the appointment was made was apprised of or aware of Mr. Dunbar's relations to the corporation in controversy; and, under the circumstances, we must assume that in appointing him the judge of the Floyd circuit court acted in good faith, believing that under the law he was qualified and competent to be appointed. The appointment, as it appears, was made by the court or judge invested by law with the authority or power of appointing jury commissioners. These officials, after their appointment, as we may assume, duly qualified thereunder by taking the oath prescribed, and, as shown, entered upon the performance of the duties of the office by selecting jurors for the ensuing calendar year; and the right of Mr. Dunbar to discharge this official duty apparently was recognized and ac-

quiesced in by the court and its officials and by the public in general. The authority of this commissioner to act, so far as it appears, was first challenged by appellee under his plea in abatement. Although his appointment to the office, as appellee contends, may have been wrongful or illegal, he, at least in selecting the names of jurors, was acting under a color of right or authority, and was not a mere intruder or usurper of the office in question; and, under the facts shown, he was at least an officer *de facto*, if not *de jure*, in the performance of the duties of a *de jure* office, and as such his official acts in selecting the jurors in question must be considered and deemed to be as valid and binding—so far, at least, as third parties and the public are concerned—as though he had been a *de jure* commissioner; and, under the circumstances, his title to the office and his right to discharge the duties thereof cannot, as appellee seeks to do, be collaterally called in question. This rule is one which is founded upon public policy, and is well and universally affirmed. See the following authorities: *Gumberts v. Adams Ex. Co.*, 28 Ind. 181; *Smurr v. State*, 105 Ind. 125, 4 N. E. 445; *Parker v. State*, 133 Ind. 178, 32 N. E. 836, 33 N. E. 119, 18 L. R. A. 567; *State v. Crowe*, 150 Ind. 455, 50 N. E. 471, and cases cited; *Spegal v. Krag, etc., Co.*, 21 Ind. App. 205, 51 N. E. 959; *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; *State v. Taylor*, 108 N. C. 196, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Sheehan's Case*, 122 Mass. 445, 23 Am. Rep. 374; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231; *Hamlin v. Kassaffer*, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; *State v. Mayer, etc.*, 52 N. J. Law, 332, 19 Atl. 780, 8 L. R. A. 697; *Mechem on Pub. Officers*, §§ 317-319, 328, 330; *Throop Pub. Officers*, §§ 633, 636, 651.

The contention that the appointment of Dunbar was illegal and wrongful, and therefore absolutely void, and that, under the circumstances, he cannot be regarded as an officer *de facto*, cannot be sustained. As previously said, it is not shown that in making the appointment there was any palpable disregard of the law, and, for aught appearing to the contrary, the appointment may be said to have been made in good faith, possibly under a mistake of facts or misconception of the law. It must be conceded, however, that at least there was a formal appointment by the court empowered to make it, and that the commissioner in question was duly inducted into the office thereunder, and therefore he cannot be considered as a mere usurper, or as having taken possession of the office without any authority whatever. The rule is well settled that the illegality of the election or appointment of one to public office, by virtue of which election or appointment he gains entrance to the office, and takes upon himself the performance of its duties, does not pre-

vent the office in question from being filled *de facto*, and the official acts of such an incumbent from being shielded against a collateral attack. *Mechem, Pub. Officers*, §§ 319-321; *Throop on Pub. Officers*, §§ 632, 633, 636, 651. See, also, other authorities above cited.

It is further asserted that a jury commissioner under the law of this state is not an officer, and that therefore his acts are not protected by the *de facto* doctrine. It will be observed that by the provisions of section 1449, *supra*, jury commissioners are required to take an official oath that they will honestly perform their duties during "the term of office." Section 1456, *supra*, declares that any person appointed a jury commissioner, who shall "fail to take upon himself said office," etc., shall be deemed guilty of contempt of court, etc. These provisions, and others of the statute in question, conclusively show that the Legislature in the enactment thereof intended to and did create a public office. The *de facto* rule extends to and embraces officers of all grades, either executive, ministerial, or judicial, and applies to inferior officers in like manner as to those who were superior. *Mechem on Pub. Officers*, § 319.

It is not charged that there was any fraud or corruption in selecting the grand jury in controversy, but the plea in abatement proceeds entirely upon the theory that the names of the persons composing the grand jury were selected by an incompetent or disqualified commissioner. To repeat, however, what has been previously said, the facts disclose that if he was not a *de jure* commissioner, he was, at least, one *de facto*, whose acts, under the rule asserted, must be protected against a collateral attack. Certainly, under the circumstances, it cannot, in reason be said that his act in selecting the grand jurors in question operated to prejudice any of the substantial rights of appellee. As previously shown, not only had his act of selecting the grand jurors been fully performed before his authority in the premises was called in question, but the grand jury had been impaneled, and had actually returned the indictment against appellee.

In respect to the question of time when the objections to the jury should have been interposed by appellee, it may be said in this case that, inasmuch as Dunbar, in the eye of the law, must be recognized at least as a *de facto* commissioner, who before the impanelment of the grand jury had already fully performed the official act in controversy, it would follow, under the circumstances, that appellee's challenge to the array, had it been made on the grounds set up in the plea in abatement, would have been no more available than are the objections to the indictment as presented by said plea. Were we, under the facts of this case, to sustain the contention of appellee, then the effect of our holding would be to affirm the right of any party in a cause pending in the Floyd circuit

court, triable by a jury during the calendar year for which the commissioner in question had acted in selecting the names of persons to serve as petit jurors, to challenge for the same reason the right or authority of the jurors to try such cause. It is manifest that if the law required or warranted such a holding, it would be justly subject to ridicule. Formerly, under the law of this state, the board of county commissioners selected the grand jurors. Were this law still in force, and had the grand jury in dispute been selected by the board of commissioners of Floyd county, appellee might, with equal propriety and right, have assailed the indictment, because the members of said board were not eligible or legally qualified at the time of their election, or that their election for some reason was illegal. If appellee could successfully in this case assail the title or right of the commissioner in controversy to the office in question, then his right must be affirmed to call in question in like manner the title or right of the clerk who, under the law, drew from the jury box the names of the grand jurors. If the right for which appellee contends could be upheld, then there would virtually be no limit to the rule, and courts would be constantly required to investigate or inquire into the infirmity of the titles of their officers, upon a collateral attack like the one in the case at bar.

It follows, and we so adjudge, that the court erred in overruling the demurrer to the plea in abatement, for which error the judgment is reversed and the cause remanded, with instructions to the lower court to sustain the demurrer, and for further proceedings.

(166 Ind. 1)

McDANIEL et al. v. OSBORNE et al.*

(No. 20,723.)

(Supreme Court of Indiana. Oct. 24, 1905.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—OPERATION—TITLE ACQUIRED BY ASSIGNEE.

As a general rule, an assignee for the benefit of creditors or a receiver cannot acquire or exercise any greater title or rights in and to the property committed to his control than the insolvent or embarrassed debtor had or could enforce; and, as against a bona fide and valid incumbrance upon the debtor's property, the assignment covers only the equity of redemption.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments for Benefit of Creditors, §§ 523, 558.]

2. SAME — PREFERRED DEBTS — LABORERS' CLAIMS.

Acts 1885, p. 36, c. 21 (Burns' Ann. St. 1901, § 7058), entitled "An act in regard to the payment of employees of companies, co-partnerships, individuals and associations," provides that all debts due any person for labor shall be a preferred claim where the debtor's property passes into the hands of an assignee; and such assignee, in the payment of debts, shall be required to first pay in full all debts due for labor. The assignment statute provides that any part of the property assigned on which there are liens or incumbrances may be sold by the trustee, subject to such liens or incum-

brances, except when otherwise ordered. *Held*, that a claim for labor does not, on the debtor's executing an assignment for the benefit of his creditors, become a lien upon the assigned estate superior to the liens of prior existing mortgages on the property included in the assignment, but becomes merely a preferred debt, to be satisfied in preference to the claims of general creditors.

Appeal from Circuit Court, Hendricks County; Thomas J. Cofer, Judge.

Action by Cyrus Osborne and others against James O. Winstead, in which Raymond R. McDaniel and others filed a petition in intervention. From a judgment for plaintiff, interveners appeal. Transferred from the Appellate Court, under Burns' Ann. St. 1901, § 1387j, subd. 2. Affirmed.

See 72 N. E. 601.

M. W. Hopkins and R. T. MacFall, for appellants. R. T. Hollowell and Harding, Hovey & Wiltale, for appellees.

MONTGOMERY, J. Appellee Cyrus Osborne brought this action upon two notes for \$850 and \$1,200, dated January 13, 1898, and due in four months and in two years, respectively, after date, and to foreclose two real estate mortgages given to secure the same. Appellants, upon their own application, were made parties to the action, and filed their intervening petition, setting up their respective claims against the mortgagor, and averring that they were liens upon the mortgaged property superior to the lien of appellee's said mortgages. Appellee's demurrer to this petition for want of facts was sustained, and, appellants declining to plead further, judgment was rendered against them for costs. Such further proceedings were had in the case as resulted in a judgment for appellee upon said notes, and a decree foreclosing said mortgages and for the sale of the mortgaged premises.

It is alleged on appeal that the court erred in sustaining the demurrer of appellee to the intervening petition of appellants. Appellants averred in their petition that James O. Winstead, the mortgagor, became the owner of the real estate in question on the 19th day of December, 1892, and continued as such owner until the 15th day of July, 1901, at which time he made a voluntary assignment of all his property to Henry S. Cox, as trustee, for the benefit of his creditors, under the laws of this state; that at the time of the execution of said mortgages said Winstead was, and prior thereto had been, and thereafter until the date of assignment continued, in the business of general farm implement merchandising; that on July 15, 1901, said H. S. Cox accepted the deed of assignment, caused the same to be duly recorded, qualified as such assignee, and entered upon the duties of his trust; that on October 5, 1901, said Winstead was duly adjudged a bankrupt by the United States District Court for the District of Indiana, and on November 25, 1901, James

M. Ogden was appointed and qualified as trustee in bankruptcy of all the property of said bankrupt; that in January, 1902, appellee commenced this action, and caused William C. Osborne to be appointed by the court as receiver of the mortgaged property, "to take charge of the property, rent the same, and collect the rents, and apply them to the payment of the plaintiff's debt, taxes, and the making of necessary repairs of the buildings on said property," and that said receiver qualified and took charge of said property; that the money realized from the sales of property coming into the hands of James M. Ogden as trustee in bankruptcy was not more than sufficient to pay the actual costs of the administration of said bankruptcy matter, and that there were no funds and would be none for distribution to any creditor of said Winstead; that within six years next preceding the 15th of July, 1901, appellants each performed "manual and mechanical labor, work, and services for said James O. Winstead at his special instance and request, for which he is indebted" to appellant McDaniel in the sum of \$107.85, to appellant Sadie Winstead in the sum of \$112.75, and to appellant Elmer B. Winstead in the sum of \$800.39, all of which was due; that said James O. Winstead was insolvent, and all his property had passed into the hands of Henry S. Cox, as assignee, as aforesaid, since which time he had not had any control of the same; and that the claim and right of appellee in and to said property was inferior to the liens and claims of appellants.

The prayer was that appellants' claims be decreed to be liens upon said real estate, and ordered paid first and in full out of the proceeds arising from the sale of said mortgaged premises. It was also shown by the record that by an order of the federal court the mortgaged property was abandoned by the trustee in bankruptcy, on the ground that there were no equities in the property above the mortgages.

The theory of appellants' petition evidently is that their claims for labor, under the statute, became liens upon the property of their debtor Winstead at the time the title to such property passed to his assignee under the deed of assignment for the benefit of creditors, superior to the liens and claims of all other persons; and that the lien, having once attached, was not divested by the subsequent bankruptcy proceedings in the federal court. If the premises are sound, the conclusion must of necessity follow.

The statute upon which the claims of appellants are based is section 7053, Burns' Ann. St. 1901, and reads as follows: "All debts due any person for manual or mechanical labor shall be a preferred claim in all cases against any individual, co-partnership, corporation or joint stock company, where the property thereof shall pass into the hands of an assignee or receiver, and

such assignee or receiver, in the distribution and payment of the debts, shall be required to first pay in full all debts due for manual or mechanical labor before paying any other, except legitimate costs and expenses." The act is entitled "An act in regard to the payment of employes of companies, co-partnerships, individuals and associations doing business or employing labor in this state." Acts 1885, p. 86, c. 21. This statute has not been construed upon the point in question by this or the appellate court, but section 7051, which is similar in principle, has been considered in a number of cases.

Appellant's counsel, in support of their contention, have cited cases in which other statutes upon the subject of liens and preferences have been construed and applied, to which we will briefly refer. Warren et al. v. Sohn et al., 112 Ind. 213, 18 N. E. 863, involved section 7443, Burns' Ann. St. 1901, by the terms of which a lien is expressly given to miners and other employes for their labor prior and paramount to all other liens, except the lien of the state for taxes, and the decision is clearly right. Bass et al. v. Doerman et al., 112 Ind. 390, 14 N. E. 377, related to section 7051, Burns' Ann. St. 1901, and was correctly decided upon the facts stated. Watts, Trustee, et al. v. Sweeney et al., 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615, presented the question of priority of the lien of a mortgage of a locomotive engine and that of a mechanic, under section 7268, Burns' Ann. St. 1901, for necessary repairs made upon the order of the mortgagor while in possession of the property, and was rightly decided. The case of Farmers' Loan & Trust Co. v. Canada, etc., Ry. Co. et al., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740, correctly declared the priority of the lien of laborers for labor performed in the construction of a railroad, where the lien was acquired upon notice duly given and recorded, as provided by sections 7265 and 7266, Burns' Ann. St. 1901. In Shull v. Fontanet, etc., Mining Association et al., 128 Ind. 331, 26 N. E. 790, it was held that the claim of a laborer rendering services for an assignee, while in charge of and operating a coal mine, was preferred, and should have been paid as part of the costs and expenses of the assignee. The case of Aurora National Bank v. Black et al., 129 Ind. 596, 29 N. E. 396, correctly declared the priority of the liens of laborers acquired upon notice given and recorded, in accordance with the provisions of sections 7248 and 7249, Burns' Ann. St. 1901, by the terms of which such laborers might obtain "a first and prior lien upon the corporate property." McElwaine et al. v. Hosey et al., 135 Ind. 481, 35 N. E. 272, correctly construed section 1 of the mechanic's lien law (Acts 1889, p. 257, c. 123). The case of Jenckes v. Jenckes et al., 145 Ind. 624, 44 N. E. 632, also involved the construction of the mechanic's lien law (sections 7255 and 7257, Burns' Ann. St. 1901). It

was expressly overruled in the case of Sulzer-Vogt Mach. Co. v. Rushville Water Co., 160 Ind. 202, 85 N. E. 583. The cases of Small v. Hammes, 156 Ind. 556, 60 N. E. 342, and Bell et al. v. Hiner, 16 App. 184, 44 N. E. 576, construed section 7051; and, so far as they may be deemed authority for the construction of the statute under immediate consideration, they are disapproved.

There is no intent manifest in the title, or from any language employed in the body of the statute under consideration, that an employé should have or could acquire a lien upon all the property of his employer on account of general manual or mechanical labor. It is provided, only, that when the property of the debtor passes into the hands of an assignee or receiver in the interest of creditors, and the estate is reduced to cash and ready for distribution, the laborer shall be so preferred as to receive payment of his claim first in point of time, and to the full amount, as against the claims of general creditors. As a general rule, an assignee or receiver cannot acquire or exercise any greater title or rights in and to the property committed to his control than the insolvent or embarrassed debtor had and could enforce. An assignor cannot transfer to his assignee a greater right than he holds himself; and, as against a bona fide and valid incumbrance upon his property, his assignment passes only his equity of redemption in the property covered by the lien. This equity of redemption is all that the assignee or receiver may ordinarily sell and administer upon, and by the sale of such equity, and any other property in his hands, the fund is created for distribution, out of which the assignee or receiver is directed by this statute to pay labor claims first and in full after the payment of his own legitimate costs and expenses. The assignment statute expressly declares that "any part of the property assigned on which there are liens or incumbrances may be sold by the trustee, subject to such liens or incumbrances," except when otherwise ordered by the court for cause shown upon special application. There is a very clear and marked distinction between a preferred debt and a debt secured by a specific lien. A general debt cannot become superior to another secured by a lien, unless expressly made so by a valid law; and, if a statutory lien is to be created, the language employed should be specific in declaring the fact, as well as the nature, character, and extent of such lien. The construction contended for by appellants would require the court to infer the lien, and that it attached to this particular property, and superseded a pre-existing valid mortgage. If such a result is within the meaning and intent of the statute, then, in case of an employer's insolvency, labor claims in amount unlimited, and bounded in time only by the statute of limitations, may be enforced against his estate to the displacement and exclusion of debts

of unquestioned validity, secured by mortgage liens of many years standing. We are unable to ascribe such an intent to the Legislature, or so to interpret this statute. The obvious purpose of the Legislature in this enactment was to give laborers of the class named in the statute preference in the payment of their claims from the estate of the insolvent employer in the same sense and to the same extent that preference is given in the payment of funeral expenses under the statute for the administration of decedents' estates.

The facts alleged in appellants' intervening petition were not sufficient to show the existence of a lien in their favor upon the mortgaged premises, and the demurrer of appellee Osborne was rightly sustained.

The judgment is affirmed.

HADLEY, J., did not participate in this decision.

(165 Ind. 381)

INDIANA NITROGLYCERINE & TORPEDO CO. v. LIPPENCOTT GLASS CO. (No. 20,726.)

(Supreme Court of Indiana. Oct. 25, 1905.)

1. ABATEMENT AND REVIVAL — DEFECTIVE SERVICE.

It is not ground for abating an action against a master and his servant for injury from the negligence of the servant, brought in the county of the servant's residence, which was other than that in which the master, a corporation, was organized and had its office, that the summons for the master was served on the servant as its agent, when he was in its employ as a laborer, and not otherwise; this, at most, being ground for quashing the service on the master.

2. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — PLEADING IN COMPLAINT.

The complaint alleging that said explosion and all the injuries and damages to plaintiff and to a well were caused solely and entirely by the negligence of defendants in "shooting" the well, shows, as a necessary inference, plaintiff's freedom from contributory negligence, and is therefore sufficient in that respect.

3. MASTER AND SERVANT — INJURIES BY SERVANT — VERDICT — SELF-CONTRADICTION.

A verdict for plaintiff against the master alone in an action against a master and his servant for negligence of the latter is self-contradictory.

Appeal from Superior Court, Madison County; H. C. Ryan, Judge.

Action by the Lippencott Glass Company against the Indiana Nitrolycerine & Torpedo Company and another. From a judgment for plaintiff against defendant company, it appeals. Transferred from the Appellate Court (72 N. E. 183), under section 1337j, subd. 2, Burns' Ann. St. 1901. Reversed.

Dailey, Simmons & Dailey, for appellant. Walker & Foster and J. A. May, for appellee.

GILLETTE, J. Appellee brought this action against appellant, and one Stephen A. Clarke to recover damages sustained by appellee, alleged to have been caused by the negligence

of said Clarke, as the servant of appellant, in and about the "shooting" of a gas well by nitroglycerine. The cause was tried under issues made by the joint answers of the defendants. There was a verdict in favor of appellee and against appellant on the fifth paragraph of the complaint, but the verdict was silent as to Clarke. The court rendered judgment for appellee against appellant for the amount of the verdict, and rendered judgment in favor of Clarke that appellee take nothing and for costs.

It is urged that the court below erred in sustaining a demurrer to a plea in abatement of the action, which was filed by appellant. The action was instituted in Madison county, and it appears from the plea that appellant was organized and had its office in Marion county. The summons for appellant was served on said Clarke as its agent, and it is alleged in the plea that at the time of the commencement of the action and at the time of the pretended service Clarke was in the employ of appellant as a laborer, and not otherwise. It was held in *Wright v. Compton*, 53 Ind. 337, that a servant and his master may be joined in an action for the tort of the former, committed during the course of his employment, and, as this action is of the same character, and as it is not questioned that Clarke was a resident of Madison county, it follows that there was no ground disclosed for the abating of the action. At the most, said plea showed only a ground for the quashing of the service upon appellant, and, this being true, there was no reason for the abating of the action, as appellee was entitled, in the event the writ was quashed, to an alias writ directed to the sheriff of Marion county.

It affirmatively appears that the verdict was on the fifth paragraph of the complaint, and it is contended on behalf of appellant that a demurrer which it addressed to said paragraph should have been sustained, because there was no averment of noncontributory negligence. Where the injury complained of is to property, it is no doubt the law that to make a complaint for negligence sufficient it must appear that the plaintiff was not guilty of contributory negligence; but a direct averment is unnecessary. Under the more liberal rules of Code pleading, it is sufficient if a fact appears as a necessary inference from such facts as are well pleaded. *Mallott v. Sample* (Ind. Sup.) 74 N. E. 245, and cases cited; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, 36 N. E. 353. This rule has been applied in determining whether a complaint shows noncontributory negligence on the part of the plaintiff. *Evansville, etc., R. Co. v. Dexter*, 24 Ind. 411; *Riest v. City of Goshen*, 42 Ind. 339; *Jeffersonville, etc., R. Co. v. Goldsmith*, 47 Ind. 48; *Duffy v. Howard*, 77 Ind. 182. In the complaint before us it is alleged "that said explosion and each and all of said injuries

and damages to plaintiff and to said well were each and all caused, produced, and occasioned solely and entirely by the unskillfulness and negligence of defendants in shooting said well." This was clearly sufficient under the above authorities. The court instructed the jury that certain of the paragraphs of the complaint were founded on the theory of negligence, and that the other paragraphs were based on a breach of contract.

The twelfth instruction of the court, to the giving of which appellant excepted, was as follows: "There are two defendants in this case, and you may find for the plaintiff against both defendants, or against one and for the other, or you may find for both defendants, as the preponderance of the evidence warrants."

After a careful study of the fifth paragraph of the complaint, it is our conclusion that in its gravamen it is an action for negligence. We base this conclusion on a study of the framework of the paragraph, on the fact that there is no sufficient allegation as to a consideration, and on the further fact that otherwise the paragraph would not even purport to state a cause of action against the defendant Clarke. The following cases tend to support us in the view that said paragraph is based on the theory of negligence: *Staley v. Jameson*, 46 Ind. 159, 15 Am. Rep. 285; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *DeHart v. Haun*, 126 Ind. 378, 26 N. E. 61; *Coy v. Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535. But we need not discuss this point further, as the view above expressed as to the theory of said paragraph is in accord with the position of counsel for appellee. Treating said paragraph as based on negligence, it is clear that the trial court fell into error in the giving of the above instruction. There could be no responsibility on the part of appellant, under the facts pleaded in said paragraph, viewing it as an action for negligence, unless Clarke, its servant, was also negligent; and a verdict against the former and in favor of the latter would, under the allegations of the paragraph, have been self-contradictory. If appellant were compelled to pay damages, it had a right to seek indemnity from its servant, and as the latter had been discharged in a suit on the merits, he could not again be held liable, for that would deprive him of the benefit of his adjudication. *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119. The action of the court is sought to be defended under section 579, *Burns' Ann. St.* 1901, but we are of opinion that said provision is not applicable to the circumstances of this case.

Judgment reversed, and a new trial ordered.

(165 Ind. 365)

TOWN OF WINAMAC v. STOUT.

(No. 20,631.)

(Supreme Court of Indiana. Oct. 25, 1905.)

Modification of judgment. For opinion, see 75 N. E. 158.

PER CURIAM. The death of appellee, Frank Stout, having been suggested, the judgment of affirmance heretofore rendered by this court is modified to the extent of ordering that said judgment be affirmed as of the date of the submission of this cause on appeal.

(165 Ind. 369)

EVANS v. STATE ex rel. FREEMAN.

(No. 20,541.)

(Supreme Court of Indiana. Oct. 25, 1905.)

1. STATUTES — RE-ENACTMENT AFTER CONSTRUCTION.

The Legislature, by carrying bodily into Rev. St. 1831 (sections 978, 980), Rev. St. 1852, p. 485, pt. 4, c. 3, §§ 1, 3, after their construction by the Supreme Court, as making a married woman a competent witness in bastardy proceedings instituted by her, adopted such construction.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 216, 312.]

2. WITNESSES — COMPETENCY OF MARRIED WOMEN — BASTARDS — NONACCESS OF HUSBAND.

Under Burns' Ann. St. 1901, §§ 990, 992, providing for bastardy proceeding on complaint of "any woman," the mother of a bastard, and that the mother shall be a competent witness, she is competent to prove all the elements necessary to sustain the charge, including nonaccess of the husband.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 159, 159½.]

3. BASTARDS—EVIDENCE.

Evidence of prosecutrix in bastardy proceedings need not be corroborated, but its weight is for the jury.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 175.]

On petition for rehearing. Overruled.

For former report, see 74 N. E. 244.

HADLEY, J. Appellant's petition for a rehearing is accompanied with so much earnestness and manifest research that we are impressed with the propriety of amplifying somewhat the principles of the previous decision. Appellant claims that the court has fallen into two errors: (1) In holding that in bastardy cases the unsupported testimony of the mother may be sufficient to sustain a judgment against the defendant, without corroboration on the point of the husband's access. (2) In holding that the testimony of a married woman is admissible to prove the nonaccess of the husband. In 1734 Lord Hardwicke arbitrarily, in *R. v. Reading*, in a filiation proceeding—that is, to charge a bastard's father with its support—declared that a wife was a competent witness to prove the adultery between herself and the defendant, because the secrecy of the act would admit of no other proof; but that it

was improper, on account of the interest of the wife in relieving her husband of the burden, to charge the maintenance of the child against the defendant upon the mother's sole and uncorroborated testimony of the non-access of the husband. 3 Wigmore, Ev. § 2063, p. 2761. This declaration of Lord Hardwicke was accepted and followed by the courts of England down to 1777, when Lord Mansfield, in *Goodright v. Moss*, Cowp. R. 591, announced as the law of England, founded in decency, morality, and policy, that neither husband nor wife would be permitted as a witness to bastardize the issue of the wife after marriage by testifying to the nonaccess of the husband. Under the doctrine of Lord Mansfield, a married mother's testimony was no longer a question of corroboration, but one of competency in relation to access of the husband. It was a doctrine which, as against the husband and wife, conclusively presumed the legitimacy of the child, but recognized the wife's right to testify to the illicit connection, to the birth of the child before marriage, or within a month after marriage; but denied her the right to be heard that her husband was continuously absent in the army for two years next before the birth of the child. "Such inconsistency," says Prof. Wigmore in his treatise on Evidence, "is obviously untenable. * * * The truth is that these high sounding 'decencies' and 'moralities' are mere pharisaical afterthoughts, invented to explain an otherwise incomprehensible rule, and having no support in the established facts and policies of our law. There never was any true precedent for the rule, and there is just as little reason of policy to maintain it." 3 Wigmore, Ev. § 2064, p. 2763.

There has been much diversity among the American courts as to which of the two English rules was the soundest. In the early part of the last century the tide was decidedly in favor of the Harwicke view, while later on the Mansfield rule seems to have attracted the most attention and found the most favor among the courts in states where the matter has not been regulated by statute. The law being thus unsettled when our state government was organized, the Legislature at its second session somewhat extended the Mansfield rule by the passage of an act which effectually closed the door against prosecutions for bastardy by married women by providing for such prosecutions by unmarried women only. Acts 1818, p. 229; *Smith v. State*, 4 Blackf. 188. The operation of this Indiana rule was found to be attended with so much hardship and injustice that the Legislature again took the subject up in 1843, and provided that "any woman who has been delivered of a bastard child or who is pregnant with such child" may prosecute, and "such woman shall be admitted as a competent witness on such trial, leaving her credibility to the jury." Rev. St. p. 1843, p. 363, c. 20, § 1. These provisions of 1843 were

carried into the Revision of 1852 (Rev. St. 1352, p. 485, pt. 4, c. 8, §1) in these words: "When any woman has been delivered of, or is pregnant with, a bastard child, shall make complaint;" etc., " * * * but [section 3] the rules of evidence shall be the same as in civil cases; and the mother of the child, if of sound mind, shall be a competent witness," and (section 11) the death of the mother shall not abate the suit. "And in such case the testimony of the mother, taken in writing before the justice of the peace may be read in evidence, and shall have the same force as if she were living and had testified to the same in court." The statute as adopted in 1852 was carried bodily into the Revision of 1881, and is now in force. After the passage of the act of 1852, and before its re-enactment in 1881, the former act was twice interpreted by this court. *Cuppy v. State*, 24 Ind. (1865) 389; *Dean v. State*, 29 Ind. (1868) 483. In the *Cuppy* Case it is said: "At common law a married woman was not a competent witness to prove non-access by the husband, but our statute has declared 'that the mother of the child, if of sound mind, shall be a competent witness.' A witness declared competent by the statute is to be regarded as any other witness, and restrictions imposed by the common law cannot be applied as restricting her testimony, in the face of the express letter of the statute." This construction of the act of 1852 having been promulgated prior to the Revision of 1881, the Legislature at the latter date, in re-enacting the statute of 1852, will be held to have adopted also the construction put upon the law by the court. *Board, etc., v. Conner*, 155 Ind. 484, 496, 53 N. E. 828, and cases cited.

We are now asked to overrule the *Cuppy* and *Dean* Cases, and to hold that the statutes conferring upon all women, married or unmarried, competency to testify, has, by implication, ingrafted upon it either the *Hardwicke* rule, which requires corroboration of married mothers, or the *Mansfield* rule, which for the sake of decency and seemliness excludes married women from testifying concerning the access of the husband. The Legislature had clearly the power to abrogate the common-law rule, and to declare who shall be competent to testify in this as well as all other cases. There is nothing doubtful or ambiguous about the words "the mother [any mother] of the child, if of sound mind, shall be a competent witness." A competent witness to what? Manifestly to prove the complaint provided for in the first section of the act, charging the defendant with being the father of her illegitimate child. She is declared to be competent to testify in support of the charge, which, in the absence of any express limitation or restriction, means all the elements necessary to sustain the charge, including the principal fact.

The corroboration of the relatrix, contended for by appellant, goes only to affect her credit or the probative force of her testi-

mony, which may or may not be sufficient without corroboration. As to this, all persons with us are competent witnesses, except such as are expressly disqualified by statute; and as we have no statute requiring corroboration in order to conviction in this sort of case, as in seduction, enticing, perjury, and other crimes, there need be none, and the weight to be given the testimony of the relatrix, as that of other competent witnesses in civil causes, and whether sufficient to authorize recovery, is, in the language of the act of 1843, "left to the jury." See 7 Am. & Eng. Ency. (2d Ed.) p. 868; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155; *State v. McGlothlen*, 56 Iowa, 544, 9 N. W. 893; *People v. Lyon*, 83 Hun, 303, 31 N. Y. Supp. 942; *State v. Nichols*, 29 Minn. 357, 13 N. W. 153; *State v. Tipton*, 15 Mont. 74, 38 Pac. 222; *McFarland v. People*, 72 Ill. 363.

We will, however, say in passing that the prevailing presumption that a child born in wedlock is legitimate is a just and salutary rule, that should not be lightly regarded. It is not the duty of a court or jury in all cases to find the nonaccess of the husband proved upon the testimony of the wife alone. On the contrary, the court should always carefully scrutinize the testimony of a married woman, and, when it is shown that the parties were still living together in the period when the child must have been begotten, and the husband had opportunity, proof of the principal fact, viewed in the light of all the surrounding facts and circumstances, should be direct, clear, and convincing to justify the court in charging the defendant, and in placing the badge of dishonor upon the unoffending offspring of the mother. The fact, however, should be determined, like any other fact, from a consideration of all the evidence submitted, giving due weight to all collateral facts that reasonably and naturally affect the value of the testimony. *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 10 N. E. 636, 59 Am. Rep. 194. What we have already said disposes of the second proposition.

The statute which dispenses with corroboration as an essential to recovery also makes the married mother a witness, generally, in her own prosecution for bastardy, and her credibility on every issuable fact is left to the jury. The record discloses that the relatrix, in giving responsive answers to questions propounded to her by appellant's counsel, testified that her child was born September 8, 1902; that she came to Bloomington from Louisville, Ky., in October, 1901; that five months before leaving Louisville she and her husband separated; and that she had never been with nor seen her husband since the separation. This was sufficient to justify the court's finding of nonaccess of the husband. We are now strengthened in our view that the original opinion correctly stated the law.

Petition for rehearing overruled.

(166 Ind. 326)

WILLIS et al. v. WILLIS. (No. 20,500.)
(Supreme Court of Indiana. Oct. 12, 1905.)

1. HABEAS CORPUS—CUSTODY OF INFANTS—DISCRETION OF COURT.

A petition for habeas corpus for the custody of a child is addressed to the sound legal discretion of the trial court.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 6.]

2. SAME—MOTIONS TO QUASH—EFFECT AS AD-MISSION.

Respondent to a petition for a writ of habeas corpus admits the truth of the allegations of the writ by moving to quash the same.

3. SAME—CUSTODY OF INFANTS—PETITION—SUFFICIENCY OF FACTS.

A petition for writ of habeas corpus for the custody of a child 18 months of age, alleging that respondent, the husband, and father of the child, by reason of his cruel and inhuman treatment, compelled petitioner, his wife and the mother of the child, to leave him, and go elsewhere to reside; that subsequently, respondent, through false promises, induced petitioner to return to the city in which respondent lived, and there, by false promises and deceptions, temporarily obtained the possession of the child, and failed to return it in accordance with his promise; that petitioner is a fit person to be entrusted with the custody of the child, while respondent is not a fit or suitable person to have its care and custody, but is addicted to the excessive use of intoxicating liquors, and has a violent, ungovernable temper; and generally alleging that the restraint of the child is wrongful and without cause—is sufficient to sustain the writ, and authorize the delivery of the child to the custody of its mother.

4. APPEAL—ASSIGNMENTS OF ERROR—VARIANCE FROM RECORD.

An order book entry recited that "respondents * * * filed their written motions and reasons for a new trial herein." Following the entry appeared a separate motion by each of the respondents for a new trial. The record then recited that the court, being fully advised, overruled "said motion, to which ruling of the court said respondents except, * * * and respondents now pray an appeal to the Supreme Court." *Held*, that a separate assignment by only one of the respondents "that the court erred in overruling his motion for a new trial, to which ruling he excepted," was not supported by the record, and would be disregarded.

Appeal from Circuit Court, Marion County; Henry Clay Allen, Judge.

Habeas corpus proceedings by Hattie Bell Willis against Nathaniel Parker Willis and another. From a judgment in favor of petitioner, respondents appeal. Affirmed.

Chambers, Pickens, Moores & Davidson and Means & Buening, for appellants. Martin M. Hugg and James A. Collins, for appellee.

JORDAN, J. Appellee, Hattie B. Willis, petitioned the lower court to issue a writ of habeas corpus against appellants for the purpose of securing the possession or custody of her infant daughter. The writ was accordingly issued. Appellant Nathaniel P. Willis appeared in court, and filed a separate motion to quash the writ, on the grounds: (1) That the petition did not show or allege that the infant child therein mentioned was unlawfully or illegally restrained of its liberty. (2)

That it did not show a sufficient reason to entitle the petitioner to the custody of said child. (3) That it did not show any sufficient reason why the defendant was not entitled to its custody. (4) That it did not show the cause or pretense of restraint. This motion was overruled, to which appellant excepted. Each of the appellants filed a separate return to the writ of habeas corpus. Trial by the court, and finding in favor of the petitioner, appellee herein, to the effect that she was the mother of said infant, Mary Frances Laura Willis, and was entitled to her custody, and that the respondents, appellants herein, unlawfully restrained said infant of her liberty. Judgment was rendered upon the finding that said infant be discharged from the custody of the respondents, and that her custody be awarded to the petitioner. Written motions by the respondents for a new trial for the reasons therein specified were filed and overruled. Appeal prayed and taken to this court.

Appellant Nathaniel P. Willis separately assigns as error (1) that the court erred in overruling his motion to quash the writ of habeas corpus, and (2) that the court erred in overruling his motion for a new trial, to which ruling he excepted. He and his co-appellant jointly assigned (1) that the court erred in overruling their motion to quash the writ, and (2) in overruling their motion for a new trial, to which ruling they excepted.

The petition substantially discloses that the petitioner, appellee herein, and appellant Nathaniel P. Willis are husband and wife; that they live separate and apart from each other; that the infant child in question, Mary Frances Laura Willis, is of the age of 18 months; that the petitioner is its mother, and the said defendant is its father; that it is the legitimate issue of the marriage between the petitioner and the defendant. Appellee has had the sole care, charge, and custody of said child from the time of its birth until, as alleged, it was fraudulently taken from her care, charge, and custody by the defendants, as hereinafter shown. The parties were married on April 25, 1900, and since that date the defendant has been guilty of cruel and inhuman treatment of his said wife, appellee herein; he has been an habitual drinker of intoxicating liquors, and accustomed to returning home in an intoxicated condition. On divers occasions he cursed and beat his said wife "until she was compelled to take her bed." By reason of the kicking and beating she received from the defendant, she was made sick for a period of three months. In the month of October, 1901, appellee was compelled to leave the defendant on account of his cruel and brutal treatment towards her. Thereafter, in the month of January, 1902, upon repeated promises made by the defendant to her that he would reform, she consented to return to his home, but the defendant continued thereafter to abuse and brutally mistreat her,

until his abuse became so violent that she was compelled to seek the home of her mother for protection. On one occasion the defendant threw her down, and on another occasion, after the birth of said child, while she was sick in bed, he cursed and abused her, and would return home "beastly drunk." By reason of his habitual and constant abuse, the appellee was compelled, on or about the 15th day of July, 1904, to leave the defendant, and with her said infant child she appears to have gone to the state of Missouri. In August, 1904, she, with the said child, was living at a place called Hayti in said state. The defendant came to the place where she was living, and represented to her that, if she would return to Indianapolis in the state of Indiana, he would divide their property and secure her a divorce. Upon their arrival at Indianapolis, on their return from said state of Missouri, the defendant represented to the appellee that his mother, Ella Willis, co-appellant herein, was very ill, and that she desired to see said infant child, and he agreed and promised appellee to return the child to her early in the afternoon of said day. She believed his representations and statements to be true, and allowed him to take the child in question to the home of his mother, Ella Willis, in the city of Indianapolis, Ind. It is alleged that said defendants, Nathaniel P. and Ella Willis, have ever since kept said child in their care, charge, and custody, and have deprived appellee of the care, charge, and custody thereof. Appellee further shows in her petition that she is ready, able, and willing to care for said child, and that she is a fit person to have the care, charge, and custody thereof, while on the contrary the defendant Nathaniel P. Willis is not a fit person to have the care and custody of the child; that he is a man who is addicted to the use of intoxicating liquors, has a violent and ungovernable temper, and is away from his home until late in the night; that he frequents and spends a great portion of his time in saloons, and thereby is compelled to leave said child with his mother, Ella Willis. The latter, it is alleged, is not a fit person to have the care and custody of said child; that she is a woman of violent and ungovernable temper, and has unkind feelings toward appellee, and, if allowed to retain the custody of the child, she would teach it to dislike and hate appellee, its mother. It is charged that the defendants have unlawfully and wrongfully seized the body of the child in question, and without cause restrain it at No. 128 West Walnut street, in the city of Indianapolis, Ind., and wrongfully deprive the petitioner of the custody and possession thereof, by forcibly confining and restraining said child in the dwelling house of defendant Ella Willis; that the said restraint is unlawful and without cause or right. The defendant Nathaniel

P. Willis has not secured the custody and possession of said child by permission of this petitioner, nor by the order or authority of any court.

Counsel for appellant Nathaniel P. Willis contend that the motion of the latter to quash the writ ought to have been sustained on the grounds assigned therein as to the insufficiency of the petition. We cannot agree with counsel that the petition is not sufficient to justify the court in issuing the writ of habeas corpus. It is disclosed by this pleading that by reason of the cruel and inhuman treatment of appellee by appellant, her husband, and father of her child, that she was finally compelled to leave him, and go elsewhere to reside. It appears that she with her child went to the state of Missouri, and located at the town mentioned in the petition. Subsequently appellant, through a false promise, induced her to return with him to the city of Indianapolis, and by other false promises and deceptions he temporarily obtained from her the possession of the child, and then failed and refused to return it to her, in accordance with his promise. The petition, by its general averments, and by facts specifically alleged, shows that she is a fit person to be intrusted with the custody thereof, that she is ready and able to care for and support it, while on the contrary its father, appellant, is shown not to be a fit or suitable person, under the circumstances, to have the care and custody of the said infant child. There is a general averment at least to disclose that the defendants unlawfully and wrongfully without cause restrained the child at the place designated in the petition. Possibly the pleading is not as definite and specific in some respects as it should be, but upon the whole we are of the opinion that it is sufficient to sustain the writ. *Curtis v. Curtis*, 131 Ind. 489, 30 N. E. 18; *Schleuter v. Canatsy*, 148 Ind. 384, 47 N. E. 825.

The petition in question was addressed to the sound legal discretion of the trial court, and appellant, under his motion to quash, in like manner as by demurring to a pleading, admitted the truth of the allegations therein. Considering these as true, they certainly show a sufficient prima facie case. Such a state of facts is disclosed as would authorize the conclusion that the interest and welfare of this infant of tender age, as shown, will be best subserved by awarding the custody thereof, at least pro tempore, to appellee, the mother, who, as it appears, has had it under her care since its birth. See *Berkshire v. Caley*, 157 Ind. 1, 60 N. E. 696; *Bullock v. Robertson*, 160 Ind. 521, 65 N. E. 5, and cases there cited. We conclude that there was no error, under the circumstances, in denying the motion to quash the writ.

It is next contended that the evidence does not sustain the finding of the trial court, and that in cases of this character, where a proper assignment of error is made, this

court, by virtue of the provisions of section 8 of the act of 1903 (Acts 1903, p. 338, c. 103), ought to consider and weigh the evidence, and award judgment according to the weight thereof. One of the reasons assigned in appellant's motion for a new trial was insufficiency of the evidence to support the finding, and he now seeks to present that question under the second paragraph of his separate assignment, whereby he alleges that the court erred in overruling his motion for a new trial, to which ruling he excepted. At this stage of the case we are confronted with the insistence of appellee's counsel that this assignment is not supported by the record, or, in other words, that the latter does not meet or respond to said assignment, and therefore no question as to the sufficiency of the evidence is thereunder presented for our consideration. An examination of the transcript fully verifies this contention. The entry from the court's order book recites that "the respondents, Nathaniel P. Willis and Ella Willis now file their written motions and reasons for a new trial herein. Said motions are as follows:" Immediately after this entry follows what purports on its face to be the separate motion of Nathaniel P. Willis for a new trial, and after his motion follows what purports to be the separate motion of Ella Willis for a new trial. The record then recites: "And the court, being fully advised in the premises, doth now overrule said motion, to which ruling of the court said respondents except, and 90 days time are given them to file bill of exceptions, and respondents now pray an appeal to the Supreme Court," etc. This is the only ruling shown by the record. It is therefore evident that the second paragraph of appellant Nathaniel P. Willis' separate assignment under this state of the record is not shown to be based on any ruling exhibited therein.

Which of the two written motions filed by the respondents for a new trial was overruled is wholly left to surmise or conjecture. The assignment in question specifically shows that the ruling upon which appellant seeks to predicate error was one to which he alone excepted, while the record discloses that both of the respondents jointly excepted to the ruling of the motion therein mentioned. That under the circumstances there is a wide variance between the assignment in question and the record is certainly manifest. It is settled beyond controversy that an assignment in a case on appeal to this court, which has no foundation or facts disclosed by the record upon which it can rest, presents no question, and must be disregarded. *Ewbanks' Manual*, §§ 127, 137; *Singer, Adm'r, v. Tormoehlen*, 150 Ind. 287, 49 N. E. 1055, and cases there cited; *Meyer v. Meyer*, 155 Ind. 569, 58 N. E. 842; *Southern Ry. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Smith v. Borden*, 160

Ind. 223, 66 N. E. 681; *Chicago, etc., R. Co. v. Walton* (Ind. Sup) 74 N. E. 988, and cases there cited.

As there is no ruling of the trial court upon which appellant Nathaniel P. Willis can base the second paragraph of his separate assignment, it follows that the question which he attempts to present in respect to the insufficiency of the evidence cannot be considered.

Finding no available error, the judgment below is affirmed.

(165 Ind. 332)

WILLIS v. WILLIS. (No. 20,574.)

(Supreme Court of Indiana. Oct. 13, 1905.)

1. APPEAL — SUPERSEDEAS — SELF-EXECUTING JUDGMENTS — HABEAS CORPUS PROCEEDINGS.

Under Burns' Ann. St. 1901, § 650, providing that an appeal taken during the term shall operate as a stay of all further proceedings on the judgment upon the filing of an appeal bond conditioned to duly prosecute the appeal, and pay the judgment and costs which may be rendered against appellant, a bond filed on appeal from a judgment awarding petitioner in habeas corpus proceedings the custody of a child, and assessing the costs to respondent, does not stay the operation of the judgment, in so far as it awards the custody of the child and is self-executing, but merely stays the execution for the collection of costs.

2. HABEAS CORPUS — COURTS — JURISDICTION — TERRITORIAL EXTENT.

Habeas corpus proceedings for the custody of a child resulted in the award of such custody to petitioner, and respondent appealed, and moved for the remission of the child to his custody pending the appeal. Subsequently the motion was withdrawn, and an agreement, leaving the custody of the child to petitioner pending the appeal, and providing that petitioner should keep the child within the jurisdiction of the circuit court during that time, was filed and made an order of court. *Held*, that the act of petitioner in taking the child into another county of the state did not remove it from the jurisdiction of the court in violation of the court's order and the agreement, but the circuit court's jurisdiction, for the purpose of enforcing or modifying its order, would extend to any place in the state at which petitioner might locate.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 46.]

3. SAME — JURISDICTION — PRIORITY — VIOLATION OF COURT'S ORDER.

Where petitioner in habeas corpus proceedings for the custody of a child violated the order of court awarding her such custody by moving with the child into another county, respondent to the proceedings should have applied for relief to the court whose order was violated, and not to the court of the county to which the petitioner removed.

4. JUDGMENT RES JUDICATA — HABEAS CORPUS PROCEEDINGS.

The doctrine of res judicata applies to habeas corpus proceedings to obtain the custody of a child.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Habeas corpus proceedings by Nathaniel Parker Willis against Hattie Bell Willis.

From a judgment quashing the writ, petitioner appeals. Affirmed.

H. N. Spaau and Crane & McCabe, for appellant. James A. Collins and C. E. Averill, for appellee.

JORDAN, J. This was a proceeding by appellant for a writ of habeas corpus against appellee to obtain the custody of a child. The petition presented for the writ shows, among other things, substantially the following facts: The petitioner, appellant herein, and the appellee are husband and wife, living separate and apart from each other, and are the parents of the child in controversy, Mary Frances Laura Willis, of the age of two years. This child is in the custody of its mother, the respondent, at the town of Ladoga, Montgomery county, Ind. Prior to the commencement of this action, on September 1, 1904, the said parties were then living separately from each other; said child at that time being in the custody of the petitioner, its father. On said date the respondent instituted an action of habeas corpus against the petitioner and his mother, Ella Willis, in the Marion circuit court, for the purpose of securing the possession and custody of the child now in controversy. On the hearing of said proceeding, the Marion circuit court found in favor of the respondent, appellee herein, and by its judgment and decree awarded to her the possession, care, and custody of the said infant child. Thereupon the petitioner herein moved the court for a new trial. This motion was denied, and an appeal in term time was prayed to the Supreme Court of said state, which was granted, upon the condition that the petitioner file an appeal bond in the penal sum of \$5,000 within 10 days from September 26, 1904. This bond was filed within the time given, and approved by the court, and thereupon said petitioner moved and requested the court to remand said child to his care and custody during the pendency of said appeal. This motion was afterward withdrawn, and the following was in open court entered of record: "Come now the parties, and the respondents, by leave of court, withdraw their motion to remand Mary Frances Laura Willis to the care and custody of respondents pending the decision of this cause by the Supreme Court on appeal, and it is agreed by all the parties to this action that pending the appeal in this cause, and until the Supreme Court shall have finally passed upon the appeal herein, the said Mary Frances Laura Willis shall be and remain in the care and custody of her mother, the said Hattie Bell Willis, and the court does now order that said child, Mary Frances Laura Willis, shall be and remain in the care and custody of her mother, as aforesaid, until said appeal shall finally be determined, and that

said child shall during the pending of said appeal, and until said appeal shall have been finally determined, be kept by the mother within the jurisdiction of this court." The appeal, as prayed for and granted, was taken and perfected. Within 15 days after the making of the above order, said Hattie B. Willis, appellee herein, took said child to Ladoga, Montgomery county, Ind. where it is now under her custody and charge. Prayer for a writ of habeas corpus, and that on the hearing of the petition the possession, care, and custody of the child be given to the petitioner. The petition was duly verified, and thereon a writ of habeas corpus was issued. Appellee appeared in court, and through her counsel moved to quash the writ for insufficiency of the facts alleged in the petition. This motion, over appellant's exception and objection, was sustained, and judgment was rendered against him for costs. From this judgment he appeals, and assigns that the court erred in sustaining the motion to quash the writ of habeas corpus.

The propositions presented by counsel to show that under the facts alleged in the petition appellant was entitled to the possession and custody of the child, and that therefore the court erred in quashing the writ, are: (1) Appellant having filed an appeal bond, and taken and perfected an appeal to the Supreme Court from the judgment of the Marion circuit court in the former action between him and appellee, hence all proceedings on the judgment or decree from which the appeal was prosecuted were stayed, and he was entitled to retain the possession and custody of his infant child during the pendency of the appeal to the Supreme Court, notwithstanding the fact that the care and custody thereof under the judgment had been awarded to appellee. (2) Under the above agreement, which she entered into in court, she bound herself to keep the child within the jurisdiction of the circuit court of Marion county, Ind.; that in taking the child to Ladoga, Montgomery county, to reside with her she violated and broke said agreement, for the reason that said county of Montgomery is not within the jurisdiction of the Marion circuit court, within the meaning of the provisions of the agreement in question. Appellee having therefore violated the agreement by taking the child beyond the jurisdiction of the Marion circuit court, appellant was thereby restored to his former right to have and retain the custody of the child during the pendency of the appeal by virtue of the fact that he had filed an appeal bond to stay the proceedings on the judgment of the Marion circuit court, from which he had appealed.

Neither of the above propositions, as advanced by appellant's learned counsel, is

tenable. Under the laws of this state, there certainly are no sufficient grounds or reasons to sustain the first proposition. The fact that appellant, as shown, filed an appeal bond, and appealed from the judgment in the former habeas corpus proceedings to the Supreme Court, did not operate to give him the right over the judgment to retain the custody of the infant child during the pendency of the appeal in controversy. It is true that section 650, Burns' Ann. St. 1901, being section 632 of the Civil Code of 1881, in respect to a term-time appeal, provides: "When an appeal is taken during the term at which the judgment is rendered, it shall operate as a stay of all further proceedings on the judgment upon an appeal bond being filed by the appellant with such penalty and surety as the court shall have approved and within such time as it shall direct, payable to the appellee with condition that he (appellant) will duly prosecute his appeal and abide by it and pay the judgment and costs which may be rendered or affirmed against him." This section contains further provisions in regard to the condition of such appeal bond, where the appeal is taken from a judgment for the recovery of real property or the possession thereof, or from a judgment for the return of personal property, etc. The effect of this section has been considered by this court in several cases. In *Padgett v. State*, 93 Ind. 396, it was held that an appeal to this court by remonstrators, in compliance with the provisions of this section, from a judgment of a circuit court awarding an applicant a license to retail intoxicating liquors, did not operate to suspend the right of the applicant to take out the license granted to him under the judgment. The court in that appeal held that the issuing of the license could not be regarded as a proceeding on the judgment, within the meaning of the above statute. One of the reasons assigned for the court's conclusion was that the judgment in question was self-executing, as the entry thereof entitled the applicant to the license granted without any other proceeding on the judgment. *Walls v. Palmer*, 64 Ind. 493 was an appeal from a judgment suspending an attorney from the practice of law. It was held in that case that the appellant, by appealing from such judgment and procuring a supersedeas or stay of proceeding, was not thereby restored to his rights as an attorney and counselor at law during the pendency of the appeal to this court. It was therein held that such judgment was self-executing, and the only effect of the supersedeas was to stay an execution upon the judgment to enforce the collection of costs. *Randels v. Randels*, 67 Ind. 434, was an appeal from a judgment in an action for partition of land. The appeal was taken in term time, and granted upon filing an appeal bond. This court in

that case held that the only effect of the appeal upon the judgment in question was to stay execution thereon for costs until the termination of the appeal; that in all other respects the judgment, until reversed or annulled, was binding on the parties thereto as to every question therein decided. In *Central Union Tel. Co. v. State ex rel.*, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136, this court, per Elliott, J., in considering the effect of an appeal, said: "The effect of a supersedeas is to restrain the appellee from taking affirmative action to enforce his decree, but it does not authorize the appellant to do what the decree prohibits him from doing. The doctrine which our decisions have long maintained is thus stated in *Nill v. Comparet*, 16 Ind. 107, 79 Am. Dec. 411: 'Indeed, the only effect of an appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, stands binding upon the parties as to every question directly decided.' " An appeal from a decree awarding an injunction does not vacate the injunction, nor authorize its disobedience. The decree is effective, and must be obeyed until reversed. *Hawkins v. State*, 126 Ind. 294, 26 N. E. 43. In *Graves v. McGuire*, 6 Paige, 379, the chancellor, in considering the condition of the judgment after an appeal, said: "The effect of an appeal, after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from, is to leave the proceedings in the same situation as they were at the time of perfecting such appeal, but not as they were before the order or decree appealed from was entered."

It is evident, in the light of the above authorities, that the judgment of the Marion circuit court, under which appellee was awarded and given the care and custody of the child in controversy, was self-executing; and, aside from the issuing of an execution to enforce the collection of appellee's costs, no other proceedings could be had or taken thereon. Under the circumstances, the only effect of the appeal bond given by appellant in that case was to stay an execution for the collection of costs on the part of appellee. Aside from an execution to enforce the collection of costs, no other process, proceeding, or act of a ministerial officer was necessary to give effect to the judgment which transferred the possession and custody of the child in controversy to appellee. It is said by this court in *Carver v. Carver*, 115 Ind. 539, 18 N. E. 37: "It was not possible to institute any proceeding upon the judgment, aside from an execution, and therefore the supersedeas and bond did not stay any proceeding except an execution." To accord to the stay of proceedings in the case in controversy the force and effect for which appellant contends would be to confer

upon him a right, i. e., to retain the care and custody of the child during the pendency of the appeal, and would result in making a stay of proceedings a remedy granting an affirmative right, rather than a preventive order or writ. Elliott's App. Proc. §§ 391, 392.

Counsel for appellant relies upon the decision of this court in *Garner v. Gordon*, 41 Ind. 92-108. That was a proceeding by a writ of habeas corpus to obtain the custody of minor children. The care and custody of the children in that case was by the trial court awarded to the petitioner. From this judgment the respondent appealed in term time to this court, and filed an appeal bond, which was approved by the court. It is held in that case that the effect of the appeal operated to stay the proceedings on the judgment, and that thereby the appellant was entitled to the custody of the children pending the appeal. The only authority relied upon by the court to sustain the holding was section 555 of the Civil Code of 1852, 2 Gav. & H. p. 271. This section, as does section 650, Burns' Ann. St., supra, provides for a term-time appeal by filing an appeal bond by the appellant. An examination of the case discloses that the question did not receive careful consideration by the court, and the holding upon the point in controversy is wholly at variance with the later decisions to which we have herein referred. That case upon the point in question is therefore overruled.

It is not reasonable to assert that appellee, by locating in Montgomery county, Ind., took the child beyond the jurisdiction in the case of the Marion circuit court. There is nothing in the agreement or the order of the court thereon by which it can be said that appellee was required to keep the child at Marion county, Ind., and was not permitted to locate at any other point in the state. The jurisdiction of the Marion circuit court certainly would extend to any place within the state at which she might locate, for the purpose, at least, of attaching her for contempt, for disobeying the court's order in the habeas corpus case, or for the purpose of citing her to appear before the court, and show cause why the judgment thereof awarding her the care and custody of the child should not be modified or changed. If appellant believed that he was entitled to the care and custody of the infant in controversy because appellee had violated the order of the Marion circuit court, instead of applying for relief to the Montgomery circuit court, he should have applied to the Marion circuit court. The doctrine of *res adjudicata* applies to habeas corpus proceedings to obtain the custody of a child. *Brooke v. Logan*, 112 Ind. 183, 13 N. E. 669, 2 Am. St. Rep. 177.

The record discloses no error, and the judgment is therefore affirmed.

(165 Ind. 411)

SWING v. HILL et al. (No. 20,628.)

(Supreme Court of Indiana. Oct. 27, 1905.)

1. INSURANCE—MUTUAL COMPANIES—POLICY HOLDERS—STATUTORY LIABILITY.

In a suit by a trustee for creditors of a foreign mutual fire insurance company to recover a statutory liability against policy holders, it was no defense that the company had written defendant's policies, insuring property in Indiana, for the benefit of defendants, who were citizens of that state, without having complied with its insurance laws; the Legislature having no authority to prohibit citizens from making contracts outside the state insuring property within its boundaries.

2. APPEAL—HARMLESS ERROR—PLEADING—REPLY—DEMURRER.

Where a reply in general denial was not on file when a demurrer was erroneously sustained to a special paragraph in the reply, such error was not rendered harmless by the subsequent filing of a reply in general denial under which the special matter was admissible, which plaintiff withdrew, after having duly reserved his exception to the order sustaining the demurrer.

3. SAME—RECORD—PRESENTATION OF ERROR.

Where, on appeal from an order sustaining a demurrer to a special paragraph in reply to a plea in abatement, appellant presented a mere epitome of the plea and the special paragraph of the reply, which was sufficient to advise the court, after reading appellant's principal brief, of the question presented for determination, the record sufficiently complied with Supreme Court rule 22 (55 N. E. vi) requiring appellant to set out a concise statement of so much of the record as fully presents the error relied on.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3092, 3093.]

Appeal from Circuit Court, Monroe County; James B. Wilson, Judge.

Action by James B. Swing, as trustee for creditors of the Union Mutual Fire Insurance Company, against Nathaniel U. Hill and others. From a judgment that the action abate, plaintiff appeals. Case transferred from Appellate Court under Burns' Ann. St. 1901, § 1337u. Reversed.

P. A. Reece and Miers, Coorrt & Miers, for appellant. Duncan & Batman, for appellees.

GILLET, J. James B. Swing, as trustee for the creditors of the Union Mutual Fire Insurance Company, of Cincinnati, Ohio, brought this action against appellees to recover on account of a statutory liability alleged to exist against the latter, as policy holders in said company. Appellees filed a plea in abatement, alleging in substance that their contracts of insurance with said company were made in the state of Indiana and that said company had not complied with the insurance laws of this state. Appellant, by way of reply, admitted that said company had not taken the steps required by statute as a prerequisite to doing business in Indiana, and as to all other matters set up in said answer it denied each and every of its allegations. A demurrer was sustained to this reply, and appellant excepted. He afterwards filed a general denial to said answer; but, as he subsequently withdrew the latter reply and

refused to plead further, the court rendered judgment that the action abate.

It is evident that it was the theory of said answer that, as said insurance company had entered into the contracts of insurance with appellees in the state of Indiana without complying with the insurance laws thereof, the action ought to abate, and the question arises whether, upon a denial of the allegation that the contracts were made in this state, there appeared upon the record admitted allegations which justified the abating of the action. Although it is competent for the state by legislation to prevent foreign corporations from entering into insurance contracts in this state concerning property therein without complying with the requirements of law, and while it is also competent for the state to prohibit the agents of such companies from soliciting insurance in this state, yet the Legislature is not empowered to enact a statute whereby it prohibits citizens from entering into contracts outside of this state insuring property within its boundaries. *Allgeyer v. State*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Nutting v. Com.*, 183 U. S. 553, 22 Sup. Ct. 238, 46 L. Ed. 324. In *Allgeyer v. State*, supra, the federal Supreme Court used the following language: "Has not a citizen of a state, under the provisions of the federal Constitution above mentioned, a right to contract outside of the state for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the state by an insurance company or its agents doing business therein, which are in violation of the state statutes. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the state, and as such was a valid and proper contract. The act done within the limits of the state, under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform, and which the State Legislature had no right to prevent, at least with reference to the federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal." It does not appear, as among the admitted facts, either that the contracts of insurance were made in this state or were to be performed here. The only admitted fact concerning the contract was that said company had written insurance upon property in this state for the benefit of a citizen thereof. This did not furnish ground for the abating of the action.

It is urged by appellees' counsel that, inasmuch as proof in denial of appellees' plea in abatement would have been admissible under the general denial which was subsequently filed, no harmful error was committed by the court in sustaining the demurrer to the first or special paragraph of reply. Had the reply by way of general denial been

on file when the demurrer was sustained to the special paragraph, we should have been required to hold that there was no available error, as the ruling would not have restricted the proof. But, as the general denial was not on file at the time the ruling complained of was made, the court, by sustaining the demurrer, was committed to the proposition that the fact that the contract was made outside of this state was not a matter of any importance. Having duly reserved his exception to said ruling, plaintiff was thereafter entitled to withdraw the reply he subsequently filed and stand upon the legal proposition which his first paragraph of reply had presented. The ruling had definitely indicated the position of the court that the place of the making of the contract was an immaterial matter, and after such special ruling was made there was no occasion for taking the judgment of the court on the same question as it would be presented on the facts.

It is further objected by counsel for appellee that appellant has not sufficiently complied with rule 22 of this court (55 N. E. vi), in that it is claimed that he has not, in his statement of the pleadings, set out a concise statement of so much of the record as fully presents the error relied upon. While it is true that appellant has only presented an epitome of the plea in abatement and of the special paragraph of reply thereto, yet he has set out enough so that each of the judges can be advised, upon the reading of appellant's principal brief, of the question which is presented for our determination. The objection is not well taken.

Judgment reversed, with a direction to the trial court to overrule the demurrer to appellant's first or special paragraph of reply, and for further proceeding not inconsistent with this opinion.

(37 Ind. App. 351)

HANCOCK v. DIAMOND PLATE GLASS CO. et al. (No. 5,435.)*

(Appellate Court of Indiana, Division No. 1, Nov. 1, 1905.)

1. APPEAL—FORMER DECISION AS LAW OF THE CASE.

The law declared by the Appellate Court on appeal is the law of the case in all subsequent trials.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4661-4665.]

2. MINES AND MINERALS—LEASES—CONSTRUCTION.

A lease of oil and gas land provided that it should commence when signed, and terminate when natural gas ceased to be used generally for manufacturing purposes in the county or on failure to pay the rent agreed on within 60 days after due, and the lessee agreed to pay \$100 each year for each gas well drilled, and unless he drilled a gas well he was to pay an annual rent of 50 cents per acre, and if wells were not drilled in five years it was to be raised to \$1 an acre. *Held*, that the rights of the parties as to the continuance and termination of the lease were not the same before and after the development of the land for oil and gas, and before the

*Rehearing denied. Transfer denied.

development the lessor might terminate the lease by refusing to accept the rent for another year on giving the lessee reasonable notice, while if the lessee took possession and drilled a valuable well the lessor could not arbitrarily terminate the lease by refusing to accept the rent.

3. APPEAL—LAW OF THE CASE—QUESTIONS CONCLUDED.

In an action by a lessor of oil and gas land for the rent stipulated to be paid by the lessee before the drilling of wells, a judgment for the lessor was reversed and the cause remanded. Afterwards the cause was dismissed and a new one instituted. The complaint in the second action was the same as in the first action, except that the complaint in the first action did not aver possession by the lessee, while the complaint in the second action did. The question of possession was presented and litigated in the first action. *Held*, that the second case was governed by the law declared on appeal in the first case, not only as to the law on the facts pleaded, but as to the law on the facts shown by the evidence, though not pleaded.

4. EVIDENCE—JUDICIAL NOTICE.

An appellate tribunal takes judicial notice of its own records, and may, in considering a cause before it, inspect its records on its own motion or at the suggestion of counsel.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 62-64.]

5. MINES AND MINERALS—LEASES—PART PERFORMANCE.

Where, in an action for rent under a lease of oil and gas land, the court on appeal decided that until the lessee took possession the agreement was one from year to year, which at the end of any year either party could terminate, a finding in a subsequent action for rent that the lessee, after having elected to terminate the agreement, furnished gas through its pipes to the lessor, as required by the lease, did not amount to finding of such part performance on the part of the lessee as prevented it from exercising the right to terminate the lease.

Appeal from Superior Court, Grant County;
B. F. Harness, Judge.

Action by Anna E. Hancock against the Diamond Plate Glass Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

B. C. Moon, for appellant. Blackledge, Shirley & Wolf and Bell & Purdum, for appellees.

ROBINSON, J. Suit by appellant to recover acreage rental upon a natural gas lease. Upon a special finding of facts the court stated a conclusion of law in appellees' favor. The correctness of the conclusion of law is the only question presented.

The facts found are in substance as follows: On July 23, 1889, appellant owned in fee and was in possession of certain land, and on that date, her husband joining, she executed to the Diamond Plate Glass Company of Indiana a gas and oil lease on the land in two parts; the lease providing, among things: That the lessee should have the right of ingress and egress to and from the tracks on which wells were to be located, the right to use the highways adjoining any part of the premises for the laying of mains and pipes for the transportation of gas, the lessee "to deliver to said first party, during the continuance of this lease,

natural gas, free of charge, necessary for domestic use for dwelling house now on said premises, or that may be hereafter erected thereon, not exceeding one," the gas to be delivered in a main or pipe at the house, the lessee to furnish at the railroad pipes necessary for conducting the gas and a superintendent for laying the same, the mains to belong to the lessee, the lessor to lay the pipes and make all necessary attachments. All gas obtained should be used in Howard county. "This grant and lease shall be deemed to commence at and run from the date of the signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in Howard county, Indiana, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due, and, in the event of the termination hereof, all rights and liabilities hereunder shall cease and terminate. And, as an additional consideration, the said second party agrees to pay to said first party an annual rental of one hundred dollars each year for each gas well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes, said payments to commence and become due and payable on the first day of January as to each of said gas wells after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas well on said premises by said second party they shall pay to said first party an annual rental of fifty-hundredths dollars an acre, to be paid on the first day of January of each year, commencing 1891." If wells were not drilled in five years the rental to be one dollar an acre. "Should any other gas well or wells be put down on said 54.60 acres tract of land, other than herein stipulated for, then said second party, their heirs or assigns, shall thereafter be relieved and released from the payment of the rental as in this contract provided. This contract shall extend to and be binding upon the heirs, executors, and assigns of the parties thereto." In the second agreement, made on the same day, the lessor agreed not to drill or permit others to drill on the land during the continuance of the lease, and in case any other wells were put down the lessee and assigns should thereafter be released from the payment of any rentals; but otherwise the lessee's rights should not be affected. On October 13, 1890, the Diamond Plate Glass Company of Indiana assigned the lease to the Diamond Plate Glass Company of Illinois, which latter company on April 1, 1895, assigned the lease to the Pittsburgh Plate Glass Company, which company agreed to perform all the terms and conditions of the lease and pay all rentals thereafter maturing under the lease. On September 19, 1895, the Pittsburgh Company assigned the lease to the Logansport & Wabash Valley Gas Company, which company held the lease until the surrender thereof. That the Log-

ansport Company agreed to perform all the conditions of the lease and pay all rentals thereafter maturing. The assignment of the lease from the Diamond Plate Glass Company of Illinois to the Pittsburgh Plate Glass Company, and from that company to the Logansport & Wabash Valley Gas Company, also embraced the assignment and conveyance of all gas lines situated within the territory covered by the leases thereby assigned which were used for supplying gas to the lessors. That the Diamond Plate Glass Company of Indiana and the Diamond Plate Glass Company of Illinois entered upon the land and laid in the highways thereof pipes for the transportation of natural gas, and maintained the same until the assignment of the lease to the Pittsburgh Company, which company, when it became owner of the lease, entered upon the land for the purpose of maintaining thereon in the highways such pipes, and continued to maintain the same until it assigned the lease to the Logansport Company, which company, when it became the owner of the lease, entered upon the land and maintained in the highways such pipes, and maintained upon and across the land in the highway, from the time it became the owner until December, 1900, about 10 rods of one-inch pipe, which it continuously used for the transportation of gas produced elsewhere, and that such pipe was a service pipe used by appellees to furnish natural gas free of charge to the lessor under the lease. That no gas or oil well has been drilled at any time upon the land, and no one of the holders of the lease ever offered to drill or put down any well, although appellant was always ready and willing for such well to be drilled by any of the holders of the lease at any time when the lease was in force. That the rent maturing under the terms of the lease on January 1, 1891, 1892, 1893, 1894, and 1895 was paid, but the rent claimed by appellant as maturing on January 1, 1896, 1897, 1898, 1899, and 1900 is unpaid. That natural gas was used generally for manufacturing purposes in Howard county from the time of the execution of the lease until the spring of 1902. That appellant has performed all the conditions of the contract on her part. That the several holders of the lease furnished appellant natural gas, free of charge, necessary for domestic use for the dwelling house on the land from a date immediately after the execution of the lease to the latter part of December, 1900, according to the contract, but the Logansport & Wabash Valley Gas Company on or about December 25, 1900, cut off the supply of gas to the house and removed its pipes and fixtures from the land, and has not since that date furnished appellant with gas or exercised any rights in the land under the lease. That on January 6, 1900, the Logansport & Wabash Valley Gas Company signed, acknowledged, and caused to be recorded a release of all rights under the lease, and the county recorder entered upon the margin of the lease,

where the same was recorded, a reference to such cancellation. That about the 1st day of January, 1896, the Logansport & Wabash Valley Company, through its general manager, decided to terminate the lease, claiming the right to do so under the clause providing: "This grant and lease * * * shall be deemed to have terminated * * * whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of its becoming due, and, in the event of the termination thereof for any cause, all rights and liabilities hereunder shall cease and terminate." That pursuant to such election or shortly thereafter it notified appellant through its field man of such election, and that it would not thereafter continue the lease in force nor pay any rentals, but that the same was then and thereafter null and void. That from and after January, 1896, the Logansport Company has continuously refused to pay any rentals, and has never since that date claimed to hold any rights under the lease, but that appellant has during that time refused to consent to the termination of the lease and denied the right of appellee so to terminate the same until about December, 1900. On February 24, 1896, after appellant had been informed that the Logansport Company claimed the lease to be no longer in force, on the ground that the same had been terminated by it under the above provision, appellant filed before a justice of the peace a complaint for rentals alleged to be due under the contract sued on in this case upon January 1, 1896, and the appellees, the Diamond Plate Glass Company and the Pittsburgh Plate Glass Company, were made parties defendant. That the complaint in that case alleged that at the date thereof, the plaintiff therein and the plaintiff herein was the owner in fee and in possession of the real estate described in the complaint herein and in that case and in the lease filed as an exhibit; that the plaintiff executed to the Diamond Plate Glass Company of Indiana a gas lease on the land, which was accepted by the company, by the terms of which lease the company agreed to pay to the plaintiff an annual rent of \$54.60, to be paid on the 1st day of January, 1895, and each year thereafter until a well was drilled, and that no well had been drilled; that the rental due January 1, 1896, was due and unpaid; that in 1890 the lease was assigned by the lessee to the Diamond Plate Glass Company of Illinois, which company on April 1, 1895, assigned the lease to the Pittsburgh Plate Glass Company, by the terms of which assignment the assignee agreed as part of the consideration to perform all the terms of the lease and pay all rentals thereafter accruing which defendants had failed and refused to do. That a copy of the lease was filed with and made part of the complaint—and demanded judgment for such rental. That the lease filed as a part of that complaint was a copy of the part of the lease sued on in this action, which

is first set out above, and no mention was made in the former suit of the second agreement above set out, and no averment was contained in the complaint in the former case as to possession taken under the lease of any part of the land or of any part performance of the terms thereof by appellees or any of them. That counsel were employed by the Logansport & Wabash Valley Company to appear in that action in behalf of the defendants, which counsel did appear and defend, but judgment was rendered against the defendants by the justice for the amount claimed by the plaintiff, from which judgment the defendants appealed to the Howard circuit court, and afterwards had the cause transferred on change of venue to the Tipton circuit court. That in the last-named court the defendants filed a demurrer to the complaint which was overruled. That they filed a cross-complaint, alleging that the plaintiff was the holder of the lease, that the lease was null and void for uncertainty in the description of the land, that the cross-complainant had never been in possession of nor drilled any well upon the land, and that the plaintiff claimed the lease was valid and was then prosecuting an action to collect rentals and was threatening to prosecute other actions against the cross-complaint on the lease—praying that the lease be declared null and void and for an injunction. That a motion to strike out this cross-complaint was sustained. That upon the trial of such cause it was the theory of the defendants that the lessees had the right to terminate the lease January 1, 1896, and had so terminated the same under the clause of the lease above set out, and that the failure to pay the rent accruing in 1896 for the period of 60 days after its becoming due was of itself notice of such termination; the theory of plaintiff being that the clause for the termination of the lease upon the failure to pay rent within 60 days was for the benefit of the plaintiff, and that the lessees had no right to terminate the lease, it being further contended by the defendants that the contract was for an indefinite period and therefore at most a tenancy from year to year, which might be terminated by the lessees at the end of any year without notice. That upon the trial of the cause a finding and judgment was made in favor of the plaintiff for the sum claimed, from which judgment the defendants appealed to the appellate court, which reversed the cause and remanded the same to the Tipton circuit court, whereupon the cause was dismissed by the plaintiff at the April, 1900, term of that court. That the cause entitled *Diamond Plate Glass Co. v. Hancock*, reported in 24 Ind. App. 701, 55 N. E. 1103, is the same cause as that originally brought by the plaintiff and dismissed as above stated. That the original case brought by the plaintiff was one of a series or number of cases instituted about the same time by a number of landowners acting in concert, of whom appellant was

one, against appellee, for the collection of rentals alleged to be due under gas and oil leases executed by such landowners to the Diamond Plate Glass Company. That during the pendency of such suit, and until in December, 1900, the Logansport & Wabash Valley Company continued to furnish free gas to appellant as above set out. In the Appellate Court the original cause was presented by counsel for the respective parties upon the respective theories above referred to, and in the decision of the cause it was adjudged: "The questions presented on this appeal are the same as those in *Diamond Plate Glass Company v. Curless*, 22 Ind. App. 346, 52 N. E. 782, and in *Diamond Plate Glass Company v. Echelbarger*, 24 Ind. App. 124, 55 N. E. 233; and upon the authority of these cases the judgment is reversed." That *Diamond Plate Glass Company v. Curless* was one of such series being prosecuted by such several landowners for the purpose of enforcing and continuing the respective leases on their several lands; the contract sued on in the *Curless* Case being substantially identical with that sued on originally by appellant herein. That the *Echelbarger* Case was one of such several suits so being prosecuted, and the contract therein sued on was substantially identical with that sued on in the *Curless* Case and in the original suit brought by appellant, except that in the *Echelbarger* Case the contract further provided "that the lessor should not drill or suffer or permit others to drill or put down any other gas well or wells on any part of the 100-acre tract during the continuance of such lease." The finding also sets out extracts from the opinions in the *Curless* Case and the *Echelbarger* Case, and that the amount due appellant, if entitled to recover, is \$376.60.

It is argued by counsel for appellees that the law in this case was established on the former appeal. *Diamond Plate Glass Company v. Hancock*, 24 Ind. App. 701, 55 N. E. 1103. That appeal was decided upon the authority of *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346, 52 N. E. 782, and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124, 55 N. E. 233, and it is argued that the law of this case is the law as established in those two decisions. It is well settled that principles of law declared upon a former appeal remain the law of the case, so far as applicable, through all subsequent steps taken in the cause, and must be followed, whether right or wrong. In *Hawley v. Smith*, 45 Ind. 183, 201, it is said: "It having been held in the former action between the same parties on the same cause of action that the relation of principal and agent existed, we should regard the question as *res adjudicata* between the parties. This should be the rule, even if we doubted the correctness of the ruling when applied to other causes." See *Lille v. Trentman*, 130 Ind. 16, 29 N. E. 405; *Phoenix Ins. Co. v. Rogers*, 11 Ind. App. 72, 38 N. E. 865. We

do not understand it to be held in either the Curless Case or the Echelbarger Case that the principles pertaining to the relation of landlord and tenant are applicable to the contracts there in question whether possession has or has not been taken under the contract. It was expressly held in the Curless Case that, possession never having been taken, it could not be said that the relation of landlord and tenant ever existed. In the Echelbarger Case possession was taken, and it was held that a tenancy was created, and, as the instrument itself did not fix its duration, the statute provides that it shall be from year to year. In the leases in question in those two cases a consideration was expressed for the privilege of going upon the land and developing it for gas and oil, and an entirely new and different consideration in the event the land was developed and gas or oil was found. It manifestly was not the intention of the parties that this privilege could be continued indefinitely at the option of either party. When possession was taken by drilling a well that produced gas in paying quantities, a new consideration was named, and the lease very clearly shows the length of time the parties intended it should continue. But possession might be taken and the land remain undeveloped, and while it does appear in the Echelbarger Case that possession was taken it does not appear that possession was taken and the land developed for oil or gas.

That the rights of the parties to the lease as to its continuance and termination are not the same under the lease before and after the development of the land for gas and oil we think is plain from the decisions. In *Consumers' Gas Trust Co. v. Littler*, 162 Ind. 320, 70 N. E. 363, it is held that the option or right to drill, which seems to have run from year to year, might be terminated by the lessor by his refusal to accept the annual payment for another year, provided that the lessee was given such reasonable notice as would afford him a fair chance to discharge his obligation; and in *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149, under a lease providing an annual rental for each producing gas well, it is held that, if the lessee has taken possession and drilled a well more valuable than the lessor anticipated when he made the lease, the lessor could not arbitrarily terminate the lease by refusing to accept the annual rental. Upon the former appeal the judgment was reversed, and after the cause was remanded the case was dismissed. Afterward the suit was again brought to recover the same rent for 1896 sought to be recovered in the former suit, and also the rent for the four succeeding years. The complaint in this action is substantially the same as upon the former appeal, except that the former complaint did not aver possession by the lessee and part performance of the lease, while the complaint in this appeal does. It

is true that the dismissal after the former appeal was without prejudice, but we fail to see any sufficient reason for holding that appellant is in a better position after having dismissed the case and refiled it with additional averments in her complaint than she would have been had she added these additional averments by amending the original pleading and appealed a second time without dismissing.

Counsel for appellee argues that, if this case is governed by the law of the case as declared on the former appeal, such law of the case extends only to the law upon the facts as there pleaded; that the complaint in that case did not aver possession by the lessee or part performance of the lease, while in this case the complaint avers both. The case decided on the former appeal originated before a justice of the peace, and, while the pleadings do not disclose that the questions of possession and part performance were presented by the pleadings, yet an examination of the record of that appeal discloses that those questions were presented, without objection, by the evidence. It is held that an appellate tribunal takes judicial notice of its own records, and that it may, in the consideration of a case before it, either on its own motion or at the suggestion of counsel, inspect its records. *Cluggish v. Koons*, 15 Ind. App. 599, 43 N. E. 158; *Washington, etc., Ry. Co. v. Coeur D'Alene, etc., R. Co.*, 160 U. S. 101, 16 Sup. Ct. 239, 40 L. Ed. 355; *Denny v. State ex rel.*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726. In the *Denny* Case the court said: "Some question having been made as to whether we can thus take notice of other records in this court in considering a case at bar, we may here remark that we have no doubt that this may be done, whether the court make such inspection of its own motion or on the suggestion of counsel."

The finding shows that no gas or oil well has been drilled at any time upon the land, and that no one of the holders of the lease ever offered to drill or put down any well; that is, possession was not taken by developing the land for oil and gas. It is found that pipes for the transportation of gas were laid and maintained in the highway and that the several holders of the lease furnished appellant free gas for the dwelling house on the land. This finding is substantially the same as the undisputed evidence as to these questions upon the former appeal. On the former appeal it was held that this did not constitute possession. It is true the finding states that the several holders of the lease furnished appellant free gas until the latter part of December, 1900, "as above found." But this apparent conclusion is to be considered in connection with the primary facts found. And, when these primary facts are considered, together with the language used in the above finding, we do not think the court intended to find that there had been a part performance of the contract by the furnishing

ing of free gas. If the lessee had the right to terminate the lease and had terminated it under the law of the case we fall to see how the continued use of gas by appellee from the lessee's pipes could impose upon the lessee the consequences of a part performance of the lease. In *Diamond Plate Glass Co. v. Curless*, supra, it is said: "As we construe the instrument in question, it was an agreement whereby appellants, until possession was taken by them, agreed to pay an annual sum for the right to go upon the land at any time within the year and prospect for gas and oil, that the agreement was only from year to year, and that, at the end of any year, either party could terminate the agreement; the one by refusing to accept and the other by refusing to pay the stipulated sum. * * * Possession never having been taken, by the terms of the instrument it cannot be said that the relation of landlord and tenant ever existed. * * * Construing the instrument in question, as we do, to be an agreement whereby a right was granted for a stipulated sum payable from year to year, and continuing from year to year if both parties desired that it should so continue, it could be terminated by either party at the expiration of such period, and a failure to pay the stipulated sum as provided in the agreement or a refusal under the terms of the agreement to pay such sum would work its termination." This doctrine was disapproved in the case of *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149, and is of no effect, except in so far as it is to be applied as the law of the case. It is quite clear that under the rule declared in *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149, appellant would be entitled to recover in this action. But the law declared upon the former appeal, although wrong, remains the law of the case, so far as applicable, upon this the second appeal.

Judgment affirmed.

138 Ind. App. 427)

OVER v. DEHNE (No. 5,382.):

(Appellate Court of Indiana, Division No. 2
Oct. 10, 1905.)

1. NUISANCE—COMPLAINT—SUFFICIENCY AS AGAINST OBJECTION RAISED ON APPEAL.

A complaint which alleged that defendant operated a foundry; that sparks were carried onto plaintiff's premises and on his dwelling, which caught fire therefrom, and was in constant danger of destruction by fire; that cinders had fallen on the roof of the dwelling, and had filled up the down spout into a cistern; that when the foundry was in operation, cinders would fill the house if the doors and windows thereof were left open; that defendant could so operate the foundry as not to cause the carrying of sparks on and into the house; that plaintiff's comfortable enjoyment of his house was constantly interfered with; that defendant was threatening to continue to operate the foundry in the same manner; that plaintiff had been damaged in a specified sum; and that the continuance of the operation of the foundry

would cause irreparable damage, and which prayed for damages and an injunction—was good, when attacked for the first time on appeal, within the rule, as stating facts sufficient to bar another action.

2. SAME—ACQUISITION OF RIGHTS BY PRESCRIPTION—EXTENT OF USER.

In a suit to restrain defendant from operating his foundry, interfering with the enjoyment by plaintiff of his premises, the evidence showed that defendant had operated his foundry for 20 years, and that plaintiff had occupied his property for over 20 years. Prior to 1901 no complaint was made of the manner in which the foundry was operated, while since that time the manner in which it was operated was a private nuisance. *Held* to warrant a finding that defendant had not acquired a prescriptive right to operate the foundry in the manner complained of.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, §§ 45-48, 89.]

3. NEGLIGENCE—FIRES—EVIDENCE—SUFFICIENCY.

In a suit for damages from fire negligently communicated from defendant's foundry, evidence held to support a finding that plaintiff's property caught fire from sparks from defendant's foundry, authorizing a recovery of the damages sustained.

4. APPEAL—FINDINGS—REVIEW.

Acts 1903, p. 341, c. 193, § 8, which provides that the Appellate Court shall, if required by the assignment of errors, weigh the evidence, and, if it appears that the judgment is not supported by the evidence, the court must award judgment according to the weight of the evidence, does not require the Appellate Court to weigh conflicting evidence.

5. TRIAL—FINDINGS—SPECIAL—SURPLUSAGE.

In an action for damages from fire communicated from defendant's foundry, the court made a general finding in favor of plaintiff, and fixed his damages at a sum stated. It then itemized the damages. *Held*, that the itemized statement could not be considered as a special finding, but must be regarded as surplusage, and the finding was a general finding.

6. SAME—SUFFICIENCY OF EVIDENCE—MATERIALITY.

Where the finding of the court as to the amount of damages sustained by plaintiff is general, and the evidence supports it, the question of the sufficiency of the evidence to support the court's itemized statement of the damages is immaterial.

7. NEGLIGENCE—FIRES—EVIDENCE—ADMISSIBILITY.

Where, in an action for damages from fire negligently communicated from defendant's foundry, there was no application for an examination by an impartial person of the condition of the flues in plaintiff's house, to determine whether there was undue liability to fire from the construction of the house, it was not error to exclude evidence as to whether plaintiff was willing that his house should be so examined.

8. EVIDENCE—HEARSAY.

The record of the fire department of a city, containing a report by the captain of a fire company of a fire, made up of a memorandum made by another person, is inadmissible as hearsay, in action for damages resulting from the fire, alleged to have been caused by sparks from defendant's foundry.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1195, 1196.]

9. APPEAL—EVIDENCE—ADMISSION—HARMLESS ERROR.

Where, in an action for damages from a fire caused by sparks from defendant's foundry, the court did not allow any damages occurring

¹ Rehearing denied, 76 N. E. 883. Transfer to Supreme Court denied.

subsequent to the fire complained of, the error, if any, in admitting evidence showing that subsequent fires were caused by sparks from defendant's foundry was harmless.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Charles Dehne against Ewald Over. From a judgment for plaintiff, defendant appeals. Affirmed.

Austin F. Denny, for appellant. Kealing & Hugg, for appellee.

WILEY, C. J. Appellee sued appellant to recover damages resulting from fire alleged to have been communicated to his dwelling from appellant's foundry, and to enjoin appellant from continuing to operate his foundry and "cupulo" so as to interfere with the comfortable enjoyment of his premises. The complaint was in a single paragraph, to which an answer in six paragraphs was addressed. Reply in denial. Upon the issues thus joined, trial was had by the court, resulting in a general finding and judgment for appellee. Appellant's motion for a new trial was overruled. By his assignment of errors he questions the sufficiency of the complaint, and attacks the action of the court in overruling his motion for a new trial. In his complaint appellee avers that for many years he has owned, and still owns, certain real estate, upon which is a dwelling house, which he occupies as a residence; that appellant also owns certain real estate, upon which he has erected, owns, and operates a foundry; that as a part of said foundry, appellant constructed a brick "cupulo" about thirty feet north of appellee's house; that appellant uses said "cupulo" almost every day, from one and a half to two hours, in which to melt iron; that he uses wood, coal, and coke in the operation of the same; that chunks of burning wood fly from the "cupulo" in all directions, and, except when the wind is from the south, the sparks, pieces, and chunks of burning wood are carried upon appellee's premises, and frequently upon his dwelling; that his dwelling has caught fire therefrom four times within the past two years, and whenever said "cupulo" is in operation, his dwelling is in constant and imminent danger of being destroyed by fire; that pieces of burning wood and cinders from the "cupulo" have fallen on the roof of his house in large quantities, have filled the down spouting more than twice in the past six months, and he has been compelled to clean out said spouting frequently; that he obtains rain water for use in his house by its being carried from the roof through the down spouting into a cistern, and by reason of said facts he is unable to so obtain rain water, and that he is put to great inconvenience and damage on account thereof. It is further charged that, when said "cupulo" is in operation and the doors and windows of his residence are open, the sparks and cinders therefrom are

carried into his house, and the house is filled with smoke coming from the "cupulo," which is offensive and injurious to the health of himself and family. It is also charged that appellant could so arrange and operate his "cupulo" in a manner that the sparks, smoke, ashes, and chunks of burning wood will not be carried upon and into his dwelling, and constantly expose him and his family to danger, annoyance, and injury, and his property to constant danger of destruction by fire. That by reason of these facts appellee's comfortable enjoyment of his home has been and is constantly interfered with, and the value of his real estate for a residence and for rental purposes has greatly depreciated. That his residence, when said "cupulo" is in operation, is in constant and imminent danger of being damaged and destroyed by fire, and that he has been damaged by the fires caused by reason of the same, as aforesaid, etc. That appellant is continuing, is threatening to and will continue, to operate the same in the same manner. That appellee has been damaged by reason of the facts aforesaid in the sum of \$500, and the continuance of the same will do him irreparable damage. Prayer for damages and injunction.

The complaint is attacked for the first time in this court. Counsel for appellant in his brief says: "The appellant has no supreme confidence that his first assignment of error, referred to in the caption, is well taken. But sometimes a court of appeals sees points and decides cases upon points not seen nor mentioned by the parties." No tenable objections to the complaint are pointed out. The rule is a familiar one that, where a complaint is tested for the first time on appeal by an assignment of error, it will be held sufficient if it states facts sufficient to bar another action. *Xenia Real Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Bertha v. Sparks*, 19 Ind. App. 431, 49 N. E. 831; *Cummings v. Girtton*, 19 Ind. App. 248, 49 N. E. 300. The complaint in this case comes within this rule, and hence must be held sufficient.

It has been stated in this opinion that but two questions are presented by the assignment of error. It is due counsel for appellant, however, to say that an application was made and granted for leave to file an amended or additional assignment of error, and in pursuance thereto 16 additional specifications of error were filed. While some of these, and possibly all, might be proper reasons for a new trial, under our practice, they are not recognized as proper assignments of error.

In his motion for a new trial appellant assigned 28 reasons therefor. The second, third, fourth, fifth, sixth, eighth, ninth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth reasons so assigned are not known to the Code, and do not present any question for decision. The first

and seventh reasons may be considered together, as they present the statutory reasons for a new trial that the decision of the court is not sustained by sufficient evidence and is contrary to law, and both depend for their determination upon the evidence. The tenth, eleventh, twelfth, and thirteenth reasons present the question of excessive damages, and may be considered together. The remaining reasons predicate error of the trial court in admitting and rejecting and refusing to strike out certain evidence. These will be considered in the order of their discussion in the briefs.

The evidence shows without conflict that appellant had owned and operated his foundry for 20 years, and that appellee had owned and occupied his property adjacent thereto for more than 20 years. While so owning and operating said factory, the evidence also shows that for more than 20 years prior to February, 1901, no fire had occurred to the damage of appellee's property. The fires that damaged appellee's property occurred since 1901, and within two years from the commencement of this action. There is no positive or direct evidence that the fires were occasioned by sparks or burning chunks of wood falling upon appellee's house from the "cupulo," for no witness testified to that fact.

Upon the evidence it is contended by appellant that the decision is not supported by sufficient evidence and is contrary to law for two reasons: (a) Because the evidence shows that appellant had acquired a prescriptive right to so operate his foundry, and (b) because the evidence fails to show that the damage to appellee's property was caused by fire communicated to it from the "cupulo." The complaint proceeds and the trial was had upon the theory that the "cupulo" and the manner of operating it constituted a private nuisance; for it is alleged in the complaint that the "defendant can so arrange and operate his said 'cupulo' in a manner that said sparks, smoke, ashes, and chunks of burning wood will not be carried upon, into, and through his house, as aforesaid, constantly exposing him and his family to danger and injury, as aforesaid, and his property to constant danger of destruction by defendant's operation of his said 'cupulo.'" The theory, as above stated, is manifest, as shown by the evidence and the rulings of the trial court. For more than 20 years prior to 1901 no complaint is made of the manner in which the "cupulo" was operated. The evidence clearly establishes the fact that since that time the manner in which the "cupulo" was operated constituted a private nuisance, and greatly interfered with appellee's occupancy and enjoyment of his property. The injury thus caused was a continuing one, and the nuisance was also a continuing one.

Appellee sought to recover damages caused by three several fires, all of which occurred

since 1901, and for a decrease in the rental value of his property. We doubt if a prescriptive right can be acquired to burn and destroy the property of another. When a nuisance actually exists, it is not excused by the fact that it arises from a business or erection which is of itself lawful, or that is necessary to the operation of the business. 21 Am. & Eng. Encyc. of Law (2d Ed.) 689; *Chicago, etc., Ry. Co. v. Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488; *Shirely v. Cedar Rapids, etc., Ry. Co.*, 74 Iowa, 169, 87 N. W. 133, 7 Am. St. Rep. 471; *Thompson v. Penn. Ry. Co.* (N. J. Ch.) 14 Atl. 897; *Columbus, etc., Coal Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528. In *Owen et al. v. Phillips et al.*, 73 Ind. 284-296, it is held that wherever a mill or factory is located, whatever its surroundings, property owners of the vicinity have a right to require that it shall be properly managed, conducted with ordinary care and proper regard for the rights of others, and in such a way as that no unnecessary inconvenience or annoyance shall be caused by them. The rule there disclosed is applicable to the facts here, for that is what appellee asks, and what the trial court held he had a right to demand.

It is not charged that appellant's business is an unlawful one, but that in the operation of a part of it (the "cupulo") great injury is done to appellee's property, and appellee and his family are put in jeopardy, inconvenience, and annoyance. It is further contended that these could all be averted by a proper operation of the "cupulo." In *Peck v. City of Michigan City*, 149 Ind. 673, 49 N. E. 804, the Supreme Court quoted with approval the following from 16 Am. & Eng. Encyc. of Law, at page 988: "Where the injury inflicted by a nuisance is not of such a character that it can be ascertained, both as to the past and future, by a single action, successive actions lie for new damages so long as the nuisance is continued," and then say: "Many authorities are cited in support of this proposition, and little doubt can exist concerning its accuracy." In the case of the city of North Vernon v. Voegler, 103 Ind. 314, 2 N. E. 821, it was held that a cause of action for damages does not accrue until the wrong or injury has resulted in damage. See, also, *Sherlock v. Louisville, etc., Ry. Co.*, 115 Ind. 22, 17 N. E. 171; 21 Am. & Eng. Encyc. of Law (2d Ed.) 724. In 2 Wood on Nuisances (3d Ed.) § 508, it is held that in order to sustain a plea of a prescriptive right to the nuisance, when the same consists of the right to do some act upon another's premises, the rule is "that, to constitute an adverse user requisite to sustain the right, it must be shown that the user had actually invaded the rights of the person against whom the claim is made, in reference to the particular matter which is the subject of complaint, that the user during the entire statutory period and the invasion of the right have produced an

injury equal to and of the character complained of, and of such a character and to such an extent that at any time during that period an action might have been maintained therefor." See, also, *Sherlock v. Louisville, etc., Ry. Co.*, *supra*; 21 Am. & Eng. Encyc. of Law (2d Ed.) 735.

Our conclusion is that the evidence is sufficient to sustain the finding of the trial court, as against appellant's contention that he has acquired a prescriptive right to operate his "cupulo" in the manner complained of.

The proposition that the evidence is not sufficient to sustain the finding, upon the ground that there was not any direct or positive evidence that appellee's property caught fire from sparks, etc., emitted from appellant's "cupulo," is in our judgment not well grounded. It is disclosed by the record that, when the wind was from the north or northwest, appellant's employes, either on their own volition or that of appellee's daughter, sprinkled the roof of appellee's house before each blast was run. It is thus shown that danger was imminent and anticipated by appellant. It is further disclosed by the evidence that the fires which damaged appellee's property always occurred while the "cupulo" was in operation. There is some evidence, as to one of the fires, that it could not have occurred from any other source. The evidence also shows that sparks were seen to fall on appellee's house while the "cupulo" was in operation. Under such facts, we are inclined to the view that, as the trial court could indulge all reasonable inferences, its finding was fully justified, and hence we cannot disturb it.

It is also contended that the evidence is not sufficient to sustain the finding as to the amount of damages assessed. With this contention we cannot agree, for upon that point the evidence is ample. As this is an equity case, we are urged to weigh and consider the evidence under section 8 of the act of 1903 (Acts 1903, p. 341, c. 193). Under the recent holdings of this and the Supreme Court, we must decline to weigh conflicting oral evidence. *Parkinson v. Thompson* (Ind. Sup.) 73 N. E. 109; *U. S. Board & Paper Co. v. Moore* (Ind. App.) 72 N. E. 487. As above indicated, the court made a general finding in favor of appellee, fixing his damages at \$247. The court, after announcing its finding for said amount, itemized the damages as follows: \$50 for the first fire; \$125 for the second fire; and \$72 for the depreciation of the rental of appellee's property. The court was not required to itemize the amount of damages, and in no sense can this itemized statement, as it appears in the record, be considered as a special finding, and it will therefore be treated as a general finding. The several items of damages, as designated by the court, will be considered as mere surplusage. The statement of facts in a general finding does not transform it into a special

finding. *Lawson et al. v. Hilgenberg*, 77 Ind. 221.

It is contended by the appellant that the evidence is insufficient to support the special findings as to the amount of damages. Under the rule just stated, it is unnecessary to consider this question further, for two reasons: (1) Because the finding is general, and the amount fixed in the general finding is of controlling influence; and (2) because, as above stated, the evidence is sufficient to support the finding.

In the course of the examination of appellee, he was asked two questions to which objections were made and sustained. The first was as to whether he would be willing for the appellant, in connection with an expert building mechanic, to go into his house, and examine and ascertain the condition of the flues, to determine whether there was undue liability to fire from the method of construction of the house. Second, whether or not he was willing that an impartial person, an expert in building, should be designated by the court to make said examination, etc. There was no error in sustaining objections to these questions. It was not a question as to whether or not appellee was willing that such an inspection be made. No application, so far as the record disclosed, was made to the court asking that such an examination be made. As to the authority of the court to order such an examination, it is unnecessary for us to decide, for no such question is presented.

The appellant offered to introduce in evidence the record of July 10, 1902, of the No. 2 Chemical Company of the Fire Department of the City of Indianapolis, which is a record that is kept under the regulations of that department. This report was made by the captain of the chemical company from a memorandum put on the slate by another person. The captain himself was not at the fire. In stating the purpose for which the record was offered in evidence, counsel stated that he expected to prove by it that the cause of the fire was a defective flue, and that the loss was \$25. This proposed evidence was nothing more than hearsay, and was not admissible for any purpose.

It is next contended by counsel for appellant that the court erred in overruling his motion to strike out certain evidence given by the daughter of the appellee relating to fires that occurred subsequently to the commencement of this action. The evidence of this witness tends strongly to establish the fact that the subsequent fires, to which she referred, were caused by sparks from appellant's "cupulo." The court admitted this evidence, as disclosed by the record, "as affecting the cause of the fire, so far as it bears on previous fires." It clearly appears that the appellee did not ask, and the court did not allow, for any damages occurring subsequent to those for which he sues in this action. It is our opinion that, if that evi-

dence was incompetent, it was harmless, as it did not in any way affect the rights of the appellant. This being true, its admission would not be the cause for reversal, and no error was committed in overruling the motion to strike out.

The remaining questions raised by the motion for a new trial are expressly waived.

We do not find any error, and the judgment is affirmed.

(36 Ind. App. 238)

**NEW HAMPSHIRE FIRE INS. CO. v.
WALL. (No. 5,201.)**

(Appellate Court of Indiana, Division No. 1,
Oct. 10, 1905.)

1. NEW TRIAL—WAIVER—MOTION IN ARREST OF JUDGMENT.

A motion in arrest of judgment cuts off the party's right to move for a new trial, except where the grounds for a new trial are unknown to the moving party when the motion in arrest is made.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 13.]

2. SAME—ISSUES—LIMITATION.

Where plaintiff's interests in the issues raised by defendant's cross-complaint were so identified with those raised by the complaint that it would not avail him to retry the issues on the complaint if the issues formed on the cross-complaint were found and adjudged against him, defendant was not entitled to limit a motion for a new trial to the issues formed on the cross-complaint.

3. JUDGMENT—MOTION FOR—ANSWERS TO INTERROGATORIES.

On the trial of a case, two sets of interrogatories with answers were returned by the jury. The record showed one set, as stated, of interrogatories submitted to the jury "for them to answer," immediately following which were interrogatories with answers purporting to have been submitted to the jury on issues joined on the cross-complaint. *Held*, that a motion for judgment by defendant on the answers to the interrogatories framed "on the complaint herein, notwithstanding the general verdict," was properly overruled, as leaving an essential part of the case undisposed of.

4. INSURANCE—ESTOPPEL—PAYMENT OF LOSS.

Where defendant insurance company executed certain drafts in final settlement of a loss on certain personal property insured by a trade-name, it was thereby estopped, in the absence of fraud, from denying that those who owned the business conducted under such name were the real parties in interest.

5. SAME—ACTIONS—PLEADING.

In a complaint on a fire policy, a general averment that plaintiff, at the inception of the policy and at the time of the loss, was the owner of the property destroyed, is sufficient to admit evidence of any interest he may have had.

6. SAME—PROPERTY INSURED—INDIVIDUAL OWNERSHIP.

A policy insuring the "Crawfordsville Sanitarium" against loss or damage by fire to certain personal property was not void because the property was owned distributively by certain of the persons doing business under such trade-name, each of whom had an insurable interest therein.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Henry V. Wall against the New Hampshire Fire Insurance Company.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Smiley N. Chambers, Samuel O. Pickens, Charles W. Moores, Claude Thompson, R. F. Davidson, and Owen Pickens, for appellant. Johnston & Johnston and O. U. Perrin, for appellee.

BLACK, J. The appellee's complaint consisted of four paragraphs, to each of which the appellant demurred for want of sufficient facts. The demurrer was sustained as to the first two paragraphs, and was overruled as to the third and fourth paragraphs. In the third paragraph it was alleged that the appellant, by its policy of insurance numbered 1,479,429, and dated October 8, 1902, in consideration of \$7.50, insured the Crawfordsville Sanitarium against loss or damage by fire to the amount of \$300 for the term of one year, commencing on the 8th day of October, 1902, at noon, and ending on the 8th day of October, 1903, at noon, on the surgical instruments, medical books, bookcases, desks, and all other articles used in sanitariums of this kind, while contained in the two-story frame, brick veneered, metal-roof building, situated at Nos. 223 and 225 east Main street, Crawfordsville, Ind., then occupied by said sanitarium, and permitted other insurance thereon; that on the 26th day of December, 1902, the greater portion of said sanitarium property was entirely destroyed by fire, and the remainder thereof burned, injured, and damaged, all to the amount of ——— dollars, of which the appellant was duly notified on the ——— day of December, 1902; that said sanitarium property was of the value of \$3,671; that the appellee effected other insurance upon said sanitarium property in the sum of \$1,700, as permitted by the terms of said policy; that the appellee had performed all the conditions on his part to be performed; that January 7, 1903, the appellant, by its authorized representative, met the appellee in said city, and agreed upon the total amount of loss or damage to said sanitarium property in the sum of \$1,496, and "became and is indebted" to him in the sum of \$224.59, that being three-twentieths of the whole amount of said loss or damage, and the proportion which \$300, insured by said policy, bears to the whole amount of insurance upon said sanitarium property; that the appellee and one Harry J. Helfrich were the owners of said sanitarium property at the time said policy was issued and at the time the same was destroyed and damaged by fire on December 26, 1902; that on the ——— day of January, 1903, said Helfrich, for a valuable consideration, sold all his claim for loss or damage to said sanitarium property under said policy to the appellee; that March 10, 1903, the appellant, in settlement of said loss and cancellation of said policy, delivered to the appellee, at

Crawfordsville, Ind., its draft, dated Manchester, N. H., March 3, 1903, for the sum of \$224.54 at sight, payable to the order of Crawfordsville Sanitarium; that thereupon the appellee delivered to the appellant said policy, which is now in its possession and annulled by it; that March 17, 1903, said draft was presented to the appellant at Manchester, N. H., for acceptance, and acceptance thereof demanded and refused, and it was then and there protested for nonacceptance; that March 20, 1903, it was presented to appellant for payment, and payment thereof demanded and refused, and it was then and there protested for nonpayment; that in March, 1903, said draft was returned to appellee, with notices of nonacceptance and nonpayment and of protest therefor; that the appellee is entitled to 5 per cent. damages upon said protested draft, and to exchange and protest damages thereon, and to lawful interest upon the sum of \$224.54 from March 20, 1903; that said amount is now due upon said draft and wholly unpaid; and that the appellant, by its neglect and refusal and failure to pay its indebtedness and draft, as alleged, has damaged the appellee in the sum of \$224.54, accrued interest thereon, and exchange and protest changes and 5 per cent. damages upon said draft, all of which is now past due and wholly unpaid. Said Harry J. Helfrich was made a party defendant to answer to whatever interest he might have in the premises. Prayer for judgment, etc. The fourth paragraph was like the third, except that it declared upon a draft for a different amount (\$374.22), alleged to have been given for loss by the same fire in settlement of another policy of a different number, issued by the appellant November 12, 1902, for \$500 on the same property. The two drafts were made exhibits, being alike except as to amounts and as to the numbers of the policies mentioned therein; that declared upon in the third paragraph of complaint being as follows: "224.54. Manchester, N. H., Mar. 3, 1903. At sight pay to the order of Crawfordsville Sanitarium the sum of two hundred and twenty-four and 54/100 dollars, in full for claim under policy No. 1,479,429, issued at Crawfordsville, Ind. Agency, as per receipt attached. F. E. Martin, A. Secy."

The appellant answered in three paragraphs, the first a general denial, and filed a cross-complaint against the appellee and Helfrich, praying that the drafts be canceled, that the settlement be set aside, and that the policies of insurance be declared void. The appellee replied to the second and third paragraphs of answer, and the appellant and Helfrich answered the cross-complaint by general denial, and Helfrich answered the complaint of the appellee, alleging that he then had no interest in the matters in

controversy as therein set out. There was a trial by jury, and a general verdict was returned for the appellee in the sum of \$628.11.

The appellant moved "for a new trial herein on the issues joined on the complaint." This motion having been overruled, the appellant moved in arrest of judgment upon the verdict. Having overruled this motion, the court rendered judgment for the appellee against the appellant for the amount of the verdict and for costs. The court then found and rendered judgment that the appellant take nothing by its action on the cross-complaint, and that the defendants to the cross-complaint recover their costs and charges thereon laid out and expended. The appellant then moved for a new trial on the issues joined on the cross-complaint, assigning the same reasons as those set forth in the former motion for a new trial. This motion having been overruled, the appellant prayed for and was granted an appeal to this court.

Among the alleged errors for which, and for each of which, the appellant prays that "the judgment of the Montgomery circuit court be in all things reversed," are the rulings upon the two motions for a new trial, which are separately assigned as errors. One of the parties defendant to the cross-complaint, in whose favor judgment was rendered for costs (Helfrich), is not a party to the appeal, and we could not take any action adverse to his interests. It is a rule of practice in this state that a motion in arrest of judgment cuts off the right to move for a new trial, except where the grounds for a new trial are unknown when the motion in arrest is made. *Eckert v. Binkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441; *Cincinnati, etc., R. Co. v. Case*, 122 Ind. 310, 23 N. E. 797. The determination of the issues tried together involved a result adverse to the appellant upon the cross-complaint if adverse to it upon the complaint. The cross-complaint, in fact, set forth only defensive matter of alleged fraud in the settlement of the loss.

It has been held that one who desires a new trial must seek it as to the whole case, and that the court cannot grant a new trial as to a part of the case only. *Johnson v. McCulloch*, 89 Ind. 270. In that case it was held that the overruling of a motion by a defendant for a new trial upon his paragraphs of counterclaim and set-off presented no question for decision on appeal. The court could not properly grant a new trial of the issues formed upon the complaint, and also render judgment for or against the appellant upon the cross-complaint. All the rights of the appellee involved in the case were not included in the issues formed on the complaint. He also was interested in the issues formed on the cross-complaint against him and Helfrich, and his interest

in the matter involved in the cross-complaint was so related to or identical with those involved in the issues on the complaint that it would not avail him to try again the issues on the complaint, if the issue formed on the cross-complaint were found and adjudged against him. See *Bennett v. Closson*, 138 Ind. 542, 548, 38 N. E. 46; *State ex rel., etc., v. Templin*, 122 Ind. 235, 23 N. E. 697; *Bisel v. Tucker*, 121 Ind. 249, 23 N. E. 81; *Louisville, etc., R. Co. v. Miller*, 141 Ind. 533, 37 N. E. 343. The court was not bound to grant a new trial as to a part of the case, and there could be no error in the overruling of either of the two motions for a new trial.

Two sets of interrogatories with answers were returned by the jury. The record represents one set as consisting of interrogatories submitted to the jury "for them to answer." Immediately following in the record are interrogatories, with answers thereto, purporting to be interrogatories submitted to the jury by the court upon the issues joined upon the cross-complaint. The appellant's motion for judgment in its favor "on the answers to the interrogatories in the above-entitled cause on the issues framed on the complaint herein, notwithstanding the general verdict," was overruled. If it may be said that the record shows the return of answers to interrogatories as described in this motion, much of what we have said concerning the motions for a new trial is not inapplicable here. The appellant could not be entitled to a judgment which would leave an essential part of the case undisposed of, or to any final judgment which would not dispose of all the issues between the appellant and the appellee relating, in effect, to the same cause of action. Such a disposition of causes would result in inextricable confusion. The court was asked to render judgment contrary to the general verdict upon a portion of the special findings returned, ignoring other special findings, which, in the matters to which the interrogatories of the first set related, showed affirmatively the good faith of the insured in the taking of the insurance and in the settlement of the loss. The assignment of error based upon this ruling is essentially an attack upon a part of the final judgment from which the appeal is taken, as are also the assignment of error in overruling the motion in arrest of judgment, and the several assignments relating to the overruling of the motions for a new trial.

No question has been made here as to the failure to make Helfrich a party to the appeal, and the question as to the sufficiency of the third and fourth paragraphs of the complaint and that as to the action of the court on the motion for judgment are discussed by counsel, and we will give these questions attention. The special findings, in answer to the questions in the first set of interrogatories, do not show any fraud on the part of the appellee or Helfrich, either in

the taking of the insurance, or in the settlement of the loss on which the drafts in suit were executed. We will seek out such findings as relate to other matters, which seem to illustrate the contention of the parties before us. The appellee and Helfrich furnished statements of articles and their value to the appellant as the basis of their claim of loss. These were afterwards changed and amended, though not added to, but diminished in amount. The total sound value of the property insured and listed by the appellee and Helfrich was \$2,696.90. The total amount of loss and damage as stated in the proofs of loss by the appellee and Helfrich was \$1,496.90. This was the total fair cash value at the time of the fire of all the property injured and destroyed or damaged by fire. The defendant insurance company had knowledge as to who composed the Crawfordsville Sanitarium at the time of the loss by fire. It was neither a corporation nor a partnership. Helfrich owned a portion of the surgical instruments, and the value of the property so owned by him at the time of the fire was \$65. The remainder of the property in the sanitarium at the time of the fire, other than that owned by Helfrich, was owned by the appellee. On or about December 29, 1902, the appellee and Helfrich furnished the adjuster of the appellant a written statement of the amount of goods destroyed by fire, which showed the total value at \$3,674.05. On or about January 6, 1903, they furnished the adjuster a detailed written statement of all the said property from catalogue and memory, showing the same total value. January 7, 1903, they submitted to the company proofs of loss, amounting to \$1,496.90. March 3, 1903, the appellee issued its drafts, payable to the Crawfordsville Sanitarium, "in payment" of its proportion of the loss under each of its policies. The total amount of insurance held by the Crawfordsville Sanitarium on the property insured by the appellant at the time of the fire was \$2,000. The amount of the drafts drawn by the appellant "in settlement" of its proportion of this loss was \$598.76. These drafts were delivered to the appellee March 3, 1903, and the appellant then took a receipt therefor. At the time of this delivery of the drafts "in settlement of said loss," the appellant had by its agent information or knowledge of the amount and character and value of the property destroyed by fire, other than such information as had been given to it and its agents by the appellee and Helfrich.

Counsel remark, concerning the third and fourth paragraphs of complaint, that they do not aver a partnership or a joint interest in the Crawfordsville Sanitarium; the allegation as to ownership being that "plaintiff and one Harry J. Helfrich were the owners of said Sanitarium property at the time said policy of insurance was issued and at the time the same was destroyed and damaged by fire on the 26th day of December, 1902,"

and that in January, 1903, Helfrich, for a valuable consideration, sold all his claims for loss or damage to said sanitarium property under said policy to the appellee, and thereafter, in March, 1903, the appellant, in settlement of said loss and cancellation of the policy, delivered to the appellee the drafts in suit, and Helfrich was made a defendant to answer as to his interest. It is said by the appellant in argument that the appellee is in no better position as plaintiff than he and Helfrich would have been if the suit were one brought by them jointly, and the appellant regards it as necessary to the sufficiency of the complaint that it should appear therefrom that a partnership existed between these persons.

The action was not one based upon the policies of insurance, which, upon the settlement, were taken up and canceled. It was an action upon the two drafts, by the giving of which, upon the settlement in payment of the loss, the appellant, in the absence of fraud, estopped itself from denying that those who composed the Crawfordville Sanitarium were the real parties in interest. *Northwestern Mut. L. Ins. Co. v. Kidder*, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89; *Smith v. Bettger*, 68 Ind. 254, 34 Am. Rep. 256; *Blacker v. Dumber*, 108 Ind. 217, 9 N. E. 104; *Sutton v. Baldwin*, 146 Ind. 361, 45 N. E. 518; *Offutt v. Rucker*, 2 Ind. App. 350, 27 N. E. 589. See, also, *Farmers' Ins. Co. v. Reavis*, 163 Ind. 321, 328, 71 N. E. 905; *Ill. Mut. F. Ins. Co. v. Archdeacon*, 82 Ill. 236, 25 Am. Rep. 313; *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85. In a complaint upon a policy of fire insurance, a general averment that the plaintiff, at the inception of the policy and at the time of the loss, was the owner of the property destroyed, is sufficient to admit evidence of any interest he may have had, without further averment. *Phoenix Ins. Co. v. Rowe*, 117 Ind. 202, 20 N. E. 122. When the appellant issued a policy to the Crawfordville Sanitarium, it may be supposed, in such a case as this, nothing to the contrary appearing, that it was not imposed upon as to the ownership of the property. It was not impossible to issue a valid policy to the owner or owners of property in such a name. See *Clark v. German Mut. F. Ins. Co.*, 7 Mo. App. 77. Nor would a policy necessarily be invalid because thereby the appellant contracted to insure property not owned by the insured jointly. If the persons insured held insurable interests, the fact that one of them was the sole owner of a portion of the property and the other was the sole owner of the remainder of the property would not necessarily invalidate the policy. Such separate interests may be insured in one policy. *Manchester F. Assur. Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 923, 41 N. E. 847, 55 Am. St. Rep. 225; *Manchester F. Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; *Monaghan v. Agricultural F. Ins.*

Co., 53 Mich. 238, 18 N. W. 797; *Northrup v. Phillips*, 99 Ill. 449. See, also, *Kausal v. Minn.*, etc., *F. Ins. Co.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. It is admitted by the appellant that this may be so, if the separate interests are designated in the policy, or are known to the insurer at the time of the issuing thereof. The same effect, certainly, would follow from knowledge at the time of a settlement of the loss.

It is specially found in the answers upon which the appellant asked for judgment, that the appellant knew who composed the Crawfordville Sanitarium. It made a settlement with the insured. They made a number of statements, and furnished proof of loss, and it took up and canceled its policies, and it does not appear to have returned the premium. Even if, without fraud, it did not know of the several ownership at the time of issuing the policy, or at the time of the adjustment, yet, having settled with the insured, without any fraud on their part, requiring of them the furnishing of proofs of loss, and having taken up the policies, and retained and canceled them, and having given its drafts "in payment" of the loss, which were accepted in good faith, it cannot avoid the payment of the drafts merely because of the fact of such several ownership, concerning which there does not appear to have been at any time any fraud or misrepresentation on the part of the insured, or any failure to make truthful disclosure of the interests or titles of the insured. It may, indeed, have been true, without inconsistency with the complaint or the answers to interrogatories in question, that the appellant or its authorized agents knew of the condition of the title to the insured property at the time of adjustment and that of execution of the drafts in suit and at the date of the issuing of the policies.

In *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15, 8 N. W. 554, the plaintiffs, mother and son, sued upon a policy of insurance issued to them jointly on a dwelling and personal property contained in it, both of which were destroyed by fire. The son owned the fee, subject to his mother's life interest. The personal property was owned in severalty; the son's property being the larger part. One defense was that the property was not joint. It was by the court regarded as not necessary that the precise nature of the interest should appear in the application or policy, unless distinctly required; that when the entire property belongs to the persons insured, it can make no necessary difference to the insurer in what way their interests are apportioned; and that, if the company deem it material, it should inform the applicant before accepting his money. See, also, *Guest v. New Hampshire F. Ins. Co.*, 66 Mich. 98, 33 N. W. 31; *German Mut. Ins. Co. v. Niewedde*, 11 Ind. App. 624, 627, 39 N. E. 534; *Glens Falls Ins. Co. v. Michael* (Ind. Sup.) 74 N. E. 964.

In *Smith v. Glens Falls Ins. Co.*, 62 N. Y. 85, 87, it is said: "The objection that there was a breach of warranty as to title and incumbrances is not available. * * * The settlement and contract to pay a specified sum operates as a waiver of any warranty in the policy, unless the settlement and contract were procured by fraud of the assured, and this is not found and scarcely claimed. It is said that the company did not know of the breach of the warranty at the time of the settlement. The answer is that, when the claim was made for the loss, the company was required to ascertain the facts as to any breach of warranty. If they saw fit to pay the claim or compromise it, or to make a new contract without such examination, it must be deemed to have waived it, and in the absence of fraud, it cannot afterwards avail itself of such breach. It cannot urge payment or settlement by mistake on account of a want of knowledge of such breach. The time for investigation as to breach of warranty is when a claim is made for payment, and, if the company elects to pay the claim, or, what is equivalent, to adjust it by an independent contract, it cannot afterwards, in the absence of fraud, retract or fall back upon an alleged breach of warranty." See, to the same effect, *Stache v. St. Paul F. & M. Ins. Co.*, 49 Wis. 89, 96, 5 N. W. 36, 35 Am. Rep. 772.

We do not find available error.
Judgment affirmed.

(36 Ind. App. 259.)

**WARMAN-BLACK-CHAMBERLAIN CO. v.
INDIANAPOLIS MORTAR & FUEL CO.**

No. 5,405.

(Appellate Court of Indiana, Division No. 2:
Oct. 11, 1905.)

**1. SALES — WARRANTY — BREACH — ACTIONS
— COMPLAINT.**

Where a complaint was based on a seller's warranty of certain horses that they were free from disease, and suitable for plaintiff's purpose, the warranty being general, an allegation of breach that the horses were not healthy and sound, but were diseased, because of which one died within a few days after the purchase, and the other became and remained lame and was of no value, was not demurrable for failure to allege the character and extent of the warranty and the nature and particulars of the breach.

2. APPEAL — FINDINGS — REVIEW.

Where, in an action for breach of warranty of certain horses, the lameness of one of them might have been due to a weakness arising from an injury warranted against, as well as from a subsequent injury, a finding that it was due to the injury warranted against was final.

3. NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

A witness having stated on cross-examination a correct date in controversy, independent of a memorandum, defendant was not entitled to a new trial for newly discovered evidence that the memorandum used by the witness on direct examination was incorrect.

Appeal from Superior Court, Marion County; Jas. M. Leathers, Judge.

Action by the Indianapolis Mortar & Fuel Company against the Warman-Black-Cham-

berlain Company. From a judgment for plaintiff, defendant appeals. Affirmed.

A. G. Smith and Bernard Korbly, for appellant. Groninger & Groninger and M. A. Ryan, for appellee.

ROBY, J. Action by appellee against appellant. The complaint is based upon an alleged warranty by the appellant, to the effect that a team of horses sold by it to appellee were healthy and sound in every respect, free from disease, and suitable for the purpose for which appellee purchased them. The breach alleged is that such horses were not healthy and sound, but were diseased, because of which one of them died within a few days after the purchase, and the other became and remained lame; that they were of no value, and were tendered to appellee, who refused to receive them.

It is insisted that the complaint is insufficient, in that the breach of warranty pleaded, in order to be good, as against a demurrer, must show the character and extent of the warranty and nature and particulars of the breach. The contention derives some plausibility from the following cases: *Shirk v. Mitchell*, 137 Ind. 187, 188, 36 N. E. 850; *Aultman, Miller & Co. v. Seichting*, 126 Ind. 137, 25 N. E. 894; *McClamrock v. Flint et al.*, 101 Ind. 278; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; *Booher et al. v. Goldsborough et al.*, 44 Ind. 490; *Conant et al. v. National State Bank of Terre Haute et al.*, 121 Ind. 323, 22 N. E. 250; *Robinson Machine Works v. Chandler et al.*, 56 Ind. 575; *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Flint et al. v. Cook*, 102 Ind. 391, 1 N. E. 633. But it has recently been declared by the Supreme Court, the line of authority above cited having been pressed in argument, that "where the warranty is general in its character or nature, the breach or failure may be shown by the general negation of said warranty." *Smith v. Borden*, 160 Ind. 223, 66 N. E. 681. The warranty relied upon by the case at bar was general, and the breach stated is coextensive therewith; the complaint containing a "general negation of such warranty." Under the rule above stated, the complaint is sufficient.

The third assignment of error is that the court erred in overruling appellant's motion for a new trial: (1) That the decision is not sustained by sufficient evidence; (2) that it is contrary to law; (3) on account of newly discovered evidence. In support of the first and second grounds stated, it is insisted that there is a total failure of proof to show that the lameness of the one horse was caused by the injury suffered before the sale, to which it is attributed. The lameness might no doubt have been caused by a sprain or other subsequent injury, but it might also be due to a weakness arising from the injury by a barb wire, against which the warranty ran; and upon that question the inference and finding of the trial court is final.

The newly discovered evidence relates to the testimony of a veterinary surgeon, who upon direct examination testified, by reference to a memorandum, as to certain dates. The memorandum is shown by the affidavit filed in support of the motion to have been incorrect. Upon cross-examination of the witness by the appellant's learned counsel, he stated the date correctly, which is all he could do were the case retried.

The issue between these parties was one of fact, and the conclusion reached by the trial court cannot be disturbed.

Judgment affirmed.

(36 Ind. App. 703)

GRIFFITHS v. ANDERSON IRON & MFG. WORKS. (No. 5,429.)

(Appellate Court of Indiana, Division No. 1. Oct. 26, 1905.)

APPEAL—BRIEFS—FAILURE TO SET OUT INSTRUCTIONS.

Where appellant's briefs refers to the instruction only by number, and neither sets out the instructions referred to nor states their substance, and the only errors for which a reversal is asked are the giving of the instructions numbered, the Appellate Court will affirm the judgment without further notice of the cause.

Appeal from Circuit Court, Huntington County; James C. Branyan, Judge.

Action between Samuel Griffiths and the Anderson Iron & Manufacturing Works. From a judgment for the latter, the former appeals. Affirmed.

Fred H. Bowers, for appellant. Leash & Lesh, for appellee.

BLACK, J. The only alleged errors for which appellant seeks a reversal are the giving of certain instructions to the jury, the numbers of which are stated in appellant's brief, in which none of the instructions are set out, and there is no attempt to state the substance of any instruction. Under the rules of this court no further notice of the cause is required.

Judgment affirmed.

(36 Ind. App. 332)

KEMP et al. v. PRATHER et al. (No. 5,907.)

(Appellate Court of Indiana, Division No. 1. Oct. 26, 1905.)

APPEAL—PARTIES.

The Appellate Court cannot take jurisdiction in vacation appeals to pass upon the merits of the cause, where all the parties in whose favor judgment has been rendered in the court below, or who would be affected by a disturbance of the judgment on appeal, are not before the court as parties in the assignment of error.

Appeal from Circuit Court, Madison County; John F. McClure, Judge.

Petition by Leanna Kemp and others for the location of a highway; William B. Prather and others remonstrators. Remonstrators filed with the board of commissioners a motion to correct its record in certain particu-

lars with reference to the highway, and, the motion being overruled, appealed to the circuit court, where a judgment in their favor was entered. Petitioners appeal. Transferred from the Supreme Court under Act March 12, 1901 (Acts 1901, p. 565, c. 247). Dismissed.

Walter Vermillion and Bagot & Bagot, for appellants. Kittinger & Diven, for appellees.

MYERS, P. J. This appeal is taken from a judgment rendered by the court below in favor of appellees and four others, ordering and directing the board of commissioners of Madison county to correct its record in the matter of a certain highway petitioned for by appellants, Leanna Kemp and others.

It appears from the record in this case that appellants petitioned said board of commissioners for the location of a certain highway in said county; that the petition was presented at the April term, 1902, of said board, and thereafter such proceedings were had before said board, and over the several remonstrances filed by William B. Prather, Perry Coy, Alexander W. McClintock, Benjamin F. Coy, Ferdinand Lutz, Sylvester G. Prather, Dora Coy, Sanford M. Coy, and Mary J. Wise, that said highway was ordered established; that on July 25, 1902, said remonstrators appealed to the Madison circuit court from the action of said board in establishing said highway. In June, 1903, and while said appeal was pending, William B. Prather, Benjamin F. Coy, Dora Coy, Perry Coy, Sylvester G. Prather, Sanford Coy, Mary J. Wise, Ferdinand Lutz, and Alexander McClintock filed with said board of commissioners a motion, asking said board to correct its record in certain particulars with reference to said highway, and for a nunc pro tunc entry to make it speak the truth. This motion was overruled by the board. Thereupon such proceedings were had whereby the makers of the motion appealed from this action of the board to the Madison circuit court, where the matters and facts set forth in said motion were tried, resulting in a finding and judgment in favor of the makers of the motion. In this appeal Leanna Kemp and 20 others appear as appellants, and William B. Prather, Alexander McClintock, Benjamin F. Coy, Sylvester Prather, and Ferdinand Lutz appear as appellees in the assignment of errors.

A motion to dismiss this appeal is made by appellees on the ground that this court has no jurisdiction to consider the merits of this cause, because all the parties to the final judgment are not before this court. Appellants have not favored us with any reason why appellees' motion should not prevail, nor do we call to mind any theory authorizing us to overrule it. This is a vacation appeal from a single judgment against appellants and in favor of William B. Prather and eight others, only five of whom are named in the assignment of errors as appellees. This court cannot take jurisdiction in vacation

appeals to pass upon the merits of a cause where all of the parties in whose favor judgment has been rendered in the court below, or would be affected by a disturbance of such judgment on appeal, are not before the court as parties in the assignment of error. *Kuhn v. American Mutual Life Ins. Co.*, 160 Ind. 356, 66 N. E. 890; *Kreuter v. English Lake Land Co.*, 159 Ind. 372, 65 N. E. 4; *North v. Davisson*, 157 Ind. 610, 62 N. E. 447; *Capital National Bank of Salem v. Reid*, 154 Ind. 54, 55 N. E. 1023; *Ex parte Sullivan*, 154 Ind. 440, 56 N. E. 911; *Wilkinson v. Vordermark*, 32 Ind. App. 633, 70 N. E. 538; *Paxton, Receiver, v. Tyler*, 20 Ind. App. 455, 50 N. E. 45. It is said in the case of *Smith v. Fairfield*, 157 Ind. 491, 61 N. E. 560: "To give this court jurisdiction of an appeal taken in vacation, the assignment of error must contain the full names of all parties affected by the judgment, since we have no power to disturb a joint judgment without disturbing it as to all, and have no jurisdiction to disturb it as to those who are not parties to the appeal;" citing authorities.

Appeal dismissed.

(36 Ind. App. 381)

STANDLEY v. CLEVELAND, C. C. & ST. L. RY. CO. (No. 5,434.)

(Appellate Court of Indiana, Division No. 1. Oct. 26, 1905.)

APPEAL—RECORD—EVIDENCE—REVIEW.

Where, on the trial of an action, a plat of the place and its surroundings was made use of, and many of the answers of the witnesses were not intelligible without it, but it was not in the appeal record, an alleged error in the granting of a peremptory instruction for defendant could not be reviewed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 2914, 2933.]

Appeal from Circuit Court, Boone County; T. J. Terhune, Special Judge.

Action by Lee Otis Standley against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

P. H. Dutch, for appellant. L. J. Hackney, John F. Dye, and S. M. Ralston, for appellee.

ROBINSON, J. Suit by appellant for the death of his infant son through appellee's alleged negligence. At the conclusion of appellant's evidence the court directed a verdict for appellee. This action of the court is the only question argued.

Appellee's road runs east and west through the town of Hazelrigg, crossing a public highway. On the day in question appellant's son, 6 years and 9 months old, started to go across the crossing on the highway, but was prevented by a freight train standing on a side track across the highway; the engine being about 60 feet east of the crossing. The boy went east and passed around in front of the engine, and soon thereafter was struck

and killed by a passenger train on the main track. The question we are asked to determine is whether the evidence authorized the court in giving the peremptory instruction. To do this the record should contain all the evidence given upon the trial. The relative position of appellee's tracks, buildings adjacent to the right of way and the highway, and all the physical conditions existing at the place and time of the injury, were matters important and essential in determining whether the boy, when struck, was a trespasser upon appellee's track. Throughout the case use seems to have been made of a map or plat of the place and its surroundings. This map has not been brought into the record, and many of the answers of the witnesses are not intelligible without it. Many of the questions asked the witnesses are incomplete without the map. The map was made a part of the question and answer. It is true the map was first used by counsel for appellee in the cross-examination of appellant's first witness; but without objection, and afterwards, the same map seems to have been used by counsel on each side. All the matters in connection with which the map was used could have been clearly expressed in words by the witnesses. It was not a case where a map or plat was necessary. But it was used, and used in a way that it became a part of the evidence that went to the jury. It is manifest from reading the record that all the evidence given upon the trial has not been brought up on appeal. *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 53 N. E. 235; *South Bend, etc., Co. v. Geldie*, 24 Ind. App. 673, 57 N. E. 562. Judgment affirmed.

(37 Ind. App. 219)

GREGG v. GREGG. (No. 5,445.)*

(Appellate Court of Indiana, Division No. 1. Oct. 24, 1905.)

1. HUSBAND AND WIFE—AFFECTIONS—ALIENATION.

A divorced wife is entitled to maintain an action against her former mother-in-law for alienation of the affections of her husband by acts maliciously done, which were calculated to produce such result.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1119.]

2. SAME—LOSS OF SERVICE.

In an action for alienation of affections, damages are recoverable for loss of the consortium, regardless of the question of loss of service.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 1125.]

3. PLEADING—COMPLAINT—AMENDMENT.

Where a complaint, in an action for alienation of the affections of plaintiff's husband, alleged their marriage with the consent and approbation of defendant, who was the husband's mother, the birth of issue, and an alleged separation by the alienation of the affections of plaintiff's husband by defendant by the use of malicious means described, the result of which was that he became so cruel to plaintiff that she was compelled to separate from him, an amendment alleging that, when plaintiff and

* Rehearing denied.

her husband were married, he had great love for her, which continued until lost and alienated by defendant's acts, was not objectionable as materially changing the case made by the complaint.

4. EVIDENCE — PRESUMPTIONS — BURDEN OF PROOF.

In a suit by a wife for alienation of the affections of her husband, the law presumes generally that the husband has conjugal affection for his wife, and the burden is on the defendant to prove the contrary.

5. PLEADING—AIDED BY VERDICT.

Where, in an action for alienation of the affections of plaintiff's husband, it was objected on appeal that the complaint did not state any fact constituting harsh and cruel treatment justifying plaintiff in leaving her husband, the complaint would be considered as one attacked for the first time after verdict, and it would be presumed, in support of a judgment for plaintiff, that conduct constituting cruel treatment on the part of the husband, justifying her separation, was sufficiently proved on the trial.

6. APPEAL—BRIEFS—RULES.

Where appellant's brief, in so far as it related to the denial of appellant's motion for a new trial, did not contain concise statements of portions of the record presenting the objections relied on, and, under a separate heading of each error, the proposition or points concisely stated, without argument or elaboration, as required by the rules, such order could not be reviewed.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by June J. Gregg against Sarah M. Gregg. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

M. W. Bruner and Whittington & Whittington, for appellant. Crane & McCabe, for appellee.

BLACK, J. The appellee, June J. Gregg, sued the appellant, her mother-in-law, Sarah M. Gregg, to recover damages for the alienation by the appellant of the affections of the appellee's husband, George M. Gregg. The complaint was in one paragraph, to which the appellant answered by the general denial. After trial by jury and verdict for the appellee, and after the overruling of the appellant's motion for a new trial, the appellee filed a motion for leave to amend the complaint. On the same day the appellant filed her motion in arrest of judgment. The court sustained the appellee's motion to amend, and the appellee amended the complaint, as asked in her motion, and the court overruled the motion in arrest, and rendered judgment upon the verdict.

The appellant has assigned error in sustaining the motion to amend the complaint and error in overruling the motion in arrest of judgment. She has also assigned that the complaint does not state facts sufficient to constitute a cause of action against her.

In the complaint it was alleged that the appellee, November 16, 1898, at the residence of her father, in Kentucky, intermarried with George M. Gregg; that they lived together as husband and wife until June 15, 1901, when she was compelled to and did leave him on

account of his cruel and inhuman treatment of her, as in a subsequent part of the complaint more fully alleged; that he is the only child of the appellant and her husband, deceased in 1900; that at the time the appellee and George M. Gregg were married he was 25 years of age, and he then was, and all his life had been, living with his father and mother at their home, as a member of the family, in the city of Crawfordsville, Ind., where these parents had resided for more than 20 years, and they each possessed considerable real and personal estate; that the appellant owned a valuable farm, worth \$15,000, in Montgomery county, and other real and personal property, and appellant's husband possessed a large and valuable residence in Crawfordsville, in which he and the appellant lived, and in which the said son was reared; that appellant's husband also owned a valuable business block in that city, and other valuable real estate and considerable personal estate, and the appellant and her husband were able to live, and did live, comfortably solely from the income of their respective estates, and they brought up their said son with his every want and wish gratified by them, and with the understanding and notion that they had abundant income and means to support him and furnish all his wants and gratify all his desires, and that it was not and would not be necessary for him to work and earn his own living, but that his father and the appellant would supply him with all the necessaries and luxuries of life out of their income and property; that these parents were informed and knew that their son intended to marry the appellee, and they prepared rooms in their residence to which the appellee should be brought, and in which she and her husband should live when they were married; that immediately upon their marriage George brought the appellee, with the full knowledge and consent of his parents, to their home, and to the rooms so prepared for them; that George had no property or estate of his own, and depended solely upon his father and the appellant for his support and for means to provide himself and the appellee with a home, board, clothing, and support and provisions suitable for the condition in which they lived, and in which George had been brought up; that the appellee and her said husband lived pleasantly and happily together in said home for several months. The means alleged to have been unlawfully, falsely, and maliciously employed by the appellant for the purpose of separating her son from the appellee, and of alienating his affections from her, are set forth at length, being means adapted to such a purpose. It is alleged that all the unlawful, false, and malicious statements, declarations, and reports before set forth were often repeated and stated by the appellant to appellee's husband, and that, gradually induced by said false, malicious, and wrongful statements, language, and conduct of the appellant, the appellee's husband's

affections for the appellee began to grow cold, and he became indifferent to her, and finally ceased to have any love or affection for her whatever, and he began to neglect and then to cruelly and inhumanly treat her, and the appellee lost the love and affection of her husband by and on account of the aforesaid false, wrongful, and malicious reports and statements and conduct of the appellant; that gradually the conduct and treatment of her husband toward the appellee became so harsh and cruel that she was compelled to and did, June 15, 1901, separate herself from him. It was shown that the appellant had control of all the property and means of support of herself and her family, and it was alleged that thereby she had complete control over the appellee's husband. It was further alleged that at the time of her separation from her husband she was with child by her husband, and that she was driven from the home of her husband, being the home of appellant, on account of and by reason of the aforesaid treatment of her husband, instigated and procured by the appellant. Afterward, December 25, 1901, a son was born to appellee. That December 12, 1902, the appellee, on account of her husband's said cruel and inhuman treatment of her, obtained a divorce from him by the judgment of the Clinton circuit court, and that she had been living separate and apart from said George M. Gregg ever since June 15, 1901. "That said George M. Gregg, at the time he married this plaintiff, had great love and affection for her, and that he continued to have love and affection for this plaintiff as his wife until the same was lost to and were alienated from her by the aforesaid acts, conduct, and language of the defendant, and that thereby, and through the said acts, conduct, and language of the defendant, plaintiff has lost the love, affection, care, support, society, and help of her said husband." The averments last above quoted were added to the complaint by the amendment permitted by the court, as above stated.

It was further alleged that during all her married life, and up to the time she was compelled to separate herself from her husband, the appellee was a loving, dutiful, and faithful wife, and that but for the aforesaid false, wrongful, and malicious reports, statements, and conduct of the appellant they would yet be living together. Alleging that she had been damaged in a certain sum the appellee demanded judgment for that amount. In *Logan v. Logan*, 77 Ind. 558, decided at the November term, 1881, it was held by a divided court that an action could not be maintained by a wife against her husband's father for damages, because by persuasion and promises and threats the defendant induced the plaintiff's husband to abandon her, whereby she lost her husband's company and care and support. In *Postlethwaite v. Postlethwaite*, 1 Ind. App. 473, 28 N. E. 99, decided in May, 1891, this court, while earnestly suggesting the right of

a married woman to maintain such an action, was not required by the case before it to go further than to hold, as it did, that where the wife had been divorced, her right to maintain the action could not be denied. In *Haynes v. Nowlin*, 129 Ind. 581, 29 N. E. 389, 14 L. R. A. 787, 28 Am. St. Rep. 213, decided in November, 1891, while not affirmatively and positively overruling *Logan v. Logan*, supra, it was shown that the reason why formerly the wife could not maintain such an action was not that she was not the source of the substantive right, which the best expositions of the common law recognize as possessed by her, but was, in truth, the lack of remedy available to her at common law because of the strict application of the maxim that husband and wife are one, and it was held that, under the modern statutes relating to the rights of married women, the right of the injured wife to maintain the action now certainly exists against one who wrongfully entices her husband and alienates his affections. In the opinion of the court it was said that there is no clearer right than that of the wife to her husband's "support, society, and affection," and that when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property rights of a citizen, and to impose upon her almost the same obligations as those relating to all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who has tortiously wrested from her "the support, society, and affections" of the husband; and the court inserted in the opinion delivered a quotation from 1 Bishop, *Marriage & Divorce*, § 1358, in part as follows: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society, and especially of his protection and support, inflicts on her a wrong in its nature actionable." See, also, *Wolf v. Wolf*, 130 Ind. 599, 30 N. E. 303.

An action by a husband for wrongful alienation of his wife's affections is based on the loss of the consortium; that is, the society, companionship, conjugal affections, fellowship, and assistance. It is not necessary that there be separation of the husband and wife, or that the latter be debauched by the defendant, or that there be actual pecuniary loss. The loss of services may constitute one of the elements of damages, but such loss is not necessary to the maintenance of the action. *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266. So the wife may sue another than her husband for the loss of the consortium, and may recover for having been wrongfully deprived by the defendant of the society, companionship, affection, and protection of her husband. *Id.*

The losses suffered by the wife, redressible by such an action, may differ from those sustained by a husband whose wife has been wrongfully enticed away from him,

but whatever be her losses consequent upon the wrongful alienation of her husband's affection, if of such character that damages therefor are assessable by a jury, such damages should be recoverable. See *Holmes v. Holmes*, 133 Ind. 386, 32 N. E. 932. And while a distinction is observable between a case wherein the defendant is a stranger and one wherein the defendant is the parent of the husband or the wife of the plaintiff, and the right of the defendant, so related, to give advice and shelter and protection to his or her own child is recognized (*Huling v. Huling*, 32 Ill. App. 519), yet such relationship only serves as a foundation on which to build the defense that there was no wrongful enticement or persuasion resulting in the alienation and desertion and consequent loss which forms the basis of the action. The complaint in such an action against the parent must aver that the acts charged against the defendant were maliciously done; the presumption being that the parent will act for the best interest of the child. *Reed v. Reed*, 6 Ind. App. 317, 33 N. E. 638, 51 Am. St. Rep. 310. See, also, *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119. The actionable offense of the defendant in such a case not being punishable through criminal procedure, exemplary damages may be awarded in the discretion of the jury, acting without passion, partiality, or fraud. *Waldron v. Waldron* (C. C.) 45 Fed. 315; *Lockwood v. Lockwood*, 67 Minn. 476, 493, 70 N. W. 784. We agree that, as the right of the wife to the conjugal affection and society of her husband is not different in kind, degree or value from the corresponding right of the husband, therefore, since the obstruction to her remedy because of antiquated forms of proceeding has been removed, though the marriage relation be not dissolved, she should have like remedy to recover for whatever substantial injury she may suffer. See *Foot v. Card*, 58 Conn. 1, 18 Atl. 1027, 6 L. R. A. 829, 18 Am. St. Rep. 258; *Lockwood v. Lockwood*, 67 Minn. 576, 70 N. W. 784.

Objections against the complaint, urged here as having been raised by the motion in arrest or by the assignment of the insufficiency of the complaint in the assignment of errors, must be regarded as directed to the complaint as amended after verdict. Concerning the action of the court in permitting the amendment, it seems sufficient to show that it did not materially affect the issue tried. The complaint, as originally drawn, showed that the appellant's son, of full age, married the appellee in another state, with the knowledge of his parents, and with their knowledge and consent brought her home to their residence, where rooms had been prepared by his parents for the use of the appellee and her husband, and that they lived there pleasantly and happily for some time. It was also shown that a son was born to them after their separation. It was shown that the appellant, for the purpose of unlaw-

fully causing the separation of the appellee from her husband and of alienating his affections from her, maliciously used means described adapted to such an end, and that, gradually induced by these means, her husband's affections for her began to grow cold, and he became indifferent to her, and finally ceased to have any love or affection for her, and he began to neglect and then to cruelly and inhumanly treat her, and she lost the love and affection of her husband by and on account of the described conduct of the appellant, and gradually the conduct and treatment of her husband toward her became so harsh and cruel that she was compelled to separate herself from him, and did so, and that she was driven from her husband's home by reason of this treatment of her husband, instigated and procured by the appellant. Also it was shown that during all her married life, until she was compelled to separate herself from her husband, she was a loving, dutiful, and faithful wife. It did not materially change this complaint to add, by way of amendment, an averment that at the time her husband married the appellee he had great love and affection for her, and that he continued to have love and affection for her as his wife until lost and alienated by the acts of the appellant. Certainly, the law will not presume that, under such circumstances as those shown by the complaint without the amendment, the man did not have conjugal affection for his wife. Indeed, the law indulges a presumption generally that a husband has such affection, and it rests with the defense in such a case as this to prove the contrary. *Bailey v. Bailey*, 94 Iowa, 598, 602, 63 N. W. 341.

In *Jonas v. Hirschburg*, 18 Ind. App. 581, 48 N. E. 656, it was held that in a complaint for alienating the affections of the plaintiff's wife it was not necessary to allege that the husband and wife were living together peaceably and happily; facts to the contrary being matter of defense.

It is claimed on behalf of the appellant that it appears from the complaint that the husband did not leave the wife, but that she left him; that the complaint does not state any fact that would constitute harsh and cruel treatment; that she should be regarded, under the allegations of the pleading, as having voluntarily left him; and that the only thing she lost by the conduct of the appellant was the love and affection of her husband. We need not discuss the question whether or not the loss of the husband's love and affection through such means would furnish a ground of action. It seems sufficient to say, with reference to this objection, that, whatever might be the proper view to be taken of the complaint in this respect upon demurrer or upon motion to make the complaint more specific, the pleading is now to be considered as one attacked for the first time after verdict, and it may well be assumed that conduct constituting cruel treatment on

the part of the husband was sufficiently proved on the trial.

The appellant's motion for a new trial was overruled. As to the reasons assigned in this motion, we must recognize the objection of the appellee to the brief of the appellant, which plainly fails to comply with the rule of this court concerning such briefs, in that, with relation to this motion, the brief does not contain such concise statements of portions of the record as the rule requires, and following such statement, under a separate heading of each error of the court below in this connection relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration. Unless this court would contravene its own rule, the enforcement of which is invoked by the appellee, and would itself perform the work of attorneys, we cannot consider the reasons for a new trial. The requirements of the rule are not obscure, and reasonable compliance therewith is not a hardship. The rule has been many times explained and enforced by our decisions. Equal justice in the decision of causes requires uniformity in the application of this rule.

Judgment affirmed.

67 Ind. App. 487)

CHICAGO, I. & L. RY. CO. v. BRYAN.
(No. 5,433.)¹

(Appellate Court of Indiana, Division No. 2.
Oct. 24, 1905.)

1. MASTER AND SERVANT—ASSUMPTION OF RISK—APPRECIATION OF DANGER.

In order to charge an employé with the assumption of risk of a danger, it must appear that he appreciated the danger to which he was exposed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

2. SAME—QUESTION FOR COURT OR JURY.

Where the evidence on the question whether an employé appreciated the danger to which he was exposed and assumed the risk thereof is conflicting, the question may be for the jury; but where the circumstances permit of but one conclusion the question is for the court.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1072.]

3. SAME.

A railroad brakeman, whose clothing was caught by the door irons of a passing freight car, to which he stood in too close proximity, and who was thereby carried to a station platform and crushed between it and the car, assumed the risk.

4. APPEAL—DISPOSITION OF CAUSE—REVERSAL WITH INSTRUCTIONS.

Where, in an action for injuries to a servant, it appears that the servant assumed the risk as a matter of law, so that liability cannot be fixed on defendant on any ground, the Appellate Court, on reversing a judgment for plaintiff, will order judgment for defendant.

Appeal from Circuit Court, Morgan County; Joseph W. Williams, Judge.

Action by Almedie Bryan, administratrix, etc., against the Chicago, Indianapolis & Lou-

isville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. C. Field and H. R. Kurrie, for appellant. East & East, for appellee.

ROBY, J. The appellee averred, in substance, that appellant was on March 18, 1899, a corporation, owning and operating a railroad, and that the decedent was in its service as a brakeman; that it had theretofore negligently constructed a platform and switch immediately west of the depot at its station at Crawfordsville and had negligently constructed a platform for a long distance at the height of 4 feet, and so close to the east rail of its track as not to allow cars of extra width to leave a space in passing of more than 6 or 7 inches, which space was not sufficient for defendant's employes to stand in and escape injury while one of its extra width cars was passing along said platform, but was likely to injure them while in the discharge of their duties; that it was also negligent in constructing and maintaining its said track in a curve, with the east rail lower than the west one, thereby causing south-bound cars to suddenly lean to the east, and close the space between such cars and the top of the platform suddenly, thereby further endangering the lives of its employes; that on said day it negligently caused a car known as a "hay" or "furniture" car, much wider and much larger than those in ordinary use, to be placed in one of its trains, and negligently caused said car to be pushed rapidly southward over said track, west of said depot and platform, and in so doing caused the space between the top edge of said platform and the side of said car to be reduced to 6 or 7 inches, when such space would, with an ordinary car, have been 15 or 16 inches; "and that in so doing it ran the said hay car against the said Joseph A. Bryan, who was then in the space between the cars and said platform in the line of his duty, and before he could escape, the front end or sides of the said hay car in some manner caught him, and so rolled and squeezed his body as to crush and break his bones, as that he then and there died." It is also averred that decedent was unaware of the danger of the place; that he had no knowledge that the car was of extra width, or that the space in which he was standing would be so closed as to endanger his life; that he could not appreciate or understand the dangers surrounding him; that his work was hurriedly done, and while doing it he was compelled to watch the car south of the hay car; that he did not discover his danger until it was too late to escape; and that, by reason of appellant's negligence as set forth, he was injured and killed. Wherefore, etc.

Formal and uncontroverted averments have been omitted from this summary. The issue made by a denial was submitted to a jury, and a verdict for \$5,000, with answers

¹ Rehearing denied. Transfer to Supreme Court denied.

to interrogatories, returned. Appellant's motion for judgment notwithstanding the general verdict was overruled, as was its motion for a new trial, and judgment was rendered on the verdict. Appellant by exceptions and assignment of error questions each adverse ruling.

The jury in its answers to interrogatories, as well as by the general verdict, find the general conditions substantially as detailed in the complaint. It also states that decedent had been in appellant's service as a brakeman upon a local freight train from 1 to 1½ years, making daily trips, and was familiar with the platform and siding referred to, and that at the time of his death an engine and three cars were being pushed south on the side track; the car which caught him being the south or front one. Said cars were pushed over said track, in response to signals given by decedent, at a rate of four to five miles an hour, and there was nothing to prevent him seeing the hay car. He crossed the track from the west to the east side a short distance ahead of the approaching cut of cars and engine, having first signaled them back, which signals he continued. These signals were properly obeyed. Those operating the engine neither knew or had reason to believe that decedent was in any peril, and stopped the engine at the first indication thereof. Decedent was not between the platform and car when struck by the car, but was north of the platform, at the northwest corner of the platform, where he stood from the time the car was 25 feet distant until part of it passed him, where he continued to stand until he was caught. It was his intention to remain out of the space between said platform and track, and far enough from the car to permit it to safely pass him. While said car was passing, decedent's coat was caught by some of the appliances connected with the door of said car, and he was thereby drawn between the car and said platform and killed. If his clothing had not so caught, the accident would not have occurred. It thus appears that decedent was not in between the platform and the car in the line of his duty when struck by the car, but was without any intention of going into such place. He stood too near the moving train. His coat was caught by the door irons, and he was carried to his death. It might have been under the wheels; it was between the car and platform. Had he been between the track and platform, his escape from the advancing car would have been cut off by the platform. Standing where he did, there was nothing to prevent him from stepping back and away from it, had he chosen to do so. These facts are inconsistent with the case made in the complaint.

The facts upon which it is to be determined (1) whether decedent assumed the risk by reason of which his death occurred, and (2) whether he was contributorily negligent, are

largely identical. The question of assumed obvious risk is, however, entirely distinct from the issue of contributory negligence. It has been recently held, in order to charge the employé with the risk, that it must appear that he appreciated the danger to which he was exposed, and that where evidence is doubtful or conflicting the question may be for the jury. *Avery v. Nordyke & Marmon Co.*, 84 Ind. App. 541, 70 N. E. 838, and authorities cited; *Baltimore & Ohio Southwestern v. Roberts*, 161 Ind. 1, 14, 67 N. E. 530. When the circumstances permit of but one conclusion, the question is for the court. The character of the defect, the imminence of danger, the opportunity and capacity of the employé may be, and often are, of such a character as to preclude any controversy upon this subject. *C. I. & L. Ry. Co. v. Tackett*, 33 Ind. App. 879, 71 N. E. 524. Decedent was an adult, in possession of his faculties, and familiar with the occupation and locality. The train moved as he ordered it to move; every condition was open and observable. There is no basis upon which to deny his knowledge of the conditions, and such knowledge, of necessity, carried with it the appreciation of danger arising from them. The conclusion follows that the risk was an assumed one. *C. I. & L. Ry. Co. v. Tackett*, supra; *Wortman v. Minich*, 28 Ind. App. 81, 62 N. E. 85.

It is unnecessary to go into the question of contributory negligence. The sufficiency of the evidence is denied by the motion for a new trial. The facts found by the jury are as favorable to appellee as the evidence warranted. If it were otherwise, the mandate would be for a new trial, but it is impossible to attribute the decedent's injury to any cause which renders the appellant liable for damages on account thereof. It follows that a new trial ought not to be ordered, and that the cause should be finally disposed of. The evidence is not of a character to sustain a verdict for appellee.

Judgment reversed and cause remanded, with instructions to sustain motion for judgment on interrogatories and their answers, notwithstanding the general verdict.

(36 Ind. App. 331)

NELSON v. NELSON et al. (No. 5,084.)
(Appellate Court of Indiana. Division No. 1.
Oct. 24, 1905.)

1. CONVERSION—DIRECTIONS IN WILL—TIME.
Under a will giving all the property to testator's widow for life, and providing that at her death all the property shall be sold, and the proceeds divided among his children, there is an equitable conversion as of the date of testator's death.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 45, 46.]

2. WILLS—REMAINDER—VESTED INTEREST.

Though, under a will giving the property to testator's wife for life, and providing that at her death all the property shall be sold and divided among his children, there is an equitable

conversion as of the date of testator's death, his children take a vested interest at his death subject to the life estate and the power of the executor to sell.

Case transferred from Supreme Court, under Act March 12, 1901, p. 567, c. 247. On rehearing. Affirmed.

For former opinion, see 72 N. E. 482.

MYERS, P. J. Appellee has interposed a motion to dismiss this appeal, which, after due consideration, we have concluded to overrule. The merits of this controversy arise upon a petition by appellant, filed in the court below, to have the will of John Entsminger construed and for directions in the distribution of his estate. Sarah H. Nelson and others, including Simon B. Kennedy, were made defendants.

The material facts, so far as this appeal is concerned, are as follows: On January 20, 1890, John Entsminger died testate, the owner of certain town property in the town of Jonesboro and certain farm lands all in Grant county, Ind. "That at his death his children were Sarah H. Nelson, Matilda J. Lucas, Rebecca Y. Robbins, John W. Entsminger, Rose M. Kennedy, and Emma C. Brooks." That part of his will asked to be construed reads as follows:

"Item first. To my beloved wife, I will during her natural life, all my real estate in the county of Grant and State of Indiana, and is described as follows. [Then follows a description of a 50-acre tract of land, also a 157-acre tract, also two tracts of land in the town of Jonesboro] All to have and to hold the same during my beloved wife's natural life."

"Item Two. I further will and bequeath to my beloved wife all my personal property of every kind, and hereby empower her, my said wife, to collect all claims, consisting of notes, accounts, rents, profits and choses in action that are due me, or may become due to me, at the time of my death, and I further empower my wife and give her full authority to collect, as aforesaid, and pay off and take receipts for all my just debts that I may be owing at the time of my death, and in the event my personal property should be insufficient to pay all my just debts that I may be owing at my death, I hereby empower my wife and give her full power to sell and convey and make title to a sufficient amount of my real estate out of that tract of land first described above, being 50 acres formerly described and purchased by me of Phillip Mather. I further will that my beloved wife shall act as executrix of all the foregoing will, and that she take charge of and transact all of the foregoing business as I have directed the same to be done without giving bond."

"Item Three. I further will that at the death of my beloved wife that what remains of my estate at the death of my said wife that there be paid to my youngest

daughter, Emma C., the sum of five hundred dollars to make her part equal with what my other children have already received. I then direct and will that after said five hundred dollars is paid to my said daughter that all of my estate both real and personal that may be left at the death of my beloved wife be sold and converted into money and out of said money so realized that all just debts which my said wife may during her life have contracted be paid and that said five hundred dollars above mentioned be paid to my said daughter Emma out of said money first, and then after said amounts are paid, whatever amount that may be left I will and bequeath that an equal division be made among all my children share and share alike, each one including my daughter Emma taking an equal share of said remainder."

Item fourth provides for the purchase of a monument to "be paid out of the remainder of my estate before the final and last divide is made," and he appoints John C. Nelson executor. That about three years after the death of John Entsminger, his daughter, Rose M. Kennedy, died testate, leaving no children nor descendants of any children, but leaving Simon B. Kennedy her surviving husband. The item of her will purporting to effect her interest in the estate of her father is in the words and figures following, to wit:

"Fifth. I will and devise to my husband, S. B. Kennedy, all my interest and right in the real estate to which I now have an interest in subject to a life estate of my mother, and which real estate is situated near Gas City, Indiana, and known as the John Entsminger farm, consisting of about 207 acres. Should the same be sold during my life, then, in that event, I direct that the proceeds of such sale as to my interest therein, shall go to my husband, S. B. Kennedy." That Martha Entsminger, the widow of said John Entsminger, died July 7, 1902, and at her death the only surviving children of John Entsminger were Sarah H. Nelson, Matilda J. Lucas, Rebecca Y. Robbins, John W. Entsminger, and Emma C. Brooks. That Simon B. Kennedy is still living, and is the surviving husband of said Rose M. Kennedy, and her only heir, devisee, and legatee.

The above and other facts, the latter not material to this appeal, were agreed upon in the court below, and submitted to the trial court for decision. The lower court found that the remainder of said John Entsminger's estate should be distributed, one-sixth to each of the surviving children at the death of the widow, Martha Entsminger, and one-sixth to Simon B. Kennedy. Judgment accordingly.

The errors assigned in this court are, first, "the court erred in overruling the motion for a new trial," and, second, "the court erred in its decision that Simon B. Kennedy is entitled to share in the distribution of

the money to arise from the sale of the real estate of John Entsminger, deceased."

The real estate of John Entsminger having been reduced to cash, the question here presented is what interest, if any, has Simon B. Kennedy in the proceeds arising from the sale of the same? The weight of authority, as established by the decisions of the appellate tribunals of this state, fix the interest of the widow of John Entsminger in his lands as a life estate, except that portion of the 50-acre tract authorized to be sold, if necessary, to pay his debts. *Pate v. Bushong*, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 598, 100 Am. St. Rep. 287; *Fenstermaker v. Holman*, 158 Ind. 71, 62 N. E. 699; *Mulvane v. Rude, Ex'r*, 146 Ind. 476, 45 N. E. 659; *Fuchshuber v. Krewson*, 33 Ind. App. 257, 71 N. E. 187; *Crew v. Dixon*, 129 Ind. 85, 27 N. E. 728; *Rumsey v. Durham*, 5 Ind. 71.

The principal contention between the parties to this appeal calls for a construction of item 3 of the Entsminger will. By this item, in our opinion, testator made it obligatory on his executor, at the death of the life tenant, to convert all of his estate then remaining into money; and, this being true, the weight of authority seems to be that an equitable conversion of testator's real estate took place at the time of his death, and such conversion will not be postponed by the fact that the land is not to be sold until after the death of the life tenant. *Rumsey v. Durham*, supra; *Allen v. Watts' Ex'r*, 98 Ala. 384, 11 South. 646; *Cook's Ex'r v. Cook's Adm'r*, 20 N. J. Eq. 375; *Handley v. Palmer*, 103 Fed. 39, 43 C. C. A. 100; *Thomman's Estate*, 161 Pa. 444, 29 Atl. 84; *Jones v. Caldwell*, 97 Pa. 42; *Lent v. Howard*, 89 N. Y. 169; *Fisher's Adm'r v. Banta*, 66 N. Y. 468, 477; *Dodge v. Williams*, 46 Wis. 70, 97, 1 N. W. 92, 50 N. W. 1108; *Hammond v. Putman*, 110 Mass. 232; *Dodge v. Pond*, 23 N. Y. 69; *McGowan v. Tift* (Sup.) 72 N. Y. Supp. 132; *Chick v. Ives* (Neb.) 90 N. W. 751; *Greenwood v. Greenwood*, 178 Ill. 387, 53 N. E. 101; *Shaw v. Chambers*, 48 Mich. 355, 12 N. E. 486; *Collier v. Collier*, 3 Ohio St. 369; *McCormick v. Cantrell*, 7 Yerg. 615; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460; *Loftis v. Glass*, 15 Ark. 680.

It is the direction of the testator that the conversion shall be made which supports the fiction, and not the actual change of the property into money, and rests upon the maxim "that equity considers that as done which is required to be done." Therefore, in the consideration of this cause, the land must be considered as money, because there is nothing in the will indicating the intention of the testator to give to his children anything but money.

Upon the theory of a conversion of testator's land into money at the time of his death, our next inquiry, and the one most vital in the decision of this cause, is, when

did the property vest in the children, or what title did they have at the death of the testator? The courts of last resort in the various states are not in full accord as to their answers to this question. In this state our Supreme Court has adopted the rule that, although the land shall be considered as having been converted into personalty from the date of the testator's death, yet, during the interim between the death of the testator and the time fixed for the actual appropriation and reduction of the land to money, residuary beneficiaries have a vested interest, which is subject to disposition by them. *Rumsey v. Durham*, supra; *Doe v. Lanius*, 3 Ind. 441, 56 Am. Dec. 518; *Brumfield v. Drook*, 101 Ind. 190; *Ballenger v. Drook*, 101 Ind. 172; *Simonds v. Harris, Adm'r*, 92 Ind. 505; *Wilson's Ex'r v. Rudd*, 19 Ind. 101; *Indiana Ry. Co. v. Morgan*, 162 Ind. 331, 70 N. E. 368. Other courts sustain the doctrine of a vested interest. *Allen v. Watts' Ex'r*, supra; *Loftis v. Glass*, supra; *Thomman's Estate*, supra.

Counsel for appellant ably and adroitly contends that, if the bequest to the children was money or personalty, it was a gift to them as a class, and their rights become vested at the time of distribution, upon the theory that the will in this case simply gives a direction to divide the property at a specified time, and not until that time does the property vest. It is true there are cases supporting appellant's theory, but, in the light of the authorities we have cited, we cannot affirm appellant's contention. The rule in this state seems to be "that the right and capacity of the remainderman to take possession of the estate if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determine whether or not the estate is vested or contingent." *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4, 12 Am. St. Rep. 436; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 810; *Corey v. Springer*, 138 Ind. 506, 37 N. E. 822. In *Thomman's Estate*, supra, the court announced a rule in our opinion applicable to the case at bar. In that case the will provided that the farm should not be sold during the life of the widow, "but after her death it shall be sold at public sale, and the proceeds thereof shall be equally divided between my children, share and share alike." The court, in construing this will, said: "That it is clear the only purpose of postponing the sale and distribution was for the benefit of his wife, and not on account of anything that affects the children, so as to cause him to attach any condition to the legacies. If his wife had not been living, there doubtless would have been an immediate distribution to his children, but the testator intended a postponement of the legacies, as stated,

"if she survive me," and this postponement was only on account of, and for the benefit of, the widow. The distribution after death of his wife was not directed on account of the age or character of the legatees, but for the advantage and benefit of his widow"—and held that there was not only a conversion of the land at testator's death, but that the children took a vested interest at his death. To the same effect is the holding of the court in the cases of *Brumfield v. Drook*, supra; *Ballenger v. Drook*, supra; and *Knight v. Pottgieser*, 176 Ill. 368, 52 N. E. 934. In *Hammond v. Putnam*, supra, in construing a will very similar to the one now under consideration, and where all the residuary legatees were living at the time of testator's death, as in this case, and where one of such legatees died soon after the testator, but before distribution, the court held that the interest of the deceased legatee was a bequest of personal property, and "had all the incidents of property of that character, and upon her death is to be distributed as her personal estate," and went to her husband as administrator.

In the case at bar, had the lands been devised to the executor named, with a direction to sell the same and divide the proceeds, then we would have a different proposition; but, as the direction to the executor is to convert the real estate into money, and after the payment of certain sums to distribute the balance among all of his "children, share and share alike," we must conclude, under our decisions, that the executor did not take the title to the lands, but his interest was limited to a naked power to sell the property, and distribute the proceeds as the will directs. *Brumfield v. Drook*, supra. In the one case it is held that the executor is the custodian of the title until divested by the sale, while in the other the title is held to be in the beneficiary or the heir until the sale is made." *Bowen v. Swander*, 121 Ind. 164, 170, 22 N. E. 725.

There is also another settled principle of law in this state that if there be a doubt from the language of the will as to when the testator intended the property to vest in his residuary legatees (and there seems to be such doubt in this case), or, in the absence of a manifest intention to the contrary, the property will be held to vest at testator's death. *Moores v. Hare*, 144 Ind. 575, 43 N. E. 870; *Aspy v. Lewis*, 152 Ind. 493, 52 N. E. 756; *Burke v. Barrett*, 31 Ind. App. 635, 67 N. E. 552; *Kilgore v. Kilgore*, 127 Ind. 276, 26 N. E. 56.

In our opinion, the time when the estate vested in the children is the controlling question in the case at bar, and, as we have concluded that time to be at the death of testator, and *Rose M. Kennedy* being at that time alive and of the class entitled to take under the will, our conclusion must be that she took a vested interest at her father's death, "subject to the widow's life estate

and the executor's power of sale under the will," and that her husband, *Simon B. Kennedy*, under the facts stated, is entitled to share in the distribution of the proceeds arising from the sale of the real estate, as decreed by the trial court.

Judgment affirmed.

(217 Ill. 610)

MANSFIELD et al. v. WALLACE et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. PARTITION—SALE—ATTORNEY AND CLIENT—PURCHASE OF CLIENT'S PROPERTY.

An attorney must affirmatively show that a purchase of his client's property, made by him at a partition sale conducted by him, was made with the utmost good faith.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 250, 262.]

2. SAME—IMPROPER CONDUCT OF ATTORNEY.

A partition sale to the attorney who conducted the suit would not be sustained, where he failed to make lienholders parties to the proceeding, so that the real condition of the title was concealed and others were unable to bid intelligently.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 250; vol. 38, Cent. Dig. Partition, §§ 336-339.]

3. JUDICIAL SALES—VACATION—MISCONDUCT OF MASTER.

Where a master in chancery accepted notes and mortgages held by purchasers as cash and so reported it, and soon afterwards a portion of the land was conveyed by the purchaser to the master's wife, the sale would not be sustained.

4. PARTITION—SALE—PRICE—DUTY TO REALIZE MAXIMUM.

A partition decree providing that the property shall not be sold for less than two-thirds of its appraised value does not excuse the officer making the sale from realizing as much as possible above the minimum two-thirds of the appraised value.

5. SAME—MISCONDUCT OF ATTORNEY.

Where an attorney who conducted partition proceedings successfully deterred other persons from bidding at the sale and bought the property for himself for an inadequate consideration, the sale would be set aside.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 365-368.]

6. PARTITION—SALE—DETERMINATION OF LIENS.

A master in chancery may not fix liens after a partition sale, in the absence of a finding by the court in regard thereto.

7. SAME—BAD FAITH—RELEVANT FACTS.

On the issue of whether the action of master and the attorney who conducted partition proceedings was such as to overthrow a sale to the attorney, the fact that notices of sale required by the decree to be posted were not posted may be considered.

8. SAME—PURCHASE BY ATTORNEY OF CLIENT'S PROPERTY.

One who knowingly joins with an attorney in purchasing property at a partition sale conducted by the attorney must affirmatively show that the transaction was fair and just.

9. JUDICIAL SALES—RELIEF FROM FRAUD—LACHES—DISCOVERY OF FRAUD.

One seeking to set aside a judicial sale on the ground of fraud is not chargeable with laches until he has acquired knowledge of the facts, or of circumstances sufficient to charge him with such knowledge.

10. ATTORNEY AND CLIENT—RIGHT TO FEES—MISCONDUCT.

An attorney in partition proceedings, who purposely omits lienholders from the bill, is not entitled to attorney's fees.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 299.]

Error to Circuit Court, Shelby County; Truman E. Ames, Judge.

Bill in chancery by Aaron B. Mansfield and others against William O. Wallace and others. There was a decree dismissing the bill, and complainants bring error. Reversed.

This is a bill in chancery, filed on October 10, 1903, by the plaintiffs in error, Aaron B. Mansfield, Freeman Mansfield, David Nanne, Frank M. Shannon, Minnie E. Dush, Wilmay Torrence, Iva Brewer, Zimroad M. Elder, Sarah McMillen, George E. Shannon, Rachel Clark, Emaline Warren, William W. Mansfield, Bertha McGowan, Fenton Mansfield, Della Curlin, Sarah Riggs, Inez E. Shannon, A. Grover Shannon, Alen Presseler, Matty Wilcox, and Sallie Popple (the last three of whom were the heirs of Emily Presseler one of the defendants to the original bill, who has since died), against the defendants in error, William O. Wallace, John A. Tackett, Jacob Mansfield, John W. Yantis, W. E. Walker, Douglas Fralley, George A. A. Dieckmann, Martha Gubser, Ross R. Mattis, and William R. Liston. The bill was subsequently amended in various particulars, and by making Jacob Mansfield a party complainant, instead of a party defendant. The object of the bill is to set aside a sale made under a decree in a partition proceeding theretofore had and prosecuted to decree and sale. The charge in the bill is that the defendant in error William O. Wallace was the solicitor for the complainants in the original partition proceeding, and also undertook to act for and represent the interests of all the other owners of undivided interests in the property besides the complainants, and that at the original partition sale he purchased the property for himself and for one John A. Tackett, who was associated with him, and that he violated his duty as attorney and obtained the property for himself, and in doing so was guilty of various acts of actual and constructive fraud such as would justify a court of equity in setting aside the sale and the deed or deeds executed in pursuance thereof and all the other proceedings had thereunder. The prayer of the bill is that, upon a hearing, the report of the commissioners in the original partition proceeding be set aside and held for naught, and that new commissioners be appointed to partition the premises and appraise the same, in case they cannot be partitioned and divided without manifest injury to the parties interested in the same; that the said pretended sale, made by the master in the original partition proceeding, be decreed to be void and of no effect, and that the prem-

ises be sold under the direction of the court; that by reason of the betrayal of the trust of the said Wallace a fee of \$1,200 allowed to him be ordered to be refunded, and that an accounting be had of the rents, issues, and profits of the premises, so held since the pretended sale to Wallace and Tackett and Yantis, for the use and benefit of the parties interested in the premises; and that the deed from the master to Wallace and Tackett, and the deed to Yantis, be canceled. The bill, as finally amended, charges that the execution and delivery of the deed by the master to Wallace and Tackett constitute in equity a mortgage in favor of Wallace and Tackett and against the owners of the premises, and as such secure to Wallace and Tackett the amount of money actually paid by them to the master, with 5 per cent. interest; that upon said mortgage the owners of the premises are entitled as credits to the proceeds derived from the sale of any part of the premises conveyed by Wallace and Tackett to innocent purchasers without notice, as well as the rents, issues, and profits received by Wallace and Tackett, less the taxes paid and improvements made, if any, by them, which amount, less said credits upon said accounting, the complainants offer to pay to Wallace and Tackett; that the premises are now held by Wallace and Tackett as trustees; that the defendants have no interest therein save as equitable mortgagees, and that an account be taken, and that Wallace and Tackett be charged with the rents, issues, and profits, and the reasonable value of any parcel of the premises sold by them; that upon the stating of said account the amount, if any, which may be found to be due to Wallace and Tackett, be decreed by this court to be secured by such equitable mortgage, and if they have from the rents, etc., received an amount sufficient to pay such amount as may be found due them, then said mortgage may be canceled, and if the amount so received by them be in excess of the amount so found to be due to them then that they be decreed to pay over such excess to the master, and that the proceeds thereof be brought into court to be distributed under the direction of this court. All the proceedings in the original partition suit and the records and papers in said suit, as well as other documentary evidence and oral testimony, were produced before the court upon the hearing of the cause. The circuit court entered a decree dismissing the bill for want of equity, to which the complainants below, the present plaintiffs in error, excepted, and have prosecuted this writ of error for the purpose of reviewing such decree of dismissal.

The material facts are as follows: One John B. Mansfield, of Shelby county, Ill., died intestate on February 5, 1901, leaving no widow or child or children, or descendants of such, and leaving, him surviving, as his only heirs at law, 11 brothers and sisters

and 10 nephews and nieces, all of whom, with the exception of Emily Presseler, who has since died, are plaintiffs in error herein. At the time of his death John B. Mansfield owned 724 acres of land in Fayette county, 60 acres in Shelby county, and 120 acres in Jackson county, besides some town lots and blocks in the city of Cowden, in Shelby county. The original bill for partition was filed on April 17, 1901, a little more than two months after the death of John B. Mansfield, by Jacob Mansfield and Freeman Mansfield, two brothers of the deceased, as complainants, through William O. Wallace, as their solicitor, and the other heirs were made defendants to the bill, and the bill set forth the interests of the parties in the premises, and alleged that Sarah Shellenberger, Ross R. Mattis, William H. Craig, George A. A. Dieckmann, Douglas F. Frailey, Martha Gubser, Louis L. Lehman, and the Aetna Life Insurance Company claim some interests in said premises. The bill also alleged that the defendants A. Grover Shannon and Inez E. Shannon were minors under age. The bill prayed for the appointment of a guardian ad litem for the minors, for partition and division of the property, or, in case the same could not be divided, for a sale of the same. The guardian ad litem filed answers for the minors on June 4, 1901. George A. A. Dieckmann filed an answer to the bill for partition, alleging that he held a mortgage upon a part of the premises to secure \$1,500, and filed a cross-bill on June 3, 1901, for the foreclosure of his mortgage, to which cross-bill an answer was filed for the minors by their guardian ad litem on June 4, 1901. Mattis also filed an answer to the bill for partition, alleging that he held a mortgage on the premises to secure a note for \$1,300 and interest and attorney's fees. None of the defendants who were heirs of the deceased, John B. Mansfield, except the two minor defendants, answered the bill for partition, and defaults were taken against all the adult heirs, who were defendants to the original bill. The cause was referred to a master in chancery, who found the facts in regard to the death of John B. Mansfield and the heirship of the parties named; that the said John B. Mansfield had executed a bond for a deed to Douglas F. Frailey in his lifetime for 120 acres of land situated in Fayette county; that certain premises in Fayette county had been sold by one Hunold to Sarah Shellenberger, and subsequently conveyed to John B. Mansfield. A decree for partition and appointment of commissioners was entered on June 4, 1901, which finds that John B. Mansfield executed the bond for a deed to Douglas F. Frailey, and that the Aetna Life Insurance Company held a mortgage upon the property sold to Shellenberger, whose interest in the same had been forfeited; that on May 15, 1899, the deceased executed a note and mortgage to Dieckmann, upon which there was then due \$1,657.33 and costs and \$100 solicitor's fees; that on April 1, 1898,

he executed a mortgage or trust deed to Mattis to secure \$1,300; that on June 25, 1900, the deceased and Frailey executed two notes to Martha Gubser for \$350 each, and to secure the same mortgaged the premises included in the bond for a deed executed by the deceased to Frailey; that Martha Gubser owns said notes, upon which there is now due \$700 and interest from June 25, 1900; that the rights of Frailey under said bond have been forfeited, and that the same should be canceled as a cloud upon the title. The decree of partition found that the interests of Frailey and Shellenberger had been forfeited, and that Mattis and Dieckmann and Gubser held mortgages upon portions of the property, specifically describing the same, and that each of 11 brothers and sisters of the deceased, John B. Mansfield, was entitled to one-twelfth of the premises in question in fee simple, and that certain nephews and nieces were entitled to the other one-twelfth thereof.

The commissioners reported that the premises were not susceptible of division, and appraised the total value of the same at \$19,020, valuing the property in Shelby county, including the lots and blocks, at \$1,850, that in Fayette county at \$16,330, and that in Jackson county at \$840, including the 120 acres in Fayette county sold by the deceased to Frailey, which was appraised at \$2,600. The report of the commissioners was filed on June 10, 1901, and on June 11, 1901, a decree of sale was entered, which directed: That all the premises in the three counties named "be sold at public auction at the south door of the courthouse in the city of Shelbyville, in the county of Shelby and state of Illinois, to the highest and best bidder, free and clear of all mortgage liens of every nature and kind, all of said mortgages, liens, and indebtedness to be paid out of the purchase price or assumed by the purchaser, and, when such mortgage indebtedness is assumed by the purchaser, such amount as is assumed shall be considered as so much paid on the purchase price, and the bids on each piece or parcel shall [be] equal to at least two-thirds of the valuation put upon the same, as shown by the reports of the several sets of commissioners heretofore appointed by the court to make partition thereof; such valuation having been made as though no mortgage indebtedness existed, unless the other pieces will at the same time sell for enough to make the total amount of the sale equal to two-thirds the total amount of the valuation of all the premises to be sold, which said sale shall be made on the following terms, namely: One-half in cash on the day of sale, the other one-half in one year from the date of sale, the deferred payment to be secured by personal security and mortgage on the premises sold, and the said deferred payment to draw interest at the rate of 5 per cent. per annum until paid. That the said master in chancery of this court, John W. Yantis, be and is here-

by directed to make said sale and to carry into effect this decree. That the said master will first give public notice of such sale and the time and place thereof by publication in the Shelby County Leader, a weekly newspaper published in the said county, for at least four successive weeks prior to said sale, and by posting written or printed notices thereof in at least five of the most public places in each [of] the said county of Jackson, the county of Fayette, and the county of Shelby, where said premises are situated; and, upon the confirmation of the report of the said master, he shall execute and deliver to the purchaser or purchasers of the premises so sold a proper deed or deeds of conveyance thereof. The said master will bring the money realized from such sale into court to be distributed to the parties entitled thereto under the direction of the court, and out of the money realized from said sale the said master will pay all the costs of this proceeding." The decree found that "W. O. Wallace is entitled to a solicitor's fee herein of \$1,200.00."

The master published a notice of sale to the following effect: "Public notice is hereby given that, in pursuance of a decretal order entered in the above-entitled cause in said court on the 11th day of June, A. D. 1901, I, John W. Yantis, master in chancery of said court, on the 19th day of June, A. D. 1901, at ten o'clock in the forenoon of said day, have sold [will sell] at public auction at the south door of the courthouse in said city of Shelbyville and county of Shelby and state of Illinois the following described real estate," describing the several pieces of property in the three counties, and giving the appraised valuations thereof. The notice then states the terms of sale as follows: "The purchaser to pay one-half of the purchase money down on the day of the sale, and the balance in one year, with interest at the rate of 5 per cent. per annum, secured with personal security and a mortgage on the premises so sold. No bid will be received unless it is equal to two-thirds of the appraised value as above set forth."

On June 20, 1901, one William R. Liston filed a petition, setting up that he was the owner of the premises above described as having been sold by Hunold to Shellenberger, and asking that the ownership of the same be vested in him. On June 21, 1901, the court entered an order that there be no sale of said last-named premises until the rights of said Liston should be heard and determined. On July 27, 1901, the master filed his report of sale, in which he states as follows: "The undersigned master in chancery of said court * * * respectfully reports that at the request of the complainant I proceeded to advertise the lands and premises described in said decree, as therein directed, by causing a notice containing the time, terms and place of sale, and a particular description of the premises to be sold to be inserted for four

successive weeks previous to the day of sale in the Shelby County Leader, a newspaper published weekly in the city of Shelbyville, in said Shelby county, a copy of which notice, with the certificate of publication thereof, is hereto attached, and also by causing similar notices to be posted in five of the most public places in said county for the same length of time, and on Friday, the 19th day of July, A. D. 1901, at ten o'clock a. m., at the south door of the courthouse in Shelbyville, in said Shelby county, I offered the said premises for sale at public vendue to the highest bidder on the terms prescribed by said decree, and the same were struck off and sold as follows: [Here follows a description of all the property, including the 904 acres in the three counties, and the lots and blocks.] And the report of sale then proceeds as follows: "The same was sold to W. O. Wallace and John A. Tackett, they being the highest bidders; the total amount of said sale being the sum of \$11,520.00, and being more than two-thirds of the appraised value of said premises; the said purchasers having paid me the one-half of said bids in cash, and executed notes and mortgages for the deferred payments, according to the terms and conditions of said decree, and said cash payment amounting in all to the sum of \$5,760.00. Out of said cash payments I have paid the costs and charges of said suit and sale, being the sum of \$1,979.48, including attorney's fees allowed by the court, and bring into court for distribution under order of the court the sum of \$3,780.52." On November 25, 1901, Wallace and Tackett filed an intervening petition, stating that since said sale they had discovered that the Laborers' Loan Association of Shelbyville was the owner of certain lots in Cowden in Shelby county, which had been sold by the association to other parties, that petitioners had paid for the same \$433.97, and praying that they be allowed a credit to that amount, \$216.98 on their note for the deferred payment, and \$216.98 on their cash payment; in other words, praying for a rebate on their bid of \$433.97. An intervening petition was also filed by Walker, the administrator, alleging the resignation of Graham, the former administrator, stating that certain claims had been allowed in the probate court, and asking that the master be required to pay over to the administrator the proceeds of the sale, if any should be left after paying off the mortgages, to apply on the claims probated against the estate.

On November 25, 1901, the court rendered a decree confirming the sale of the master, reciting "that the said master, John W. Yantis, has in every respect proceeded in due form of law and in accordance with the terms of said decree, and that said sale was fairly made, and * * * that the proceeding, sale, and report of said master, John W. Yantis, be, and the same are hereby, approved and confirmed; and it is further ordered that

the said master * * * execute and deliver to the said John A. Tackett and William O. Wallace, the purchasers at said sale, proper conveyances of the premises so sold," etc. The decree allowed to the purchasers the credit theretofore prayed for of \$433.97. A decree was also entered granting the prayer of the intervening petition of Liston.

Braz D. Tull, Robert M. Peadro, and George B. Rhoads, for plaintiffs in error. W. C. Kelley, Richardson & Whitaker, and William H. Ragan, for defendants in error.

MAGRUDER, J. (after stating the facts). First. It will be seen, by reference to the statement of facts preceding this opinion, that the defendant in error William O. Wallace was the solicitor of the two complainants in the original partition suit, to wit, Jacob Mansfield and Freeman Mansfield. The other heirs of John B. Mansfield were not represented upon the face of the record by any solicitor, but Wallace admits in his answer that the relation of attorney and client existed between him and the owners of the premises in question, and that it was his duty to protect the interests of all the parties to the partition proceeding. He says in his answer: "Respondent, further answering, says that it is true that he was solicitor for the complainants in said cause, and he also admits that by reason of the prosecution of the said partition suit he was allowed by this court a solicitor's fee of \$1,200.00, and that the said fee was paid by the interested parties in said suit in proportion to their respective interests in said land, as fixed and determined by the decree of this court. Respondent, further answering, admits that by reason of the relation of attorney and client existing by and between this respondent and the joint owners of said premises it became and was the duty of respondent to protect the interests of each and all of the said parties to said proceedings, as charged in said amended bill." It also appears from the statement of facts that he was the purchaser, together with one John A. Tackett, of the whole of the premises at the nominal sum of \$11,520, although they were appraised by the commissioners at something over \$16,000, after taking out certain pieces of property which belonged to other parties than the deceased intestate. As Wallace was solicitor and counsel for the owners of the property, and conducted the partition proceeding as their solicitor and counsel, he must show that as purchaser he acted with the utmost fairness towards his clients. Where the relation of attorney and client thus exists, and the attorney becomes the purchaser of his client's property, the law watches over the transaction with a jealous eye, and will often declare it void when, as between other persons, it would be unobjectionable. It does not so much consider the bearing of this doctrine upon particular cases "as

it does the importance of preventing a general public mischief." "It is not necessary to establish that there has been fraud or imposition upon the client; * * * but the burden of establishing its perfect fairness, adequacy, and equity is thrown upon the attorney, upon the general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence, a rule applying equally to all persons standing in confidential relations with each other." 1 Story's Eq. Jur. (12th Ed.) §§ 310, 311. The attorney, who bargains in a matter of advantage to himself with his client, is bound to show that the transaction is fair and equitable, and that he fully and faithfully discharged his duties to his clients. *Willin v. Burdette*, 172 Ill. 117, 49 N. E. 1000, and cases there referred to. In such cases the burden of proof rests upon the attorney to show "fairness, adequacy, and equity, and, upon a failure to make proof, a court of equity will treat the case as one of constructive fraud." *Jennings v. McConnel*, 17 Ill. 148; *Morrison v. Smith*, 130 Ill. 304, 23 N. E. 241; *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399. The rule that such a transaction as this between an attorney and client must show fairness, adequacy, and equity on the part of the attorney towards his client is demanded by "a sound public policy." *Zeigler v. Hughes*, 55 Ill. 288. Where there is a purchase by an attorney of his client's property, "the transaction is presumptively fraudulent, and the burden is on the attorney to show fairness, adequacy, and equity." *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401. It has been said by this court in *Hess v. Voss*, 52 Ill. 472, that "there is no rule of law which prohibits an attorney from becoming a purchaser at a master's sale, even of land owned by his client, but in such cases the attorney must act in good faith. On such a purchase the conduct of the attorney will be closely scrutinized, and if he has not acted with strict fairness his purchase will be held to have been made for his client." See, also, *Moore v. Bracken*, 27 Ill. 23. The question then arises whether, in the purchase of this property by the defendant in error Wallace at the master's sale thereof in the partition suit conducted by himself, his conduct towards his clients was characterized by fairness, adequacy, and equity.

Second. Wallace failed to make persons holding mortgages or other liens upon portions of the property parties defendant to the partition proceeding. Some of these mortgages or liens were held by himself, and were so obtained by him before he began the partition proceeding. Section 6 of the partition act provides that "every person having any interest whether in possession or otherwise, and who is not a petitioner, shall be made a defendant to such petition." 3 Starr

& C. Ann. St. 1896 (2d Ed.) p. 2916, c. 106. Section 15 of the partition act provides that "the court shall ascertain and declare the rights, titles and interest of all the parties to such suit, the petitioners as well as the defendants, and shall give judgment according to the rights of the parties." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 2919, c. 106. In *Smith v. Higgins*, 152 Ill. 159, 38 N. E. 757, it was held that a judgment creditor of a party in a partition suit, whose claim is to be paid in the distribution, should be brought before the court, so that the amount remaining due upon his judgment may be ascertained. In a partition suit money should not be paid to judgment creditors or holders of mortgage or other liens who are not parties to the suit, and therefore not before the court. The amount remaining due upon such judgments or liens should be ascertained before any distribution is awarded to the holders of them. In *Kilgour v. Crawford*, 51 Ill. 249, which was a suit for partition of lands, the bill stated that the premises were subject to a certain mortgage executed to one of the defendants, and the answer of the mortgagor defendant also set up the mortgage, but on the hearing neither the mortgage was put in evidence, nor any proof offered in support of it, and in the decrees of partition and sale which were subsequently entered the court failed to make any mention of it, and it was there held that this was error, and that the court should have passed upon the mortgage in such manner as to have clearly defined the interest which would be acquired by a purchaser at the sale; and we there said (page 252): "In this uncertainty, it is evident the sale of the premises would be greatly injured. A person desirous of purchasing would not know whether he bought subject to the mortgage or not. The statute not only requires all persons having either a present or contingent interest to be made parties, but further requires the court in its decree to declare the rights and interests of all the parties."

On February 1, 1900, John B. Mansfield had executed a note for \$1,250 to one Craig, and secured the same by a mortgage upon a considerable portion of the property in question, situated in Fayette county. Some time in 1900 Wallace, as the solicitor of Craig, filed a bill for the foreclosure of this mortgage, and under a decree entered in the foreclosure proceeding on December 8, 1900, the lands were offered for sale and sold. The certificate of sale, issued to the purchaser, was on December 13, 1900, assigned and transferred to W. O. Wallace, so that on April 17, 1901, when he filed the bill for partition for the Mansfield heirs, he was himself the holder of this certificate of sale. The holder of such certificate was not made a party defendant to the partition proceeding, nor did the papers or record in that proceeding reveal the fact that Wallace himself was the holder of such certificate. On March 17,

1899, John B. Mansfield had executed a mortgage to one C. J. Kurtz upon a portion of the property here in question to secure a note for \$625. On March 9, 1901, this note and the interest coupons attached thereto were assigned by Kurtz to W. O. Wallace himself. Neither Kurtz nor Wallace was made a party defendant to the partition proceeding, nor did that proceeding reveal in any way to the court or to outside parties the existence of the mortgage to Kurtz. On November 25, 1899, John B. Mansfield executed a mortgage to secure \$425 on a part of said property to Tallman and Barton, which note and mortgage appear to have been assigned to W. O. Wallace, and were held by him at the time of, or shortly after, the sale. Neither Tallman nor Barton nor their assignee was made a party to the partition suit, nor was any reference made to the Tallman and Barton mortgage in any of the partition proceedings. It also appears from the record that the mortgage held by George A. A. Dieckmann was transferred to Wallace on July 23, 1901, a few days after the sale of the property was made by the master, Yantis. The decree of sale provided "that all mortgages and indebtedness be paid out of the purchase price or assumed by the purchaser." But as to the mortgages just mentioned, except the last, there was nothing in the decree or in the partition proceedings to disclose the existence of such mortgages to parties purchasing at the master's sale. As holders of such mortgages had not been made parties to the partition proceeding, and the court had made no finding as to the existence of such mortgages, it was impossible for the purchasers or persons desiring to purchase at such sale to know what mortgages and how much of a mortgage indebtedness they were to assume. Inquiries were made of the master by purchasers at the sale, which showed that they were in doubt whether, when they paid certain amounts for property, their bids were subject to existing mortgages, or existing mortgages were to be deducted from the amounts of their bids. This uncertainty affected the sale, and deterred parties from bidding thereat. The master declined to furnish any information on the subject, but simply referred the parties to the decree or to the notice of sale.

In his report of sale the master states that the purchasers, Wallace and Tackett, paid him one-half of the amount bid, to wit, \$11,520, in cash. This was not true. They gave him a check for \$2,000 in money in part payment of one-half of their bid, which one-half was \$5,760, and as to the remainder of the \$5,760, after taking out the \$2,000, to wit, \$3,760, Wallace settled that with the master by producing certain notes and mortgages held by himself. The master states that he knew nothing about these notes and mortgages until they were produced before him, and that they were produced by Wallace. Wallace produced before the master

the certificate of sale that he held upon the land sold under the Craig foreclosure, and was given credit for a certain amount upon this. Wallace produced the Kurtz mortgage before the master, and was given by the master credit for a certain amount on account of this mortgage. He also produced before the master the Tallman and Barton mortgage, and received credit for a certain amount on account of that mortgage. There was also produced before the master a certain mortgage on a portion of the land in Jackson county, amounting to 120 acres, known as the Lehman mortgage, and the master gave Wallace credit for a certain amount due upon this mortgage, but no mention was made of any of these mortgages in the decree. The court was unable to tell whether the correct amount had been paid in to the master for the benefit of the heirs or not, because the master reported that he had received \$5,700 in cash, when as matter of fact he had received \$3,700 of it by giving credit to Wallace for certain mortgages on the property, produced by him, which were not mentioned in the decree, nor explained in the proceedings. It is quite clear that the correct facts in regard to the payment of the half of the \$11,520 were not presented to the court by the master in any of his reports. We think it apparent from the record that the defendant in error Wallace, who was an intelligent lawyer, beclouded the records in such a way as to keep the real condition of the title concealed, so that purchasers were unable to bid intelligently.

One of the heirs of John B. Mansfield was a Mrs. Wilmay Torrence, and in February or March, 1901, Wallace sent for Mr. and Mrs. Torrence to come to his office, and asked them to begin a partition suit. He told Mrs. Torrence that, if she would bring such suit, he would see that she would get well paid for it. She and her husband declined to give him authority to bring the suit, and he subsequently began the partition suit in the names of Jacob and Freeman Mansfield.

Third. John W. Yantis was the master in chancery who made this sale. Among the pieces of property which he sold was a certain 60 acres of ground in Shelby county. This tract of 60 acres was struck off and sold to Wallace, or Wallace and Tackett. Shortly after the sale was made this tract of 60 acres was deeded to the wife of Yantis, the master in chancery. The master, Yantis, admits that he acted as the agent of his wife in this matter. When the property was transferred to Mrs. Yantis, the sum of \$540 was credited on the mortgage, which had been given by Wallace and Tackett to secure one-half of the purchase money, and which was payable in one year. This tract of 60 acres had been appraised by the commissioners at \$600, and there is testimony in the record going to show that it was worth upwards of \$1,000. The testimony also shows that several parties

were anxious to buy this 60 acres, and were promised by Wallace that, if they would not bid against him and would allow him to take the 60 acres, he would subsequently deed it to them at the value at which it had been appraised by the commissioners.

Fourth. In addition to this, the evidence shows that Wallace sought to deter parties, who were inclined to bid at the sale, from making any bids. In other words, he discouraged competition by trying to induce persons who were disposed to bid to abstain from doing so. One Brownback testified that he desired to purchase the 60-acre tract in question, and talked with Wallace about it before the sale. He says that Wallace told him that he (Wallace) expected to buy the 60 acres, and to buy all the land. He said that the land would probably sell as a whole. Brownback swears distinctly that there was an agreement between him and Wallace that he (Brownback) was not to bid upon the tracts as a whole, and that Wallace was to let him have the 60 acres of land at the appraised value. He says that such agreement was made at the courthouse before the sale, and on the day of the sale, and that his business was banking, and he was able to buy the whole of the property. He also says that he was prevented from bidding by the promise of Wallace that the latter intended to buy the whole of the land, and that, when he did, he would transfer the 60 acres to Brownback at its appraised value. One Hadley swears that he had a conversation with Wallace before the sale, and Wallace told him he would send him a notice of the time of sale, but that he received no such notice from Wallace as to the date of the sale. He says that Wallace told him that the land would be sold in a bunch, and that, if he bought it, he would sell to Hadley the 80-acre tract which the latter desired to have. Hadley also says that he did not attend the sale because he thought the property was to be sold in a body, and he was anxious to get what was called the "John Nolan Tract," consisting of 80 acres. There is also testimony tending to show that one Fralley, who had received a bond for a deed for 120 acres of the property from Mansfield in his lifetime, and still owed \$1,700 upon the purchase, would have been able to pay the \$1,700, but was discouraged from doing so by Wallace, who held the notes that had been given by Fralley to Mansfield. The decree prepared by Wallace was drawn in such a way as to cut off the interest of Fralley in the property and declare it forfeited, and the property was struck off to Wallace and Tackett for less than Fralley would have paid upon it. One Westervelt, a physician residing in Shelbyville, testified that he made several bids upon the property, but that it was struck off to Wallace, and after the sale Wallace told Westervelt that the latter had run the price of the land up on him (Wallace), and that, if he (Wallace) had seen Westervelt before the

sale, he would have obtained the property for less money. Without further discussion of the evidence, the conclusion is irresistible from the testimony of the witnesses that Wallace discouraged parties from bidding at this sale. "The law may be regarded as well settled that the greatest fairness is required by those intrusted by law to conduct judicial sales, and those who purchase at such sales; and any agreement, contract, or arrangement entered into, on the part of the bidders, calculated to stifle competition at the sale, is contrary to public policy, a fraud upon the law, and would vitiate the sale." *Wilson v. Kellogg*, 77 Ill. 47. "It is a well-recognized rule that where a person, desirous of purchasing property at auction, prevents others, by his improper conduct, from bidding against him, and thus succeeds in purchasing the property at less than its fair market value, the sale will be set aside. So, agreements not to bid at a public auction are in general void, as against public policy and tending to fraud, and such agreements, at least when brought about or participated in by the purchaser, will vitiate the sale." *Ingalls v. Rowell*, 149 Ill. 163, 36 N. E. 1016; *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580. In *Garrett v. Moss*, 20 Ill. 549, 553, we said: "It is a well-established doctrine that any corrupt agreement amongst bidders which prevents competition at a public sale is a fraud upon the owner, for which a sale should be set aside."

It is true that inadequacy of consideration, standing alone, is not sufficient reason to set aside a judicial sale, yet, where the sale is attended by circumstances showing that the purchaser desired to prevent fair and open competition, these, coupled with the inadequacy, are sufficient for setting the sale aside. *Dutcher v. Leake*, 44 Ill. 398; *Lurton v. Rodgers*, 139 Ill. 554, 29 N. E. 866, 32 Am. St. Rep. 214. While the decree provided that the property should not be sold for less than two-thirds of the appraised value, yet this did not make it any the less the duty of the officer making the sale, or of the attorney conducting the proceedings, to realize as much more as possible from the sale than two-thirds of the appraised value. The property here was appraised by the commissioners in partition at something over \$16,000, and there is testimony in the record tending to show that it was actually worth from \$18,000 to \$20,000. In *Smith v. Huntoon*, 134 Ill. 24, 30, 24 N. E. 971, 972, 23 Am. St. Rep. 646, we said: "Although gross inadequacy of price alone will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition." In the case at bar there were many circumstances, including those already detailed, and many irregularities, which, considered in connection with the conduct of the attorney and the master and the

inadequacy of the price for which the property was sold, justify a court of equity in setting the sale aside.

Fifth. Among such circumstances is the fact that the notice of the sale required to be given by the decree was not actually given. The notice of the sale did not state that the land would be sold free from all liens and incumbrances. The decree of sale required that the master should not only give public notice by publication in a newspaper in Shelby county, but also required that notice should be given "by posting written or printed notices thereof in at least five of the most public places in each Jackson, Fayette, and Shelby counties." The evidence does not show that notices were posted in at least five of the most public places in Jackson, Fayette, and Shelby counties. It is shown by the testimony that the master himself posted no notices, nor made any effort to post any. Two notices appear to have been posted in Shelby county, and several in Fayette county, but there is nothing to show that any notice was posted in Jackson county. In his report of sale the master said that he caused notices "to be inserted for four successive weeks previous to the day of sale in the Shelby County Leader, a newspaper published weekly in the city of Shelbyville in in said Shelby county, a copy of which notice, with the certificate of publication thereof, is hereto attached, and also by causing similar notices to be posted in five of the most public places in said county for the same length of time." The words "in said county" refer back to Shelby county, and the master merely states that he caused notices to be posted in five of the most public places in Shelby county, but does not state that he caused them to be published in Jackson and Fayette counties. The report, as made by the master, was recorded by the clerk, and, as recorded, contained the word "county." Subsequently, the letter "s" appears to have been added in the original report to the word "county," but with a comma between the "y" and the "s." The testimony shows that the original report and other papers in the partition suit were taken from the files by different attorneys and carried to their offices. At any rate, it is not clear that the master's report, as recorded by the clerk, which contains the word "county," thereby referring to Shelby county alone, was not made by the master, as it purports to have been made, before the change indicated was made. The master himself gives no testimony whatever upon the subject. No evidence was produced to show that the claims for which the master gave Wallace credit upon his purchase were really just and valid claims against the land. In one case where there was a mortgage on the land in Jackson county, the master acted judicially and found that three-fourths of the note secured by the mortgage was the proper portion for Mansfield to pay; but, so far as this record shows, he acted without evidence,

argument, or notice. It was for the court to determine the liens upon the property, and not for the master to fix them after the sale, and without any finding by the court.

Sixth. It is claimed, on the part of the defendants in error, that Wallace was not himself alone the purchaser of this property, but that he was only a joint purchaser with Tackett. Wallace was the solicitor of record in the partition suit for the owners of this property, and Tackett had actual, as well as constructive, notice of this fact. "A party purchasing at a judicial sale is chargeable with notice of such material facts as the record of the proceedings under which he derived title discloses, and he will be presumed to have examined the same before becoming a purchaser." *Webber v. Clark*, 136 Ill. 256, 26 N. E. 360, 32 N. E. 748. In *Alwood v. Mansfield*, 59 Ill. 496, it was held that, where a third person was a party with a solicitor in a transaction with clients of the latter and sought to hold property thus secured, the burden was upon him, as it would have been upon the solicitor, to show that the transaction was in all respects just and fair. So, here, Tackett, by associating himself with Wallace in transactions concerning the clients of Wallace, placed himself under the same rules that govern Wallace, and the burden is upon him to show that the transaction was in all respects just and fair. Tackett was not present at the sale, and the master did not know that Tackett had any interest in the sale with Wallace, until he was directed by Wallace to put Tackett's name with Wallace's name in the certificate of sale. Wallace, having made the bids for Tackett in his absence, was in that regard Tackett's agent, and the knowledge which Wallace, as such agent, had had, affected Tackett himself with notice. It has been said: "The principles * * * which govern the cases of dealings of persons standing in a fiduciary relation apply to persons who clothe themselves with a character which brings them within the range of the principle, or who take instruments, securities, or moneys, with notice that they have been obtained by a person filling a position of a fiduciary character, from a person towards whom he stands in such relation. * * * In the application of the principles of the court, there is no distinction between the case of one who himself exercises a direct influence or of another who makes himself a party with the person who exercises the undue influence. * * * Whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity, the court will immediately raise a constructive trust and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who, in equity, are entitled to the beneficial enjoyment." *Alwood v. Mansfield*, supra. The case of *Alwood v. Mansfield*,

supra, is similar in its facts to the case at bar, for the reason that, under the evidence in that case, the person who made himself a party with the attorneys occupying a position of a fiduciary character knew of the existence of the relation of solicitor and client. The decree prayed for in this case cannot cause any loss to Wallace and Tackett. Their deed or deeds are held to be equitable mortgages, and they are to be paid all that they have expended for purchase money, taxes, and improvements, together with interest, and to be charged with rents and profits, and, in case of sale to innocent purchasers without notice, with the excess of the amount realized over what they paid. They are only to be charged with the reasonable worth of the lands sold. Therefore, in case of a resale of the lands, Wallace and Tackett cannot be injured, inasmuch as the direction will be that, if upon such resale no advance is made upon the sum paid by Wallace and Tackett, they shall be held to be purchasers. *Thorpe v. McCullum*, 1 Gilman, 614; *Lagger v. Mutual Union Loan Ass'n*, 146 Ill. 283, 33 N. E. 946; *Ebelmesser v. Ebelmesser*, 99 Ill. 541.

Seventh. It is said that plaintiffs in error are not entitled to relief upon the ground of laches. The claim is that they should have filed exceptions to the master's report of sale. We do not think the record shows that the plaintiffs in error were guilty of laches. Wallace was their solicitor and attorney. He was acquainted with all the facts; and, if exceptions were filed to the master's report of sale, it was his duty to file such exceptions. As, however, he was not only solicitor for the owners of the property, but purchaser of the property, it was for his interest not to file such exceptions, and his clients cannot be chargeable with laches because of his neglect to do his duty in their behalf. Two of the plaintiffs in error were minors when the sale was made on July 19, 1901. They had a right, at any time until three years elapsed after they attained their majority, to file an original bill in the nature of a bill of review. The three years did not expire until 1904, and this bill was filed on October 10, 1903. The final report of the administrator, to whom so much of the proceeds of the sale as remained after discharging the mortgages were directed to be paid, was not made until April, 1903. It also appears that many of the heirs, at least seven of them, were nonresidents, besides the two who were infants. Where bills are filed to set aside transactions between parties standing in a fiduciary relation, the defense of laches is not regarded with favor. *Ross v. Payson*, 160 Ill. 349, 43 N. E. 399; *Elmore v. Johnson*, 143 Ill. 513, 32 N. E. 413, 21 L. R. A. 366, 36 Am. St. Rep. 401. A delay from November 19, 1881, to June 8, 1887, where heirs were scattered over several states, has been held to be no bar. *Ingalls v. Rowell*, 149

Ill. 163, 36 N. E. 1016. The facts in regard to the manner in which Wallace was allowed to make his cash payment upon the sale, by turning in outstanding claims which he had bought up, were not revealed by the master's report, nor by any portion of the record in the partition suit, and knowledge of those facts was not obtained by the plaintiffs in error until after the partition suit was ended. Laches cannot be charged upon one seeking to set aside a public sale of real estate on the ground of fraud, actual or constructive, until after his knowledge of the facts, or of circumstances sufficient to put him on inquiry, which would have led to such knowledge. *Williams v. Rhodes*, 81 Ill. 571; *Grimes v. Grimes*, 148 Ill. 550, 32 N. E. 847; *Haines v. Hewitt*, 129 Ill. 347, 21 N. E. 930.

Eighth. The solicitor's fee of \$1,200, which was allowed to Wallace in the partition decree, was improperly taxed as costs, and he should account for the same to the heirs. Section 40 of the partition act provides that "in all proceedings for the partition of real estate when the rights and interests of all the parties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including the reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or petition. In such case the party or parties making such substantial defense shall recover their costs against the complainant according to equity." 3 Starr & C. Ann. St. 1896 (2d Ed.) p. 2927, c. 106. The reasonable solicitor's fee can only be apportioned as a part of the costs among the parties in interest in the suit when the rights and interests of all such parties are properly set forth in the bill or petition. They were not properly set forth here, but, on the contrary, necessary parties holding liens were purposely omitted. *Hartwell v. De Vault*, 159 Ill. 325, 42 N. E. 789; *Metheny v. Bohn*, 164 Ill. 495, 45 N. E. 1011.

The decree of the circuit court of Shelby county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(183 N. Y. 33)

COHEN v. WAGAR.

(Court of Appeals of New York. Oct. 27, 1905.)
BANKRUPTCY—ACTION BY TRUSTEE—PLEADING.

In an action by a trustee in bankruptcy to recover money collected by a stock exchange from the debtors of the bankrupt, the complaint is not demurrable for failing to allege that the moneys were not paid to the bankrupt or his assignee for the benefit of creditors, who was succeeded by the trustee in bankruptcy, where

the funds so collected could not properly be paid by the stock exchange to the bankrupt, because he had made an assignment before such collection and the complaint alleges a demand on the exchange for the money, creating the presumption that a demand was necessary and therefore that, in the absence of demand, they had not been paid to the assignee for benefit of creditors.

Appeal from Supreme Court, Appellate Division, First Department.

Action by J. Quintus Cohen, trustee of John T. Lee, bankrupt, against Mortimer H. Wagar, president of the Consolidated Stock & Petroleum Exchange. From a judgment of the Appellate Division (87 N. Y. S. 1130, 93 App. Div. 613), affirming a judgment for defendant entered on an order of the Appellate Division reversing an interlocutory judgment of the Special Term overruling a demurrer to the complaint, plaintiff appeals. Reversed.

Michael Kirtland, for appellant. Francis D. Pollak, for respondent.

HAIGHT, J. The plaintiff was appointed trustee in bankruptcy of the estate of John T. Lee on the 23d day of September, 1901, upon the petition of a creditor, bearing date August 27, 1901. The Consolidated Stock & Petroleum Exchange is an unincorporated association organized under the statute. On the 9th day of May, 1901, John T. Lee, being then insolvent, made a general assignment for the benefit of creditors to one George Buckmaster, who accepted the trust and entered upon his duties as such assignee, but was superseded by the appointment of the plaintiff as trustee in the bankruptcy proceedings. The complaint alleges that, subsequent to the assignment made for the benefit of creditors, the Consolidated Stock & Petroleum Exchange, through its officers or agents, "collected, had, and received from divers persons, firms, and corporations then indebted to said John T. Lee certain sums of money, amounting in the whole to the sum of \$13,287.09, * * * which several sums were collected, had, and received to and for the use of the estate of said John T. Lee, and which rightfully belonged to said estate and now belongs to plaintiff as trustee thereof; that heretofore and before the commencement of this action the aforesaid several sums and the total amount thereof were duly demanded by the plaintiff from said association, and no part thereof has been paid or turned over to the plaintiff." There is no allegation in the complaint that the moneys so collected, had, and received were not paid to the bankrupt or his assignee. To this complaint the defendant interposed a demurrer upon the ground that it does not state facts sufficient to constitute a cause of action against the defendant, and the same has been sustained in the courts below upon the ground that there was no allegation in the complaint that the moneys were not paid over by the defendant to Lee or his assignee.

The defendant could not properly pay the funds to Lee, the bankrupt, for the reason that, under the allegations of the complaint, the same were had and received after Lee had made the assignment to Buckmaster for the benefit of creditors. The allegations of the complaint do not disclose the circumstances under which the moneys were paid over to the defendant, so that we are unable to determine whether they were received on deposit, or in trust, or as the agent of the insolvent. The complaint, however, as we have seen, alleges that the plaintiff made a demand upon the association for the payment of the moneys to him, and we must, therefore, assume that a demand was necessary, and consequently that the circumstances under which the defendant held the moneys were such that they were not due and payable until demanded by the proper person or officer. This being so, the presumption arises that they were not paid until due, and consequently that they were not paid to the assignee, and therefore the allegation of the complaint that they were not paid to the plaintiff upon his demand is sufficient.

The judgment should be reversed, and judgment ordered entered for plaintiff on demurrer, with costs in all courts, with leave to the defendant to answer within 20 days upon the payment of costs.

CULLEN, C. J., and GRAY, BARTLETT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment reversed, etc.

(183 N. Y. 23)

CITY OF ROCHESTER v. FOURTEENTH WARD CO-OPERATIVE BLDG. LOT ASS'N et al.

(Court of Appeals of New York. Oct. 24, 1905.)

1. TAXATION—ASSESSMENT ROLLS—CURATIVE ACTS—VALIDITY.

The old charter of the city of Rochester (Laws 1880, p. 15, c. 14, as amended by Laws 1898, p. 371, c. 182) provides, in relation to the assessment of taxes, that the assessment rolls shall be delivered to the city treasurer, with a warrant annexed, "under the hand of the mayor and the seal of the city," commanding him to collect the taxes. Laws 1903, p. 1187, c. 522, § 1, validates taxes theretofore spread upon the assessment rolls in the city of Rochester, "notwithstanding the omission from any tax warrant of the seal of the mayor." *Held* that, since the seal might have been dispensed with in the first instance, the curative statute is valid, and cures any irregularity in the omission of the assessment roll of a certain year to have affixed thereto the warrant of the mayor.

2. SAME—REDEMPTION BY OWNER—FORECLOSURE OF EQUITY.

The old charter of the city of Rochester (Laws 1880, p. 15, c. 14, as amended by Laws 1898, p. 371, c. 182) provides, with reference to the assessment of taxes, that when land is sold for taxes and bid in by the city the owner may redeem within two years, and if such land is not redeemed within that time the city may, within one year thereafter, serve a notice upon

the owner requiring him to redeem within 30 days. If it is not then redeemed, the mayor must execute a certificate of the fact of sale and the purchase by the city and the failure to redeem. When such certificate is recorded in the county clerk's office, it is made *prima facie* evidence as to the legality of the tax and the regularity of proceedings, and the city may take possession of the land, and can bar an equity of redemption which is preserved in the owner after the manner of foreclosing mortgages upon real estate. *Held*, that the city cannot maintain an action for the foreclosure of the equity of redemption, unless the owner has been actually served with notice to redeem.

3. SAME—FORECLOSURE OF LIENS—NOTICE TO REDEEM—NECESSITY OF SERVICE.

Laws 1903, p. 1187, c. 522, declaring taxes previously assessed by the city of Rochester legal and binding, notwithstanding any irregularity or error in the method of assessing and levying the same, does not cure the failure of the city to serve the notice required by the old charter of Rochester (Laws 1880, p. 15, c. 14, as amended by Laws 1898, p. 371, c. 182), nor authorize it to maintain an action to foreclose the owner's equity of redemption where the notice has not been served.

4. SAME—STATUTORY PROVISIONS.

The old charter of the city of Rochester (Laws 1880, p. 15, c. 14, as amended by Laws 1898, p. 371, c. 182) prescribes certain essential steps in the assessment and collection of taxes, and gives the owner two years, after sale to redeem, at the expiration of which the purchaser may, within one year, serve a notice requiring the owner to redeem within 30 days, and provides that, if lands bid in by the city are not redeemed pursuant to notice, the mayor shall execute a certificate of the fact of sale, the purchase by the city, and the failure to redeem, and record such certificate in the county clerk's office. An equity of redemption is still preserved in the owner, which it is provided may be foreclosed after the manner of foreclosing mortgages upon real estate. Laws 1903, p. 1187, c. 522, § 1, validates taxes on the assessment rolls in the city of Rochester, notwithstanding irregularities in the proceedings relating to the same, and section 3 authorizes the collection of taxes previously spread on the assessment rolls "by foreclosure of tax liens," and provides that "the remedies herein provided shall be in addition to the other methods provided in the charter." *Held* that, since the charter provides for the foreclosure of tax liens, the remedy of foreclosure given by the act of 1903 is not an additional remedy, except in so far as it authorizes the foreclosure of liens which were not previously valid because of failure to follow the provisions of the statute in assessing and levying the taxes.

5. SAME.

The "foreclosure of tax liens" authorized by the act of 1903 means the lien created by the record of the list of lands sold in the county clerk's office, and not the lien created by the levying of the tax by the common council.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by the city of Rochester against the Fourteenth Ward Co-operative Building Lot Association, impleaded with others. From a judgment of the Appellate Division (93 N. Y. Supp. 1124, 105 App. Div. 625), affirming a judgment in favor of defendant association entered upon a dismissal of the complaint, plaintiff appeals. *Affirmed*.

William W. Webb, for appellant. William A. Sutherland, for respondent.

VANN, J. The object of this action was to foreclose a tax lien upon lands in the city of Rochester pursuant to the provisions of the charter and certain special acts relating to that city. As the facts found by the trial court received the unanimous approval of the Appellate Division, we must accept them as final. The material facts thus found are that in 1901 the lands in question were assessed in accordance with law for general city purposes to the amount of \$4.60; that they were subsequently sold by the city treasurer for nonpayment of said tax and struck off to the city; that no notice to redeem from the tax sale was ever served upon the respondent, the owner of the premises, but by mistake such notice was served upon one who was neither the owner nor occupant. The complaint was dismissed because no notice of redemption had been served on the proper person and it was held that chapter 522, p. 1187, of the Laws of 1903, does not authorize the foreclosure of a tax lien until after the service of such a notice. That act is a curative statute, which is relied upon by the appellant to justify its attempt to foreclose without complying with the provisions of the charter relating to the sale of lands for unpaid taxes and the service upon the owner of a notice to redeem.

In order to properly construe the curative act it is necessary to look at the original statute, so as to discover what its requirements are; for it was the failure to comply with some of those requirements that made the later act necessary. In thus learning the mischief to be remedied, we discover the object of the remedial statute, and are led to the proper interpretation of its provisions. The city of Rochester is a city of the second class and to some extent is governed by the "White Charter," so called, which went into effect on the 1st of January, 1900, and to some extent by the old charter, passed in 1880 and frequently amended, as well as by certain special laws which, so far as they relate to the procedure governing the assessment and collection of taxes, are still in force. Laws 1880, p. 15, c. 14, as amended; Laws 1898, p. 371, c. 182. The old charter contains an elaborate system for the assessment and collection of taxes, nearly 200 sections being devoted to the subject. It provides the method of assessment by the assessors, including the levy of taxes by the common council, and requires the assessment rolls to be delivered to the city treasurer, with a warrant annexed, "under the hand of the mayor and the seal of the city," commanding him to collect the taxes. Public notice is given by the treasurer as to the time and place when taxes may be paid to him, and the amounts to be added if payment is not made within the periods specified. No fee is charged on taxes paid during the month of May, but on those paid after the last day of May an ad-

dition of 1 per cent. each month for the next five months is made, and after the 15th of September interest is charged at the rate of 12 per cent. per annum. The city treasurer is required to issue his warrant for the collection of all taxes remaining unpaid on the 15th of October by distress and sale of the goods and chattels of the persons liable. As to all taxes returned unpaid the city treasurer is directed to advertise and sell the lands covered thereby at public auction to the bidder who will take the premises for the shortest term and pay the tax, fees, and expenses. If no one bids the amount called for, the land is struck off to the city. Two years are given within which the owner may redeem by paying the taxes, charges, and interest. Within one year after the expiration of that period of redemption the purchaser may serve a notice upon the landowner requiring him to redeem within 30 days. If the lands bid in by the city are not redeemed pursuant to the notice, the mayor is required to execute a certificate of the fact of sale, the purchase by the city, and the failure to redeem, and when such certificate is recorded in the Monroe county clerk's office it becomes *prima facie* evidence as to the legality of the tax and the regularity of all proceedings to the date thereof. It is the duty of the city treasurer to cause a list of all lands sold, "specifying when, to whom, for what time and the amount," to be recorded by the county clerk of Monroe county, and thereupon "the amount of such sale on each lot or parcel of land shall be a lien thereon and take precedence of all incumbrances whatever." When the mayor's certificate is recorded, the city or its assigns may take possession of the lands; but an equity of redemption is preserved, which can be barred by the foreclosure of the equity of redemption after the manner of foreclosing mortgages upon real estate, by an action in the Supreme Court or the County Court of Monroe county.

While the old charter and certain special acts contain many other provisions relating to the subject, we have enumerated enough to show that there could be no foreclosure by the city until after the mayor and treasurer had performed their duties. As the seal of the city was not affixed to the warrant of the mayor attached to the assessment roll for the year 1901 when it was delivered to the city treasurer, there could be no valid sale by him or foreclosure by the city without further legislation. This irregularity could be cured by the Legislature, for the seal of the city might have been dispensed with in the first instance. "Whatever the Legislature might have dispensed with or made immaterial by a prior statute may be cured by a subsequent statute." *Smith v. City of Buffalo*, 159 N. Y. 427, 433, 54 N. E. 62, 63. This was one of the objects of the act of 1903, which, so far as it is now material, is as follows: "All taxes heretofore

spread upon the assessment rolls of the various wards in the city of Rochester are hereby validated, and rendered legal and binding upon the persons taxed and property assessed, notwithstanding any irregularity, omission or error in any of the proceedings relating to the same, or in the making, levying and assessment of the same, and all proceedings for the collection of such taxes are hereby declared valid and effectual, notwithstanding any irregularity, omission or error in any of such proceedings, and notwithstanding the omission from any tax warrant of the seal of the mayor of the city of Rochester." Laws 1903, p. 1187, c. 522, § 1. Section 3: "All taxes heretofore spread upon the assessment rolls of the various wards in the city of Rochester, may be collected by the corporation counsel, either by action, or by supplementary proceedings, or by foreclosure of tax liens, without regard to the date when the said taxes were so spread, and the statute of limitations cannot be interposed as a defense thereto. The remedies herein provided shall be in addition to the other methods provided in the charter of the city of Rochester for the collection of taxes in the said city of Rochester, and not dependent upon them, or any of them. No certificate of the mayor of the city of Rochester, made by said mayor under section 104 of the charter of said city, of failure to redeem lands sold for taxes, now or hereafter recorded in the office of the county clerk of Monroe county, shall be discharged until all city taxes which are a lien upon the premises described in the said certificate, shall have been paid. Notice to redeem from sale for taxes, may be served at any time after the expiration of two years from the date of said sale. Upon the foreclosure of tax liens in actions brought in the supreme and county courts, all taxes due the city of Rochester may be included in the action of foreclosure and be satisfied from the proceeds of the sale of the premises."

It is contended in behalf of the city, although the action was not brought on that theory, that the object of this curative act was not only to correct all irregularities and omissions in the assessment of taxes and in the proceedings to collect the same, but to provide new remedies for the collection of taxes wholly independent of the methods provided by the charter. It is claimed that neither a sale by the city treasurer need be made, nor any notice to redeem given in order to foreclose a tax lien. It may be that the statute admits of this construction, but before we conclude that the Legislature intended to provide such a harsh and oppressive remedy we should study the act with diligence to see whether another construction, less severe upon the owner and equally effective for the city, is not reasonable and practicable. The construction thus contended for encounters difficulties other than the harshness of the result. When, it may be

asked, may the city resort to foreclosure? Can it be that the Legislature intended to allow the heavy costs of such an action to be imposed upon the taxpayer as soon as the tax becomes due and payable, without any effort to collect it by the ordinary methods? If no sale is required by the treasurer and no remedy provided by the old charter is to be exhausted before the right to resort to foreclosure, there is nothing to prevent the city from foreclosing as soon as the tax becomes a lien and every tax becomes a lien upon the lands affected "from the time of the passage of the resolution of the common council * * * and the confirmation by said common council of the roll containing the same." Laws 1897, p. 1150, c. 784. The curative act does not specify when the foreclosure may be commenced nor on what proof it is to be founded. It simply provides that a tax lien may be foreclosed, but makes no specification as to time or default. Does the owner have any time to pay without liability to the costs of foreclosure? If so, what time? Is it during the month of May, when, according to the old charter, he can pay without fees? Is it during the month of June, when 1 per cent. is added? Is it during any of the four months immediately following, during each of which another addition is made by way of penalty for not paying? Is it when the city treasurer issues his warrant and it is returned uncollected? Is it after a sale has been made, or is it after all these proceedings have been had and the pressure of the statute exhausted by the service of a notice to redeem, which is contemplated by the curative act, for it is expressly mentioned therein? The Legislature intended either to give the city power to foreclose as soon as the tax becomes a lien, or else did not confer that power until after all the proceedings to collect the tax mentioned by the old charter had been taken by the treasurer and a notice to redeem duly given to the owner after the expiration of the period of two years. There is no middle ground to stand upon. There is an immediate right to foreclose, or else no right until the charter method of collection has been exhausted.

What does the word "foreclosure" imply, especially when read in the light of the provisions of the old charter relating to the subject? What is foreclosed? The old charter says, "the equity of redemption in said lands struck off to the city." What is there to redeem from unless a sale has been had? What does "equity of redemption" mean, as used in the statute, unless some right of the owner has already been imperiled, but he still has the right to redeem his land from the sale by paying the tax and expenses? A taxing statute is to be construed strictly as to the taxing power and liberally as to the owner, not only because the Legislature in authorizing proceedings to divest a freeholder of his land is presumed to take unusual care to

make its meaning plain, but because the citizen needs more protection than the state. *People ex rel. Mutual Trust Co. v. Miller*, 177 N. Y. 51, 57, 69 N. E. 124; *Matter of Harbeck*, 161 N. Y. 211, 217, 55 N. E. 850; *Matter of Fayerweather*, 143 N. Y. 114, 119, 38 N. E. 278. The courts below, construing the statute according to this rule, have held in effect that there can be no foreclosure until after the notice to redeem has been served, and that method of procedure is still open to the city, for the old limit of one year has been abolished and the notice may be served at any time after the expiration of two years from the date of sale by the treasurer. The city is fully protected, for it still has a complete remedy available, with interest at 12 per centum running in its favor in the meantime. We think this construction is the more reasonable, not only because it is less oppressive, but because it accords with the real meaning of the terms "foreclosure" and "equity of redemption," as well as with the analogies of the law relating to the collection of taxes throughout the state. Whoever heard of a statute authorizing the foreclosure of a tax lien with the attendant costs, in many cases largely exceeding the amount of the tax, before any effort has been made by the municipal government to collect by ordinary methods? While the Legislature could do this, we do not think it has done it.

The learned counsel for the appellant, in order to justify the construction he contends for, relies especially upon the following sentence, which appears in the curative act almost in direct connection with the provision relating to the service of a notice to redeem: "The remedies herein provided shall be in addition to the other methods provided in the charter of the city of Rochester for the collection of taxes in the said city of Rochester and not dependent upon them or any of them." This seems plain when read by itself, but it is not plain when read in connection with the old charter. The remedy of foreclosure was not an additional remedy because it had already been provided. The foreclosure authorized by the old charter, however, depended upon what had actually been done by the mayor, treasurer, and other officers of the city, when their acts were essential to the validity of the tax. The requirements of the statute had not, in fact, been complied with, for the mayor had failed to attach the seal of the city to his warrant to the treasurer and the courts had held that on this account the treasurer had no authority to collect the taxes. *Matter of City of Rochester v. Bloss*, 77 App. Div. 28, 79 N. Y. Supp. 236; *Id.* 173 N. Y. 646, 66 N. E. 1105. What had been done, therefore, was not enough to authorize foreclosure according to the old charter, and hence the Legislature provided that the proceedings to collect the tax should be valid notwithstanding such omission and gave the remedy of foreclosure based upon that changed condition of affairs.

The omissions were made immaterial and the right to foreclose given on that basis. In this sense only, as we read the act, was the remedy of foreclosure "in addition to the other methods provided in the charter of the city of Rochester for the collection of taxes." In this sense only was the new remedy of foreclosure not dependent upon such old methods as had not been complied with, although it was dependent upon what had been done according to law, after all omissions had been cured by the Legislature and the procedure which had not been followed made the same in effect as if it had been strictly pursued.

We are also of the opinion that the "foreclosure of tax liens" authorized by the curative act means the liens created by the record of the list of lands sold in the county clerk's office, and not the lien created by the levying of the tax by the common council. When the lien becomes a matter of record in the office which contains a history of all titles in the county, it is dignified in the statute by the name of a tax lien, which may be foreclosed in a court of record the same as a mortgage lien when a mortgage is recorded in that office.

It is, however, argued that according to the curative act an action at law may be commenced to recover the amount of the tax as soon as it becomes due, without any sale by the treasurer, and that this remedy is nearly as severe as an action of foreclosure. If this is so, and we are not now required to pass upon the question, it does not follow that the Legislature intended to give two drastic remedies, each involving the imposition upon the taxpayer of costs out of all proportion to the amount of the tax, instead of one.

We have reached the conclusions announced not without hesitation, for whatever construction is adopted serious difficulties are encountered. The real meaning of the Legislature is not clear, but all doubts as to the construction of a taxing statute are to be resolved in favor of the taxpayer, and we resolve those doubts in this case by affirming the judgment appealed from, with costs.

GRAY, BARTLETT, HAIGHT, and WERNER, JJ., concur. CULLEN, C. J., dissents. O'BRIEN, J., absent.

Judgment affirmed.

(189 Mass. 395)

GARFIELD v. PEERLESS MOTOR CAR CO.
(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 28, 1905.)

1. PRINCIPAL AND AGENT—EMPLOYMENT OF AGENT—CONTRACT—CONSTRUCTION.

Where a manufacturer's contract appointed plaintiff exclusive agent for the sale of automobiles for W. and vicinity, and expressly provided that, if the agent received inquiries from territory other than his own, he should promptly refer them to defendant, the agent was entitled to commissions on a sale made

outside of his territory, to a resident thereof temporarily residing elsewhere.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 199.]

2. SAME—SALES BY PRINCIPAL.

Where plaintiff was made an exclusive agent for the sale of defendant's automobiles in a specified territory, and there was nothing in the contract to limit the words "exclusive agent," the right to plaintiff's territory was exclusive of the principal, as well as of other agents.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, § 199.]

3. EVIDENCE—VARYING CONTRACT BY PAROL—CUSTOMS AND USAGES.

Where a contract appointing plaintiff as defendant's exclusive sales agent in a certain territory did not contemplate sales made by others in such territory, but provided for compensation by way of deduction in the price paid by plaintiff, evidence of a usage that an exclusive agent was entitled to his commission on all sales in his territory, by whomsoever made, was not objectionable, in an action for commissions on a sale made to a resident of plaintiff's territory by defendant, as contradicting the contract, but was admissible to cover a point not embraced therein.

4. PRINCIPAL AND AGENT—SELLING AGENT—CONTRACT—VIOLATION.

Where a contract appointing plaintiff defendant's exclusive agent for the sale of automobiles within a certain territory provided that all inquiries from territory other than his own should be promptly referred to defendant, efforts made by plaintiff to sell a car to a resident of territory other than his own constituted a violation of the contract, and not an act done thereunder.

5. SAME — ACTIONS FOR COMMISSIONS — INSTRUCTIONS.

Where, in an action for an agent's commissions on a sale of an automobile, the evidence would have justified a finding that plaintiff sent a man to see the customer, after defendant's agent had said to him that any man that left his card, or admitted they had any conversation with plaintiff in regard to the car, was plaintiff's customer, and he should get the commission, it was proper to refuse to rule that plaintiff's efforts to sell the car were not a consideration for a promise thereafter made by the defendant to pay plaintiff a commission should it later sell a car to such prospective purchaser.

6. TRIAL—PLEADING—VARIANCE—OBJECTIONS.

A general request for a ruling that plaintiff cannot recover is insufficient to present an objection of variance between the pleadings and proof.

7. PRINCIPAL AND AGENT—SALES AGENTS—COMMISSIONS—PROMISE TO PAY.

A statement made to plaintiff by defendant's district agent that any man that left his card, or admitted he had any conversation with plaintiff in regard to a car, was plaintiff's customer, and he should get a commission, constituted a promise that if plaintiff would introduce defendant's car to one who afterwards became a purchaser at defendant's branch office, and the customer admitted that plaintiff had called the car to his attention, plaintiff should receive a commission.

8. EVIDENCE—ADMISSIONS—LETTERS—PRELIMINARY PROOF.

In an action for commissions on a sale of automobiles, a letter purporting to have been written by defendant company to plaintiff was admissible on proof that it was signed in defendant's name by defendant's sales manager.

9. PRINCIPAL AND AGENT—ADMISSIONS OF AGENT—PROOF OF AUTHORITY.

The fact that defendant held out K. as its sales manager was sufficient to make his

admission of defendant's liability to pay a commission on a certain sale to plaintiff evidence against defendant, without further proof as to K.'s duties.

Exceptions from Superior Court, Worcester County; Francis A. Gaskill, Judge.

Action by Roy M. Garfield against the Peerless Motor Car Company. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

The letter referred to in the opinion, as printed in the note, is as follows: "Dr. R. M. Garfield, Worcester, Mass.—Dear Sir: Your telegram of Aug. 15, also letter of same date, received. Also have received word from Mr. Morrison of Boston to the effect that he has decided to notify you, and, under the circumstances, we will have to back him up. We also note that he agrees to keep your machine in the best of shape, and we take pleasure in informing you that we will also back him up on this and will insist upon it. Trusting that the above will be satisfactory to you, we remain, yours, very truly, The Peerless Motor Car Co."

Herbert Parker, Chas. C. Milton, and Danl. F. Gay, for plaintiff. Frank Bulkeley Smith, T. H. Gage, Jr., and Frank F. Dresser, for defendant.

LORING, J. This action was brought to recover commissions on the sale of two automobile cars. By force of a written contract between the plaintiff and the defendant, the plaintiff was the exclusive agent for the defendant in the city of Worcester and vicinity. The contract was dated March 12, 1903, and was terminated September 14, 1903. One of the two cars in question was sold at the branch office in Boston to a Mr. Orndoff, then staying at Gloucester for the summer, and was delivered to him at Gloucester in August or September, 1903. The plaintiff claimed that he was entitled to the commission on this sale, because Mr. Orndoff was resident in Worcester at the date of the sale; relying on a trade usage which gave an exclusive agent his commission on all sales in his territory, no matter by whom made. Evidence of this usage was introduced under the objection and exception of the defendant. The other car was sold at the branch office in Boston to one Billings, of Marlboro, from whom it came to one Hitchcock, of Marlboro. The plaintiff admitted that he was not entitled to a commission on this sale under the contract, but relied on a subsequent special agreement made by word of mouth. The evidence of the subsequent special agreement was as follows: Upon the plaintiff's telling one Morrison, the agent of the defendant for New England, at the Boston branch office, that he had written to Hitchcock, and that a friend of his had interviewed him, and he would probably buy a car at the New England branch office in Boston, Morrison said: "That any man that left his card, or ad-

mitted they had any conversation with me [the plaintiff] in regard to the car, was my [the plaintiff's] customer, and I [he] should get the commission." The car subsequently was sold to Hitchcock through Billings, and there was evidence that Morrison had admitted that Hitchcock told him that the plaintiff had written to him (Hitchcock) regarding the sale. It appeared that Billings was an agent of the defendant, and had been paid a commission on this sale.

The written contract between the plaintiff and defendant recites first, that the defendant is engaged in manufacturing and selling motor cars, and that the plaintiff is desirous of becoming its exclusive agent for the sale of its motor cars in the territory included in Worcester and vicinity. It then provides that the defendant appoints the plaintiff "as its exclusive agent for the sale of said motor cars in the aforesaid territory," and agrees to furnish the plaintiff with circulars, catalogues, and other printed matter. The plaintiff agrees to maintain proper sales-rooms and repair and storage rooms in the city of Worcester, carry in stock, for sale at list prices, one or more new motor cars, and supplies necessary for replacing parts of such cars, or of repairing them. It was agreed that upon all sales of cars, parts, or supplies made by the plaintiff a commission or discount of 15 per cent. from list prices should be allowed to the plaintiff. Payments for all such sales were to be made by the plaintiff as follows: 10 per cent. net price of all orders to be forwarded to defendant with the order; the balance on shipment. Then follows an agreement on the part of the plaintiff "to devote his best energies to the sale of the product of the party of the first part [the defendant], and to secure orders for the same as far in advance of delivery dates as possible, and to canvass through his territory, and introduce said product there. He agrees to refer promptly to the party of the first part [the defendant] all inquiries received from territory other than his own, and that he will not, except by permission in writing from the party of the first part [the defendant], sell or deliver any such products in any territory other than his own"; and to be prepared to receive promptly all cars and goods ordered by him, and that he may be required to accept the same within 90 days from the time the order is given.

The judge instructed the jury that they might find that the plaintiff was entitled to a commission on the sale to Mr. Orndoff under the first count of the substitute declaration, which declares on the contract, and a commission on the sale to Mr. Hitchcock under the third count, which went on a special contract made July 15, 1903.

The defendant asked the judge to give the following rulings: "(0) The contract declared on does not prevent the defendant from selling, during its continuance, cars

outside the territory specified, although the sales are made to one who is a resident within the territory." The court gave this ruling, modified as follows: "Orndoff was within the territory as a resident within the territory at the time of the sale to him, so that I instruct you that no question arises with reference to that, even though the delivery of the machine was made to him at Gloucester, if he still retains his place of residence in Worcester." "(8) The only commissions or discounts which the plaintiff can recover under the contract declared on are commissions or discounts on sales to the plaintiff himself." The court gave this ruling, modified as follows: "You must be satisfied that there was something under the usage of trade that adds to the terms of this contract, because it is admitted that the actual sale was not made by Dr. Garfield to Orndoff. * * * Now you have heard evidence from certain witnesses called by the plaintiff, and Mr. Morrison does not, as I understand, deny that, and that is this: that if Orndoff was sent to him, and Morrison is the agent of the company, and the branch office, to wit, Morrison, as its head, sold that machine to a person having his legal residence within the city of Worcester, that under that contract, according to the usage, the plaintiff would be entitled to his commission." "(9) The contract does not provide for the payment of commissions on sales to persons other than the plaintiff, when the sales are made by persons other than the plaintiff himself." The court gave this ruling, modified as follows: "So you must be satisfied, with reference to that fact, that the sale was made prior to the 15th, that the usage of trade applied to this contract was sufficient to include it, and the contract itself in terms applies only to sales made by the company to the agent himself. That is the theory of the contract. But it was entirely competent, if the usage was otherwise, as applied to that, that that meant that the company could consent to deliver a machine at the request practically of the plaintiff, and take its pay from the purchaser, rather than from the particular man himself, if that was the usage of trade, as I understand Mr. Morrison to practically have testified." "(12) On all the evidence, the plaintiff cannot recover under count 1 of his declaration." This was refused. "(13) If the sale by the defendant of a car to Orndoff was made outside of Worcester and vicinity, the plaintiff cannot, under the contract, recover the commission therefor." This was refused. "(17) On all the evidence, the plaintiff cannot recover under count 3 of his declaration." This was refused. "(24) On all the evidence, the plaintiff did not obtain a purchaser for a sale of the car to Hitchcock, and cannot recover under count 3." This was refused. "(25) On all the evidence, the contract set out in count 3 is without consideration, and is not enforce-

able." This was refused. "(26) The efforts of the plaintiff to sell a car to Hitchcock were made under and in pursuance of a written contract existing between the parties, and are not a consideration for a promise thereafter made by the defendant to pay the plaintiff a commission should it later sell a car to Hitchcock. "(27) The efforts and acts of the plaintiff to sell a car to Hitchcock are not a consideration for a promise thereafter made by the defendant to pay the plaintiff a commission should it later sell a car to Hitchcock."

The court modified the twenty-sixth and twenty-seventh rulings requested as follows: "Under the contract, upon the evidence, Marlboro is not within the designated phrase 'Worcester and its vicinity.' Now that does not conclude the plaintiff, however, from recovering for the Hitchcock machine, provided there was a special contract made. Now what is the evidence with reference to that? The plaintiff says that he knew of Hitchcock; that he had shown Hitchcock a machine; that Hitchcock wanted a better machine than the Knox, and all that sort of thing; and that he went to Morrison and told him. That is now upon the assumption that it was outside the limits of the territory, so that the contract had nothing to do with it whatever. It was entirely competent for Morrison, as manager of the company in New England, to make a contract with Garfield, if he saw fit, that would bind the company with reference to procuring a purchaser. What does Garfield say? Garfield says, in view of that: 'I went in April and saw Morrison, and told him about Hitchcock, and asked him if the sale was made, * * * if I would send him, or if I would send Hitchcock to him, and that Hitchcock would say that I sent him, "and you, Morrison, shall make a sale, but I procure the customer. Will you pay me the commission?" And he said "yea." Morrison said: "Yes; I will."' Now, if there was something yet to be done by this plaintiff, Garfield, in order to procure that commission and to procure that sale, and he did something in the future, and that promise was based upon that, then if that is the fact, that he did after this arrangement with Morrison actually send Henry to Hitchcock, and actually procured Hitchcock to go down to Morrison, and a sale resulted, then, if you are satisfied that is the fact, he would be entitled to recover the commission. Morrison says that he did not make any such contract at all; that nothing was said about it in that way; that he had then such an agent, Mr. Billings, at Marlboro; and that it was his business, so that he made no such contract as that. Garfield says he did. Garfield says, also, that after Henry had been sent to him, that he saw Morrison, and Morrison said: 'Yes; Hitchcock has been here, and mentioned your name as sending him, and I have sold him a machine.' If that was done, and the burden

is upon the plaintiff to satisfy you, then you would be justified in finding a verdict for the \$420 commission with reference to that Hitchcock machine; but otherwise not."

The defendant excepted to the refusal to rule as requested, where the ruling asked for was refused or was not given in terms, and also excepted to each modification given by the court.

At the trial the presiding judge admitted in evidence the letter printed in the note, and the defendant took an exception. He also admitted in evidence a conversation which the plaintiff had at Cleveland (Cleveland, we assume, was the home office of the defendant corporation) with W. H. Kirkpatrick, who was found by the plaintiff in an office with "Sales Manager" on the door. Kirkpatrick introduced the plaintiff to the manager, and they all three had a conference. Afterwards Kirkpatrick, the sales manager, said that no commission was due on the Hitchcock car, but that he (the plaintiff) would get a check for the Orndoff car when he got home, because the car was sold in the city of Worcester. If commissions were due, \$420 was due on each sale. The jury returned a general verdict for \$840 and interest.

1. The defendant's first contention is that the sale to Orndoff was outside the plaintiff's territory, because the contract of sale was made in Boston and the car sold was delivered in Gloucester. His position is that the place where the sale is made, not the residence of the purchaser, is the test. But we do not think that it is so. It is manifest that the contract contemplates that persons buying cars or supplies shall buy them in the territory in which they belong. It is expressly provided that, if the agent receives inquiries from territory other than his own, he shall refer them promptly to the defendant. This, coupled with his appointment as exclusive agent for Worcester and vicinity, implies that all inquiries from Worcester and vicinity should be referred to him. At the time of the sale of the car here in question to Orndoff, Orndoff was a resident of Worcester, spending the summer at Gloucester, and continued to reside at Worcester for a year and a half more at least, and apparently still continues to have his legal domicile there. The defendant's agent testified at the trial in March, 1905, that "since January of this year [he] has been in California, where he expects to remain for a year." We are therefore of opinion that the sixth request could have been rightly refused. But the presiding judge gave it with the modification that, so far as this case goes, it was not applicable, because Orndoff resided in Worcester. We interpret this to mean that the presiding judge thought that he could not say that there might not be cases in which sales could be made out of the territory to residents within it without violating the contract, but that the Orndoff case was not such a case. The only case cited

by the defendant is a case where an exclusive agent for the sale of typewriters in the state of Michigan was held not entitled to a commission on a sale made to a corporation having a dock, freight, and ticket office in Chicago and another office in Benton Harbor, where the sale was made in Chicago, and the machine was sent by it to its office in Benton Harbor. *Wyckoff, Seamans & Benedict v. Bishop*, 115 Mich. 414, 73 N. W. 392. That does not help the defendant here.

2. The defendant's next contentions are, as stated in the eighth and ninth rulings requested, (1) that the only commission to which the plaintiff is entitled under the contract is by way of a discount on the price paid by the plaintiff to the defendant on a sale made to him of a car which he resells to a customer, and (2) that the trade usage was erroneously admitted in evidence, because it contradicted the contract. The only objection made is that evidence of usage on the point is not admissible. No objection was made to the evidence of usage introduced, if evidence on the point is admissible. The defendant relies on the recent decision in *Boruszweski v. Middlesex Assur. Co.*, 186 Mass. 589, 72 N. E. 250. Had the contract been what the defendant contends for, it may well be thought that the trade usage would not have been competent. But that is not the contract. The contract was that the plaintiff was to be the exclusive agent of the defendant for Worcester and vicinity. The sale in question was a violation of that contract. We do not agree with the defendant in his argument that the sale to Orndoff, being by the defendant itself, and not by an agent, was not in derogation of the plaintiff's rights as an exclusive agent for the territory in question. In our opinion, a case where one is made an exclusive agent for the sale of his principal's goods in a specified territory, unless there is something to control the phrase, is the same as the case where an agent is given the sole and exclusive sale of the goods of the principal, as was the agreement in *Wiggin v. Consolidated Shoe Co.*, 161 Mass. 597, 37 N. E. 752. The right given here is exclusive of the principal, as well as of other agents. When it is said that the right is exclusive of the principal, it is not meant that the principal cannot sell. Of course, he can sell; but, if he does, he violates the rights of his agent under the contract. The defendant cites to the contrary in *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606, but after a full and careful consideration of that decision, we are of opinion that, so far as it rests on this ground, it should not be followed. In the case at bar the contracts contemplated that every sale to a Worcester man should be made by the plaintiff, and should take the form of a sale to the plaintiff. In providing for a commission by way of deduction in the price

paid by the agent, the contingency which has arisen in the case at bar was not a case which in the contemplation of the contracting parties would arise, and no provision is made for it. To provide by usage for that contingency is not to contradict what is provided for by the contract, but to cover a point left uncovered by it. We are of opinion that the usage was competent, and that the modification given by the presiding judge to the eighth and ninth rulings requested by the defendant was correct.

3. The defendant's next complaint is to the instructions given in substitution for the rulings specified in his twenty-sixth and twenty-seventh requests. The twenty-sixth ruling requested is plainly wrong. Under our construction of the contract, an inquiry by Hitchcock, if one had been made, ought to have been referred by the plaintiff to the defendant. The efforts of the plaintiff to sell a car to Hitchcock, a resident of Marlboro, were made in violation of the contract, and not under and in pursuance of it, as stated in this ruling. The twenty-seventh ruling requested was rightly refused. The plaintiff testified that his first talk with Morrison, the defendant's New England agent, was in the last of March or the first of April. His story is that he then said that he had already written to Hitchcock, and had sent one Henry to see him. He also testified that his second conversation with Morrison was after Hitchcock received his car, the last of May or the first of June. But Henry testified that he saw Hitchcock at the plaintiff's request, and that this was in June. It was open to the jury to find that Henry was sent by the plaintiff after the defendant's New England agent said that "any man that left his card, or admitted they had any conversation with me in regard to the car, was my customer, and I should get the commission." For this reason, the twenty-seventh ruling requested was rightly refused.

4. The objection of a variance between the third count and the evidence was not specifically raised at the trial. A general request for a ruling that the plaintiff cannot recover does not sufficiently call the attention of the presiding judge to the fact that a variance between the pleadings and the evidence is relied on. We do not mean to express an opinion on the question whether there was or was not a variance between the third count and the evidence.

5. The defendant's next contention is that the New England agent's statement that "any man that left his card, or admitted that they had any conversation with me in regard to the car, was my customer, and I should get the commission," does not disclose any promise or agreement, but is a bare statement, defining who are customers. But we are of opinion that this statement can be construed to have been intended for,

and to have been, a promise that if the plaintiff would introduce the Peerless car to a man who afterwards bought one at the branch office, and the customer admitted that the plaintiff had introduced the car to his attention, the plaintiff should have a commission.

6. The letter admitted seems to be immaterial, and was competent on proof that it was signed in the defendant's name by the sales manager.

7. The fact that Kirkpatrick was held out by the defendant to be its sales manager was sufficient to make his admission as to the defendant's liability to pay a commission evidence against the defendant, without further evidence as to his duties as sales manager.

Exceptions overruled.

(189 Mass. 353)

O'BRIEN v. MURPHY.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1905.)

1. APPEAL—CONCLUSIVENESS OF FINDINGS—FAILURE TO REPORT EVIDENCE.

Where the evidence in an equity case is not reported, the master's findings of fact are conclusive on appeal, and the only question presented for appellate decision is whether the decree is consistent with the findings.

2. EASEMENTS—LOCATION—WAYS—BOUNDARIES.

The space between buildings, through which a way "sufficiently wide for all purposes of travel" to the land in the rear of the buildings exists, does not define the boundaries of the way, but only the limits within which it must be laid out.

3. SAME—CREATION—EXCEPTION OR RESERVATION.

The grant of a part of a tract of land, with "right of passage to and from over a strip of land * * * lying along the westerly side of the land above described, the same to be used in common with the grantor," does not create, either by reservation or exception, an easement over the land conveyed for the benefit of the land retained by the grantor.

4. SAME—CREATION BY IMPLICATION.

Where a conveyance of a part of a tract of land leaves to the grantor full access to the highway over the land retained by him, he cannot, in derogation of his grant, claim an easement by implication in any part of the granted premises, even to the extent of a use of such premises for that purpose shown to exist at the date of the deed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 51, 53.]

5. SAME—CONSTRUCTION OF GRANT.

Where a conveyance of the easterly part of a tract of land carried as appurtenant thereto a way "lying along the westerly side of the land described, the same to be used in common with the grantor," the way, while not exclusive in the grantee, lay entirely on the premises retained by the grantor.

6. SAME—UNCERTAINTY OF BOUNDARIES—DEFINITION BY USER.

Where the boundaries of a way are not defined in the deed creating the same, such boundaries are to be determined by a resort to the purpose for which the way was created and the acts of those having the right of user.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 106.]

7. SAME—OBSTRUCTION OF WAY—REMOVAL OF OBSTRUCTION.

The act of a landowner in obstructing by a fence the use of a way existing in favor of an adjoining landowner over the former's land is unjustifiable, and the removal of the fence by the adjoining owner within the limits of the way is not wrongful.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, § 129.]

8. INJUNCTION—GROUNDS—PAST TRESPASSES.

A bill for injunction may not be maintained on account of past trespasses.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 20.]

9. TRESPASS—ACTS CONSTITUTING INJURY TO PROPERTY.

The act of the owner of a way over another's land in accumulating and discharging water and shoveling snow upon the latter's land, when not done for the improvement or repair of the way, is unlawful.

10. EQUITY—RIGHTS TO DECREES—SUFFICIENCY OF PROOF.

Failure to maintain all the allegations of a bill in equity does not preclude plaintiff from obtaining equitable relief, if those sustained are sufficient to entitle him to a decree.

11. INJUNCTION—GROUND—TRESPASS ON LAND.

The inconvenience and annoyance which result from repeated trespasses, which, though relatively harmless, interfere with the free use and enjoyment of real property, authorize the issuance of an injunction to prevent their continued repetition, even if a recovery of nominal damages at law would afford full compensation for the trespasses.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

12. EQUITY—JURISDICTION—TITLE TO LAND.

Courts of equity have at least concurrent jurisdiction with courts of law to adjudicate title to land.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 39.]

13. INJUNCTION—GROUNDS—INSOLVENCY OF DEFENDANT—NECESSITY.

Insolvency of a defendant, from which his inability to pay damages may be inferred, is not necessary in order to confer jurisdiction on a court of equity to enjoin him from trespassing on land.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 99.]

Appeal from Superior Court, Hampden County; Edward P. Pierce, Judge.

Bill for injunction by Bridget O'Brien against John F. Murphy. In the superior court the bill was dismissed, and plaintiff appealed. Reversed.

E. A. McClintock and J. P. Kirby, for appellant. J. R. Callahan and T. B. O'Donnell, for appellee.

BRALEY, J. This is a bill in equity, brought in the superior court, praying for an injunction to restrain the defendant from wrongfully interfering with the plaintiff's use of her estate, and for general relief. Having been referred to a master, upon his report a decree was entered dismissing the bill, and the case is before us on the plaintiff's appeal. His findings of fact must be taken as conclusive, as the evidence is not reported, and the only question for our deci-

sion is whether the decree is consistent with them. *East Tennessee Land Co. v. Leeson*, 183 Mass. 37, 38, 66 N. E. 427.

The parties own contiguous estates fronting on a public street, from which access to the rear land of each is over a private way used in common, but not defined by metes and bounds. From the nature of the title, it becomes important to first determine the proper location of this way, as the alleged wrongful use of the plaintiff's land by the defendant for this purpose is the principal foundation of the suit. Both estates, formerly owned by a common grantor, consisted of one tract, with two dwelling houses. In 1874 he made a division by conveying the easterly part, with the dwelling house, to the predecessor of the defendant, who has occupied the premises since he acquired title in 1896. In the deed of conveyance there was granted as appurtenant. " * * * the right of passage to and from over a strip of land sufficiently wide for all purposes of travel, with team or on foot, lying along the westerly side of the land above described, the same to be used in common with the grantor and those claiming under him for the purpose of entering upon the rear part of the lot above described." Upon the findings appearing in the report as amended, and those subsequently made in response to objections filed by the parties when the draft report was submitted, but not embodied in the final report, as they should have been, the way of necessity passed between the dwelling houses of the respective parties. These buildings were 13 feet apart, and this space affords the only feasible means by which the land in the rear of either house could be reached. This narrow space, however, does not define the boundaries, but only the limits within which a way conveniently must be laid out. *Johnson v. Kinnicut*, 2 Cush. 153.

Notwithstanding the plaintiff's contention that by the erection of fences running northerly along the division line, from a point 13 feet south of the intersection of this line with the line of the south wall of the defendant's house extended, and which had been maintained in substantially the same location for more than 20 years, she had acquired certain prescriptive rights over the land of the defendant, her claim is not sustained by the master. The rights of the parties are thus left as established by the grant. At the date of the deed the way used by the original grantor ran partly on land now owned by the defendant, and so continued to be used until 1887. In that year a division fence, which has since been maintained, was built on the line that ran north and south between the estates. Unless the plaintiff has a right to subject the defendant's land to a part of the easement, the physical location of the way on her land next to the westerly side of the fence must be deemed the true location. The language of the grant did not create, either by reservation or exception, an easement over the land conveyed for the benefit

of the remaining land now owned by the plaintiff. There are no sufficient words to support an implied grant on the part of the grantee, or to indicate that the grantor retained this right as a part of his former estate, to be used in connection with the remainder. *Wood v. Boyd*, 145 Mass. 176, 13 N. E. 476; *White v. N. Y. & New England Railroad Co.*, 156 Mass. 181, 30 N. E. 612; *Haverhill Savings Bank v. Griffin*, 184 Mass. 419, 68 N. E. 839. This division left to the grantor full access to the highway over the remaining land. There being no necessity for the use of any part of the granted premises, he could not, in derogation of his grant, claim an easement therein by implication, even to the extent of the use shown at the date of his deed. *Carbrey v. Willis*, 7 Allen, 364, 83 Am. Dec. 688; *Randall v. McLaughlin*, 10 Allen, 366; *Buss v. Dyer*, 125 Mass. 287, 291; *New York & New England Railroad v. Railroad Commissioners*, 162 Mass. 81, 83, 38 N. E. 27.

The "right of passage" is described as placed along "the westerly side of the land above described," and is thus brought inside of the division line, as the grantee's land lay entirely to the east of this line. He, indeed, says that it is "to be used in common." By this phrase he intended that, while the easement as such became appurtenant to the land conveyed, the right granted was not exclusive. Such construction, while it places the way wholly upon the plaintiff's land, does not define its boundaries, which, being left uncertain, are to be determined by resort to the purpose for which it was granted and the acts of those having the right of user. *Bannon v. Angier*, 2 Allen, 128. From the evidence before him, including a view of the premises, the master states that "a way sufficient in length for the purpose of entering upon the rear part of the Murphy land, for all purposes of travel, with team or on foot, would extend upon the land of the plaintiff along the side division line to a point in said line 20 feet southerly of said point of intersection of the said division line with the line of the south wall of the Murphy house extended."

The plaintiff contends that it should not be extended further than is necessary to enable the defendant conveniently to pass upon his own premises, directly in the rear of his house, and for this purpose the full length of 20 feet below the line of intersection would not be required. But it must be taken as settled by the terms of the report that a way across the plaintiff's land has been defined for the length and width described. How far she would have the right to establish and maintain reasonable gates and bars at the termini to protect her property from unlawful and annoying intrusion is not before us, and need not be decided. See *Short v. Devine*, 126 Mass. 119, 124, 15 N. E. 148. From this establishment of the way, the act of the plaintiff in obstructing its use by a fence at the southerly end was unjustifiable.

and the removal of this fence by the defendant, within the limits of the way as defined, was not in excess of his lawful right. But, as the bill cannot be maintained for past trespasses, there is no occasion to consider the further finding that in the exercise of this right the defendant slightly exceeded his authority. *Washburn v. Miller*, 117 Mass. 376.

If the final location of the way presented the most important question, the report also states that the defendant, by ditches upon his land, accumulated and discharged water, and also shoveled snow in small quantities, upon the plaintiff's land. Not being done for the improvement or repair of the way, these acts were correctly found to have been unlawful. *Rathke v. Gardner*, 134 Mass. 14, 16. While it is stated that the injury was inappreciable, it also is found that the defendant claimed to have acted within his lawful rights, and, although suits to recover damages were pending, "his conduct after the bringing of the actions at law and prior to the filing of the bill was such as to indicate that the acts would be continued and repeated."

A failure to maintain all the allegations of the bill does not preclude the plaintiff from equitable relief, if those sustained are sufficient to entitle her to a decree. It is true that she has not suffered "irreparable injury," in the sense that the wrongs threatened cannot readily be estimated or compensated by money damages; and therefore it is argued that she should be remitted to an action at law. See *Lynch v. Union Institution for Savings*, 158 Mass. 394, 33 N. E. 603; *s. c.*, 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842. The inconvenience and annoyance from repeated trespasses, though relatively harmless, but which interfere with the free use and enjoyment of real property, justify the interference of a court of equity to prevent their continued repetition, even if a recovery of nominal damages at law would afford full compensation. *Slater v. Gunn*, 170 Mass. 509, 49 N. E. 1017; *Jager v. Volinger*, 174 Mass. 521, 522, 55 N. E. 458; *Cobb v. Mass. Chemical Co.*, 179 Mass. 423, 60 N. E. 790; *Boston & Maine R. R. v. Sullivan*, 177 Mass. 230, 234, 58 N. E. 689, 83 Am. St. Rep. 275; *Driscoll v. Smith*, 184 Mass. 221, 223, 68 N. E. 210; *Wheelock v. Noonan*, 108 N. Y. 179, 185, 186, 15 N. E. 67, 2 Am. St. Rep. 405. If the plaintiff's title is put in issue, it can be as well determined by a court clothed with full equity powers as at law. The jurisdiction at least is concurrent. *Billings v. Mann*, 156 Mass. 203, 30 N. E. 1136. It has been said that the insolvency of a defendant, from which his inability to pay damages may be inferred, affords a reason for entertaining such a bill, where otherwise relief would be denied. This element, however, is no longer required in order to confer jurisdiction. *Boston & Maine Railroad v. Sullivan*, *ubi supra*.

The decree of the superior court should be reversed, and a decree, without costs, entered in favor of the plaintiff, overruling the exceptions of both parties, confirming the report, and awarding an injunction restraining and enjoining the defendant from committing further trespasses similar to those described in the report.

Decree accordingly.

(139 Mass. 351)

NEALE v. SPRINGFIELD ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1905.)

CARRIERS—PASSENGERS—BOARDING STREET CAR—CONTRIBUTORY NEGLIGENCE.

Plaintiff, intending to board an approaching street car the side of which projected over the rail about eight inches, stood in a space about two feet from the south rail of the track at a stopping place, and as the car approached plaintiff leaned his head forward and signaled the car, when he was struck on the head by some part of the car, but his body was not injured. *Held*, that plaintiff was guilty of contributory negligence in not taking a position outside the reach of the car, and was not entitled to recover.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1363, 1364.]

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Daniel Neale against the Springfield Street Railway Company. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

J. B. Carroll and W. H. McClintock, for plaintiff. Henry W. Ely and Jonathan Barnes, for defendant.

LATHROP, J. This is an action for personal injuries received by the plaintiff from being struck by an electric car of the defendant. In the superior court, at the close of the evidence for the plaintiff, the judge ruled that the plaintiff was not entitled to recover and directed a verdict for the defendant. The case is before us on the plaintiff's exceptions.

The accident occurred shortly after 7 o'clock in the evening of February 23, 1903, at a point about a quarter of a mile eastwardly from the village of Feeding Hills, in the town of Agawam, in a sparsely settled neighborhood. In the vicinity of the place of the accident the defendant's track runs in the highway on the southerly side of the traveled way. Westwardly from the place of the accident the highway rises in a long grade, and at the place of the accident the part of the highway occupied by the traveled way and the defendant's track is 3 or 4 feet above the level of the adjoining land south of the track; the distance between the south rail and the upper edge of the embankment being between 3 and 4 feet. There was no sidewalk or path on the south side of the track. There was snow on the ground at the time of the accident, and a snow plow had been along and cleared the track, leveling the snow on each

side thereof. The plaintiff was familiar with the locality, and had frequently taken cars there. On the evening of the accident, the plaintiff, who had come from Springfield in the afternoon to see his son, came out into the highway with his son from a house on the north side of the street to take a car back to Springfield. Upon reaching the track the son walked up the grade to the west for some distance. The plaintiff crossed the track at a point somewhat westerly from the place of the accident, and walked easterly along the south side of the track, looking back occasionally at the car which he saw approaching. When he reached the point of the accident, he stopped, and waited for the car, fronting obliquely toward the track, and with his face turned toward the car. He stood in a space about 2 feet from the south rail, where the snow had been scraped off by the plow so as to be substantially level with the track, and beyond which was a ridge of snow about 18 inches high. The side of the car projected about 8 inches beyond the rail. As the car approached the son signaled it, and the plaintiff, leaning his head forward, also signaled it. He was struck on the head by some part of the car, but his body was not injured.

We assume, in favor of the plaintiff, that there was some evidence of the defendant's negligence in running at too high a rate of speed. But we are of opinion that on the evidence the plaintiff was not in the exercise of due care. It is evident that, if he had not put his head forward, he would not have been struck. It is the duty of a person intending to enter a car upon a highway to take a position outside the reach of an approaching car; for it is common knowledge that a car usually passes a person who has signaled it to stop, so that he may enter by the rear end. *Cox v. South Shore & Boston Street Railway*, 182 Mass. 497, 499, 55 N. E. 823; *Garvey v. Rhode Island Co. (R. I.)* 58 Atl. 456. The same rule has been applied where a person intending to board a train on a steam railroad stands too near the edge of the platform and is struck. *Pennsylvania Railroad v. Bell*, 122 Pa. 58, 15 Atl. 561. *Matthews v. Pennsylvania Railroad*, 148 Pa. 491, 24 Atl. 67.

Exceptions overruled.

(189 Mass. 349)

DESAUTELS v. CLOUTIER et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Oct. 19, 1905.)

MASTER AND SERVANT—INJURY TO FELLOW
SERVANT—ORDER OF EMPLOYER.

An employer, though ordering an employé in a room in an icehouse to throw a pick over a partition into another room, is not liable for an injury received by an employé in the latter room by being struck by the pick on its being negligently thrown over, as the order can only be interpreted as one to throw the pick in a proper way, and not as directing the act, re-

gardless of the safety of the employés in the other room.

[Ed. Note.—For cases in point, see vol. 84, Cent. Dig. Master and Servant, §§ 417, 533.]

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Eusebe Desautels against Felix J. Cloutier and others. There was a verdict for defendants, and plaintiff brings exceptions. Overruled.

T. B. O'Donnell, for plaintiff. Brooks & Hamilton, for defendants.

LATHROP, J. This is an action of tort at common law for personal injuries received by the plaintiff while in the employ of the defendants. At the trial in the superior court, at the close of the plaintiff's evidence, the judge ruled that the action could not be maintained, and directed a verdict for the defendants. The case is before us on the plaintiff's exceptions.

The defendants were the proprietors of an ice business, and had an icehouse, divided by partitions into compartments or rooms, each about 50 by 75 feet in extent. The partitions, according to the plaintiff's testimony, were about 27 feet in height, and extended to within 5 feet of the roof. At the time of the accident the plaintiff was working with others in room 2, and was injured by being struck in the foot by an ice pick, which was thrown over the partition from room 1 by a fellow servant named McFadden. The surface of the ice in both rooms was at the time within about 12 feet of the top of the partition, and there was a ladder to each opening in the building, which was used by the workmen as the surface of the ice was raised. McFadden testified that as he was going up the ladder leading to room 1, and when he was 5 feet from the ground, one of the defendants "told him to take the pick and throw it over in the other room;" that he "took the pick and got on top of the ice, and threw the pick, and called out to the men below to look out;" that "he hollered, 'Look out!' before he threw the pick over, and then threw the pick." He was then asked: "How long after you hollered, 'Look out below!' that you threw the pick?" He answered: "When I threw the pick I hollered."

This evidence indicates very strongly that the warning and the act of throwing were separated by only a slight interval of time, if they were not simultaneous. This, too, is shown by the testimony of the plaintiff, who testified through an interpreter. He was asked, "How long was it after you heard somebody call out to look out was it before you got hurt?" The answer was: "He only had time to get his head up." The plaintiff had previously testified that at the time he was hurt he had just put a cake of ice in its place; that he was stooping down, and, as he straightened up, the pick fell on his foot. There can be no doubt that the evidence

shows an act of negligence on the part of McFadden in not ascertaining where the men were who were working in the room, and in throwing the pick over immediately after once shouting, "Look out!" But, as McFadden was a fellow servant of the plaintiff, the defendant cannot be held liable for McFadden's act. It is sought, therefore, to hold the defendants on the ground that the order given was an act of negligence, and that McFadden should have been warned of the danger of throwing the pick over without giving adequate notice. But this McFadden knew as well as any one. The order can be interpreted only as an order to throw over the pick in a proper way and in a proper place, and not as telling him to throw it over, regardless of the safety of those in the other room. This view of the meaning of an order was taken in a somewhat similar case. *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078. See, also, *Gorman v. Woodbury*, 173 Mass. 180, 53 N. E. 378.

Exceptions overruled.

(189 Mass. 358)

RICCIO v. NEW YORK, N. H. & H. R. CO.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 19, 1905.)

MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

An employé, while engaged in shoveling snow in a railroad yard, was struck by a locomotive and injured. He knew that trains and engines were frequently passing, and there was no undertaking on the company's part to give him warning, but he was expected to look out for himself. *Held*, that the company was not guilty of actionable negligence, though the engineer failed to sound the whistle or ring the bell.

Exceptions from Superior Court, Hampden County; Elisha B. Maynard, Judge.

Action by Michele Riccio, as administrator of one Bianco, deceased, against the New York, New Haven & Hartford Railroad Company. There was a verdict for defendant, and plaintiff brings exceptions. Overruled.

C. Reno and G. A. Bacon, for plaintiff. W. S. Robinson, for defendant.

HAMMOND, J. This is an action to recover damages for injuries resulting in the death of one Bianco, the plaintiff's intestate. At the trial it appeared that at about 5:30 o'clock in the afternoon of January 2, 1904, Bianco, while at work shoveling snow in the large freight yard of the defendant at New Haven, in the state of Connecticut, was struck by a locomotive engine and mortally hurt. Snow had been falling all that day, and at the time of the accident was still falling. The wind was blowing, and it was dark. The evidence tended to show that Bianco had performed similar work there the preceding winter, but it

does not appear that he had worked during the winter in question before the day of the accident. On this day he began about 10 o'clock in the morning and worked up to the time of the accident.

We see no negligence on the part of the defendant. The plaintiff knew that he was at work in a railroad yard where trains and engines are frequently passing. There was no undertaking upon the part of the defendant to give him warning, but he was expected to look out for himself. If the engineer failed to sound the whistle or ring the bell, it was not negligence for which the defendant was responsible. Both by the common law and by the law of the state of Connecticut, as we understand it to be under the decisions of that state which were put in the case as evidence, there is no evidence of negligence of the defendant. *Morris v. Boston & Maine Railroad*, 184 Mass. 368, 68 N. E. 680; *Whittlesey v. New York, New Haven & Hartford Railroad*, 77 Conn. 100, 58 Atl. 459, and cases cited. It becomes unnecessary to consider the other grounds of the defense.

Exceptions overruled.

(189 Mass. 242)

COPELAND v. BOSTON DAIRY CO.

(Supreme Judicial Court of Massachusetts. Franklin. Oct. 19, 1905.)

1. TRIAL—INSTRUCTIONS—ACCOUNT BOOK—RULINGS ON ADMISSIBILITY.

Plaintiff was a farmer, from whom, among others, one M. collected milk and delivered it to one W., by whom it was carried to defendant. M. kept an account of the milk taken by him from each farmer, and at the close of each month his account book was given by him to W., who took it to defendant and later brought it back in an envelope addressed to M. and containing defendant's check for the amount due from it to each farmer whose milk M. had collected and sent to defendant. M. was paid by defendant. *Held*, in an action for milk sold and delivered, a ruling that M. was not defendant's agent in such sense that his entry would bind defendant, but admitting the entries to aid the jury in determining the amount of milk received by defendant, and permitting the jury to consider whether there was or was not an acquiescence on defendant's part in the correctness of the entries, was sufficiently favorable to defendant.

2. FOOD—QUALITY—NECESSITY OF ANALYSIS.

In an action for milk sold and delivered, it is not necessary for plaintiff, in proving that the milk sold contained the quantity of fats and solids required by Rev. Laws, c. 56, §§ 56, 57, to show that an analysis of the milk was made, but the quality of the milk may be shown in other ways.

Exceptions from Superior Court, Franklin County; John A. Aiker, Judge.

Action of contract by Edgar F. Copeland against the Boston Dairy Company. There was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

Dana Malone and Chas. N. Stoddard, for plaintiff. Fredk. L. Greene and Wm. A. Davenport, for defendant.

LATHROP, J. This is an action of contract on an account annexed for milk sold and delivered by the plaintiff to the defendant in March and April, 1900. When the case was last before us, it was held that the burden of proof was on the plaintiff to show that the milk delivered by him was up to the standard prescribed by Rev. Laws, c. 56, §§ 56, 57, and the case was sent back to the superior court for a new trial. *Copeland v. Boston Dairy Co.*, 184 Mass. 207, 68 N. E. 218. The case was subsequently tried in the superior court, a verdict was again returned for the plaintiff, and the case is before us on the defendant's exceptions.

1. The plaintiff is a farmer in Colrain, and the defendant is a milk dealer in Charlestown. One Miner collected the milk in cans from about a dozen farmers, among whom was the plaintiff, and delivered the cans to one Williams at the railroad station in Greenfield, where they were placed in a car under the charge of Williams and brought to Boston. Miner kept an account of the milk taken by him from each farmer in a book appropriately ruled to cover a month, with a separate page for each farmer supplying the milk. At the close of each month this book, with the entries made in it, was taken by Miner to Williams, who took it to the defendant. Later Williams brought back the book, inclosed in a sealed envelope addressed to Miner, and the envelope contained a check of the defendant for the amount due from it to each farmer whose milk Miner delivered. There was also evidence that Miner was paid by the defendant, and not by the plaintiff; and, while the judge ruled that Miner was not an agent of the defendant whose entry in the books would bind the company, he admitted in evidence the covers of the books mentioned, and the pages in each headed by the plaintiff's name, to assist the jury in determining the amount of milk the defendant received. The judge further instructed the jury that, if the books came to the attention of the defendant, it was for the jury to consider whether there was or was not an acquiescence on the part of the company in the correctness of the entries. We are of opinion that the rulings were sufficiently favorable to the defendant. Indeed, on reading the evidence, we should have been better satisfied if the question whether Miner was the agent of the defendant had been submitted to the jury; but the defendant is not aggrieved by the rulings made.

2. The next question arises upon a portion of the judge's charge. The defendant requested the judge to instruct the jury that the plaintiff could not recover unless there was proof by a fair preponderance of the evidence of the actual presence in the milk delivered of the fats and solids required by law. This instruction was given by the judge, but he added: "It is not necessary that he establish that presence by having an analysis made of the milk before he de-

livers it or at any time. If you are satisfied in other ways of the actual presence of the necessary percentage of solids, the plaintiff would be entitled to recover." The defendant excepted to the addition made by the judge. We are of opinion that it is not necessary, in an action for the price of milk, to show that an analysis of the milk has been made. To make an analysis of every can of milk sold would be practically impossible, and there is no law requiring it. There was evidence in this case of the nature of the herd of cattle owned by the plaintiff, the manner in which they were fed, that no water or foreign substance was added to the milk, and that the milk furnished was of good quality and was not skimmed. Indeed, the defendant's president, in a letter to the plaintiff, dated April 5, 1900, while complaining that the milk had been watered, said: "The samples taken from your cows were found to be up to the standard, and the best we have ever taken from one herd." There was much conflicting evidence on the question whether the milk was watered. The jury by its verdict has determined this question in the negative, and no question of law arises in regard to it.

Exceptions overruled.

(189 Mass. 363)

GARDNER SAV. BANK v. TABER-PRANG ART CO.

(Supreme Judicial Court of Massachusetts
Worcester. Oct. 19, 1905.)

CORPORATIONS—CAPITAL STOCK—DIVIDENDS—PRIORITY OF PREFERRED STOCK.

The by-laws of a corporation divided the capital stock into cumulative preferred stock and common stock, and provided that certain of the preferred stock, for which special provision was made, should be "entitled to annual dividends in preference to the remaining preferred stock for a period of three years from the original issue thereof." *Held*, that the special preferred stock was entitled to three annual dividends in preference to the remaining preferred stock, though such dividends were not declared during a three-year period immediately following the original issue of the stock.

Appeal from Superior Court, Worcester County; William Cushing Wait, Judge.

Bill in equity by the Gardner Savings Bank against the Taber-Prang Art Company. In the superior court the bill was dismissed, and plaintiff appealed. Affirmed.

Thatcher B. Dunn, for appellant. J. B. Carroll and W. H. McClintock, for appellee.

LATHROP, J. The plaintiff in this bill in equity is the payee and owner of a promissory note for the sum of \$18,000, signed by persons not parties to this suit. The note is dated December 1, 1898, and is payable on demand. The plaintiff also holds, as collateral security for the payment of the note, 162 shares of the preferred stock and 324 shares of the common stock of the

defendant. The defendant was incorporated under the laws of the state of Maine in 1897. It has its usual place of business, its officers, and all the property employed in its business at Springfield, in this commonwealth. Its capital stock is \$550,000, divided into 3,000 shares of 7 per cent. cumulative preferred stock, and 2,500 shares of common stock. A part of the preferred stock, namely, 1,500 shares, is known as the "Springfield stock." At a meeting of the board of directors of the defendant, held at Springfield in January, 1904, a 7 per cent. dividend was declared upon the Springfield stock, but upon no other of the preferred stock. This dividend was made payable on February 15, 1904, and this bill was filed in the superior court three days before the date when the dividend was payable. A temporary injunction issued. The case was afterwards heard, and the bill was ordered to be dismissed, with costs. The case is before us on the plaintiff's appeal.

The controversy between the parties arises as to the construction to be given to article 1 of the by-laws of the defendant, a copy of which is annexed to the bill. It reads as follows: "First. The capital stock of the corporation shall be five hundred and fifty thousand dollars (\$550,000), divided into three thousand (3,000) shares of 7 per cent. cumulative preferred stock and twenty-five hundred (2,500) shares of common stock; the preferred stock to be preferred as to assets, and cumulative preferred as to dividends, and both the preferred and common stock to have a par value of one hundred dollars (\$100) a share. Such of the preferred stock as is known as 'Springfield stock,' for which provision is hereinafter made, shall be entitled to annual dividends in preference to the remaining preferred stock, for the period of three years from the original issue thereof; but dividends may annually be declared on such remaining preferred stock, during said period, after said 'Springfield stock' shall have received its annual 7 per cent., or the accumulations thereof, if the full amount is not paid in any one year. The dividends on said remaining preferred stock shall accumulate during said three years to the extent that they are not paid." The period of three years from the original issue of the Springfield stock had elapsed long before the dividend in question was declared, and no dividend upon any of its stock had previously been declared by the defendant.

The contention of the plaintiff is that by the true interpretation of the by-law the Springfield stock was entitled to preference only for the period of three years from the original issue thereof, and that, this period having passed, the other preferred stock is entitled to share equally with the Springfield stock. We are of opinion,

however, that the judge of the superior court was right in dismissing the bill, and that the Springfield stock was entitled by the by-law to three dividends of 7 per cent. each, in preference to the remaining preferred stock. If the corporation could not pay the full 7 per cent. in any one year, the unpaid amount was to accumulate and to be paid before payments were made on the other preferred stock. The word "dividend" is not used in the by-law in a strictly accurate way. It is used rather in the sense of a payment to be charged upon the profits whenever they might be made. *Boardman v. Lake Shore & Michigan Southern Railway*, 84 N. Y. 157, 176; *Henry v. Great Northern Railway*, 1 De G. & J. 606, 635, 641; *Sturge v. Eastern Union Railway*, 7 De G., M. & G. 158; *Crawford v. Northeastern Railway*, 3 Jur. (N. S.) 1093; *Mathews v. Great Northern Railway*, 5 Jur. (N. S.) 284. It was said by Lord Justice Knight-Bruce, in *Henry v. Great Northern Railway*, that "the word 'dividend' carries no spell with it"; and in that case he construed it to mean "share of profits." 1 De G. & J. 642. So in *Webb v. Earle*, L. R. 20 Eq. 556, where the directors of a limited company were authorized to issue preference capital, carrying a dividend at £10 per cent. per annum, payable half-yearly, it was held by Sir George Jessel, M. R., that if the profits of any year were insufficient to pay the dividend in full the deficiency might be made good out of subsequent profits. Of course, in this class of cases much depends upon the language used. In the case at bar all of the preferred stock was cumulative, but the Springfield stock was to be paid dividends in preference to the remaining preferred stock. The case differs from that of *Staples v. Eastman Photographic Materials Co.* [1896] 2 Ch. 303, where the holders of preference shares were entitled "out of the net profits of each year to a preference dividend of £10 per cent. per annum." This was held by the Court of Appeals not to make the dividends cumulative; and the cases of *Henry v. Great Northern Railway*, and *Webb v. Earle*, supra, were thus distinguished.

Decree affirmed.

(189 Mass. 380)

**BARTLETT v. WORCESTER CONSOL.
ST. R. CO.**

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

**STREET RAILROADS—INJURY TO BICYCLIST—
CONTRIBUTORY NEGLIGENCE.**

A person riding a bicycle at about noon in a crowded city street, who, when about to cross a street car track, looked to ascertain whether a car was coming, and, his view of an approaching car being obstructed, took his chances, and while crossing the track was struck by the car, was guilty of contributory negligence.

Exceptions from Superior Court, Worcester County; Edward P. Pierce, Judge.

Action by Emerson E. Bartlett against the Worcester Consolidated Street Railroad Company. A verdict was directed for defendant, and plaintiff excepted. Exceptions overruled.

Sheehan & Cutting, for plaintiff. F. H. Dewey, Chas. C. Milton, and Chandler Bullock, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, resulting from his coming into collision with an electric car of the defendant on Main street in Worcester. At the trial in the superior court, at the close of the plaintiff's evidence, a verdict was ordered for the defendant; and the case is before us on the plaintiff's exceptions.

We are of opinion that the ruling was right. At the place of the accident Main street runs north and south, and there are two tracks of the defendant in the street. The plaintiff was going south, riding on a bicycle, and a car passed him going in the same direction, stopping at Austin street. The plaintiff testified that he was then 12 or 15 feet behind the car, and turned to cross the track; that he looked and listened, to ascertain whether a car was coming on the other track; that he could not see, because the car that had stopped obstructed his view; that he heard nothing; that he took his chance, and was struck by a car on the other track. It appeared that the plaintiff's bicycle struck the forward truck of the car, and that the car was going slowly, as it stopped within 10 feet. We find very little evidence, if any, of negligence on the part of the defendant. The evidence was entirely negative on the question whether the gong was sounded, and there was no evidence that it was a usual place to sound the gong. The plaintiff testified that he did not see the car until he was within five feet of it, and the motorman could not see him sooner. The sounding of the gong then would have been of no avail. If there was any evidence for the jury on this branch of the case, it is clear that the plaintiff was not in the exercise of due care. The accident happened soon after 12 o'clock, noon, on the main street of a large city. The case falls within *Saltman v. Boston Elevated Railway*, 187 Mass. 244, 72 N. E. 951, where it is said: "The plaintiff's looking while his view was obstructed by a passing car did him no good. Common experience teaches us that it is unsafe to cross a double line of tracks without looking to see whether a car is approaching on either line, and it also teaches us that, if the view is temporarily obstructed, one should wait until the view is unobstructed." See, also, the cases cited in *Saltman v. Boston Elevated Railway*, supra.

Exceptions overruled.

(189 Mass. 296)

HUBBARD v. LAMBURN.

(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 19, 1905.)

1. JURY—RIGHT TO TRIAL BY JURY—TRUSTEE PROCESS.

Rev. Laws, c. 189, § 32, authorizes the voluntary appearance of an adverse claimant of property garnished by trustee process for the purpose of determining his title to the property, and authorizes him to put in issue facts not stated or denied by the supposed trustee, which shall be tried and determined, as provided by section 16, on depositions or oral testimony as the court orders; and section 16 declares that a question of fact in such proceedings may be tried by the court or justice, or may be submitted to a jury, in such manner as the court orders. *Held* that, as the claim of an adverse claimant under an assignment is a claim "between two or more persons" involving a right to property within Declaration of Rights, art. 15, entitling either party under such circumstances to a trial of the issues of fact by a jury, section 16 should be construed as conferring an absolute right on the claimant to a jury trial of such issues of fact.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Jury, § 90.]

2. SAME—DEMAND—TIME.

A demand for a jury trial by claimants of credits garnished by trustee process in a police court, made at the time claimants appealed to the superior court, was in time.

Exceptions from Superior Court, Middlesex County; J. B. Richardson, Judge.

Action by one Hubbard against one Lamburn by trustee process in the police court of Somerville. On appeal to the superior court, judgment was rendered against the claimants of the property, charging the trustee on his answer, and claimants bring exceptions. Sustained.

This was an action of contract by trustee process. The claimants filed a bond to dissolve the attachment, and defendant was defaulted. In the lower court the trustee was charged, and the claimants appealed to the superior court. Claimants entered their appeal and claimed a jury trial. Thereafter plaintiff's counsel, without consulting claimants' counsel, objected to the clerk that the case was not one for a jury, but for the court, and the clerk removed the word "jury" from the docket, and the case was marked for sittings for trial by the court. The claimants' counsel did not know of this until the day of trial, when he objected to going to trial without a jury, and called the attention of the court to the fact that claimants had claimed trial by jury. The court overruled this objection, heard the case, found for the plaintiff, charging the trustee, and claimants excepted.

S. W. Mendum and R. E. Joslin, for plaintiff. J. L. Powers, for claimants.

BRALEY, J. At the adoption of our state Constitution the form of legal procedure known as the "trustee process" had been established by the provincial statute of 32 Geo. II, c. 2, and was in common use. Jarvis

v. Mitchell, 99 Mass. 530, 531. St. 1794, p. 120, c. 65, was a revision of this statute, and of the subsequent statute of 1788. St. 1788, p. 27, c. 18, § 4. After providing the form of writ, full provisions were made for the summoning, appearance, and answer of the trustee, and his examination upon written interrogatories, as well as for subsequent proceedings that might be required to make the remedy effective. A practice seems to have prevailed under this enactment that, if the debt had been assigned, the assignee was required to notify the trustee, and before the latter was examined to exhibit to him evidence of the assignment. It became the duty of the trustee in his answers to disclose this fact, with the evidence of the transfer, the validity of which was then determined by the court. Unless such notice was given, payment by the trustee on execution operated as a discharge. *Comstock v. Farnum*, 2 Mass. 96; *Foster v. Sinkler*, 4 Mass. 450; *Wood v. Partridge*, 11 Mass. 488, 491; *Dix v. Cobb*, 4 Mass. 508, 511. See *Marvel v. Babbitt*, 143 Mass. 226, 227, 9 N. E. 566. An inference would not be unwarranted that under this system an opportunity would be open for a successful evasion of an anticipated attachment by a fraudulent assignment, while the rights of an assignee might be imperiled by a refusal of the trustee to make the assignment a part of his answer. In some of the earlier cases, the court suggests that if the assignee also was summoned, upon his being interrogated, such collusion might be exposed. *Dix v. Cobb*, *ubi supra*; *Gordon v. Webb*, 18 Mass. 215. But in *Hawes v. Langton*, 8 Pick. 67, 69, 70, it is said that this suggestion never became the practice.

By St. 1817, c. 148, a new and more satisfactory proceeding for the benefit of both was first authorized between the plaintiff and an assignee. *Parker v. Danforth*, 16 Mass. 299, 300; *Hawes v. Langton*, *ubi supra*; *Burlock v. Taylor*, 16 Pick. 335, 336. Any person adversely interested, who asserted title to the "goods, effects or credits" by force of an assignment, was given the absolute right to intervene voluntarily in the suit, or to appear, upon a summons issued on motion of the plaintiff, and to establish his claim as superior to that of the attaching creditor. *Boyle v. Young*, 6 Allen, 582; *Mortland v. Little*, 137 Mass. 339. When admitted as a party, under either form of appearance, he takes upon himself the corresponding burden of proof, and, having submitted his claim for adjudication, is obliged to follow such forms of procedure for the framing and trial of the issues as may have been legally adopted. By section 1 it was provided that an assignee, upon " * * * his appearing voluntarily, and claiming to be so admitted, or upon coming into court upon being notified by a summons * * * and upon * * * becoming a party to the suit, the validity of the assignment, or its effect on the case, shall be

tried by the court, or by a jury, as the case may require." The reported cases, so far as examined, seem to show the practice under this section uniformly to have been to submit all issues of fact to a jury. See *Parker v. Danforth*, *ubi supra*; *Adams v. Robinson*, 1 Pick. 461, 462, *ad finem*; *Burlock v. Taylor*, *ubi supra*; *Sibley v. Smith*, 19 Pick. 546; *Dennis v. Twitchell*, 10 Metc. 180. Indeed, it was said by Chief Justice Shaw, in *Sibley v. Smith*: "The intervening party is allowed to bring proofs and try his title upon fact and upon law, and in this way he can have a trial of fact by the jury."

No statutory change was made until by Rev. St. 1836, c. 109, this section was divided, and the part now under consideration appears in sections 16, 18. By section 16 "shall" was changed to "may," and this portion recast so as to read: "Any question of fact arising * * * may be tried and determined by the court, or may be submitted to a jury in such manner as the court shall direct." Notwithstanding this change, the former practice apparently still continued. *Eldridge v. Benson*, 7 Cush. 483; *Richardson v. Forepaugh*, 7 Gray, 546. See, however, *Taylor v. Lynch*, 5 Gray, 49, for an exception where all the issues were determined by the court. No material modification was made either by Gen. St. 1860, c. 142, §§ 12, 16, or Pub. St. 1882, c. 183, §§ 18, 36. But the practice under these revisions seems to have been substantially changed, and such cases were tried to the court. See *Boyle v. Young*, *supra*; *Gifford v. Rockett*, 119 Mass. 71; *Clinton Bank v. Bright*, 126 Mass. 535; *White v. Coleman*, 127 Mass. 34; *Sheehan v. Marston*, 132 Mass. 161; *Marvel v. Babbitt*, 143 Mass. 226, 9 N. E. 566; *Moors v. Goddard*, 147 Mass. 287, 17 N. E. 532; *Butler v. Butler*, 162 Mass. 524, 39 N. E. 182; *Creed v. Gilman*, 169 Mass. 562, 48 N. E. 778.

Inasmuch as a remedial process unknown to the common law was provided, under article 15 of the Declaration of Rights the unqualified privilege of either party to a trial of the issues of fact by a jury was preserved. The controversy is "between two or more persons," and certainly involves the right to property. If the plaintiff in the present case had been nonsuited, or defeated in a trial upon the merits, or if the trustee had been discharged, the claimants could have brought suit at common law to recover the money. They then would have been entitled to a jury trial, if seasonably claimed. Declaration of Rights, art. 15; Rev. Laws, c. 173, § 56. The form which the litigation may assume does not change the nature of the controversy. In either action the object to be accomplished is to settle the right to the debt, which has been held to be the correlative of "credits." *Wilde v. Mahaney*, 183 Mass. 455, 460, 67 N. E. 337, 62 L. R. A. 813. And this is true, whether the original owner or his assignee sues the debtor directly, or the title is determined in a suit brought by a creditor of

the owner, to which others interested are allowed by intervention to become parties. *Powers v. Raymond*, 137 Mass. 483. Rev. Laws, c. 189, re-enacted previous revisions for the appearance of adverse claimants, and in section 32 refers to section 16 for the form of trial of questions of fact that may be presented. This last section in its literal wording plainly leaves the option of a jury trial to the discretion of the court. But, when read in connection with its legislative origin, supplemented by the practice that prevailed under the original statute, if a jury trial is seasonably claimed, "may," in the second clause, should be construed to mean "shall." *Phillips v. Fadden*, 125 Mass. 198, 201. By this construction the statute can be sustained as being in harmony with the constitutional right upon which the claimants rely.

It may be suggested that the remedy provided for adverse claimants is to be considered as analogous to a bill of interpleader in equity, where after the claimants interplead, the issues raised would be tried to the court, unless in its discretion they were submitted to a jury. *Parker v. Simpson*, 180 Mass. 334, 62 N. E. 401. Apart from the fact that the employment of either process may afford a convenient means of settling a disputed title to personal property, there are features relating to the introduction of evidence, found in the first statute that lend some further support to this view. After providing in section 1 that the original defendant might be admitted as a witness upon the application of either party, section 19 required that "the testimony shall all be given by depositions * * * taken and filed in the case." This mode of proof was in accordance with the practice then prevailing in chancery. Chancery Rule 29 (of this court) 24 Pick. 417. Until St. 1852, p. 238, c. 312, § 85, was passed, permitting oral evidence to be taken, this rule remained unmodified. *Pingree v. Coffin*, 12 Cush. 600. Before this change, however, it was provided by St. 1839, p. 48, c. 107, § 1, subsequently Gen. St. c. 142, § 16, and Pub. St. c. 183, § 36, now Rev. Laws, c. 189, § 32, that in suits by trustee process, when claimants intervened, the testimony might be taken orally or by deposition as the court should order.

Laying aside any distinction that might be drawn from these different evidentiary methods as finally indicative of a legislative intention to regard the statutory and equitable remedies as dissimilar, the analogy fails. A bill of interpleader is strictly a proceeding in equity, that before the Constitution regularly would have been tried without a jury, and hence is within the exception stated in article 15, while the right of intervention given to a claimant is a statutory remedy at law since created, and therefore subject to the constitutional guaranty of a jury trial. At the time the claimants entered their ap-

peal they seasonably asked for a trial by jury, and that request must be considered to mean a demand that any questions of fact arising between them and the plaintiff concerning the title to the fund in the possession of the trustees should be thus determined. Rev. Laws, c. 173, § 56; Rule 18, Common Law Rules of the Superior Court. The request, for the reasons stated, should have been granted.

Exceptions sustained.

(189 Mass. 368)

MARTIN v. FOSKETT et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

WILLS—INTEREST CREATED—ABSOLUTE ESTATES—REPUGNANT LIMITATIONS.

A will bequeathing money to testatrix's sister "for her use during her lifetime, after which such part of it as may be left shall be equally divided" between certain persons, vested in testatrix's sister an absolute interest in the money bequeathed to her, and not merely the income thereof during her life; and the limitation over, being repugnant to the gift to the sister, was void.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1421.]

Case Reserved from Supreme Judicial Court, Worcester County; John Lathrop, Judge.

Petition to the probate court by one Martin, executrix of the will of Eliza Foskett, deceased, against Mercy Foskett and others for a construction of the will of testatrix. From the decree rendered, defendants appealed to the Supreme Judicial Court, where the case was heard by a single justice, who reserved the same for the full court. Reversed.

E. A. D. Moss, for Mercy Foskett. Geo. R. Stobbs, for Annie A. Foskett and others.

LATHROP, J. This is a petition to the probate court by the executrix of the will of Eliza Foskett for the construction of the third clause in the will of said testatrix, which is as follows: "To my sister Miss Mercy Foskett I give \$600 for her use during her lifetime, after which such part of it as may be left shall be equally divided between my niece Annie Augusta Foskett, and my nephew Robert Foskett, and my nephew once removed, M. Clifton Martin, the same to be held in trust by my niece T. Amelia Martin, and given to each of them when she shall think it wise and best so to do." The judge of the probate court entered a decree that Mercy Foskett was entitled during her life to the income only of the \$600 bequeathed to her by this clause. From this decree an appeal was taken by Mercy Foskett to this court, where it was heard by a single justice, who, at the request of the parties, reserved the case for our consideration.

It appears from an agreed statement of facts filed in this court that the will was

drawn by, and was in the handwriting of, the testatrix, and that Mercy Foskett was the sister of the testatrix, and at the time of her death was living with her.

The question presented is whether, under the third clause of the will, Mercy Foskett took an absolute interest or only the income for life. We have no doubt that Mercy Foskett took an absolute interest in the \$600 bequeathed to her, and not merely the income during her life. It is plain that Mercy Foskett was to have the possession and control of the entire fund during her life; otherwise a trust would have been created as to the gift to her, as it was as to the limitation over. We are also of opinion that the limitation over "of such part of it as may be left" was void, as repugnant to the first gift. The case is governed by *Bassett v. Nickerson*, 184 Mass. 169, 68 N. E. 25, and cases cited. The case of *Bassett v. Nickerson* seems to have escaped the attention of the counsel in the case, as it is not cited on either brief.

The decree of the probate court must be reversed, and a decree entered in accordance with this opinion.

So ordered.

(189 Mass. 223)

CRANE v. BROOKS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 18, 1905.)

1. ACCOUNT—SETTLEMENT—EVIDENCE.

In a suit in equity for an accounting, evidence held to sustain a finding on a cross-bill that the matters involved in the account alleged therein had been settled, and that there was nothing due defendant thereon.

2. INTEREST—RECOVERY—EFFECT OF SATISFACTION OF PRINCIPAL DEBT.

Where, on an accounting, it appeared that the matters in difference between the parties had been long since settled by the application of receipts from collaterals, etc., and no interest had ever been charged or paid, any possible claim that might have been made for interest fell with the principal debt when it was satisfied.

3. EVIDENCE—ADMISSION BY ASSIGNOR.

Where, in a suit for an accounting, defendant filed a cross-bill, based on an assignment of a claim against plaintiff for a debt alleged to be due to a firm and to certain estates, inventories of such estates, containing no reference to such indebtedness, made and filed by defendant's assignors, were admissible against defendant to show that the claim was not regarded as property belonging to the estates, on the issue of the validity of the indebtedness.

Appeal from Superior Court, Suffolk County; J. B. Richardson, Judge.

Bill by Charles R. Crane against James I. Brooks and others for an accounting. From a final decree in favor of plaintiff on defendants' cross-bill, defendant Brooks appeals. Affirmed.

The account annexed to the cross-bill, on which it was founded, purported to represent a balance due from Crane, as surviving partner of the firm of Shedd & Crane, to the estate of N. R. Treadwell and the firm of

Treadwell Bros. & Clark, for sales of leather made for them by Shedd & Crane. Early in 1888 Shedd & Crane were leather commission merchants in Boston. The business of the estate of N. R. Treadwell was conducted, first by Treadwell's widow as administratrix, and later as a firm composed of Treadwell's heirs. The firm of Treadwell Bros. & Clark was composed of two sons of Treadwell and Clarence S. Clark, both of which were engaged in the manufacture of leather, which was sold by Shedd & Crane on commission. In March, 1893, an account was rendered by Shedd & Crane to their correspondents, Treadwell Bros. & Clark and the administratrix of Treadwell's estate, showing a balance due them of \$27,989.21. After the dissolution of the firm of Shedd & Crane, Crane as surviving partner, to secure the balance due from the firm, individually placed in the hands of the consignors a quantity of bonds of the approximate face value of \$25,000, which, with Cranes' consent, were divided among the firm of Treadwell Bros. & Clark and the administratrix, the value of which, with the proceeds of coupons collected thereon, were to be applied on such indebtedness. Just prior to the filing of plaintiff's bill, to wit, on February 6, 1902, defendant Brooks procured an assignment of said claim from Clark, as agent of the N. R. Treadwell estate, for the purpose of using the same as an offset to any claim which plaintiff, Crane, might make against him, and at this time, Mrs. Treadwell, the administratrix of N. R. Treadwell's estate, being dead, on February 20, 1902, Clark, as administrator de bonis non of said estate, ratified such assignment to Brooks; he having been appointed such administrator a few days prior thereto. At no time after the rendering of the final account of Shedd & Crane to the consignors in 1893 did they, or any of them, have any communication with Shedd in relation thereto, or make any demand on him for payment thereof, though he was thereafter continuously in business in Boston, as they well knew, and, so far as appears, they believe him to be perfectly solvent; nor did they take any effective steps to collect any sum whatever from Crane on account of it. It also appeared that, on Mrs. Treadwell's death, and that of her son, administration was taken out on their several estates, and inventories filed, but that in neither of such inventories, nor that of Clark as administrator de bonis non of N. R. Treadwell, was any such claim mentioned or referred to as an asset. It also appeared that subsequent to the rendering of such account Crane himself paid at one time \$2,000, and another \$2,500, in money on the account, in addition to the sums raised from the bonds and coupons, and Clark testified that at the time of the assignment to Brooks, and for a long time prior thereto, the consignors considered the account as dropped or defunct.

Wm. T. Way, for appellant. Albert P. Worthen, for appellee.

KNOWLTON, C. J. This is an appeal by the defendant Brooks from a final decree in favor of the plaintiff upon the defendant's cross-bill, in which he claimed sum due upon an account. The only questions raised are upon the defendant's exceptions to the master's report, numbered 9, 11, 13, 14, 15, and 16; all his other exceptions having been waived. These exceptions were founded on contentions of the defendant as follows: First, that the finding that the matters involved in the account were settled long ago, and that there is nothing due the defendant upon them, is erroneous; secondly, that a special error, which entered into the finding, is the master's failure to allow interest on the items of the account; and, thirdly, that there was error in considering the inventories of the estates of the persons from whose administrators Brooks derived his title to the account, in each of which inventories there is no reference to the existence of such an account.

The exceptions all relate to a finding of fact, and, inasmuch as there is no report of the evidence, this finding must stand, unless upon the face of the report it is inconsistent with other findings and is plainly wrong. *Richards v. Todd*, 127 Mass. 167-172. The account grew out of transactions between the firm of Shedd & Crane, of which the plaintiff was a member, and two other firms which were associated in their dealings, to whose rights the defendant Brooks has succeeded by assignment. The transactions on which the defendant rests his claim were closed at some time in the year 1892, and there was evidence tending to show that the balance due the intestates of the defendant's assignors in March, 1893, was \$27,989.21. Payments in cash were made by the plaintiff, and collaterals, pledged by him as security for this debt, were sold or appropriated by these creditors, to an amount, as we infer from the findings, considerably in excess of this sum. A part of this was from coupons collected by the creditors for several years upon bonds of the plaintiff, whose face value was \$25,000, which bonds were afterwards disposed of at different times, and the proceeds applied to the payment of this account. It did not appear exactly what the amount received from the coupons was, nor what was the market value of the second lot of the bonds, which were taken and appropriated by the intestates of the defendant's assignors to the payment of this account. These collections and appropriations were with the plaintiff's consent. The assignment of this account was procured by Brooks on February 6, 1902. In the report the master says: "It is evident to me that the parties considered the account as settled long before the assignment thereof to Brooks, and that it was in fact settled in the manner indicated above, and I so find." The "manner indicated above" was by the receipt of money, and of property taken as money, by the persons to whom the account was due. While the precise amount so received does not ap-

pear, the fair inference from the findings is that it was much more than the amount of the account as it was made up in March, 1893. One Clark was a member of one of the firms to which the account was due, and his wife was the surviving member of the other firm. The master says: "Clark further testified that at the time of the assignment to Brooks, and for a long time prior thereto, the consignors considered this account as dropped or defunct, and their acts clearly indicate this to be so." There is nothing to show that the master's finding that this account was settled by the receipt of money in payment was not well warranted. *Hunt v. Nevers*, 15 Pick. 500-504, 28 Am. Dec. 616.

The defendant contends that the finding was erroneous, because the master did not compute interest upon the items of the account. It does not appear that the master did not take into account an allowance of interest after the account was made up and payment upon it was demanded. He found, from the conduct of the parties, and the payments made, and the transfer of property applied to the account, that the account was settled fully by payments to the satisfaction of the claimants. How they dealt with the question of interest does not expressly appear in the report. In the account of March 1, 1893, "no interest appears to have been charged upon the moneys paid from time to time, nor credited upon the moneys received from sales. Nor did it appear that at any time thereafter was any such interest charged or credited by either Shedd & Crane or the consignors; the consignor's books containing no items whatsoever relating to interests." We do not find in the report anything which shows that interest was at any time agreed upon, or that the payments were appropriated to interest, instead of to principal, or that the payments were not treated as applicable to the principal, so far as to pay it in full. The allowance of interest upon an account of this kind, in the absence of an agreement in regard to it, is in the nature of damages for nonpayment of the debt when it was due. The parties are not obliged to insist upon interest on an account after it is rendered, and in many such cases interest is not asked for. If the parties in this case dealt with the principal debt, and payments were made in full settlement of it, any possible claim that might have been made for interest fell with it, when it was satisfied. *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771, and cases cited.

The thirteenth and only remaining exception is "to the use of the state of the inventory of the estates of the Treadwell family as evidence against Brooks on the issue of payment." These were inventories made by the defendant's assignors. The defendant Brooks acquired no greater rights than they had, and it is not contended that their admissions, while owners of the account, would not be admissible against him. One of them, Clark, was a member of one of these firms

which formerly held the account, and he personally knew all about it. A failure to treat the account as property in which his intestates had an interest was some evidence in the nature of an admission of the administrator as the reputed owner that it had ceased to exist as property. The forms of the different inventories do not appear, but we infer from the report that there is nothing in them, either by reference to assets in the hands of the former firms or otherwise, which has any relation to this account. If the account were included in a reference to claims of a firm of which the intestate was a member, the failure to refer to it separately would be unimportant. It does not appear that the defendant was injured by the introduction of the inventories.

Decree affirmed.

(189 Mass. 266)

BOSWORTH v. STOCKBRIDGE et al.

(Supreme Judicial Court of Massachusetts. Hampden. Oct. 19, 1905.)

1. WILLS — CONSTRUCTION — VESTING OF ESTATES — ACCUMULATIONS.

The fact that income was to be accumulated after the estate vests in interest, before it vests in possession, does not prevent the application of the rule that the law favors vested, rather than contingent, estates.

2. SAME.

Testator devised a part of his estate to his executors, in trust to pay the income to the three daughters of his deceased brother in equal shares, and at the death of one of them her share should be put at interest until all the daughters were dead, and then the principal and interest of the trust fund should be divided into six equal parts and given to others specially designated, children and grandchildren of such deceased brother. *Held*, that such children and grandchildren took estates in such trust fund which vested at the death of the testator.

3. SAME — REMAINDER — LEGATEES — ISSUE.

Where testator bequeathed the remainder of a trust fund accumulated after the death of certain beneficiaries for life to certain designated beneficiaries, one of whom died before the testator leaving issue but after the execution of the will, and the other died after the testator's death but prior to the death of the last beneficiary for life, also leaving issue surviving such life tenants, the gifts to the remaindermen so dying passed to their respective issue under Rev. Laws, c. 135, § 21, declaring that, if a legacy is made to a child or other relative of testator who dies before him leaving issue surviving the testator, such issue shall take the legatee's estate unless a different disposition is made or required by the will.

Case Reserved from Supreme Judicial Court, Hampden County.

Bill by Charles W. Bosworth, as trustee, etc., against Edward B. Stockbridge and others. Case reserved for full court. Instructions granted.

Testator, by the third clause of his will, bequeathed all the remainder of his estate to his executors in trust, to be divided into nine equal parts as follows: One part to pay the net income to three daughters of testator's deceased brother, Caleb Stock-

bridge, in equal shares, and at the death of any one of them the income of her share to be accumulated until all the daughters were dead, and then to divide the principal and interest into six equal parts and give one of such parts to testator's nephew, Caleb Stockbridge, one to Joseph Stockbridge, one to the children of Randolph Stockbridge, one to Alphonso Stockbridge, one to the children of Eber Allis Stockbridge, and one to the children of Benjamin Stockbridge, children and grandchildren of testator's brother, Caleb Stockbridge, to have the same, forever. The three daughters of testator's deceased brother referred to died, the last on January 2, 1904, leaving a trust fund in the hands of the executors for distribution under the will amounting to \$42,000. Caleb Stockbridge, the testator's nephew referred to in this paragraph of the will, died November 29, 1880, prior to the death of the testator, but subsequent to the execution of the will, leaving ten children, of whom two are living. Five of these children died without issue long prior to the death of the testator. Others died leaving issue, both prior and subsequent to testator's death, and Alphonso Stockbridge, referred to in the third paragraph, died after testator's death and prior to the death of the last survivor of the three daughters, leaving children now living.

Richard J. Talbot, for defendant Frances E. Knight. Wm. Waldo Hyde and Chas. G. Gardner, for defendants Security Co. of Hartford and others. John C. & Thos. J. Hammond, for defendant heirs at law. W. B. Warner, for respondents.

KNOWLTON, C. J. This is a bill for instructions, brought by a trustee under a will. The language of the will under which the questions arise is as follows: "One of said parts to my said executors, in trust that they pay the net income thereof to the three daughters of my deceased brother, Caleb Stockbridge, in equal shares, and at the death of one of them that my said executors put the income of such one at interest until all of said daughters are dead, and then to divide the principal and the interest into six equal parts, and give one of said parts to my nephew, Caleb Stockbridge, one to Joseph Stockbridge, one to the children of Randolph Stockbridge, one to Alphonso Stockbridge, one to the children of Eber Allis Stockbridge, and one to the children of Benjamin Stockbridge, children and grandchildren of my brother, Caleb Stockbridge, to have the same, forever." Although the claimants are numerous and their relations to the testator and the legacies particularly named are complicated, they all present in argument a single fundamental question, the answer to which will relieve us from further difficulty as to individual claimants. That is: When did the rights of the children and grandchildren of the testator's brother, Caleb Stockbridge, vest?

Had these persons vested rights in the property from and after the death of the testator, or had they no rights, but only the possibility of acquiring rights before the time for the distribution?

The general rule is familiar that, in cases of doubt in the construction of wills, the law favors the creation of vested, rather than contingent, estates. Speaking more specifically, in the language of Mr. Justice Gray in *McArthur v. Scott*, 113 U. S. 340-378, 5 Sup. Ct. 652, 660, 23 L. Ed. 1015: "It has long been a settled rule of construction in the courts of England and America that estates, legal or equitable, given by a will, should always be regarded as vested immediately, unless the testator has by very clear words manifested an intention that they should be contingent upon a future event." This is the law of Massachusetts, controlling the later, as well as the earlier, decisions. *Abbott v. Bradstreet*, 3 Allen, 587; *Merriam v. Simonds*, 121 Mass. 198; *Minot v. Tappan*, 122 Mass. 535; *Hills v. Simonds*, 125 Mass. 536; *Teele v. Hathaway*, 129 Mass. 164, 165; *Loring v. Carnes*, 148 Mass. 228, 19 N. E. 343; *Shaw v. Eckley*, 169 Mass. 119, 47 N. E. 609; *Pierce v. Knight*, 182 Mass. 72, 64 N. E. 692; *Smith v. Smith*, 186 Mass. 138, 71 N. E. 314; *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913; *Harding v. Harding*, 174 Mass. 269, 54 N. E. 540—and other cases relied upon by some of the respondents, are not departures from this rule; but they are cases in which the court found in the will evidence of a clear intention that the estate should not vest until the death of the life tenant. The fact that income is to be accumulated, after the estate vests in interest, before it vests in possession, does not prevent the application of this rule. At most it is only a circumstance, to be considered with other circumstances in determining the intention of the testator. See *Codman v. Brigham*, 187 Mass. 310-314, 72 N. E. 1008, explaining *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913, and *Cronan v. Adams*, 185 Mass. 436, 70 N. E. 423.

In the present case, if the only persons to receive the equitable remainder after the death of the daughters were the nephews, Caleb Stockbridge, Joseph Stockbridge, and Alphonso Stockbridge, who are mentioned by name, no one would contend that their several interests did not vest at the death of the testator. Does it make any difference that three of the six parts are given to children of deceased nephews who are not mentioned by name? We think not. They stand in the places which their respective parents would have occupied if living. There is no good reason for holding that the rights of the children of each deceased nephew did not vest in them as a class at the death of the testator, as the rights of the several living nephews vested in them respectively. In cases of this kind, where the testator seems to have intended to include all the persons who come within the description of the class,

not only at the time of his death, but up to the time when the property vests in possession, it has often been held that, though the estate vests in interest at the death of the testator, the devise will open to let in after-born children, up to the time fixed for distribution. *Moore v. Weaver*, 16 Gray, 305; *Dorr v. Lovering*, 147 Mass. 530, 18 N. E. 412, explaining *Lovering v. Lovering*, 129 Mass. 97; *Bowers v. Porter*, 4 Pick. 198-210. So far as the courts of New York differ from this view in their application of the rule as to the vesting of estates where the gift over is to a class, instead of to an individual, their decisions may rest upon a construction of *Rev. St. N. Y. pt. 2, p. 1, tit. 2, par. 13*. See *In re Baer*, 147 N. Y. 348, 41 N. E. 702, and cases cited. *In re Hoadley et al.* (D. C.) 101 Fed. 233-237; *Hale v. Hobson*, 167 Mass. 397, 398, 45 N. E. 913.

We are of opinion that there is nothing in this will to show an intention on the part of the testator that the rights of the other children and the children of the deceased children of Caleb Stockbridge, after the death of the three daughters, should not vest immediately upon his death. The gifts to Caleb Stockbridge and to Alphonso Stockbridge passed to their respective issue. (*Rev. Laws, c. 135, § 21*), and gifts made to persons who died after the death of the testator and before the death of the last survivor of those entitled to a life interest passed to the issue or legal representative of such persons. We do not deem it necessary to discuss further the rights of particular claimants.

Decree accordingly.

(189 Mass. 369)

BALL v. HOLLAND et al.

(Supreme Judicial Court of Massachusetts.
Worcester. Oct. 19, 1905.)

WILLS—CONSTRUCTION—VESTED ESTATES.

Testator, by the third clause of his will, gave the residue to his widow for her use during widowhood, providing that she should care for testator's minor children during minority. The fourth clause provided for a division among testator's "surviving children" if his widow remarried, and the fifth clause directed that, if the widow remained unmarried and died, then all of testator's property which she then possessed should be disposed of equally among all his "surviving children," except minor children who should survive their mother, provision for whom should be made under the third clause. *Held*, that the remainder devised to testator's children under the fifth clause vested at testator's death, and not at the death or remarriage of his widow.

Case Reserved from Supreme Judicial Court, Worcester County.

Petition by Frank H. Ball, as administrator, against Frank H. Holland and others, for the construction of a will. From a decree of the probate court, petitioner appealed to the Supreme Judicial Court, where the case was reserved for the full court. Affirmed.

Appeal by petitioner from a decree of the probate court on a petition for the construc-

tion of the fifth clause of the will of Henry Holland. The fifth clause was as follows: "I also direct that, should my said wife, Hannah Avery Holland, remain unmarried until her death, then that all of my property which she may possess shall be disposed of equally among all of my surviving children, unless in case of any of my minor children may survive their mother, who shall be provided for as stated in No. 3 of this my last will." The third clause gave the rest and residue of the testator's estate to her use and benefit so long as she should remain his widow, "provided, nevertheless, that, should any of my children be in their minority at the time of my decease, they shall be cared for by their mother out of my property until such time as they shall reach their majority." The question for determination was as to whether the children of the deceased children of Henry Holland share in the property, or whether it was to be distributed among the children who survived his widow. In the Supreme Judicial Court, LATHROP, J., reserved the case for the full court.

John B. Scott, for Frank H. Holland.
Henry L. Parker, guardian ad litem.

BRALEY, J. The scheme of the will was to make full provisions for the support of the testator's wife, and, during minority, of their minor children living at his death. To accomplish this she was given full authority, so long as she lived or remained unmarried, to spend, not only the income, but the residue, of his entire property, after the payment of nominal pecuniary legacies provided for in the second clause of the will. Until her widowhood was terminated it could not be determined whether any of his property would be left for distribution under the fifth clause. If there was, he directed at her death "then that all of my property which she may possess shall be disposed of equally among all my surviving children." The widow having died unmarried, leaving surviving children and representatives of those that have deceased since the death of her husband, the question is, among whom is the remainder of his property, not used by her, to be distributed?

The general rule is well settled that a remainder after a life estate is held to have vested at the death of the testator, unless from the terms of the will it clearly appears to have been his intention that it should not vest, except upon the happening of the event on which the final distribution of any residue remaining is to be made. *Cushman v. Arnold*, 185 Mass. 165, 168, 169, 70 N. E. 43. If he had said, at the death or marriage of his widow, "I give all of my property which she may possess to such of my children as shall then be living," those alive at the time fixed would have taken a contingent remainder. *Thomson v. Ludington*, 104 Mass. 193. If the adverb "then" refers to his wife's death as the period when posses-

sion shall be taken, and not to the time when the estate is to vest, this construction does not dispose of the word "surviving"; for, if he had meant that all his children living at his decease should participate, ordinarily this word would seem to be unnecessary. Throughout the will the testator, when he has occasion to refer to them, invariably limits those that are to take to children living at the end of the period. Thus in the fourth clause, which provides for a division if his widow again marries, he expresses his purpose by directing it to be among "my surviving children." It is possible to hold from these clauses that he meant such of his children as might be living at the termination of their mother's estate, and so bring the case within a line of decisions where, under language largely, if not exactly, similar, such a construction has been adopted. *Olney v. Hull*, 21 Pick. 311; *Smith v. Rice*, 130 Mass. 441; *Denny v. Kettell*, 135 Mass. 138; *Coveny v. McLaughlin*, 148 Mass. 576, 20 N. E. 165, 2 L. R. A. 448; *Bigelow v. Clap*, 166 Mass. 88, 43 N. E. 1037; *Hale v. Hobson*, 167 Mass. 397, 45 N. E. 913; *Harding v. Harding*, 174 Mass. 268, 54 N. E. 549.

But, upon resorting to the second clause, which is preliminary to his principal purpose, the gift by name is "to my sons and daughters, should they be living at the time of my decease, or any of them that may be alive." The will speaks only from his death, when 11 of the 12 children born of the marriage survived, and the more natural construction, in the light of the whole will and of this fact, is that he refers to these children as a class, in the sense that they were to take all of his property, subject to the devise in favor of his wife, although they might die before their mother. *Bosworth v. Stockbridge*, 75 N. E. 712. We are of opinion, therefore, that the remainder vested at the death of the testator, and that his children then living, with the representatives of any child since deceased, are entitled to the residue of the estate.

Decree of the probate court affirmed.

(189 Mass. 301)

BOLSTER v. GRAVES (two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1905.)

1. INSOLVENCY—FRAUDULENT PREFERENCE—RECOVERY—EVIDENCE.

In an action to recover payments made to a preferred creditor by an insolvent debtor, evidence of the state of the money market at the time of the payments is inadmissible on the issue of the debtor's insolvency at that time.

2. SAME—ACTION BY ASSIGNEE.

An assignee of an insolvent debtor, suing for the recovery of an alleged preference given a creditor by the debtor, under Pub. St. c. 157, § 96, need only show, in order to recover, that the debtor was insolvent; that the transfer was made within six months of the filing of the petition in insolvency, and with a view to give a preference; that the creditor receiving the property had reasonable cause to believe

that the debtor was insolvent; and that the transfer was made in fraud of the insolvency laws.

3. APPEAL — FINDING OF TRIAL COURT — REVIEW.

The appellate court cannot revise the findings of fact of the trial court when there is any evidence to sustain them.

4. INSOLVENCY — RECOVERY OF FRAUDULENT PREFERENCES — FINDING OF AUDITOR — SUFFICIENCY.

In a suit by the assignee of an insolvent for the recovery of a preference given to a creditor, the auditor found that the debtor, within six months of the filing of the petition in insolvency by the debtor, transferred goods to the creditor to secure loans, past as well as present, and assigned book accounts as collateral in part for pre-existing debt; that the transfers and assignments were made with a view to give the creditor a preference; that the creditor had reasonable cause to believe that the debtor was insolvent; that the transfers were made in fraud of the insolvency laws; and that the creditor converted to his own use the goods transferred, and received a specified sum on the book accounts which the creditor owed. *Held*, that the auditor's report warranted the court in giving judgment for the assignee for the goods converted and the money received.

5. SAME.

Where a transfer by an insolvent debtor to his creditor was a fraudulent preference, so far as it was intended to secure a pre-existing debt, the creditor did not have a lien on the property transferred to the amount of loans made after the transfer and on the faith of it as, if any part of the original contract was fraudulent, the whole was invalid.

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Separate actions in tort and in contract by one Bolster, assignee in insolvency of John S. Gibbon, against one Graves. Judgment for plaintiff in each case, and defendant brings exceptions. Overruled.

Percy G. Bolster, pro se. I. R. Clark and J. H. Sherburne, Jr., for defendant.

LATHROP, J. These are two actions, one in tort in the nature of trover and the other in contract, by the assignee in insolvency of John S. Gibbon for alleged preferences received by the defendants from Gibbon within six months before the filing of his petition in insolvency.

The proceedings in the case are under Pub. St. c. 157, § 96, now Rev. Laws c. 163, § 110. In the superior court the case was sent to an auditor, who found in the action of tort that all the goods enumerated in the plaintiff's amended declaration included in the items numbered 221 to 343, both inclusive, were pledged and transferred to the defendants to secure loans and debts, past as well as present; that these pledges and transfers were made within six months before Gibbon filed his petition in insolvency; that Gibbon made the pledges and transfers to the defendants with a view to give them a preference, and the defendants received the pledges and transfers having reasonable cause to believe that Gibbon was then insolvent; that the pledges and trans-

fers of the goods enumerated in the items specified were made in fraud of the laws relating to insolvency, and were void; that the defendants converted to their own use the goods enumerated in the items above mentioned; and that the fair market value of the goods at the time of the conversion was \$6,776. In the action of contract the auditor found that on July 1, 1893, and on August 1, 1893, Gibbon executed and delivered assignments to the defendants of all his book accounts then due to him on those respective dates. The auditor further found that the assignments were within six months before the filing of Gibbon's petition in insolvency; that these assignments were made by Gibbon as collateral in part for pre-existing indebtedness at a time when he was insolvent, when he was not paying, and was unable to pay, his debts in the usual course of business; that the defendants had reasonable cause to believe that Gibbon was insolvent; and that the assignments were made, and the defendants had reasonable cause to believe that they were made, with a view of giving them a preference, and in fraud of the laws relating to insolvency. The auditor further found that after the last assignment was made Gibbon's business was interrupted by attachments and practically stopped, and that during the period of this cessation, from about August 20th to some time in October, Gibbon received from his book debtors, and turned over to the defendants, checks and money to the amount of \$1,030.59, and that the defendants owed this sum, with interest, from the date of the plaintiff's writ. At the trial before a justice of the superior court, the plaintiff put in the auditor's report and rested. The defendants put in testimony, which is reported at length in the bill of exceptions, and the plaintiff put in evidence in rebuttal. The judge refused to give certain instructions requested, and made the following findings: "In the action of tort the court finds for the plaintiff, and assesses damages in the sum of \$10,482.47. The auditor's report has not been controlled or overcome by the evidence before me, and I make my findings in accordance with his report." In the action of contract the finding was as follows: "The court finds for the plaintiff in the sum of \$1,594.32. I find that the facts in evidence before me do not control the auditor's report, and I find in accordance with his report." The case is before us on the defendants' exceptions to the exclusion of certain evidence, to the findings, and to the refusal to give the rulings requested.

The first exception relates to the exclusion of evidence of one Cram, who was assistant cashier of a national bank in 1893. He was asked whether he knew the state of the money market in Boston and vicinity through June, 1893, and down to August 10th. He answered in the affirmative. He

was then asked to state what it was, and the question was excluded. We are of opinion that the question was rightly excluded. In *Vennard v. McConnell*, 11 Allen, 555, 561, it is said by Chief Justice Bigelow: "The rule of law by which a condition of solvency or insolvency is to be ascertained and determined could not be affected or modified by any sudden, temporary, or general embarrassment of the operations of trade, causing widespread monetary distress and mercantile disaster, whatever may have been the causes which led to such a result."

2. Under Pub. St. c. 157, § 96, under which these actions were brought, it is enough to show that the debtor was insolvent; that the conveyance was made within six months before the filing of the petition, and with a view to give a preference; that the person to whom the conveyance was made had reasonable cause to believe the person making the conveyance to be insolvent; and that it was made in fraud of the laws relating to insolvency. *Whipple v. Bond*, 164 Mass. 182, 41 N. E. 203. See, also, *Denny v. Dana*, 2 Cush. 160, 171, 48 Am. Dec. 655. In *Denny v. Dana* it was held that "actual insolvency of the debtor, and reasonable belief on the part of the creditor that he is so, without contemplation of insolvency, constitute a fraudulent preference." It was competent for the auditor and the judge to find that the conveyances in question were in fraud of the insolvent law. *Abbott v. Shepard*, 142 Mass. 17, 6 N. E. 826. These cases, as we have already said, were tried by a judge without a jury; and we cannot revise his findings of fact if there was any evidence to sustain them. *Bridges v. Miles*, 152 Mass. 249, 25 N. E. 461; *Mundo v. Shepard*, 166 Mass. 323, 44 N. E. 244.

3. The remaining exceptions relate to the refusal to give the rulings requested. The first request in each case was that the plaintiff was not entitled to recover. In *Quinn v. Bay State Distilling Co.*, 171 Mass. 283, 290, 50 N. E. 637, 638, it was said by Mr. Justice Knowlton: "The auditor's report in favor of the plaintiff is enough to warrant the finding of the judge and his refusal to give the rulings requested, unless the findings in the report or the other facts stated are necessarily inconsistent with the refusal and the result." We are of opinion in the cases at bar that the defendants, on the evidence in the cases, were not entitled to have the requests granted. See *Peabody v. Knapp*, 153 Mass. 242, 243, 26 N. E. 696; *Killam v. Peirce*, 153 Mass. 502, 27 N. E. 520.

The facts in the case may be summarized as follows: The first publication of notice of Gibbon's petition in insolvency was on September 25, 1893. Gibbon had failed previously in 1891, and the defendants at that time had advanced to him the means to make a settlement with his creditors. It was

then agreed between them that Gibbon should at all times keep the defendant secured for the sum then advanced by them, and for the value of all goods they should thereafter sell Gibbon on credit. The defendants thereafter made further loans to Gibbon, and sold him further goods on credit, and he was indebted to them on both of these accounts in the sum of \$18,622.21 on June 30, 1893, before the transactions of which the plaintiff complains. Between 1891 and June 30, 1893, Gibbon gave the defendants security for indebtedness by placing merchandise in warehouses from time to time, having receipts issued for such merchandise in the defendants' name, and delivering such receipts to the defendants. There was a general understanding between Gibbon and the defendants with respect to the collateral which was thus transferred to the defendants, namely, that any and all collateral received by the defendants from Gibbon at any time became in the defendants' hands security for any and all indebtedness of Gibbon to the defendants, whether such indebtedness arose before, or contemporaneously with, or subsequently to the receipt by the defendants of such collateral. On June 30, 1893, before the transfers of which the plaintiff complains, the defendants held collateral, under the foregoing understanding, of the value of \$15,381. Previously to June 30, 1893, Gibbon had but a limited capital. He had become party to notes and obligations beyond his ability to pay, several of which had been protested for nonpayment. He had frequently renewed his notes to the defendants, and had recently been sued, and property in his store had been attached. For two years Gibbon usually had looked to the defendants when he needed a cash loan, and they practically had acted as his banker. They knew of the attachment. They knew that he was being pressed by one Holden for payment of a large debt, and there was evidence that they knew that he was on paper of Thomas & Son, who had just failed. Under these circumstances, Gibbon informed the defendants that he wished to make an assignment to them, but, upon the defendants' advice, on June 30, 1893, instead of assigning, he borrowed \$3,500 more of them, and gave them as collateral, under their general understanding with respect to collateral, merchandise of the value of \$5,646 (being the goods described in items 221 to 253, inclusive, in the bill of particulars in the action of tort), and an assignment of all his book accounts. He also agreed to assign his book accounts to the defendants in each month thereafter. On August 1, 1893, Gibbon assigned his book accounts to the defendants again. They have received under both assignments \$1,039.59, to recover which the action in contract was brought. Between June 30 and September 6, 1893, the defendants made further loans to Gibbon, and sold him goods on credit in reliance on the collateral held by them. On September 6th

the defendants lent Gibbon \$450, with which he paid his note held by one Clark, who also held as collateral the goods described in items 341 and 342 in the bill of particulars in the action of tort. Gibbon took out new warehouse receipts for these goods, and gave them to the defendants to hold as collateral, under the general understanding recited above. These goods were of the value of \$1,130. The total amount of loans made and value of goods sold by the defendants to Gibbon, from and including the loan of \$3,500 on June 30, 1893, to the date of Gibbon's insolvency, including the loan of \$450 on September 6th, was \$6,695.68. The defendants still hold Gibbon's unpaid notes, in amounts aggregating some \$6,000, which were made before June 30, 1893.

The defendants rely upon the refusal of the judge to give the sixth request in the action of contract and the twelfth request in the action of tort. These are as follows: "(6) If Gibbon made the assignment of June 30th upon the understanding that he was to be allowed to borrow to the full value of the accounts, and did so borrow, the plaintiff cannot recover. * * * (12) If the value of the goods transferred on June 30th did not exceed the advance made upon that date, and subsequently, upon the faith of such goods, no preference was in fact given, and the transfer is not voidable." We are of opinion that both of these requests were properly refused. The contention of the defendants in favor of the rulings requested is a special finding of the judge "that on June 30, 1893, the alleged value of the collateral held by the defendants was equal to the indebtedness of Gibbon to the defendants." The judge, however, did not find that the actual value of the collateral held by the defendants on June 30th was equal to the indebtedness of Gibbon to the defendants, but merely that the alleged value was equal to such indebtedness. The findings of the auditor on this point are that before the transaction of June 30th the value of the collateral was \$3,241.41 less than the indebtedness of Gibbon to the defendants. One of the defendants admitted on cross-examination "that the collateral pledged on June 30th would go to secure prior indebtedness under the old agreement between the parties, if there was an unsecured balance at that time." The judge also refused to find that the transaction of June 30th and the subsequent loans were made solely for the purpose of enabling Gibbon to continue his business, and found that the auditor's report had not been controlled by the evidence before the court. The question, therefore, which the defendants seek to raise by these requests, based upon the assumption that before the transaction of June 30th the value of the collateral equaled the indebtedness of Gibbon to the defendants, does not arise. This question is thus stated in the defendants' brief: "The question intended to be raised is whether, if one who is in-

solvent, or in the contemplation of insolvency, pledges or mortgages property as security for a present loan, with the understanding that he can borrow to the full value of such collateral, and if he does so borrow, the pledgee or mortgagee can be held liable for the value of such goods." If the transaction of June 30th was a fraudulent preference, so far as the intention was to secure the pre-existing indebtedness, it was entirely voidable at the election of the plaintiff. *Denny v. Dana*, 2 Cush. 160, 172, 48 Am. Dec. 655; *Lynde v. McGregor*, 13 Allen, 172, 181; *Forbes v. Howe*, 102 Mass. 427, 435, 3 Am. Rep. 475; *Peabody v. Knapp*, 153 Mass. 242, 28 N. E. 696; *Whipple v. Bond*, 164 Mass. 182, 188, 41 N. E. 203; *Hill v. Marston*, 178 Mass. 285, 59 N. E. 766.

The defendants next contend that the requests numbered 11 and 17 in the tort case should have been given. The eleventh request is as follows: "The defendants have a lien upon the collateral to the amount of the other fresh loans made after June 30th upon the faith of the collateral pledged then." The seventeenth request was as follows: "If the contract and agreement between Gibbon and the defendants was that Gibbon was to be allowed to borrow upon any collateral held by defendants in excess of the indebtedness, and if Gibbon did so borrow, the defendants have a lien upon the collateral to the amount of the loans so made." These requests were properly refused. The whole contract was tainted with fraud, and, as was said by Mr. Justice Hoar in *Lynde v. McGregor*, 13 Allen, 172, 181: "But no authority has been found, and we cannot believe that any exists, for the proposition that, where a contract expressly and intentionally fraudulent has been made, it is possible to give it a partial validity by any subsequent payment or advances in part without rescinding the whole. If any part of the original purpose is fraudulent, the whole may be avoided, though made upon sufficient consideration; and, in like manner, if any part of the fraudulent purpose remains, it vitiates the whole." See, also, *Lamb v. McIntire*, 138 Mass. 367, 370, 67 N. E. 320.

The seventh request in the tort case and the fourth request in the action of contract were properly refused, as the court expressly refused to find the facts upon which the requests were predicated. The same is true of the fourteenth and fifteenth requests.

Exceptions overruled.

(139 Mass. 306)

BENNETT et al. v. TOWN OF WELLESLEY et al. (39 other cases).

(Supreme Judicial Court of Massachusetts. Norfolk. Oct. 19, 1905.)

1. COUNTIES — COUNTY COMMISSIONERS — AMENDMENT OF RECORDS.

The board of county commissioners has power to amend its records according to the truth.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 70.]

2. HIGHWAYS—ALTERATION AND RELOCATION—ACTION OF COMMISSIONERS.

Whether county commissioners, in ordering changes in a street, acted under Rev. Laws, c. 48, § 1, providing for the alteration of highways, or under section 12, providing for their relocation, is not to be determined by their intention alone, but by the petition under which they acted, and by which their powers are measured.

3. SAME—CONSTRUCTION OF PETITION.

Rev. Laws, c. 48, § 1, provides for the alteration of a highway on written petition to the county commissioners, and section 52 provides for the payment of damages on the alteration of a highway by the county. Section 12 provides for the relocation of a highway, either for the purpose of establishing the boundary lines or of making alterations in the course or width thereof, on petition of the town or by five inhabitants thereof; the expense to be assessed upon the abutters, upon the petitioners, or upon the county or town, as the commissioners may order. The selectmen of a town granted a street railway a location for its tracks through a street in the town, the grant providing that at the expense of the railroad such street should "be located or relocated and widened," as the county commissioners should decree. The boundary lines of the street were uncertain and in dispute, and numerous encroachments had been made thereon by walls, fences, and buildings. The petition presented to the county commissioners recited that common convenience required "the alteration of [the street] by the widening, straightening, and relocation" of such street, and prayed that the street might be "altered by widening, straightening, and relocating" the same. *Held*, that the word "alteration" in the petition was not used in the technical sense of section 1 of the statute, but was intended to indicate the effect of relocating the street, and the petition would, notwithstanding the use of such word, be construed, in view of the situation of the street, the changes which were sought, and the language of the order granting the location for the railroad tracks, as a petition under section 12.

Knowlton, C. J., dissenting.

Case Reported from Supreme Judicial Court, Norfolk County; John A. Aiken, Judge.

Forty petitions by Mary T. Bennett and others, against the inhabitants of the town of Wellesley and county of Norfolk, for the assessment of damages caused by the taking of land for highway purposes. In the superior court it was ruled that the inhabitants of Wellesley were liable, and the petitions were dismissed as against the county of Norfolk. Reported to the Supreme Judicial Court. Cases to stand for further proceedings in accordance with the report.

H. V. Cunningham, G. Edmunds, O. A. Banker, R. A. Jackson, and W. S. Kelley, for Mary T. Bennett and others. Victor J. Loring and C. S. Quinn, for Town of Wellesley. C. F. Jenney, for Norfolk County.

HAMMOND, J. The only question is whether in passing the decree ordering the changes in Worcester street the county commissioners were acting under the first section of Rev. Laws, c. 48, or under the twelfth section. If under the first, the land damages must be paid by the county; if under the twelfth, by the town, as ordered.

This question arose in *Livermore v. County of Norfolk*, 186 Mass. 133, 71 N. E. 305, upon a demurrer to a petition for damages for land taken under this same decree; and upon the case as there presented it was held that the decree was made under the first section. But no part of the record as such was before the court, and the petition contained only a very incomplete statement of it. In giving the opinion, Knowlton, C. J., said: "From the recitals in the petition for assessment of damages, which are all that is before us to show the details of the proceedings, it is not plain beyond the possibility of question whether the commissioners were acting under Rev. Laws, c. 48, § 1, and making an alteration of the highway, or under Rev. Laws, c. 48, § 12, and merely relocating it." It was held that the recitals in the petition showed an alteration of the highway, under Rev. Laws, c. 48, § 1, rather than a mere relocation, under section 12. In these cases now before us we have the whole record of the county commissioners as it stood both before and after amendment, and also the circumstances under which the petition for the change was presented. It is plain, therefore, that the decision made in the *Livermore* Case does not relieve us from the duty of examining the question as now presented, and that the decision there reached is not conclusive in these cases.

On January 17, 1902, the selectmen of the town of Wellesley granted to the Boston & Worcester Street Railway Company a location for its tracks through Worcester street, upon certain conditions. In this grant it was provided that at the expense of the company Worcester street should "be located or relocated and widened as the county commissioners of Norfolk county shall, in consequence of a petition therefor, decree, * * * as follows." Then follows a statement of the proposed width in feet. There is a further provision that the "tracks * * * shall be located within a reserved space of 25 feet in width, and in the center of and along" the street, "as located or relocated and widened," to the width thereinbefore named. It is further provided that the company shall secure from every abutter on the street a "good and sufficient release of all lands necessary for the location or relocation and widening" of the street, * * * "as shall be determined by the county commissioners of Norfolk county, * * * in accordance with a petition therefor, or shall sufficiently indemnify said town from all damages which may be recovered or paid by said town in consequence of the taking of land * * * for the widening of said street," and "shall pay all expenses of widening" the street, "including all land damages." It was further provided that "this location is granted only on the express condition that said Worcester street shall be widened as aforesaid, and at the expense of said company, and shall

apply to and be valid only in said Worcester street located and relocated and widened and constructed as herein provided"; and also that "no track shall be laid in any portion of said street that is not located or relocated and widened and constructed as aforesaid." In the grant was set out a copy of the bond to be required of the company. One of the conditions of the bond was that the company should "pay all expenses of the location or relocation and widening" of the street to the extent thereinbefore indicated in the grant; another that the company should secure from the abutters a release of the land "necessary for the location and relocation and widening," or should pay all damages which should be recovered and paid by the town, and also all expenses of the "location or relocation and widening" of the street. Throughout the whole grant the word "alteration" is not used with reference to the contemplated changes in Worcester street. The expression uniformly used is "location or relocation and widening." It appears in the amendment to the records of the county commissioners that at the time of this grant "the boundary lines of said Worcester street were uncertain and in doubt and dispute; that the bounds thereof could not be determined; that in portions thereof * * * no bounds or monuments of any kind could be found, nor could the boundaries be made certain by records or otherwise; and that numerous encroachments had been made thereon by walls, fences, and buildings," as therein more fully set forth. The street ran from east to west through the town, and evidently was an old and important street. It is plain that the idea of the selectmen was that the street as it existed should be widened if the tracks of the street railway company were to be located therein, and that the time was opportune to have the street relocated and the encroachments upon the original location removed. The physical changes desired were in a sense an alteration, and could have been made by a petition under either the first section or the twelfth section of Rev. Laws, c. 48. If made under the first section, the land damages would be paid by the county. Rev. Laws, c. 48, §§ 1, 52. If made under the twelfth section, the commissioners could order that the expenses, including land damages, should be paid either by the abutters or the petitioners or the town or county. It is evident that the selectmen desired and intended that these changes should be made eventually at the expense of the street railway company, and one of the conditions of the grant was that the company should indemnify the town for all expense, including land damages. In this state of things the petition for the changes in Worcester street, signed by 11 persons, describing themselves as "citizens of the town of Wellesley," was presented to the county commissioners. It

represented that "common convenience and necessity" required "the alteration of Worcester street * * * by the widening, straightening, and relocation of said Worcester street," and that said widening was "rendered necessary for the public convenience, for the purpose of granting a location of the tracks of the" street railroad company; and the prayer was that the street might be "altered by widening, straightening, and relocating the same, so that the width" should be as therein particularly set forth, and for further meet and proper proceedings. A recognizance, as prescribed in Rev. Laws, c. 48, § 2, was taken; the petition being described as a petition for the "alteration" of Worcester street.

The record of the commissioners set forth that after due notice they adjudged that common convenience and necessity required that the street be "widened, straightened, and relocated," as prayed for, and that they "do so widen, straighten, and relocate anew said street." Then follows this language: "And the said location anew and widening of said Worcester street is as follows: Said Worcester street is relocated and widened and the grade thereof established as shown on" certain plans. The northerly side line of the street, "as relocated and widened," is then set out in great detail. The southerly side line, as "located or relocated and widened," is then set out. Then comes the statement that "the lines of this relocation and widening * * * are shown" upon a certain plan, called a "Plan of the relocation, widening, and established grade" of Worcester street. The decree then provides that the inhabitants of the town of Wellesley, "in which said way is located," shall complete the way, and that "said way, as relocated and widened," shall be constructed in accordance with the restrictions, stipulations, and conditions contained in the order of location granted by the selectmen of the town of Wellesley, on petition of the Boston & Worcester Street Railway Company on January 17, 1902. It is then provided that "all the expenses of making the location anew and widening prescribed in this return, including the expenses of constructing said way, and all land or other damages and expenses incident thereto, be paid by the inhabitants of the town of Wellesley." Nowhere in the record, except in the copy of the petition, are the changes described as an "alteration." Even the adjudication of common convenience and necessity does not use that word. The words are "widened, straightened, and relocated," and throughout the whole record the word "relocated" is retained.

Thus far we have spoken only of the record as it originally stood, and, in view of its language and the final order that the expenses should be paid by the town, it appears reasonably clear that the commissioners construed the petition as asking for a relocation under the twelfth section of the statute, and

not for an alteration under the first section, and acted accordingly.

Even if the record as it originally stood can be said to have left uncertain the interpretation given to the petition by the commissioners, the record as amended places the matter beyond the possibility of doubt. In the record as amended it is recited that it appeared at the hearing that the boundary lines of Worcester street were uncertain and in dispute; that the bounds could not be determined; that in portions thereof no bounds or monuments of any kind could be found; that the boundaries could not be made certain by records or otherwise; and that numerous encroachments, in the nature of walls, fences, and buildings, had been made upon the street; and it is stated that the abutting owners claimed that, by reason of the maintenance of said encroachments for many years, "they had, under the provisions of Gen. St. 1860, c. 46, § 1, Pub. St. 1882, c. 54, § 1, and Rev. Laws, c. 53, § 1, acquired title to the land and the right to permanently continue said encroachments; while in behalf of said town * * * it was claimed that the length of time and other circumstances of said encroachments were not sufficient to establish such claims." The amended record also recites those parts of the order of the selectmen granting the location of the tracks of the street railway company which refer to the "relocation and widening" of the street. It contains also the explicit statement that in acting under the petition the commissioners acted "wholly under the authority given to them in and by section 12 of chapter 48 of the Revised Laws, and under no other authority or statute whatsoever." Here, then, was a public street whose bounds, by reason of encroachments and other causes, were uncertain and in dispute. There was a proposition to devote a part of it to the tracks of a street railroad, and such additional use of the street rendered it desirable that its width should be increased. Two things were to be done—namely, to relocate and to widen. The twelfth section of the statute gives jurisdiction to the county commissioners, upon the petition of a town or five inhabitants thereof, to "relocate a way within such town, * * * either for the purpose of establishing the boundary lines of such way or of making alterations in the course or width thereof." Here, then, was presented a typical case for action under this section. That the selectmen who granted the location, and who are the first three signers to the petition to the county commissioners, supposed that the action would be taken under the twelfth section, appears quite clear from the language of the grant, and especially from the fact that they insisted upon a bond from the street railway company, conditioned for the payment of all land damages which might be "recovered and paid by the town." If the changes were to be made under the

twelfth section, there was occasion for such a provision, but not if made under the first section; for in that case the land damages would be paid by the county. As we have seen, the commissioners acted in accordance with the same view. They interpreted the petition as requesting action under the twelfth section, and they intended to act, and supposed they were acting, solely under its authority, and all proceedings are consistent with that view; and one part of the decree—namely, that part which imposes upon the town of Wellesley the burden of paying the land damages—is inconsistent with any other.

The board of county commissioners has power to amend its records according to the truth. *Gloucester v. County Commissioners*, 116 Mass. 579, and cases cited. The amendments are in harmony with all the proceedings, and especially with the order as to land damages, and were properly made. But the question whether the commissioners did act under the twelfth section is not determined by their intention alone. They acted under the petition. If, under the circumstances, it can be fairly regarded as a petition under the twelfth section, then the commissioners had the right to use the powers vested in them by that section; but if it must be regarded as a petition under the first section, then the commissioners could exercise only the powers granted them under such a petition, and the amendments, so far as they show an intention to act under powers not fairly arising upon the petition, would be of no avail. *Warren v. Street Commissioners*, 183 Mass. 119, 66 N. E. 412.

The petition sets forth that common convenience and necessity require the "alteration" of the street by the "widening, straightening, and relocation" of it, and prays that it may be "altered by widening, straightening, and relocating." If the word "alteration" was used in its technical sense, there was no need of the other words, such as "widening" or "relocation." These two words more aptly describe a case under the twelfth section. The presence or absence of one word is not always conclusive as to the character of the petition. In *Bliss v. Deerfield*, 13 Pick. 102, 106, where the petition prayed for "alterations" in a road, Shaw, C. J., said that it was very doubtful whether the word "alteration" was used technically, and in *Watertown v. County Commissioners*, 176 Mass. 22, 56 N. E. 971, it was held that, under the peculiar circumstances of the case, a petition representing that certain streets "are uncertain in their boundaries, of insufficient width, and in need of relocation, widening, and general revision," and asking that they may "be relocated or located anew, widened, and straightened," the proceedings of the county commissioners were under the first section of the statute, although the word "alteration" was not used in the petition.

The commissioners in the present case interpreted the petition as calling for action

under the twelfth section of the statute. In view of the situation of the street, the changes which the petitioners sought, and the reasons for the changes, the language of the order granting the location for the railway tracks, the manifest expectation of some, at least, of the petitioners that some, if not all, of the land damages would be assessed upon the town, and of the language of the petition, we are of opinion that the word "alteration" is not used in the technical sense of the first section of the statute, but is intended to indicate, in a general way, the effect of the relocating of the street, and of the changes in width which are to be made under the twelfth section, and that in construing the petition as one presented under this section, the commissioners committed no error in law.

In the opinion of a majority of the court, the ruling of the Chief Justice of the superior court was correct. In accordance with the terms of the report, the cases are to stand for further proceedings in that court, and it is so ordered.

KNOWLTON, C. J. (dissenting). In this case a majority of the court have agreed upon a decision which seems to me erroneous. Much as I dislike to put upon record an expression of dissent when I differ from a majority of the judges, I think in this case it is my duty to do so. If the opinion agreed to were to pass without judicial comment, it seems to me it would tend to unsettle the law, and throw the public authorities dealing with highways into confusion.

Section 1, Rev. Laws, c. 43, provides for the alteration of old highways, as well as for the location of new ones. Section 12 of the same chapter provides for the relocation of ways. Every alteration of a highway, if it involves a widening or other change of lines, includes also a relocation of it. Every relocation of a highway, if it includes, as it may, a change in the boundaries, is a change, or, in the general sense of the word, an alteration, of the way. But an alteration of a highway within the meaning of the word in the first section is not a relocation of it within the meaning of the twelfth section, and a relocation under the twelfth section is not an alteration within the meaning of the first section. In the case of a relocation, the county commissioners may, if they choose, require all the expense to be paid by the petitioners, or they may compel the abutters to pay the whole of it. Rev. Laws, c. 48, § 52. In the case of an alteration, they can do neither of these things; but all the expenses, except land damages, must be paid by the county or the town, as the county commissioners order. Rev. Laws, c. 43 §§ 52, 54, 55. In the case of an alteration, there may be an assessment of betterments, under Rev. Laws, c. 50, upon estates benefited. In the case of a relocation, there can be no such assessment of betterments. *Tufts v.*

Somerville, 122 Mass. 273. The differences in the jurisdiction of the county commissions and in the rights and liabilities of petitioners and landowners in the two classes of cases make it plain that the two sections cannot be used interchangeably to accomplish the same thing, at the election of the petitioners or at the election of the county commissioners. If what is asked for is an alteration, within the meaning of section 1, the proceedings must be under that section; and if what is desired is a relocation, within the meaning of section 12, the proceedings must be under that section, and not under section 1.

What, then, is the difference between the two classes of cases to which the two sections, respectively, apply? There is, and must necessarily be, a plain line of distinction between them, even though the decisions have not stated exactly how this line should be drawn. See *Watertown v. County Commissioners*, 176 Mass. 22, 56 N. E. 971; *Tufts v. Somerville*, 122 Mass. 273. First, we look at the words used to describe the things meant. In the first section the word is "alteration," and nothing more. In the twelfth we have: "to relocate a way within such town * * * for the purpose of establishing the boundary lines of such way, or of making alteration in the course or width thereof." The substance of the proceeding is in one case an alteration, and in the other a relocation. While a statutory alteration will usually include a relocation in a general sense, and a statutory relocation may include some alteration in a general sense, the character and principal purpose of the proceeding in each case is indicated by the word used in the statute to designate it. The word "relocate," without addition or qualification, means to locate again, and implies a preservation of the identity of the way without material change. A relocation for the first purpose mentioned in the statute is exactly this, and a relocation for the second purpose, while it permits some change in course and width, is, after all, in its substantive features a relocation as distinguished from an alteration. It has repeatedly been said in the decisions that the main purpose of locating anew or relocating is to establish the boundary lines of a road which are in doubt or dispute. *Tufts v. Somerville*, 122 Mass. 273-275; *Watertown v. County Commissioners*, 176 Mass. 22-29, 56 N. E. 971. Relocating is not intended to be used as a method of making important changes in a way. By the express terms of the statute, it can only be done when the whole road to be relocated is in a single town. The fact that the statute gives the county commissioners power to assess the whole expense upon the petitioners implies that it is intended for cases in which the expense will be very small. It is not expected, when important changes are desired for the benefit of the public, that they will be made under

a statute which holds the petitioners liable for the payment of the whole expense. The fact that, under the twelfth section the county commissioners may compel the abutters to pay all the expenses of the relocation tends to show that this section was not intended to apply when important and expensive changes are asked for. The principle under which it is held that the cost of sewers and other public works cannot constitutionally be collected from the owners of abutting estates, except to the amount of the benefits conferred, is applicable to improvements in public ways and to the provisions of this section. *White v. Gove*, 183 Mass. 333, 67 N. E. 359, and cases cited. The language of these two sections, with the various accompanying provisions, indicates the line of distinction between the different classes of cases to which they respectively apply. The first is applicable in every case of an "alteration"; that is, of an important change in any of the essential features of the way, such as largely to affect its appearance or character or fitness for use in any kind of public travel. The second is applicable in every case where a mere relocation is desired, without a change of boundaries, or with only such slight changes in the course or width or otherwise as falls short of constituting an alteration, within the meaning of section 1, and as do not affect, in a material and important way, the condition or character of the road, either in its physical features or in its adaptedness to the uses of the public. It seems to me that this is very nearly, if not quite, an accurate statement of the difference between a statutory alteration of a way and a statutory relocation of a way. I know of nothing in the statutes or decisions which is inconsistent with this view, and I do not see any reason for establishing a materially different line of distinction.

The jurisdiction of the county commissioners to act under one section or the other is determined by the language of the petition, interpreted in its application to the way referred to. If a petition plainly calls for an alteration within the meaning of section 1, the commissioners have no jurisdiction to act upon it under section 12, and if it plainly calls for a relocation within the meaning of section 12, they have no jurisdiction to proceed under section 1. Their purpose or intention cannot give them jurisdiction which is not conferred by the petition, nor change a proceeding which belongs under one section to a proceeding under the other section. The petition in this case represents "that common convenience and necessity require the alteration of Worcester street in said town, formerly known as 'Worcester Turnpike,' by the widening, straightening, and relocation of said Worcester street; * * * and that said widening is rendered necessary for the public convenience, for the purpose of granting a location of the tracks of the Boston & Worcester Street Railway therein." The petitioners

then pray that the street "may be altered by widening, straightening, and relocating the same, so that the width of said street shall be as follows," etc. They then state the widths desired through the town, which are given at 75 feet through a large portion of the distance, and at not less than 75 feet in other parts, and at 66 feet, or not less than 66 feet, through the remainder of the course. They then ask for such further proceedings as the commissioners deem proper. The petition calls for a very substantial widening through a large part of the town.

It was a matter of public record and common knowledge when the petition was filed that the selectmen had granted the street railway company a location only on condition that there should be a substantial widening, with great changes in the construction of the way, such as to leave a reserved space in the center of sufficient width for a street railway with a double track, and to provide a wrought way for travel by ordinary vehicles on the side of the road, with wrought portions at intervals across the tracks, and a sidewalk for persons traveling on foot. The petition for alteration refers in terms to this purpose of the widening, and impliedly suggests that the alteration shall be ordered in accordance with the requirements of the previous grant to the street railway company. The county commissioners interpreted the petition correctly in reference to the nature and extent of the changes asked for, and made an order accordingly, prescribing lines and construction and changes, of which the record before us fills 10 closely printed quarto pages. There is also an addition to the record, by way of amendment, which fills five pages more. The petition in terms calls for an "alteration." It then specifies the particulars in which the alteration is to be made, namely, "by widening, straightening," etc., so as to meet the requirements of public convenience and necessity for the use of the way in connection with the construction and use of a street railway. There is nothing in these particulars that tends to limit the effect of the word "alteration"; but, on the contrary, when taken in connection with the previous conditional grant to the street railway company, they show that the alteration prayed for is one that will change the whole character of the way from one end of the town to the other. Presumably, the changes ordered and completed by construction constitute by far the most important and costly alteration of a way that has ever been made in the history of the town. The words "widen, straighten, and relocate," which appear in the record of the county commissioners, do not tend to show that this was not an alteration, within the meaning of section 1, for a widening to such an extent, and for such a purpose, with a straightening, is an alteration, as distinguished from a relocation under section 12; and when there is such an alteration by widening and

straightening, a relocation, in the general sense of the word, is necessarily involved, and may, without impropriety, be included in the statement. No one has ever contended, so far as I know, that a change of either of the termini of a way, or a change in its general course is necessary to constitute an alteration of it, within the meaning of this section.

After the decision in *Ahearn v. County of Middlesex*, 182 Mass. 518, 65 N. E. 905, following *Watertown v. County Commissioners*, 176 Mass. 22, 56 N. E. 971, the county commissioners filed an amendment of their record, in which they said that they proceeded under Rev. Laws, c. 48, § 12. They said nothing else in this amendment that has any bearing upon the question which section of the statute was the foundation of their jurisdiction. So far as they referred to the previous uncertainty in the boundaries of the way, their reference has no tendency to show that the jurisdiction was not under the first section. Very often there is such an uncertainty in cases of alteration under section 1. Moreover, the petition plainly shows that this uncertainty did not move the petitioners to action, and that their animating purpose was to procure an alteration of the road by widening, straightening, and new construction, to adapt it to the changed conditions in public travel.

We have already seen that the understanding or intention of the commissioners in regard to their jurisdiction, and their statement in reference to it, cannot give a petition for an alteration under section 1 any effect as a petition for a relocation under section 12, nor subject the petitioners or the abutters to a liability for expenses which did not exist under a true interpretation of the petition. The effect of a statement of this kind, made under similar circumstances in proceedings under another statute, was discussed in *Warren v. Street Commissioners*, 183 Mass. 119-122, 66 N. E. 412. See, also, *Haven v. County Commissioners*, 155 Mass. 467-470, 29 N. E. 1083. Nor is it of any consequence if the selectmen overlooked the provisions of the statute in regard to the payment of land damages, and supposed that such land damages would be assessed upon the town, when they made their grant of a location to the railway company. The jurisdiction and power of the county commissioners were fixed by the statutes and by the petition, viewed in reference to the substantive matters in which action was prayed for, and not by any previous mistake or opinion of another tribunal.

It is conceivable that a petition might be made so ambiguous and doubtful in its meaning as to leave the commissioners uncertain, in applying it to the way, whether substantial and important changes were asked for, such as amount in law to an alteration under section 1, or only a second location, with or without slight changes, such

as would be a mere relocation under section 12. In such a case, if the commissioners gave the petition a construction which was not unreasonable, and accordingly ordered changes which would constitute an alteration, or, with a different interpretation of it, ordered a mere relocation with no change, or with only slight changes, their jurisdiction in either event would be upheld. But this is not such a case, for in my judgment the language of the petition, as applied to existing conditions, plainly called for an alteration, and the changes which the commissioners ordered amounted in law to an alteration. If this expensive widening and straightening and new construction of the way, which changed its whole character, was not an alteration, I am at a loss to know what additional change was necessary to make it an alteration.

In my view, the decision is entirely inconsistent with *Livermore v. Norfolk*, 186 Mass. 133, 71 N. E. 305, which dealt with the proceedings that are now before us. The only doubt felt or expressed in that case grew out of the fact that the original record of the petition and the action upon it was not before the court, but only a recital of what had been done. After copying the recital in the opinion, this court said: "We are of opinion, for reasons stated at length in *Watertown v. County Commissioners*, 176 Mass. 22, 56 N. E. 971, that this description shows an alteration of the highway, rather than a mere relocation of it, and that therefore the damages for the land taken are to be paid by the county." It now appears from the record before us that the description in the recital was absolutely accurate, being given in the exact words of the petition on which the jurisdiction of the county commissioners was founded, and of the substantive part of the order of the commissioners thereon. This seems to me to make the decision cover this case beyond the possibility of question. All the additional provisions of the record seem to me only to emphasize the fact that what the petitioners asked for and what the commissioners ordered was an alteration of the way, as distinguished from a statutory relocation of it.

The grant of location by the selectmen to the street railway company, in different parts and in varying language, required the street railway company to pay all the expenses of changes to be made in the way. The acceptance of this grant, and the giving of a bond in accordance with its requirement, and the subsequent action of the county commissioners in ordering the changes, made it the legal, as well as the moral, duty of the railway company to pay the land damages and the other expenses. The assessment upon the county, instead of upon the town, would open to the railway company a possible question for defense against a claim for the payment of them under one part of the bond. Other provisions in

the bond and in the grant of location, including the stipulation for the payment of all the expenses by the railway company, would not be affected by such an assessment. Whether the company could escape liability for the payment is a question which is not before us. Without intimating that it could, I think the decision of this case should not be affected by any view that may be taken of this question.

(189 Mass. 326)

LIVERMORE et al. v. NORFOLK COUNTY et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. Oct. 19, 1905.)

1. HIGHWAYS—ALTERATION AND RELOCATION
—EXPENSES OF PROCEEDINGS.

Rev. Laws, c. 48, § 52, providing that, when a highway has been established, relocated, or altered, the expense of the proceedings, the damages allowed, and the amounts awarded as indemnity shall be paid by the county upon the order of the commissioners, except as otherwise provided, does not, in view of the history of legislation on the subject (St. 1835, p. 550, c. 152, § 8; Rev. St. 1836, c. 24, § 9; St. 1851, p. 685, c. 214; Gen. St. 1875, c. 43, § 12; St. 1873, p. 593, c. 165; Pub. St. 1882, c. 49, § 13; Rev. St. 1836, c. 24, §§ 38, 42; Gen. St. 1875, c. 43, § 47; Pub. St. c. 49, § 58), require the county, where the commissioners have by valid order cast the expenses and damages on the town, to first pay the land damages itself, and then recover them from the town.

2. APPEAL—DISPOSITION OF CAUSE.

In proceedings against a town and a county for the assessment of damages caused by the taking of land for highway purposes, the court ruled, at the close of the petitioners' case, that the proceeding could not be maintained against the town, and submitted the case against the county to the jury, whereas, the petition should have been dismissed as to the county, and submitted as to the town. A verdict was rendered for petitioners, and the case was reported to the Supreme Judicial Court. By the terms of the report such entry was to be made as law and justice might require, in case petitioners' exception to the ruling ordering the petition dismissed as to the town was sustained. Held that, since the town was relieved by the ruling of the court from making further defense, the verdict rendered should be set aside, and the case should stand for trial as against the town.

Report from Supreme Judicial Court, Norfolk County; Chas. U. Bell, Judge.

Petition by George S. Livermore and others against the county of Norfolk and town of Wellesley for the assessment of damages caused by the taking of land for highway purposes. In the superior court there was a finding and verdict for petitioners as against the county, and the case was reported to the Supreme Judicial Court. Petition dismissed as against the county, verdict set aside, and case to stand for trial as against the town.

For facts see 186 Mass. 133, 71 N. E. 305.

Chas. F. Jenney, for Norfolk County. Victor J. Loring, for Town of Wellesley. C. E. Washburn, for applicants.

HAMMOND, J. When this case was here before, it was held that the allegations of the

petition set forth a case arising under the first section of Rev. Laws, c. 48, and not under the twelfth section. It was stated, however, in the opinion of the court, that "from the recitals in the petition for assessment of damages, which are all that is before us to show the details of the proceedings, it is not plain beyond the possibility of question whether the commissioners were acting under Rev. Laws, c. 48, § 1, and making an alteration of the highway, or under Rev. Laws, c. 48, § 12, and merely relocating it. If they were acting under the former section, the petition for the assessment of damages should be brought against the county of Norfolk, which would be liable under Rev. Laws, c. 48, § 52, if under the latter, the petition should be brought against the town of Wellesley, which was ordered by the commissioners to pay the expenses of the change, including the land damages. The only question before us arises on the demurrer of the county." *Livermore v. County of Norfolk*, 186 Mass. 133, 134, 71 N. E. 305. There has since been a trial upon the merits before a jury, and the case comes before us upon a report made by the presiding justice.

At this trial the records and proceedings of the county commissioners appeared in evidence substantially as in *Bennett v. Wellesley*, 75 N. E. 717, and for reasons stated in that case the majority of the court are of opinion that in construing the petition for the changes in Worcester street as a petition under Rev. Laws, c. 48, § 12, and in ordering the expenses and land damages to be paid by the town of Wellesley, the commissioners made no error in law. The order, therefore, is valid.

It is urged, however, by the petitioners that, even if the order is valid, the county, in the first instance, must pay the land damages, and then recover them from the town; and Rev. Laws, c. 48, § 52, is recited in support of that proposition. The history of the legislation shows that this position is untenable. See St. 1835, p. 550, c. 152, § 8; Rev. St. 1836, c. 24, § 9; St. 1851, p. 685, c. 214; Gen. St. 1875, c. 43, § 12; St. 1873, p. 593, c. 165; Pub. St. 1882, c. 49, § 13; Rev. St. 1836, c. 24, §§ 38, 42; Gen. St. 1875, c. 43, § 47; Pub. St. c. 49, § 58; *Damon v. Reading*, 2 Gray, 274; *Brigham v. County of Worcester*, 147 Mass. 446, 18 N. E. 220. It follows that the exception of the county to the refusal of the court to rule that "on all the evidence the petitioners cannot recover against the county of Norfolk in this action" must be sustained. By the terms of the report, therefore, the petition must "be dismissed as to the respondent county." This renders it unnecessary to consider the other exceptions of the county.

At the close of the petitioners' evidence, the court ruled that the proceedings of the commissioners were under Rev. Laws, c. 48, § 1, and that the petition would not be maintained against the town of Wellesley. To the ruling that the petition could not be main-

tained against the town the petitioners excepted. For reasons already stated, the majority of the court think that that exception must be sustained. By the terms of the report, "if the exception of the petitioners as to the ruling of the court ordering the petition dismissed as to the respondent town is sustained, or in case any other exceptions of the petitioners are sustained, such entry is to be made as law and justice may require."

It is apparent from the report that, notwithstanding the decision upon the demurrer, the town, as was very proper, was represented by counsel at the trial on the merits, and was actively engaged in opposition to the petitioners' case, until the ruling was made that the petition could not be maintained against it. This ruling, as before stated, was made at the close of the petitioners' evidence, and the town was thereby relieved from further action at the trial, and it does not appear that it took any further action in defense. Under these circumstances, it is plain that to allow the verdict to stand as against the town would be holding the town when it has not been heard. Justice requires that the verdict should be set aside.

Petition dismissed as against the county, verdict set aside, and case to stand for trial as against the town.

(189 Mass. 324)

**TOWN OF WELLESLEY v. NORFOLK
COUNTY COM'RS.**

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1905.)

**HIGHWAYS — LOCATION — ACCEPTANCE BY
COUNTY OFFICIALS—EFFECT ON RIGHTS OF
TOWN.**

An order of the county commissioners, made in compliance with Rev. Laws, c. 48, §§ 54, 56, accepting a relocated street to the extent provided for in and by the order of location, has no effect upon whatever rights the town in which the street is situated may have to insist upon the work being done to the acceptance of the selectmen.

Case Reserved from Supreme Judicial Court, Suffolk County; John W. Hammond, Judge.

Petition by the inhabitants of the town of Wellesley for a writ of certiorari against the county commissioners of Norfolk county. Dismissed.

The order of November 8, 1903, referred to in the opinion, was an order of the county commissioners accepting the street to the extent provided for in and by the order of location.

Victor J. Loring, for petitioners. Chas. F. Jenney, for respondents.

HAMMOND, J. In construing the original petition for changes in Worcester street, as brought under Rev. Laws, c. 48, § 12, as well as in amending the record of June 3, 1902, by the decree of March 24, 1903, the county commissioners made no error in law. *Bennett v. Wellesley*, 75 N. E. 717. The petition upon which was based the decree of October 20, 1903, was brought under Rev. Laws, c. 48, § 12, and we do not see that in making the decree the commissioners went beyond their authority under that section.

Although the order of November 8, 1903, speaks of the order of location granted by the selectmen to the street railway company, yet its legal effect is simply a statement made in compliance with the statute (Rev. Laws, c. 48, §§ 54, 56), that so far as the commissioners are concerned, the work has been completed to their satisfaction, and is accepted by them as in full compliance with the decree of June 3, 1902. It has no effect upon whatever rights the town may have under the grant of location to insist upon the work being done to the acceptance of the selectmen. Nor is the recital in the order that certain construction was not required by the decree of June 3, 1902, of any legal effect upon the rights of the town against the street railway company.

The majority of the court see no error in the proceedings. We have considered as waived the objections not argued upon the petitioners' brief, in view of their nature. Petition dismissed.

(189 Mass. 287)

OULIGHAN v. BUTLER et al. (two cases).**BENT v. SAME. LAWRENCE v. SAME.**

(Supreme Judicial Court of Massachusetts. Middlesex. Oct. 19, 1905.)

1. DEATH—RIGHT TO SUE—DECLARATION.

Under Rev. Laws, c. 171, § 2, authorizing a recovery of damages for wrongful death in favor of the decedent's widow, children, or next of kin, declarations failing to allege that persons killed left either widow, children, or next of kin were demurrable for want of facts.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, §§ 64-66.]

2. PLEADING—OBJECTIONS—TIME.

Such defect was one of substance, which could therefore be raised by a request for a ruling that the proof of all the allegations pleaded did not entitle plaintiffs to recover.

3. APPEAL—OBJECTIONS TO PLEADING—WAIVER.

Where, in actions for wrongful death, the declarations failed to allege that decedents left either widow, children, or next of kin, as required by Rev. Laws, c. 171, § 2, but defendant joined issue without specific objection on that ground, such objection could not be made for the first time in the Supreme Court on exceptions.

4. DEATH—EMPLOYÉS—STATUTES.

An action to recover damages for the instantaneous death of an employé, caused by the wrongful act of his employer, is expressly authorized by St. 1887, p. 899, c. 270, as amended by Laws 1892, p. 226, c. 260, § 1, which is not affected by Rev. Laws, c. 171, § 2, authorizing a recovery of damages for the death of a person not employed by the defendant, arising from the defendant's wrongful act.

5. MASTER AND SERVANT—RELATIONSHIP.

Where defendant or a certain cartridge company contracted with deceased's employer to transport the contents of certain powder magazines to a certain place pending repairs, and then to return such contents to the magazines, and deceased attended, in charge of one of his employer's teams, without any duty as to the loading of the wagons or to determine the place of deposit, deceased did not thereby become the general servant of either defendant or the cartridge company.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 144-152.]

6. SAME—QUESTION FOR JURY.

Whether, under such circumstances, deceased became defendant's servant temporarily was for the jury.

7. SAME—INJURIES TO THIRD PERSONS—NEGLIGENCE OF SERVANT—QUESTION FOR JURY.

Where certain persons were killed by the explosion of certain powder magazines, caused by the alleged negligence of G., who, with certain men, was making certain repairs to such magazine, and the evidence was conflicting as to whether a certain cartridge company or defendant contracted to make the repairs, whether G. was defendant's servant, so as to render it liable for his negligence, was for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1004.]

8. EXPLOSIVES—WRONGFUL DEATH—NEGLIGENCE.

Where, in an action for death in an explosion of certain powder magazines, there was evidence that the disaster would not have occurred except for defendant's conduct in permitting a portion of the magazine floor to become soaked with nitroglycerine, and defendant, when informed of this condition, was negligent in keeping a large quantity of explosives in the magazine, and in not having repairs made under the personal supervision of its superintendent,

ent, rather than entrusting them to an inexperienced servant, such negligence could be properly found to be the efficient cause of the accident.

9. NEGLIGENCE—JOINT TORT FEASORS—CONCURRENT AND CONTRIBUTING ACTS.

Where plaintiff's decedents were killed in an explosion of defendant's powder magazine and also of certain powder belonging to another, which had been loaded on wagons and transported some distance from the magazine pending alterations thereon, and defendant was guilty of negligence in the preparation for and the making of such repairs, and the owner of the powder removed was negligent in not transporting it to such a distance as to preclude all danger of explosion in case the magazine was ignited, which negligence of both might have contributed to intestates' death, both were jointly or severally liable.

10. DEATH—ACTIONS—JOINT TORT FEASORS—JOINDER.

In an action for wrongful death, authorized by Rev. Laws, c. 171, § 2, joint tortfeasors may be joined in one suit, though there can be but one satisfaction of any judgment that may be obtained.

11. EXPLOSIVES—NEGLIGENCE.

Where defendant's servant, entrusted with the repair of a powder magazine which had become defective and dangerous by a leakage of nitroglycerine, before removing dynamite and gunpowder therein, as directed, poured a liquid on the discolored area which had been furnished him, and then began scrubbing the surface with a broom, which resulted in a general explosion, such facts justified a finding that he was not only lacking in ordinary care but was guilty of gross negligence.

12. DEATH—WRONGFUL ACT—SERVANTS OF CORPORATIONS—GROSS NEGLIGENCE.

In an action against a corporation for wrongful death, authorized by Rev. Laws, c. 171, § 2, resulting from the acts of its servant, the negligence of defendant and the gross negligence of its servant, charged as grounds of liability, were separate and distinct issues, which should be separately submitted to the jury.

13. SAME—ACTIONS—DAMAGES—INSTRUCTIONS.

In an action for wrongful death it was proper for the court to charge that recovery could not be had for damages as in an action for personal injuries, but that the remedy provided was in the nature of a penalty, which was assessed according to the degree of defendant's culpability or that of its servants.

Exceptions from Superior Court, Middlesex County; William Cushing Wait, Judge.

Actions by William Oulighan, as administrator, etc., of William H. Bent, and by Alfred Lawrence against Paul Butler and others to recover for the wrongful death of their several intestates. A verdict was rendered in favor of each plaintiff against the American Powder Mills alone, and defendant brings exceptions. Exceptions overruled.

Wm. H. Bent and Albt. O. Hamel, for plaintiffs. Woodward Hudson, Geo. L. Mayberry, and Frank L. Washburn, for defendant.

BRALEY, J. These are actions of tort brought by the plaintiffs, under the provisions of Rev. Laws, c. 171, § 2, to recover damages for the death of their intestates, each of whom, at the time of his decease, is admitted to have been in the exercise of

due care. There were four defendants originally, but by reason either of pleas in abatement that were sustained, or of rulings made at the trial, the American Powder Mills was left as sole defendant, against which each of the plaintiffs has obtained a verdict.

The remedy given being purely statutory, it became obligatory to allege and prove that the several decedents left either a widow, children, or next of kin, to whom any damages that might be recovered were to be paid in the proportions specified by the statute. By reason of the omission of such allegations, the declaration did not set forth a legal cause of action, and hence was demurrable. *Commonwealth v. Boston & Albany Railroad Co.*, 121 Mass. 36. Or, the defect being one of substance, and not of form merely, this question could be raised by a request for a ruling that proof of all allegations pleaded did not entitle the plaintiffs to recover. *Commonwealth v. Eastern Railroad Co.*, 5 Gray, 473; *Hervey v. Moseley*, 7 Gray, 479, 484, 66 Am. Dec. 515. But the defendant was content to join issue and to try the cases within the pleadings as they stood. Under the general request for a ruling that upon all the evidence the actions could not be maintained, this objection was not alluded to, nor directly called to the attention of the presiding judge. By the course taken, he well may have understood, as he probably did, that nothing more was intended than to generally cover the questions more directly and fully shown by the specific requests. It can hardly be doubted that, if the objection now raised then had been stated, this difficulty would have been obviated by an amendment, or disposed of by a distinct and positive ruling. This exception, therefore, cannot be considered open, because not raised before or passed upon by the trial court. *Edwards v. Carr*, 13 Gray, 234, 238; *Hicks v. New Haven & Hartford Railroad Company*, 164 Mass. 424, 429, 41 N. E. 721, 49 Am. St. Rep. 471.

Another exception raises the question that upon the evidence the intestate, Charles W. Moore at the time of his death was in the employment or service of the defendant, and thus not within the class for whose death damages are recoverable under the statute. The Statutes of 1897 (page, 388, c. 416) and of 1898 (page 724, c. 505), of which Rev. Laws, c. 171, § 2, is a substantial re-enactment, were passed after the statute of 1887 (page 899, c. 270), as amended by St. 1892, p. 226, c. 260, § 1, commonly known as the "Employer's Liability Act," took effect. When thus amended, the act contained provisions for the recovery of damages for the instantaneous death of an employé caused by the wrongful act of his employer. By these several remedial enactments, it must be deemed to have been the intention of the Legislature to establish a system under which damages might be awarded for death arising from the wrongful act of a person or corporation, whether the relation of master and servant

did or did not exist between the decedent and those responsible for his death. Upon ascertaining the relation, it then can be determined under which statute the remedy provided is to be sought.

The fact that Moore was in the general employment of the Stanley Transportation Company, which had been hired to transport the contents of the magazine of the United States Cartridge Company, and for this purpose attended in charge of one of its teams, does not appear to have been disputed. There was uncontroverted evidence that this was his only duty, as the boxes of powder were to be loaded onto the wagons by others, who then would direct where the teams should be driven. After the loaded wagons had been taken to what perhaps was considered a safe distance, the horses were to be unhitched and sent to their stable, while the workmen were making certain contemplated repairs of the powder house. Upon the completion of these repairs, the drivers, with the horses, were to return and move back the powder. No other directions are shown to have been given to him by any one on the premises engaged in the work of removal or of repair, nor does it appear that he otherwise was required to submit himself to their direction or control. A servant sent to perform work for another person, with whom a contract for its performance has been made by his master, does not by that fact alone, at common law or by the statute under which these actions are brought, become a servant of the latter. *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922; *Delory v. Blodgett*, 185 Mass. 126, 69 N. E. 1078, 64 L. R. A. 114, 102 Am. St. Rep. 328. Under these circumstances, the jury could find that, if subject to the direction of those in charge as to where he should drive his wagon after it was loaded, he still remained the servant of his original employer, who through him retained the control and care of the horses; and whether his master was employed by the United States Cartridge Company or by the defendant, he did not become the general servant of either. *Huff v. Ford*, 126 Mass. 24, 30 Am. Rep. 645; *Reagan v. Casey*, 160 Mass. 374, 36 N. E. 58; *Driscoll v. Towle*, *ubi supra*; *Delory v. Blodgett*, 185 Mass. at page 129, 69 N. E. at page 1080. It therefore could not be ruled as matter of law that he was the defendant's servant, and this question was rightly submitted to the jury.

As the case was tried on the first count of the declaration, which charged negligence of the defendant or the gross negligence of its servants or agents, in considering the remaining exceptions it becomes important to recur somewhat fully to the evidence for the purpose of determining what legal relations, if any, it sustained to the persons present at the time of the explosion, as well as the questions of negligence. There were two buildings, containing three magazines. Of these, two were under one roof, but sepa-

rated by a partition of open joists about two inches apart; one compartment being used by the partnership known as the "United States Cartridge Company" for the keeping of gunpowder alone, while the other was occupied by the defendant for the keeping of gunpowder and dynamite, of which a large quantity of each was then on storage. Nearly four weeks before the explosion, the employees of the first company had observed that the floor on the defendant's side was discolored, and that the discoloration had spread through the partition. Upon investigation it was decided that this was caused by the leakage from the dynamite of nitroglycerine, which had soaked into the floor. The danger to the lives of those employed about the premises or living in that vicinity by reason of its explosive character and proximity to other explosives being obvious, on July 7th notice was given to the local agent of the defendant by the United States Cartridge Company that the spot which had appeared was believed to be nitroglycerine, and requesting that the source of danger should at once be remedied; but it was not until July 29th, and after further correspondence with the defendant and interviews with its superintendent, that arrangements were finally made to remedy this dangerous condition by removing the discolored portion and putting in a new floor. The evidence, however, being conflicting whether the United States Cartridge Company contracted to make these repairs, which included the temporary removal of the contents of their magazine, or whether one Goodwin, who with the men under him actually undertook to perform the work, was in the employment of the defendant, this question was properly left to the jury, with instructions that, unless he was the defendant's servant, it would not be responsible, if he was found either to have been incompetent or grossly negligent. If the explosion, which followed after the work began, was immediately caused by the act of Goodwin, it was open upon the evidence to find that the disaster would not have occurred except for the defendant's conduct in permitting a portion of the floor to become soaked with a high explosive, or, when informed of this condition, to continue keeping in its magazine a large quantity of explosives, or in not having the repairs made under the personal supervision of its superintendent, rather than entrusting them entirely to an inexperienced servant. From one or all of these causes, that an explosion might be precipitated was a probable consequence, which, in the light of common experience, the defendant was called upon reasonably to anticipate, and to guard against by taking every proper precaution. *Lane v. Atlantic Works*, 111 Mass. 136; *Derry v. Flitner*, 118 Mass. 131, 134; *Hill v. New River Co.*, 9 B. & S. 303. Its negligence, therefore, could be found to have

been the efficient cause of the accident. *McCauley v. Norcross*, 155 Mass. 584, 586, 587, 30 N. E. 464; *Lynn Gas & Electric Co. v. Meriden Fire Insurance Co.*, 158 Mass. 570, 575, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540, and cases there cited; *Koplan v. Boston Gas Light Co.*, 177 Mass. 15, 27, 58 N. E. 183; *Higgins v. Higgins*, 188 Mass. 113, 74 N. E. 471.

The defendant, however, urges that the rule as to proximate cause applicable to suits for damages arising out of injuries received from defective highways should be followed. But this rule that the accident must be caused solely by the defect rests on the construction of the statute, to which it should be confined. *Lynn Gas & Electric Co. v. Meriden Fire Insurance Co.*, 158 Mass. at page 576, 33 N. E. at page 691, 20 L. R. A. 297, 35 Am. St. Rep. 540; *Raymond v. Haverhill*, 168 Mass. 382, 384, 47 N. E. 101; *Nestor v. Fall River*, 183 Mass. 265, 267, 67 N. E. 248.

It also is shown that the boxes of powder belonging to the other company, and temporarily on the wagons at a distance from the defendant's magazine, exploded; and, there being no evidence that one explosion more than the other was the cause of the death of the decedents, the defendant takes the position that, under the statute, its negligence or the gross negligence of its servant must have been the sole cause of death, or the plaintiffs cannot recover. It may be assumed that the duty still rested upon the owners of the powder, which was being removed with their knowledge and consent, properly to protect it from the hazard of its being exploded; and, in view of the generally dangerous conditions that were present, if it should have been transported to such a distance as to preclude all danger of its taking fire provided the contents of the defendant's magazine were ignited, then their conduct might be found to have been negligent, thus contributing to the intestates' death. But, even then, the rulings requested on this branch of the case were inappropriate. In the practical furtherance of justice, it is a principle of the law of torts that where two or more wrongdoers injure another in person or in property by their several acts, all of which are concurrent and contribute to one wrong, but which might have been caused by each, then, if upon the evidence no distinction can be drawn between their acts, they all are jointly or severally liable. *Boston & Albany Railroad Co. v. Shanly*, 107 Mass. 568, 579; *Munroe v. Carlisle*, 176 Mass. 199, 57 N. E. 332; *Corey v. Hevener*, 182 Mass. 250, 65 N. E. 69. For convenience joint tortfeasors may be joined in one suit, or sued separately, but the measure of recovery, under Rev. Laws, c. 171, § 2, would be the same, though there could be but one satisfaction of any

judgment that might be obtained. *Elliott v. Hayden*, 104 Mass. 180; *McAvoy v. Wright*, 137 Mass. 207.

In answer to questions submitted to them, the jury also found that the agents or servants of the defendant were grossly negligent. To reach correctly this conclusion, they must have determined, under the instructions, that Goodwin was present as the defendant's servant and their answer to the second question should be taken to refer to and characterize his conduct. Unless there was evidence to sustain this finding, then the defendant's fourteenth request should have been given. The dangerous character of the undertaking was fully known to him. Without removing the large quantity of dynamite and gunpowder that still remained in the defendant's compartment, he poured upon the discolored area a liquid that had been furnished to him, but which he was instructed not to use until the entire contents of both magazines had been removed. It further distinctly appears that he was told that, if the dynamite and powder then in the defendant's magazine exploded, it instantly would generate a heat sufficiently intense to fire all the powder on the teams and in the other storehouse. After applying this liquid, he began scrubbing the surface with a broom. Thereupon smoke arose, which increased in volume, and, though water was applied, it could not be extinguished, and a general explosion followed. To use deliberately, and attempt to brush in, a solution without knowing what the effect would be, and where the highest degree of care should have been exercised, was not according to the dictates of common prudence and foresight. Upon proper consideration, as a reasonable man, he must have known of the dangerous surroundings, and to have realized that any agency used might be attended with great danger. Neglecting obvious precautions, he unhesitatingly went forward, when he ought to have ascertained what effect the solution and his manner of applying it would have upon the nitroglycerine; or, if an experiment was to be made without such knowledge or examination, then he should have taken every precaution against a possible ex-

plosion. Owing to the inflammable nature of the substance with which he was called upon to deal, and where, unless the greatest care was exercised, ignition might take place, followed probably by destruction of life and property, the jury well might find that his conduct was not only lacking in ordinary care, but rose to that degree of reckless indifference to consequences sufficient to constitute gross negligence. *Galbraith v. West End Street Railway*, 165 Mass. 572, 581, 43 N. E. 501; *Banks v. Braman*, 188 Mass. 387, 74 N. E. 594.

Although the plaintiffs were rightly allowed to go to the jury upon both issues, these grounds of liability have been held distinct in statutory actions against corporations operating railroads and railways for loss of life of one not being a passenger. *Com. v. Boston & Maine Railroad*, 133 Mass. 383; *Peaselee v. Fitchburg Railroad*, 152 Mass. 155, 25 N. E. 71; *Gay v. Essex Electric Street Railway*, 159 Mass. 242, 34 N. E. 258; *Gordon v. West End Street Railway*, 175 Mass. 181, 55 N. E. 990.

The statute on which the present cases are founded extends the remedy for death by wrongful act to all corporations, and should be similarly construed. *Kelsey v. New York, New Haven & Hartford Railroad Co.*, 181 Mass. 64, 68, 63 N. E. 8. We assume, from the silence of the bill of exceptions upon this point, that this distinction was pointed out, and the jury instructed that, if they found the accident was caused by the defendant's negligence, they would have no occasion to determine the question of gross negligence.

There was no exception taken to the rulings on the measure of the defendant's liability, and the jury were accurately instructed that recovery could not be had for damages as in an action of tort for personal injuries; but the remedy provided was in the nature of a penalty, which must be assessed according to the degree of the defendant's culpability or that of its servants. *Hudson v. Lynn & B. Railroad Co.*, 185 Mass. 510, 517, 518, 71 N. E. 660.

Exceptions overruled.

(189 Mass. 377)

FLYNN v. BUTLER et al.(Supreme Judicial Court of Massachusetts.
Middlesex. Oct. 24, 1905.)**1. EXPLOSIVES — REGULATION — STATUTES — PERSONAL INJURIES — STATUTORY REMEDIES.**

Rev. Laws, c. 102, § 83, regulates the keeping and storage of gunpowder in towns having a fire department, etc., and provides a fine, but no civil remedy, for violation. Section 103 declares that whoever suffers injury by the explosion of an explosive being kept or transferred contrary to law may recover damages therefor against the persons violating such law; but section 105 defines the word "explosive" to include substances other than gunpowder. *Held*, that a person injured by an explosion of gunpowder kept by defendants in violation of such act had no statutory cause of action for such injuries.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Explosives, §§ 4, 5.]

2. NUISANCE—POWDER MAGAZINE—EVIDENCE.

On an issue as to whether a double magazine, filled with a large quantity of gunpowder, constituted a nuisance as a peril to life and property in the vicinity by reason of a possible explosion, evidence as to the proximity of dwellings and highways, the usual facilities for public travel, and the density of the population in the vicinity, was admissible.

3. SAME—HAZARDOUS SUBSTANCE.

Where a powder magazine, by the explosion of which plaintiff was injured, was extremely hazardous, as ordinarily used, by reason of its location, etc., or became such by the presence of nitroglycerine, with which a portion of the floor had become saturated, it was so intrinsically harmful as to constitute a nuisance.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 145.]

4. SAME—PERSONAL INJURIES—RIGHT TO USE —RELIEF.

Where plaintiff was injured by the explosion of a powder magazine, the maintenance of which constituted a public nuisance, he was entitled to maintain a private action against the owners for damages sustained, to be followed, in the discretion of the court, by judgment for an abatement.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Nuisance, § 169.]

5. SAME—INJUNCTION.

A person injured by the explosion of a powder magazine, which had become a public nuisance, may maintain a bill in equity for an injunction to restrain its continuance.

6. EXPLOSIVES—CARE REQUIRED.

Where defendants maintained a powder magazine on their own land, they were bound to take every possible precaution absolutely to prevent injury therefrom to those living in the neighborhood, and were liable for such injuries, unless caused by an explosion precipitated by a great and unanticipated natural force, or by wrongful acts of persons over whom defendants had no control, which could not reasonably have been anticipated.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Explosives, §§ 4, 5.]

7. SAME—JOINT TORT FEASORS.

Defendant and the A. powder mills occupied certain connected powder magazines, and defendant, knowing that the premises had become inherently dangerous by the leakage of nitroglycerine in its magazine, made arrangements with the mills for the repair of the magazine, involving removal of large quantities of defendant's powder, which was taken from the magazine on wagons some distance therefrom until the repair work was finished, when

it was to be returned. Defendant, knowing that the repair work was dangerous, failed to remove the powder a sufficient distance from the magazine, so that it also was exploded by the explosion of the magazine, injuring plaintiff and others. *Held* that, the explosion being undoubtedly more destructive by the simultaneous explosion of the magazine and the powder on the wagons, defendant and the A. mills were joint tortfeasors, against each or both of whom plaintiff was entitled to maintain her action for injuries, regardless of the arrangement between them for the repair of the magazine.

8. ASSIGNMENTS — PERSONAL INJURIES — CLAIMS.

A claim for personal injuries is not assignable before judgment.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, § 43.]

9. RELEASE—PARTIES IN INTEREST.

Where defendants were not parties to the assignment of a claim for personal injuries claimed to be a technical release, and there were no recitals therein that it was made for their benefit, it did not operate to release the cause of action against defendants.

10. SAME—ASSIGNMENT.

Where an assignment of a claim for personal injuries did not purport to extinguish the claim, but to assign it as an existing cause of action, it could not operate as a release.

11. EVIDENCE—WRITTEN INSTRUMENTS—CONTRADICTION BY PAROL.

Where an assignment of a cause of action for personal injuries was unambiguous, parol evidence was inadmissible to explain or vary its terms.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1733.]

12. PRINCIPAL AND AGENT—POWERS—TERMINATION.

Where an assignment of a claim for personal injuries contained a power to release, the power, being a mere naked authority, became inoperative on the failure of the consideration for the assignment.

13. SAME—IMPLIED REVOCATION.

Where plaintiff assigned a claim for personal injuries, and executed a power to release the same, such power was impliedly revoked by plaintiff subsequently commencing suit on the claim.

Exceptions from Superior Court, Middlesex County; William C. Wait, Judge.

Action by one Flynn against one Butler and others for personal injuries caused by an explosion of certain gunpowder and dynamite. The court directed a verdict for defendants, and plaintiff brings exceptions. Sustained.

Francis P. Rivet and Albt. S. Howard, for plaintiff. Geo. L. Mayberry, Frank L. Washburn, and Burke & Corbett, for defendants.

BRALEY, J. This is an action of tort for personal injuries caused by the explosion of gunpowder and other explosives under the same general conditions which appear in the case of Oughlhan, Adm'r, v. Butler et al, 75 N. E. 726.

By an amendment the third count of the declaration was abandoned, and the trial proceeded upon the remaining counts. The first of these alleged that the defendants' gunpowder was stored in violation of Rev.

Laws, c. 102, § 93, while by the second the plaintiff sought to hold them liable for the maintenance of a nuisance. The land upon which the powder house stood was situated in the town of Tewkesbury, which maintained no fire department. Neither had it adopted any by-laws relating the manner in which this or other explosives should be stored or kept for sale. No notice ever had been given to the fire wardens of the town, as required by the statute, of the amount of gunpowder which the defendants proposed to keep, with a description of the building in which it was to be stored, though they had used the premises for this purpose from 1893 to the date of the explosion. But if, without giving such notice, its storage was made a penal offense, no civil remedy to recover damages is given by this section to those injured by its explosion. Such a remedy is provided by section 103, where the injury follows from the keeping of explosives or their transportation in violation of the general provisions of this chapter. Gunpowder, however, being expressly excepted by section 105, the plaintiff, upon the evidence, is left without any statutory cause of action, and is obliged to rely upon the second count. Rev. Laws, c. 102, §§ 93, 103, 105.

In *Com. v. Kidder*, 107 Mass. 188, 192, it was said: "A nuisance at common law may consist in the keeping or manufacture of gunpowder, naptha, or other explosive or inflammable substances in such quantities and places or in such manner as to be dangerous to the persons and property of the inhabitants of the neighborhood." In a community sparsely settled, a magazine of the capacity of that belonging to the defendants, when filled with the quantity of gunpowder shown by the evidence, may not imperil life or property in the vicinity by reason of a possible explosion; but, if located in a more populous neighborhood, it might be found to endanger both. In such an inquiry, the proximity of dwellings or of highways, or of the usual facilities for public travel, or the density of population, may be shown; and the exclusion of the evidence offered by the plaintiff for this purpose was erroneous.

Under suitable instructions, the jury could have found that by reason of its location the magazine, as ordinarily used, or after its use had become extremely hazardous by reason of the presence of nitroglycerine, with which a portion of the floor had become saturated, was within that class of dangerous objects that, according to common experience, are likely to cause damage, or are considered so intrinsically harmful as to expose the persons or property of others to the chance of instantaneous injury or destruction. *Cooley on Torts* (2d Ed.) 722. See *Pollock on Torts* (7th Ed.) 400, 404, 489, 490. If this condition was established, then the maintenance of a building so used became a constant menace to the safety of the immediate community, and hence constituted a nuisance.

Com. v. Kidder, ubi supra; *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296; *Cheatham v. Shearon*, 1 Swan (Tenn.) 213, 55 Am. Dec. 734; *Regina v. Lister*, *Deardsley & Bell*, 209; *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Wilson v. Phoenix Powder Co.*, 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; *McAndrews v. Collier*, 42 N. J. Law, 189, 36 Am. Rep. 508; *Lafin Powder Co. v. Tearney*, 181 Ill. 322, 23 N. E. 385, 7 L. R. A. 262, 19 Am. St. Rep. 74; *Bradford Co. v. St. Mary's Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528, 45 L. R. A. 858, 71 Am. St. Rep. 740; *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Emory v. Hazard Powder Co.*, 22 S. C. 476, 53 Am. Rep. 730; *Commings v. Stevenson*, 76 Tex. 642, 13 S. W. 556; *Rudder v. Koopman*, 116 Ala. 332, 22 South. 601, 37 L. R. A. 489; *Wier's Appeal*, 74 Pa. 230. Compare *Dilworth's Appeal*, 91 Pa. 247; *Klinney v. Koopman*, 116 Ala. 310, 22 South. 598, 37 L. R. A. 497, 67 Am. St. Rep. 119; *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 713, 48 Am. St. Rep. 146; *Kleebauer v. Western Fuse & Explosive Co.*, 138 Cal. 497, 71 Pac. 617, 60 L. R. A. 377, 94 Am. St. Rep. 62. Where the general public only are annoyed, the remedy would be by indictment (*Commonwealth v. Rumford Chemical Works*, 16 Gray, 231; *Com. v. Parks*, 155 Mass. 531, 533, 30 N. E. 174; *Com. v. Packard*, 185 Mass. 64, 69 N. E. 1067); but when direct injury to an individual results, a private action can be sustained for damages suffered, to be followed in the discretion of the court by judgment for an abatement (*Codman v. Evans*, 7 Allen, 481; *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 90 Am. Dec. 181; *Quinn v. Lowell Electric Light Corporation*, 140 Mass. 106, 3 N. E. 200; Rev. Laws, c. 186). A bill in equity also may be maintained for an injunction to restrain its further continuance. *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519.

In this continued use of their land at the risk of inflicting injurious consequences upon others, the defendants were under a legal obligation to take every possible precaution absolutely to prevent injury therefrom to those living in the neighborhood. *Gray v. Boston Gas Light Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Ainsworth v. Lakin*, 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 182, 91 Am. St. Rep. 314. See *Davis v. Rich*, 180 Mass. 235, 237, 62 N. E. 375, and *Rockport v. Rockport Granite Co.*, 177 Mass. 246, 255, 58 N. E. 1017, 51 L. R. A. 779. The only exceptions are a possible explosion precipitated by a great and unanticipated natural force, or the wrongful acts of persons over whom they had no control; and that reasonably could not be anticipated. *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Gorham v. Gross*, 125 Mass. 232, 233, 28 Am. Rep. 224. The defendants endeavor to avoid this liability, because there was evidence from which it might have been found that the explosion

would not have occurred if the American Powder Mills, which was making the repairs, and over whose magazine they had no supervision, had not been negligent. No contract was entered into by which the mills engaged independently to repair the floor of the defendants' magazine. If there had been such a contract, they would not have been exonerated. *Hilliard v. Richardson*, 3 Gray, 349, 396, 68 Am. Dec. 743. At most the arrangement amounted to a revocable license to go upon the premises and handle their gunpowder for the purpose of removing from each compartment a source of danger common to both, but permitted to exist by the mills, that, as between themselves, alone was responsible. The boxes of powder, although on the wagons, still remained the property of the defendants, and subject to their control. Even if done by order of a servant of the mills, the jury might find that the temporary shifting of this explosive from one part of the lot to another, which, as tenants in common, the defendants or their licensee could rightfully use for this purpose, did not render its keeping less noxious. Nor was there in any sense an abandonment by them of the premises as a permanent place for its unlawful storage. Besides, they were fully informed of the cause that had made necessary the removal of a portion of the floor of the several compartments, as this work had been undertaken at their urgent request. They knew of the dangerous character of the work required, and also that during these repairs their own gunpowder would have to be removed to a place of safety. This contemplated use of their premises manifestly would be attended with great danger, by reason of the highly combustible quality of the nitroglycerine. In the natural course of things, if suitable precaution was not taken, this substance, upon friction, was likely to ignite, and the heat thus generated probably would set fire to the several explosives. It was equally plain that, if their gunpowder exploded in bulk, injury to their neighbors might follow. With this understanding of the attendant risks, they were not relieved from responsibility simply because they permitted the tenant of the adjoining compartment, for their mutual benefit, to repair the magazine, and for this purpose to remove temporarily its contents. *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Lane v. Atlantic Works*, 111 Mass. 136; *Derry v. Flitner*, 118 Mass. 184; *McCauley v. Norcross*, 155 Mass. 584, 586, 80 N. E. 464; *Wetherbee v. Partridge*, 175 Mass. 185, 55 N. E. 894, 78 Am. St. Rep. 486; *Shipley v. Fifty Associates*, 106 Mass. 194, 200, 8 Am. Rep. 818; *Koplan v. Boston Gas Light Co.*, 177 Mass. 17, 27, 58 N. E. 183; *Turner v. Page*, 186 Mass. 600, 72 N. E. 329. Whether placed in the magazine or on wagons, the primary duty still rested on the defendants so to handle their gunpowder as not to jeopardize persons or property in the vicinity. *Bower v. Peate*, 1

Q. B. Div. 321; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Stewart v. Putnam*, 127 Mass. 403; *Woodman v. Metropolitan Railroad*, 149 Mass. 335, 340, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; *Ainsworth v. Lakin*, *ubi supra*. Compare *Patnoud v. New York, New Haven & Hartford Railroad Co.*, 180 Mass. 119, 120, 61 N. E. 813. The explosion undoubtedly was rendered more destructive by the simultaneous exploding of the different magazines, yet the plaintiff was entitled to maintain her action against each or all who contributed to her injury. *Boston & Albany Railroad Co. v. Shanly*, 107 Mass. 568, 579; *Oulghan, Adm'r, v. Butler*, 75 N. E. 728.

She further seeks to hold the defendants liable for the discharge of the contents of the second building owned by them, but leased and occupied at the time by their tenant for the storage of gunpowder. It is enough to say that this claim cannot be sustained, as the declaration contains no sufficient allegations setting forth such a cause of action.

There remains for consideration the effect of an instrument alleged to have been executed by the plaintiff, under which the defendants contend that by the general clause "all other claims and demands which we may have by reason of damage of any name or nature arising out of said explosions," she released them from any liability for damages covered by the present suit. It was a serious question of fact whether this instrument was executed under such circumstances as to make it legally binding upon her, and, if it is found to have the inclusive effect for which the defendants contend, this issue should have been submitted to the jury. *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747. When considered as an attempt to assign a claim for her personal injuries, no title passed to the assignee, as such a claim was unassignable before judgment. *Rice v. Stone*, 1 Allen, 566; *Stone v. Boston & Maine Railroad Co.*, 7 Gray, 539; *Linton v. Hurley*, 104 Mass. 353; *Bennett v. Sweet*, 171 Mass. 600, 51 N. E. 183; *Robinson v. Wiley*, 188 Mass. 583, 74 N. E. 923. But if, while expressed in the form of an assignment, it was the intention of the parties that the instrument should operate as a technical release, the defendants are not parties. Neither are there any recitals that it was made for their benefit. No appropriate words are found which give it this effect, and, being unambiguous, parol evidence was inadmissible to explain or vary its terms. *Hammond v. Pinkham*, 149 Mass. 356, 359, 21 N. E. 871. Furthermore, the claim was not extinguished, but, on the contrary, is expressly assigned as an existing cause of action.

The defendants further contend that the writing may be given effect as a power of attorney, authorizing the agent to release the demand. Even then, so long as the power remained unexecuted, it was revocable at the pleasure of the plaintiff. The agency conferred was in conjunction with the subject-

matter of the assignment, the consideration of which, so far as it relates to the wrong to her person, had fully failed. Upon this part of the instrument becoming inoperative, the accompanying power became a mere naked authority, uncoupled with any vested interest of the agent, or without conferring upon him any valuable independent rights as a consideration. By the defendants' amended answer, pleading the assignment as a release, or by the evidence, it nowhere appears that any further relinquishment of her claim was attempted. It accordingly may be assumed that after delivery and payment of the money no steps were taken to exercise the power, or to effect an adjustment before the bringing of this action.

In commencing the suit and proceeding to trial the plaintiff could be found to have manifested her intention to withdraw any authority she previously may have delegated. Thereupon it would be terminated by an implied revocation, of which the attorney, upon the evidence, must be presumed to have had knowledge. The plaintiff, consequently, is not barred from prosecuting her action.

We are of opinion, for the reasons stated, that the case should have been submitted to the jury, and that the ruling directing a verdict for the defendants was wrong.

Exceptions sustained.

(189 Mass. 226)

FEENEY v. YORK MFG. CO.

DONOVAN v. SAME.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 24, 1905.)

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—DEFECTIVE APPLIANCES—MASTER'S LIABILITY.

Rev. Laws, c. 106, § 71, authorizing an employé to recover for a personal injury caused by a defect in the ways, works, or machinery in the business of the employer, or by the negligence of a person in the service of the employer exercising superintendence, does not limit the right of recovery to injuries caused by defective permanent appliances, but embraces wrongs arising from negligence of the employer, or those representing him, in directing an employé to use an unsafe appliance, though it may be only of a temporary character, such as a staging.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 199-211.]

2. SAME—DEFECTS DISCOVERABLE ON EXAMINATION.

The rule that an employer, buying from a reputable maker a completed appliance recognized as suitable, is not liable to an employé for injuries due to latent defects, has no application where on a superficial examination the weakness of the appliance was discoverable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 233, 237.]

3. SAME—PRESUMPTION OF EMPLOYEE'S PERFORMANCE OF DUTY.

Employés directed by a person intrusted with the supervision of the employer's business to use a completed staging have a right to rely on the presumption that the employer had performed its duty, with the implied assurance

that the structure so furnished could be safely used.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 713, 778.]

4. SAME—DEFECTIVE APPLIANCE—LIABILITY OF MASTER.

The liability of an employer furnishing a defective staging to his employés is not limited to the actual knowledge of its superintendent that the staging was defective, but includes responsibility for the negligence of the superintendent in not ascertaining the existence of the defect before directing the employés to use it, if by due diligence on his part the defect could have been discovered.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 406, 465.]

5. SAME—QUESTION FOR JURY.

Whether a superintendent directing employés to use an appliance could, by the exercise of ordinary care, have discovered a defect therein, is for the jury.

6. APPEAL—ESTOPPEL TO ALLEGE ERROR.

Where the court erroneously admitted, over plaintiff's objection, a record, without sufficient authentication, defendant could not complain of an instruction limiting the effect of the record, as he obtained a limited benefit from evidence that should have been entirely excluded.

Exceptions from Superior Court, Suffolk County; John H. Hardy, Judge.

Actions in tort for personal injuries by John Feeney against the York Manufacturing Company and by John J. Donovan against the same defendant. There were verdicts for plaintiffs, and defendant brings exceptions. Overruled.

Henry A. Richardson, for plaintiffs. Frank N. Nay and Leon M. Abbott, for defendant.

BRALEY, J. The temporary staging provided for the use of the plaintiffs collapsed because constructed of insufficient materials, but under Rev. Laws, c. 106, § 71, it formed no part of the permanent "ways, works, and machinery" of the defendant. *Burns v. Washburn*, 160 Mass. 457, 36 N. E. 199. By the statute the right of recovery, however, is not limited to injuries caused to employés by defective permanent appliances, but also embraces wrongs that may arise from negligence of the employer, or of those properly representing him, in directing an employé to use an unsafe appliance, even though it may be only of a temporary character. *Arkerson v. Dennison*, 117 Mass. 507; *Ryan v. Tarbox*, 135 Mass. 207; *Haley v. Case*, 142 Mass. 316, 7 N. E. 877; *Ryalls v. Mechanics' Mills*, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667; *Meagher v. Star Laundry Co.*, 187 Mass. 586, 73 N. E. 853. The doctrine of exemption from liability of an employer who buys from reputable makers for use in his business a completed machine or other appliances which generally are recognized as being suitable, but prove to be unsound by reason of latent defects, has no application in the present case, as it appears from the evidence that upon a superficial examination the structural weakness of the staging could have been readily discovered. *Roughan v. Boston & R. Block Co.*, 161 Mass. 24, 36 N. E. 461; *Reynolds v. Mer-*

chants' Woolen Co., 168 Mass. 501, 47 N. E. 406. See, also, *Toy v. United States Cartridge Co.*, 159 Mass. 313, 315, 34 N. E. 461. It also may be said that if sufficient and suitable materials had been provided by the defendant, and the plaintiffs in their own way had built the staging they were to use, the risk of defective construction would have been assumed by them. *Colton v. Richards*, 123 Mass. 484, 488; *Reynolds v. Barnard*, 168 Mass. 226, 46 N. E. 703; *Thompson v. Worcester*, 184 Mass. 354, 68 N. E. 833. But being ignorant of its construction or suitability, when directions were given by a person intrusted with supervision to use a completed staging, they had a right to rely on the presumption that their employer had performed its duty, with the implied assurance that the structure so furnished could be safely used. *Connolly v. Waltham*, 156 Mass. 368, 370, 31 N. E. 302; *O'Driscoll v. Faxon*, 156 Mass. 527, 81 N. E. 685; *Brady v. Norcross*, 172 Mass. 331, 333, 52 N. E. 528; *Cunningham v. Atlas Tack Co. (Mass.)*, 72 N. E. 325. In the discharge of this duty, the defendant's liability was not limited alone to the actual knowledge of either its superintendent or of an under-foreman, who acted as superintendent, that the staging was unsound; it included also responsibility for the negligence of the acting superintendent in not ascertaining that fact before directing the plaintiffs to use the staging, if by the exercise of due diligence on his part this condition, upon examination would have been made known to him. *Arker-son v. Dennison*, *ubi supra*; *Connolly v. Waltham*, *ubi supra*. Such an inquiry is a question of fact, and, as the defendant's first request could not be given, both cases were rightly submitted to the jury, with instructions that were sufficiently full.

A further exception is presented in the first case relating to the effect to be given to the admission of certain evidence. After his injury the plaintiff became an inmate of a hospital, which kept daily records of the medical treatment of its patients. Subject to his exception, and without the testimony of the person who made the entry concerning him, or that of any one properly charged with their custody, this entry was introduced in evidence by the defendant. The exceptions are obscure as to the precise ground upon which at first the evidence was admitted. From the statement of the defendant's counsel at the close of the instructions, it may be assumed that the object was to affect the measure of damages by showing that the plaintiff had refused to submit himself to proper medical treatment, and insisted upon a different course being prescribed, and that, no change being granted, he refused to remain, and left the hospital. It further may be assumed from the instructions that the plaintiff was a witness at the trial, and this testimony was finally deemed admissible as in some manner tending to contradict him. If for either purpose it was competent, the

record did not prove itself, and therefore was inadmissible, without sufficient authentication, for reasons fully stated in the recent case of *Cashin v. New York, New Haven & Hartford Railroad Co.*, 185 Mass. 543, 546, 70 N. E. 930. At the time of admission, no limitation appears to have been put upon the evidential scope of the record. Subsequently the presiding judge limited its effect as being, in substance, a declaration by the plaintiff that he did not desire to remain or to submit himself to the proposed treatment. Incompetent evidence, if admitted without objection, has the same probative effect as if competent. *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668. But under our practice, when admitted as it was here, subject to the exception of the plaintiff, the subsequent ruling limiting its relevancy, to which the defendant excepted, was within the discretionary power of the trial court. *Hawes v. Gustin*, 2 Allen, 402, 406; *Eldridge v. Hawley*, 115 Mass. 410, 412; *Roberts v. Boston*, *ubi supra*; *Anthony v. Travis*, 148 Mass. 53, 19 N. E. 8. By the course pursued, the instructions given on this part of the case must be taken as expressing the final ruling, with the practical result that the defendant had a limited benefit of evidence that should have been entirely excluded. Because the original error was partially cured, it cannot now consistently complain that for this reason a new trial should be granted.

Exceptions overruled.

(189 Mass. 332)

PIERCE et al. v. PERRY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 19, 1905.)

1. LIMITATION OF ACTIONS—EXISTENCE OF TRUST.

Defendant, who was one of the executors of his father's estate, in which testatrix, his sister, was entitled to a one-fourth interest, received her dividends from the estate, made payable to defendant as "trustee," which were by him so indorsed, and deposited with his own funds in bank. Defendant thereafter received his sister's securities, which he kept with his own in his deposit box, according to her directions, deposited money for her in certain savings banks, and stated that he had told her that he would take care of her property as he did of his own. She had no other property, no business education, and did not collect any of her money herself. *Held*, that such facts were sufficient to support a master's finding that defendant was a trustee, and not a mere custodian or collecting agent for his sister, and was therefore not entitled to urge limitations as a defense to his liability to account to her executors.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 494, 495, 500-503.]

2. SAME—BAR—PLEADING.

Where the statute of limitations is relied on as a bar, plaintiff, if he would avoid it by an exception in the statute, must plead the same specially in his bill or reply, or amend his bill, if it contains no suitable allegation to meet the bar.

3. SAME—BILL.

Where a bill alleged that defendant acted as the financial agent and trusted adviser of plaintiff's intestate, and as such did the various acts described in the bill, the allegations were sufficient to show that the statute of limitations pleaded in bar was not applicable, and no special replication was required.

Case Reserved from Supreme Judicial Court, Suffolk County; William Caleb Loring, Judge.

Action by Carrie Augusta Pierce and others, as executrix of the will of Martha A. Perry, deceased, against Oliver H. Perry. Exceptions having been filed to a master's report in favor of complainants, the case on exceptions was reserved for the full court, for the entry of such judgment as justice might require. Exceptions overruled.

Wm. L. Putnam and Stoughton Bell, for plaintiffs. H. R. Bailey and P. G. Bolster, for defendant.

HAMMOND, J. 1. The defendants contend that the statute of limitations is a bar to the recovery of any sum received by Oliver H. Perry more than six years prior to the bringing of this suit. The total amount claimed to be thus barred, including interest, is \$9,238.77. The defendants contend that the relation of Perry to his sister, the plaintiff's testatrix, was not that of a trustee, but simply that of a simple agent for the collection of money, and a mere custodian. As to this, the master has found that "he was not a mere custodian, as claimed by the defense, and that he was more than a financial agent, as alleged in the bill, that he was really a trustee, [and] that the statute of limitations did not run in his favor." This finding should stand, unless upon the facts found and evidence reported it appears to be erroneous.

As to this question of trust, although the master has not reported the evidence verbatim, he states that he has reported it in substance. The report is quite voluminous, but the following may be regarded as a brief summary of the facts bearing upon this question. Oliver, the defendant, Martha, the plaintiff's testatrix, and Mrs. Moseley were the three surviving children of Augustus B. Perry, who died in November, 1887, leaving his property, real and personal, one-half to Oliver, and one-quarter to each of his daughters. Oliver and Mr. Moseley, the husband of one of the daughters, were the executors, and they kept the accounts in the name of A. B. Perry & Co. They managed the real estate, and from time to time made division of the rents and of the principal and income of the personal property. Up to the time of her father's death, Martha had no property of her own. She was then 57 years old. "She had always lived at home with her parents, and, with the exception of a trip to Europe some years before her father's death, her life had been simple and

uneventful." She was an intelligent woman, but up to the time of her father's death she had no particular knowledge of or experience in business matters. Her share of her father's estate amounted to more than \$30,000. She liked to travel, and although "economical, even close," she spent considerable money in gratifying this taste. Besides making short journeys, she went once to Alaska, once to the Yellowstone Park, and twice to Europe, and at the time of her death, which occurred very suddenly, she was planning a trip to Japan. She does not seem to have collected any money herself. Her part was paid to her brother, and when she needed money she went to him. On May 12, 1888, Mr. Moseley brought her a check for her first dividend of income, and gave it to her. She took it, but said that he might as well "pay the dividend to Oliver." Accordingly, the subsequent checks for her share were, by her instructions, drawn to the order of "Oliver H. Perry, Trustee," and were by him so indorsed and deposited with his own funds in a national bank. On June 12, 1888, Oliver, Martha, and Mrs. Moseley received their respective shares of certain railroad bonds, a part of their father's estate. Mrs. Moseley received hers, but Oliver said to Martha that he would keep hers in his box without charge. She told him to do so, and he put them there, together with other bonds, which he afterwards bought for her. The coupons from these bonds were deposited, like the dividends, in his name at the bank. In 1889 a house belonging to the estate of Augustus B. Perry was sold, the purchaser giving a mortgage back for \$2,000, which, at the defendant's suggestion, was taken in Martha's name as an investment. It is not profitable to recite further details of the collection by Oliver of money belonging to his sister Martha's estate. The report goes into the matter very fully, and it is sufficient to say that she personally had but little, if anything, to do with the collection or investment of her money or with the care of it.

Owing to the death of both principals, there is but little information as to what express contract, if any, was made between them, and what there is comes entirely from Oliver. In May, 1900, speaking to one of the tenants in a store belonging to the estate respecting his relations with his sister, he said that Martha had told him to do with her property as he would with his own. He also told one Grant, a close personal friend of his, that he had charge of his sister's property, and to another friend he said that he kept the bonds in his box because his sister did not want to pay the expense of a separate one, and that he had told her that he would take care of her property as he did of his own. In a letter of July 2, 1888, he informs her that he has collected the money on certain bond coupons, and he asks

what she wants him "to do with the money." In another letter he says: "I deposited at Provident Savings Bank for you \$600; believe they don't pay interest over \$1,000; so when you have some more money, if you do not want to use it right, should buy a bond, say the N. Y. & N. E. first, but when it comes round you can tell." He afterwards bought such a bond, and told Mr. Moseley he had bought it for Martha.

We are of opinion that, upon the whole evidence, the question whether he was the mere custodian of the property of his sister, or whether there was an element of trust in the relation between them, was a question of fact for the master, and we cannot say that the finding that the relation was one of trust was clearly erroneous, so far as respected the defense of the statute of limitations. See *Jones v. McDermott*, 114 Mass. 400; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070.

2. The defendants further contend that, as they have pleaded the statute of limitations as a bar, the plaintiffs were bound either to allege in their bill the facts which avoid it by any exception, or specially reply to it. The defendants contend that the plain-

tiffs have done neither. The true rule is tersely stated in *Platt v. Vattier*, 9 Pet. 405, 415, 9 L. Ed. 173: "And the doctrine is now clearly established that, if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill or specially reply, or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar." While it is true, as contended by the defendants, that there is no special replication here, we are of opinion that the bill sets out enough to avoid the statute, or rather to show that the statute is not applicable. It sets out that the defendant, Oliver, acted as the financial agent and trusted adviser of the plaintiff's testate, and as such did the various acts described in the bill. It thus sets out a trust. To such, a trust the statute is not applicable, at least in the absence of a demand. *Campbell v. Whoriskey*, *ubi supra*. It is not a claim against which the statute would run, and which would be barred by it but for some exception upon which the plaintiff relies, but is a case against which the statute does not run.

Exceptions to master's report overruled.

(189 Mass. 418.)

FAIRBANKS v. BOSTON STORAGE WAREHOUSE CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 27, 1905.)

1. MASTER AND SERVANT—THIRD PERSONS—ASSAULT BY SERVANT—LIABILITY OF MASTER.

Plaintiff, having goods stored in defendant's warehouse, on going there to remove them, was taken by defendant's servant to the room in which they were stored. A short time thereafter plaintiff called to the servant to take him down the elevator and to bring up plaintiff's servant, and, when defendant's servant stepped out of the elevator, he struck plaintiff without provocation, committing the assault complained of. Held that, the assault not having been committed as a means or for the purpose of performing any work for his master, defendant was not liable therefor.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1221.]

2. SAME—LIABILITY TO CUSTOMERS.

Where a warehouseman contracted to store plaintiff's goods, to use due care in keeping the property, to deliver same on reasonable demand, and to permit plaintiff to visit the room where his goods were stored in the presence of one of defendant's employes, defendant was only bound to exercise ordinary care and diligence to prevent plaintiff from being assaulted by one of its employes while plaintiff was on defendant's premises.

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by Arthur W. Fairbanks against the Boston Storage Warehouse Company for assault. A verdict was directed in favor of defendant, and plaintiff brings exceptions. Overruled.

Chas. W. Bartlett, E. B. Anderson, and A. T. Smith, for plaintiff. P. H. Cooney and F. L. Hayes, for defendant.

MORTON, J. There was evidence which would have warranted a finding by the jury of an unjustifiable and wanton assault upon the plaintiff by Havender, who was the defendant's servant. But the question is whether the defendant is liable for it. The fact that Havender was in the employ of the defendant at the time when the assault was committed, and that the assault took place upon the defendant's premises, does not necessarily show that the defendant is liable therefor. "An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master." *Bowler v. O'Connell*, 162 Mass. 319, 320, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359; *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523; *Perlstein v. Am. Express Co.*, 177 Mass. 530, 59 N. E. 104, 52 L. R. A. 959. In the present case the uncontradicted evidence showed that the defendant's superintendent directed Havender to take the plaintiff up in the elevator, and that he did so and unlocked the room where the plaintiff's goods were stored, and then went back to the elevator; that the plaintiff went in and

selected some goods which he wished to take away, and in a short time went to the elevator well and called to Havender to come up and get him; that he called two or three times with considerable waits between, and finally called to Havender and asked him to go out into the yard and get a man who had come with the plaintiff and take him in where it was warm; and that in about 10 minutes Havender came up with the man, and, as the elevator stopped at the landing, Havender stepped forward, leaving the man on the elevator, and grabbed and struck the plaintiff without any provocation, committing the assault complained of. Havender was not a witness, and it did not appear where he was. He was discharged by the defendant three days after the assault. There was nothing to show that down to the assault his conduct, while in the defendant's employ, had been otherwise than good. We do not see how it can be said that the assault was committed as a means or for the purpose of performing the work which Havender was employed to do.

The plaintiff, relying on the doctrine laid down in *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311, and similar cases, contends that under the contract between himself and the defendant the latter was bound to protect him while on its premises, pursuant to such contract, from improper force and violence on the part of any of its employes, and that it is liable to him for any damages sustained by him in consequence of its failure to perform this duty. The contract, so far as material, was a contract for the storage of goods belonging to the plaintiff, with an agreement on the part of the defendant to use due care in keeping the property, and to deliver it upon reasonable demand, and that the plaintiff might visit the room where it was stored, during business hours, in the presence of one of its employes. The contract was not like that in *Bryant v. Rich*, supra, for transportation by a common carrier, but, as already observed, was a contract for the storage of goods; and the case comes within the class of cases relating to warehousemen, or those where one enters upon the premises of another by his express or implied invitation for the transaction of business with him. What is required in such cases is ordinary care and diligence. *Carleton v. Franconia Steel & Iron Co.*, 99 Mass. 216; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Aldrich v. Boston & W. R. R. Co.*, 100 Mass. 81, 1 Am. Rep. 76, 97 Am. Dec. 74. There is nothing to show that it was not exercised by the defendant in the selection and employment of Havender by the defendant or otherwise.

The result is that the exceptions must be overruled.

So ordered.

(189 Mass. 535)

LOVETT, HART & PHIPPS CO. v. SULLIVAN.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 29, 1905.)

1. PRINCIPAL AND AGENT—SPECIAL AGENT—AUTHORITY—NOTICE.

A person dealing with a special agent is bound to ascertain the extent of his authority.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 529, 530.]

2. SAME—EXECUTION OF GUARANTY.

Where an agent was authorized to sign his principal's name to a guaranty to secure purchases made by S. during his minority, the agent's authority was special, and he was not authorized to execute in the name of his principal a guaranty of such purchases, good until canceled in writing by the principal.

Case Reported from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by the Lovett, Hart & Phipps Company against Jeremiah Sullivan. On report. Judgment for defendant.

John A. Kerns and James M. Swift, for plaintiff. John W. Cummings, Chas. R. Cummings, and Chas. A. MacDonald, for defendant.

LATHROP, J. This is an action of contract upon a written guaranty, addressed to the plaintiff corporation, dated August 16, 1893, and reading as follows: "Please deliver my son, George F. Sullivan, such goods as he may order, from time to time, and I will guarantee payment for same. This agreement good until canceled by me in writing. The goods to be charged to George F. Sullivan." This paper was signed, "Jeremiah Sullivan, by John Sullivan." At the trial in the superior court the judge directed a verdict for the defendant, and reported the case for our determination.

It appears from the testimony at the trial in the superior court that the guaranty in question was in the handwriting of one Phipps, the treasurer of the plaintiff corporation; that he gave it to an agent to have it signed; and that the agent returned it to him signed; that after the guaranty was signed the plaintiff had no oral or written communications with the defendant; and that the guaranty had not been canceled. The treasurer testified that he had not heard of any limitations or restrictions placed upon John Sullivan's authority to sign the guaranty for his father; that before the guaranty was signed George F. Sullivan had dealt with the plaintiff, but no credit had been given him; that George F. Sullivan did a good deal of business with the plaintiff between August 26, 1893, and August 15, 1903, probably to an amount of \$1,500 a year; that George F. Sullivan went into bankruptcy in the fall of 1903, and was then indebted to the plaintiff for goods sold in 1902 and 1903. It was admitted that George F. Sullivan was born in May, 1873, and was therefore a minor when the guaranty was signed. The only testimony

introduced to show that John Sullivan was authorized to sign the defendant's name was that of John Sullivan, who was called by the plaintiff as a witness. He testified that the defendant authorized him to sign his (the defendant's) name to a guaranty, to last during the minority of his brother, George F. Sullivan, whereby the plaintiff would be guaranteed payment by the defendant for all goods sold George F. Sullivan during his minority, and that, when he signed his father's name, he did it without reading the paper very carefully.

There is no evidence in the case to show that John Sullivan was the general agent of the defendant. So far as the evidence discloses, he was a special agent only, with limited authority; and the law is well settled in this commonwealth that a person dealing with a special agent is bound to inquire and ascertain the extent of his authority. *Snow v. Perry*, 9 Pick. 539; *Murdock v. Mills*, 11 Metc. 5, 15; *Harrison v. City Ins. Co.*, 9 Allen, 231, 233, 85 Am. Dec. 751; *Stollenwerck v. Thacher*, 115 Mass. 224, 227; *Brown v. Henry*, 172 Mass. 569, 566, 52 N. E. 1073. The cases of *Locke v. Stearns*, 1 Metc. 560, 35 Am. Dec. 382, and *Haskell v. Starbird*, 152 Mass. 117, 25 N. E. 14, 23 Am. St. Rep. 809, relied upon by the plaintiff, differ so essentially in their facts from those in the case at bar that they have no bearing upon the question before us. *Locke v. Stearns* was an action of trespass upon the case in the nature of deceit. One of the members of a firm sold as, and for, linseed meal a mixture of linseed meal and teelseed meal, manufactured by the firm. It was held that all the members of the firm were liable, and that they were also liable for a sale made by their foreman, acting within the scope of his authority. In *Haskell v. Starbird*, it was held that false and fraudulent representations made by an agent, general or special, employed to sell land, rendered his principal liable in an action of tort for deceit. See, also, *Weeks v. Currier*, 172 Mass. 53, 55, 51 N. E. 416. Of course, a person who has derived a benefit through the fraud of his agent cannot keep the fruits of the bargain, thus ratifying the fraud, without being liable in an action for deceit. See *Bennett v. Judson*, 21 N. Y. 238.

Judgment for the defendant.

(189 Mass. 496)

FOUNTAIN v. WAMPANOAG MILLS.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 28, 1905.)

1. MASTER AND SERVANT—INJURY TO EMPLOYÉ—DEFECTIVE APPLIANCE—EVIDENCE.

In an action for injuries to an employé while cleaning exposed gears on a spinning frame, due to the starting of the frame after it had been stopped by moving the belt operating it to a loose pulley, evidence that a similar frame had started, and that the employé had so notified an employé whose duty it was to repair

it, was inadmissible as showing negligence on the part of the employer; it not appearing that the conditions of the two frames were the same.

2. SAME—NEGLIGENCE OF EMPLOYER—QUESTION FOR JURY.

Evidence in an action for injuries to an employé while cleaning exposed gears on a spinning frame examined, and *held*, that the questions whether the starting of the frame was due to a defective condition of the machinery and whether the employer had sufficient notice of the defects to have repaired the same in the exercise of due care were for the jury.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action for injuries to an employé while cleaning exposed gears on a spinning frame examined, and *held*, that the question of contributory negligence was for the jury.

4. SAME—EVIDENCE OF CONTRIBUTORY NEGLIGENCE—CONCLUSIVENESS.

Where an employé, injured while cleaning gears on a spinning frame in consequence of the starting of the frame after it had been stopped by moving the belt operating it to a loose pulley, was performing in a proper way the work she was employed to do, the fact that she had seen another frame start without any one working on it was not conclusive evidence of her contributory negligence; the evidence of the circumstances of the former starting up having been excluded.

Exceptions from Superior Court, Bristol County; Robert J. Harris, Judge.

Action by Ida Fontaine against the Wampanoag Mills. The court directed a verdict for defendant, and plaintiff brings exceptions. Sustained.

J. W. & C. R. Cummings, for plaintiff. Richd. P. Borden and Robt. C. Davis, for defendant.

SHELDON, J. The plaintiff was employed by the defendant as a ring spinner, and was injured while engaged in cleaning certain exposed gears on one end of the spinning frame upon which she was at work. She offered evidence tending to show that she had stopped the frame by moving the belt which operated it from the tight to the loose pulley, by means of a shipper at the south end of the frame, and then walked the length of the frame, some 20 feet, to the north end, where the gears were situated; that when she reached the gears the frame was stopped and she began to clean them; that just after she began to clean the gears the frame started of itself, and her hand was caught in the gears and injured. It was her duty to clean these gears, and the duty of taking care of the shifting apparatus which moved the belt and stopped or started the frame did not rest upon the plaintiff, but on the second and third hands and the overseer. There was evidence that in the six or seven months before the accident the frame had started of itself 16 times while the plaintiff was not there, and that other similar frames also had started of themselves. The spinning frame was of the Marvel & Davol make, and the shipper was a Marvel & Davol shipper. The plaintiff put in evidence that this kind of frame had not been made in 28 years, and that the life of

a shipper substantially like this is about 20 years. There was evidence that this shipper had become loose some months before the accident, that the bottom bolt had become worn, and that the nut of this bolt had worked off by reason of the shaking of the machine, and had been replaced occasionally, but would work loose in three weeks or thereabouts. Edmond Gosselin, the defendant's third hand at the time of the accident, testified that he examined the shipper after the accident and found nothing about it, only that the shipper was loose, that the whole of it was loose, and that the looseness was caused by the bottom bolt being worn out; that he had charge of the belt and pulleys, and over him was the second hand and over him the overseer; that he had put the belt on about two weeks before the accident; that at the time of the accident the belt was not cut very straight, it was cut a little crooked, not square; that he took both ends and put them together and hammered the clasp in, and he illustrated, by means of two hooks, how he brought the ends of the belt together. On cross-examination he testified that he found this bolt on the floor four weeks after the accident; that he put it back and tightened it, and it was all right to use for a while; that the belt was like all other belts in the room, and he saw nothing the matter with it. Stephen Myolt testified that six months before the accident he was third hand of the room in which the plaintiff was hurt. Evidence having been put in that there had been no change of the starting or stopping apparatus of the frame in the meantime, he further testified that he then knew of the frame starting of itself, that he examined it, and found that the shipper was loose and worn and the bottom bolt loose. On cross-examination he said that the frame started of itself because the nut came off; that he hammered in the bolt so as to prevent this; that the nut worked loose by the shaking and the frame again started of itself; that the machine would not start of itself unless there was trouble with the bolt; and that he thought the shipper and the bolt were both wrong. One Dailey also testified that, with a belt cut crooked and fastened in the manner described by Gosselin, there would be a likelihood of the machine starting of itself; and there was other evidence that there should have been a turned stud instead of the bottom bolt on the shipper; that if the lower nut or bolt on the shipper was worn the shipper would be loose; that such a shipper would not be suitable; that there would be a tendency to start the machine; and that the tendency of a loose nut or bolt would be to shift the belt from the loose to the tight pulley and cause the frame to start.

The first question that arises is on an exception to the exclusion of evidence. The plaintiff testified that, while she was at work in the spinning room, a frame like that on

which she was injured had started up. She then offered to show that this was a frame similar to the one on which the accident happened and one of those which she was tending, and that she called the third hand's attention to it. The court, on the defendant's objection, excluded this evidence, and the plaintiff excepted. She now contends that this tended to show that the frame on which she was working could start up in the same way, and, also, to prove negligence on the part of the defendant by showing that the man charged by the defendant with the duty of repairing the machine had been warned of the danger of its starting up and its need of repair, and she relies on *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675, in which such a question seems to have been admitted without objection, and was considered as bearing on the question of the plaintiff's own due care. But in the case at bar the object was to show the existence of a defect in another frame and negligence in the defendant. It did not appear that the conditions of the two frames were the same, and we think that the court rightly excluded the question. *Cohen v. Hamblin & Russell Manuf. Co.*, 186 Mass. 544, 71 N. E. 948.

It did not appear that the nut came off from the lower bolt at the time of the accident. The defendant offered evidence upon which, taken in connection with the cross-examination of the plaintiff's witnesses, it has earnestly contended that it is mechanically impossible for this frame to have started of itself, whether or not the alleged defects in the belt and shipper had any real existence; that it could not have started without human intervention; that at least the larger number of the alleged instances of spontaneous starting of this frame and of others like it are fully accounted for by causes which appear on the evidence; and that these frames had all been recently overhauled and new parts put in for all that were worn out, so that they were made practically new. And the defendant argues with great force that, even if the jury might have found that this frame did start of itself, yet this was so improbable an occurrence that it could not reasonably have been anticipated, and so the defendant could not be found to have been negligent in failing to guard against it. *Ross v. Pearson Cordage Co.*, 164 Mass. 257, 41 N. E. 284, 49 Am. St. Rep. 459; *Toland v. Paine Furniture Co.*, 175 Mass. 476, 56 N. E. 608; *Hill v. Iver Johnson Sporting Goods Co.*, 188 Mass. 75, 74 N. E. 303. A model of the frame and shipper was produced at the argument to illustrate and explain the grounds of these contentions. Without recapitulating the testimony, it is enough to say that this argument was put very forcibly and might well have impressed the jury. But the weight of the evidence and the inferences properly to be drawn from it were all for the jury: and it seems to us that they might have found upon the evidence which has been

stated that this machine did start of its own accord, that its starting was due to a defect in the condition and arrangement of the belt and to a worn-out and defective condition of the shipper and its bolts and nuts, that the defendant had had sufficient notice of the existence of these defects to have enabled it to repair them, that in the exercise of due care it ought to have done so, and that this accident was due to its negligence in failing to make such repairs. *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 28 N. E. 352; *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675; *Connors v. Durite Manuf. Co.*, 156 Mass. 163, 30 N. E. 559; *Lynch v. M. T. Stevens Co.*, 187 Mass. 397, 73 N. E. 478; *Gregory v. American Thread Co.*, 187 Mass. 239, 72 N. E. 962; *O'Neil v. Ginn*, 188 Mass. 346, 74 N. E. 688.

The jury might have found that the plaintiff was in the exercise of due care. She was performing exactly the work she was employed to do, and apparently was performing it in the proper way. She had no duty of taking care of the shifting apparatus. The main circumstance relied on against her is that she had seen another frame start up before without any one working on it; but such a circumstance was held in *Donahue v. Drown*, 154 Mass. 21, 27 N. E. 675, not to be decisive against the plaintiff, and it is to be observed that all evidence of the circumstances of such former starting up was excluded in the present case upon the defendant's objection. And the defendant's contention as to the apparent impossibility of this accident happening in the manner claimed by the plaintiff has, as to this question, a strong bearing in her favor. *Packer v. Thomson-Houston Electric Co.*, 175 Mass. 496, 56 N. E. 704.

We are of opinion that the case should have been submitted to the jury.

Exceptions sustained.

(189 Mass. 390)

DUNBAR et al. v. KELLY et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Oct. 25, 1905.)

1. FRAUDULENT CONVEYANCES — ATTACHMENT — DISSOLUTION — DEATH OF DEBTOR.

Rev. Laws, c. 167, § 112, providing that an attachment shall be dissolved if the debtor dies before the property is taken or seized in execution and administration is granted within a specified time, applies to attachments of property fraudulently conveyed, as well as of property the record title to which stands in the name of the debtor at the time of his death.

2. ADMINISTRATORS — ASSETS OF ESTATE — PROPERTY FRAUDULENTLY CONVEYED.

Rev. Laws, c. 146, § 2, authorizes the sale to satisfy a decedent's debts of all rights and interests in land which would descend to his heirs, or which would have been liable to attachment or execution in his lifetime. Section 17 provides that an administrator licensed to sell land which has been fraudulently conveyed by the deceased may, within one year after such license, sell the land without first obtaining possession thereof by entry or action. Chapter 178, § 1, provides that land of a debtor fraud-

lently conveyed by him with intent to defraud creditors may be taken on execution for his debts. *Held* that, as between a debtor and his creditors, property fraudulently conveyed by the debtor may be recovered or sold by his administrator by due proceedings.

3. SAME—REMOVAL OF ADMINISTRATORS—REFUSAL TO ACT.

An administrator, who refuses to take steps to try the question whether an alleged conveyance made by his decedent is fraudulent or not, may be removed, and another administrator may be appointed in his place.

4. FRAUDULENT CONVEYANCES—ATTACHMENTS—DISSOLUTION—DEATH OF DEBTOR.

Rev. Laws, c. 167, §§ 38, 63, 64, and chapter 178, §§ 1, 47, giving creditors a remedy by writs of attachment and execution in case of lands fraudulently conveyed, do not, in view of the provisions of chapter 146, §§ 2, 17, and chapter 178, § 1, empowering administrators to recover and sell for debts land fraudulently conveyed by their decedents, supersede the provisions of chapter 167, § 112, declaring an attachment to be dissolved if the debtor dies before the property is taken or seized on execution.

5. EXECUTION—LAND SUBJECT TO LEVY—PROPERTY FRAUDULENTLY CONVEYED.

Rev. Laws, c. 178, § 53, provides that lands of a deceased person may be taken on execution on a judgment against his administrator for the debt of the deceased, and shall be sold as if execution had been levied against the deceased in his lifetime. Another section of the statutes provides that, in case of an execution levied on lands fraudulently conveyed, the levy shall be void unless action is brought to recover possession within one year after the return day of the execution. *Held*, that a creditor may, on recovering judgment against his debtor's administrator, cause execution to be levied on land fraudulently conveyed by his debtor.

6. QUIETING TITLE—GROUNDS OF RELIEF—DELAY IN LEGAL REMEDY.

Rev. Laws, c. 178, § 31, provides for the suspension of a levy of execution where there is a prior attachment or seizure of the same land. Another section of the statute provides that a levy of execution on lands fraudulently conveyed shall be void unless action is brought to recover possession within a year after the return day of the execution by a creditor or purchaser at the sale. *Held*, that the suspension, by prior attachments, of a levy of execution on lands fraudulently conveyed, and the delay which may arise from that cause, and from the time given the creditor to sue for possession, do not of themselves authorize fraudulent grantees to proceed in equity to obtain the cancellation of the levy as a cloud on their title, and thus procure a determination of the question of fraud in the conveyance to them.

7. SAME—RIGHT TO MAINTAIN SUIT.

Trustees in a voluntary conveyance from a heavily involved debtor are not entitled to maintain a bill to cancel a suspended levy of execution as a cloud on their title, where such execution was sued out by a nonassenting creditor, who had refused to participate in the trust scheme, and had obtained a judgment for the amount of his claim.

8. EXECUTION—VALIDITY OF LEVY—DISSOLUTION OF ATTACHMENT—EFFECT.

A levy of execution on all the debtor's right, title, and interest in certain property which has previously been attached, is not rendered invalid by reason of the dissolution of the attachment.

9. SAME—LEVY SUSPENDED BY ATTACHMENT—DISSOLUTION OF ATTACHMENT—DUTY TO COMPLETE PROCEEDINGS.

Where prior attachments, which operate to suspend a subsequent execution, are dissolved by the death of the attachment debtor, the execution creditor should proceed without unnecessary delay to complete his levy.

10. QUIETING TITLE—REMOVAL OF CLOUD—WHAT CONSTITUTES CLOUD.

The suspension of a levy of execution issued against property constitutes such a cloud on the title of the property as may be removed by a bill in equity.

Case Reserved from Supreme Judicial Court, Suffolk County; John Lathrop, Judge.

Bill by one Dunbar and others, trustees under a conveyance by Orlando E. Lewis, against one Kelly and others, to remove a cloud on plaintiffs' title and for an injunction. In the Supreme Judicial Court a single justice reserved the case for the full court. On demurrers to the bill. Case to stand for hearing.

Wm. H. Dunbar and John G. Palfrey, for complainants. Frederic S. Elliot, for respondents.

MORTON, J. One Orlando E. Lewis conveyed to the plaintiffs certain real estate upon the trusts set out in a declaration of trust executed by them of even date with the conveyance. Subsequent to the conveyance, Coleman, one of the defendants, sued Lewis in contract, and caused a special attachment to be made of the real estate thus conveyed. The real estate was described in the officer's return as property of the said Lewis, the record title to which stood in the name of D. Blakely Hoar and William H. Dunbar, the plaintiffs in this suit. Lewis died during the pendency of the action, and his administrators appeared, and took upon themselves the defense of the suit. Coleman recovered judgment, and sued out a writ of execution, and placed it in the hands of one Martin, a deputy sheriff, who levied it upon the property specially attached, and by reason of certain prior attachments of said property as the property of said Lewis suspended the levy, and caused a copy of the levy and the suspension thereof to be duly recorded in the registry of deeds. Martin died subsequent to the bringing of this bill, and thereupon the execution was committed to the defendant Kelly, a deputy sheriff, who now holds it and maintains the levy. The bill has been amended by making Kelly a party, and is brought to have the cloud upon the plaintiffs' title, thus alleged to exist, removed. The defendants severally demurred, and the case was reserved for this court upon the bill as amended and the demurrers. If the demurrers are sustained, the bill is to be dismissed; otherwise to stand for hearing.

The statute expressly provides that: "An attachment of real or personal property shall be dissolved if the debtor dies before it is taken or seized on execution and administration of his estate is granted in this commonwealth upon an application therefor made within one year after his decease." Rev. Laws, c. 167, § 112. This applies, we think, to property fraudulently conveyed, as well as to property the record title to which stands in the name of the debtor at the time of his

death. The object of the statute is to bring the property attached, as well as other property, into the control of the administrator, as a general fund to be administered by him, and thus to secure a more equal distribution of the assets, especially in the case of insolvent estates. *Bullard v. Dame*, 7 Pick. 239; *Parsons v. Merrill*, 5 Metc. 356; *Willmarth v. Richmond*, 11 Cush. 463; *Day v. Lamb*, 6 Gray, 523. As between the debtor and his creditors, property fraudulently conveyed remains the property of the debtor, and may be recovered or sold by the administrator by due proceedings. Rev. Laws, c. 146, §§ 2, 17; Id. c. 178, § 1; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Holland v. Cruft*, 20 Pick. 321; *Welsh v. Welsh*, 105 Mass. 229. And if an administrator refuses to take steps to try the question whether an alleged conveyance is fraudulent or not, he may be removed, and another appointed in his place. *Putney v. Fletcher*, 148 Mass. 247, 19 N. E. 370. The provisions giving creditors a remedy by writs of attachment and execution in the case of lands fraudulently conveyed (Rev. Laws, c. 167, §§ 38, 63, 64; Id. c. 178, §§ 1, 47) are not intended, we think, to supersede the provisions in regard to the dissolution of attachments, if the debtor dies before the land is taken on execution. In view of the rights and remedies given to administrators in relation to lands alleged to have been fraudulently conveyed, no good reason can be given why attachments by creditors of such lands should stand on any different footing, in respect to the dissolution of them by the death of the debtor, from attachments of lands the record title to which is in him at the time of his death. So far the case presented is that of an attachment undischarged of record, but dissolved by operation of law, and whether the plaintiff would be entitled to relief if that were all, might admit of question. But the case goes further. Coleman, as already observed, got judgment, and caused the land to be seized and taken on execution. The levy was then suspended by reason of prior attachments, and still remains or purports to remain suspended. It is this levy which really constitutes the alleged cloud upon the title and further proceedings under which the plaintiffs seek to enjoin. It is expressly provided that "land of a deceased person may be taken on execution on a judgment against his executor or administrator for the debt of the deceased, and * * * shall be appraised and set off and sold in like manner as if execution had been levied against the deceased in his lifetime." Rev. Laws, c. 178, § 53. And it is further provided that in the case of an execution levied on lands fraudulently conveyed, the levy shall be void unless action is brought to recover possession within one year after the return day of the execution by the creditor to whom the land is set off, or the purchaser at the sale, or the person lawfully claiming under either. There is nothing limiting this to debtors who

are living, and the defendant Coleman was therefore acting within his rights in causing the execution to be levied on the land alleged to have been fraudulently conveyed, and ordinarily the complainants would have an adequate and complete remedy at law. The suspension of a levy if there are prior attachments is provided for by statute (Rev. Laws, c. 178, § 31), and the delay which may thus be caused, as well as that which may arise from the limitation in regard to the bringing of an action by the creditor, do not, of themselves, afford ground for equitable relief. Otherwise it would follow that in every case the alleged fraudulent grantee would or might be entitled to have the question whether the conveyance was fraudulent heard and determined in equity. *Freeman v. Carpenter*, 147 Mass. 23, 16 N. E. 714, is directly to the contrary. It is no doubt true that since general equity jurisdiction was conferred upon this court, cases have arisen in which it has been exercised concurrently with that at law. Assuming, without deciding, that a case might arise in which an alleged fraudulent grantee would be entitled to have the question heard and determined upon a bill to remove a cloud from his title, we do not think that this is such a case. The plaintiffs are trustees under a voluntary conveyance from one who was heavily indebted at the time that it was made. The scheme provides for the issuing of preferred stock to an amount not exceeding \$35,000 to such creditors as choose to come in, and common stock to the amount of \$100,000. The common stock has all been issued to the grantor Lewis and his wife. The defendant Coleman did not choose to come in. He brought an action against Lewis, as he had the right to do, and attached the lands as fraudulently conveyed, and obtained judgment, and took out execution which he caused to be levied on such lands. In all this he was acting, as already observed, within his clear legal rights.

The plaintiffs contend that the levy is invalid because of the dissolution of the attachment on which it is contended the levy was based. The levy was "on all the right, title, and interest" which Orlando E. Lewis had (not exempt by law from attachment or levy on execution) on the 8th day of October, A. D. 1901, at 10:45 o'clock a. m. (being the time the same was attached on mesne process), in and to the following described real estate, the record to which, at the time of said attachment, stood in the names of D. Blakely Hoar and William H. Dunbar, and is bounded and described as follows." The validity of the levy did not depend on the continuance of the attachment. If the defendant Lewis had any right, title, or interest in the premises described, the levy operated as a seizure of it as of the date of the levy. The only effect of the dissolution of the attachment was to destroy the lien created thereby. See *Brackett v. Redlon*, 54 Me.

426; *Morse v. Sleeper*, 53 Ma. 329; *Cogswell v. Warren*, 1 Curt. 223, Fed. Cas. No. 2-968. There is, however, one aspect of the case in which we think that the plaintiffs are entitled to the relief which they seek. The levy of the execution was suspended by reason of prior attachments. But these were dissolved by the death of Lewis. There was no just ground, therefore, for the suspension of the levy, and the parties should have proceeded without unnecessary delay to complete it. The delay was such as to defeat the levy, and render any further proceedings under the execution of no effect. *Haskell v. Varina*, 111 Mass. 84. But the suspension of the levy constitutes a cloud upon the title, which may continue indefinitely if not removed, and interfere seriously with the disposition of the property by the plaintiffs. *Hall v. Whiston*, 5 Allen, 126; *Russell v. Deahon*, 124 Mass. 342; *O'Hare v. Downing*, 130 Mass. 16; *Stevens v. Mulligan*, 167 Mass. 84, 44 N. E. 1086.

The respondent Coleman can, no doubt, take out another execution, but we think that the plaintiffs are entitled to the relief prayed for against the execution already taken out and referred to in the bill. According to the reservation, the case is to stand for hearing. So ordered.

(139 Mass. 510)

BEST v. BERRY.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 28, 1905.)

1. WILLS—CONSTRUCTION—EXTRINSIC DOCUMENTS.

Where a will was not ambiguous on its face, taken in connection with all the surrounding circumstances, and no doubt was raised as to its subject-matter or the identity of the legatee, an extrinsic memorandum, signed by the testatrix, was inadmissible to control or alter her legal intent as manifested by the will itself.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1022.]

2. SAME—RESIDUARY BEQUEST.

Where testatrix bequeathed the residue of her estate to her two younger children by name, to be divided equally between them, the legatees took separate bequests, and not as a class; and on the death of one before testatrix, his share descended to the heirs of testatrix.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1115, 1997, 2003.]

Appeal from Supreme Judicial Court, Bristol County.

Suit by Ellen I. Best for construction of the will of Nancy C. Chace, deceased, against Lewis W. Berry. From a decree of the probate court in favor of respondent, petitioner appeals. Affirmed.

J. J. O'Connor and Wm. J. Corcoran, for appellant. Phillips & Fuller, for appellee.

SHELDON, J. Nancy C. Chace died February 16, 1903, leaving a will, the material parts of which are as follows:

"First. After the payment of my just debts and funeral charges, I give and bequeath the sum of two hundred dollars to my oldest son, Lewis W. Berry.

"Second. I give and bequeath the rest and residue of my estate to my younger children, Elbridge G. Chace and Ellen I. Best, to be divided equally between them.

"Third. I hereby nominate my son Elbridge G. and my daughter, Ellen I. Best, sole executors of this will, and request that no sureties be required on their bond as such executors."

Lewis W. Berry is the son of the testatrix by her first husband, who died in 1859, and Elbridge G. Chace and Ellen I. Best are her children by her second husband, who also died before the date of her will. At the date of the will the three children named therein were living, but Elbridge G. Chace died before the testatrix, intestate and leaving no issue. The testatrix received at least a substantial part of her property under the will of a sister of her second husband. The petitioner was appointed executrix of Mrs. Chace's will, and having paid all debts and charges and the legacy to Lewis W. Berry, and having a considerable residue in her hands, she brought this petition in the probate court to determine her rights and those of Berry under the residuary clause of said will. She claims the entire residue, contending that it was bequeathed to a class of which she is the survivor, while the respondent, Berry, claims that the residue was given in equal parts to the petitioner and the deceased severally, and not as members of a class, and that upon the decease of said Elbridge the share bequeathed to him descended in equal parts to the heirs of the testatrix—that is, one-half to the petitioner, and one-half to the respondent—so that the respondent is now entitled to one-fourth part of such residue. The probate court entered a decree in favor of the respondent's contention, and the petitioner appealed.

1. After the death of the testatrix there was found among her private papers, together with her will, a memorandum, reading as follows:

"Fairhaven, I have finished this the 7th day of December, 1902, began it a month ago.
"Nancy C. Chace.

"Lewis W. Berry. Rock Elm, Wis.

"I have remembered him, it was my duty, he was a neglected child after nine years old.

"Ida M. Putny. Gilmington, Wis.

"Ellen, give her 25 dollars, is my wish.

"She is my granddaughter & married.

"Mary E. Berry. Marinett, Wis.

"Give her 50 dollars, she is single, also my granddaughter, not strong.

"Alvira Cowley, Plymouth, Mass.

"Give my niece 50 dollars as a debt of gratitude, she & I understand.

"A mat to Frank Shooks.

" " " " Effie Peck.

"Silk quilt to Deborah, and anything else you wish.

"Alter & Ellen what they wish.

"Give Will's folks two quilts, the same to Walter.

"You will do this for me Ellen—but give no money legacies unless you have plenty for other expenses.

"Your mother.

"To Ellen I. Best, Stoneham, Mass.

"This is not a legal document but you with your principal will legalize it if necessary with without interference if so make what change you need.

"Feb. 3d, 1903.

N. C. Chace."

The authenticity of this memorandum is admitted, and it is agreed that it may be admitted in evidence, if competent; but the respondent denies its competency. The petitioner contends that the contents of this memorandum indicate an intention that Berry should have only the \$200 bequeathed to him, and that the whole of the residue should go to the younger children; that it is equivalent to a declaration by the testatrix that her intention was what the petitioner now contends that it was. But the very statement of her contention is enough to overthrow it. The language of the will is to be construed with reference to the subject-matter and all the surrounding facts which were known to the testatrix. Her purpose and intention must be gathered from the language of the will, taken in connection with such attendant circumstances. *Gould v. Chamberlain*, 184 Mass. 115, 68 N. E. 39; *Morse v. Stearns*, 134 Mass. 389, 390; *Buckley v. Gerard*, 123 Mass. 8. And where, as here, there is no ambiguity on the face of the will, taken in connection with all the surrounding facts, so that no doubt is raised as to the subject-matter of the bequest, or the identity of the legatee, extrinsic evidence of the intention of the testatrix is not admissible to control or alter her legal intent as manifested by the will itself. *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *American Bible Society v. Pratt*, 9 Allen, 109; *Tucker v. Seaman's Aid Society (Mass.)* 7 Metc. 188. Accordingly, the memorandum was not admissible to show the intention of the testatrix.

2. The residuary clause in the will must be regarded as making separate bequests to Elbridge Chace and the petitioner, and not one bequest to them considered as a class. There is nothing to indicate that these words are, as argued by the petitioner, merely the chance expression of the scrivener. The general rule is "that when an aggregate fund is bequeathed to several legatees, to be divided among them, nominatim, in equal shares, if any of them die before the testator, what was intended for them will lapse." *Metcalfe, J.*, in *Jackson v. Roberts*, 14 Gray, 546, 550. And the same rule has been often affirmed and followed by this court. *Lyman v. Ccolidge*, 176 Mass. 7, 56 N. E. 831; *Powers*

v. Codwise, 172 Mass. 425, 52 N. E. 525; *Frost v. Courtis*, 167 Mass. 251, 45 N. E. 687; *Workman v. Workman*, 2 Allen, 472; *Sohler v. Inches*, 12 Gray, 385; *Gardiner v. Savage*, 182 Mass. 521, 523, 65 N. E. 851. It is true that this rule will not be enforced when it plainly appears from the will that the testator intended that the survivors of such legatees should take the whole fund bequeathed, as in *Swallow v. Swallow*, 166 Mass. 241, 44 N. E. 132, and *Jackson v. Roberts*, 14 Gray, 546, though the language of the court in the cases just cited and in *Sohler v. Inches*, 12 Gray, 385, shows that this limitation must be applied with some strictness. We find no sufficient circumstances in the case at bar to prevent the application of the general rule.

The result is that the contention of the respondent must be sustained, and the decree of the probate court affirmed.

So ordered.

(189 Mass. 446)

O'NEILL v. LOWELL MACH. SHOP.

(Supreme Judicial Court of Massachusetts.
Middlesex. Nov. 28, 1905.)

MASTER AND SERVANT—INJURIES TO SERVANT —ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to a servant who was young, stupid, and inexperienced, and was set to work on a complicated machine, whether the master was negligent in the performance of its duty to instruct the servant *held*, under the evidence, a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1048, 1050.]

Case Reported from Superior Court, Middlesex County; Wm. C. Wait, Judge.

Tort for personal injuries by one O'Neill, by his next friend, against the Lowell Machine Shop. In the superior court a verdict was directed for defendant. Plaintiff excepted, and the case was reported to the Supreme Judicial Court. Verdict set aside.

John J. & Wm. A. Hogan, for plaintiff.
F. E. Dunbar, for defendant.

HAMMOND, J. The plaintiff, a boy, while working for the defendant upon a speed lathe, was injured. Before working for the defendant he had been employed for two or three weeks as a bobbin boy, and two weeks tying knots on a creeler. About 16 months before the accident he worked for the defendant a day and a half, polishing rolls or caps on a speed lathe similar to that by which he was injured. He was hurt at that time by the catching of his jumper in the machine, and was taken off and set to work as a tool boy, in which work he continued up to the day of the accident. His duties as a tool boy were to collect tools and parts of machines and carry them to the toolroom to be sharpened. The lathe was used in polishing iron caps, and the cap, after being fastened in the machine, was turned very rapidly, so as to make 1,000 revolutions in a

minute. These caps were conical in shape, about a foot long, $3\frac{1}{2}$ inches wide at the base, and somewhat rounded at the top. They weighed about two pounds each. There was a round hole in the top, and they were fastened into the lathes by means of an arbor, which is a round iron rod about a foot and a half long, tapering from a diameter about half an inch at one end to one quarter of an inch at the other. This arbor was passed through the cap, so that the small end would come through a hole a short distance at the apex of the cone, and the cap was forced down by a blow, so as to make it tight upon the arbor. In the center of the arbor, at each end, a hole about one-eighth of an inch in diameter was drilled. The arbor, with the cap upon it, was placed between the headstock and tailstock of the machine; the headstock being a stationary iron rest, in which a live center is adjusted. One end of this live center is connected with a round and rather thick iron disk, to which is attached a pulley that supplies the power. The other end is beveled to a point, which fits into the end of the arbor. The tailstock is another stationary iron rest, in which is adjusted a dead center, which in like manner is beveled to a point and fits into the other end of the arbor. By means of a small wheel and screw this is moved up to its place when the arbor and cap are put in, and is brought in contact with the end of the arbor. The point of contact of the arbor with the dead center is oiled before the machine is set in motion. There is a check nut on the tailstock to bind the socket and hold it firm after it has been adjusted by the wheel, so that the end of the arbor and the dead center are in contact. It appeared that the bevel point of the dead center would wear with the revolutions of the arbor upon it, and it was the duty of the defendant's overseers to see that it was kept properly pointed. When in perfect form, the bevel at the point was at an angle of 60 degrees. While the plaintiff was polishing one of these caps, it flew out of its place in the machine and struck him in the eye.

The lathe on which the accident happened was set up in court at the trial, and it was shown that in operating it "the following acts occurred in running it. (1) Insert the arbor through the hole in the cap, and by a blow force the cap down on the tapering arbor as far as it would go. This left, with caps which the plaintiff was polishing at the time of the accident, a space of about half an inch between the small end of the arbor and the top of the cap; this end of the arbor being, as aforesaid, about one quarter of an inch in diameter. (2) Place the small end of the arbor in the jaws of the chuck far enough to be held firmly, and yet so as to leave a space between the jaws of the chuck and the top of the cap. (3) Tighten the screw nut in the chuck by means of the wrench handle. [Upon the machine in question the point of applying the wrench was about level with

the plaintiff's shoulder.] (4) Move the socket containing the dead center toward the big end of the arbor by means of the wheel, until the point of the dead center enters and fits into the hole in the arbor. (5) Oil the end of the dead center where it entered the arbor. (6) Tighten the screw nut on the dead center." It appeared that, when the machine was in motion, the live center, chuck, and arbor, with the cap upon it, revolved at a speed of 1,000 revolutions per minute, while the dead center remained still; and that the plaintiff's work at the time of the accident was to polish the revolving cap by applying a piece of emery cloth to its surface.

One Hartley, the second hand in the room where the accident occurred, called for the defendant, testified on cross-examination "that the jaws of the chuck which plaintiff used upon the lathe at the time he was hurt were not corrugated or grooved in any way, but were flat and came together, so as to grasp the round end of the arbor like the jaws of a monkey wrench; and that if, by any reason, the arbor became disengaged from the dead center, the centrifugal force of the arbor and cap, moving at the rate of 1,000 revolutions per minute, might cause an arbor which had been properly tightened in the chuck to work loose in the chuck and jump out of the lathe with force." On redirect examination he testified "that he should expect the arbor to break before slipping out." It appeared that there would be a tendency for the arbor, with the cap upon it, to jump out of the lathe by its centrifugal force when the machine was in motion, if the small end of the arbor were not properly tightened in the chuck by means of the wrench handle, or if the point of the dead center had not been properly adjusted into the hole in the arbor by means of the wheel, or if the check nut in the dead center had not been properly tightened, or if the point of the dead center were so worn or blunted as not to fit properly into the hole of the arbor. It further appeared that there would be such a tendency if the end of the dead center were not properly oiled, since the end of the dead center might thus burn off for lack of lubrication and allow the arbor to fly out. The defendant introduced evidence to show that, with the chuck properly tightened, an arbor could not be thrown out by the centrifugal force. It appeared that it took some strength to tighten the check nuts on the chuck and the tailstock, respectively. Without stating the evidence further in detail, it is sufficient to say that this was apparently a complicated machine, and that the work of adjusting the various parts to each other, preparatory to the act of polishing, required a considerable degree of care, strength, and skill.

The plaintiff testified "that Mr. Hartley set him to work upon the machine about 3 o'clock p. m.; that before setting the plaintiff to work Mr. Hartley spent about five minutes showing him how to operate the machine and

polish the caps; that by words and acts he showed him how to force the cap down upon the arbor, put the small end of the arbor into the chuck, tighten the check nut on the chuck, adjust the dead center, tighten the check nut in the tallstock, and put some oil on the end of the dead center; and that he polished a few caps for him in this way with emery paper, but that Mr. Hartley said nothing to the plaintiff about there being any danger that the arbor might jump out of the lathe, or that the plaintiff might be hurt if it did; that Mr. Hartley then went away, and the plaintiff polished seven or eight caps without accident; that he was hurt about 20 minutes after Hartley left; that at the time he was hurt he forced a cap on the arbor, put the small end of the arbor into the chuck, tightened the check nut on the chuck, adjusted the dead center, tightened the check nut on the tallstock, and put some oil upon the dead center; that he then turned on the power and had been polishing the cap for about two minutes with emery paper which he held in his hand, when suddenly, without warning, the arbor and cap jumped out of the lathe and hit him in the left eye, destroying its sight." He further testified "that he did not examine the end of the dead center while he was at work, and that he did not know that there was any danger that the arbor, by reason of the point of the dead center being worn or from any other cause, might jump out of the lathe, or that, if it did so, he might be injured." On cross-examination he testified that he tightened up the nuts before he began to use the cloth, so that it would not fly out, and that he tightened the chuck because he did not want the arbor to fly out, although in answer to the direct question he said that he did know that the cap and arbor would fly out if not tightened. The evidence as to the age and mental capacity of the plaintiff was conflicting, but it would have warranted a finding that at the time of the accident he was only 14 years and 4 months old, and was dull and stupid. Such was the machine, and such the boy.

The chief contention of the plaintiff is that, when placed face to face with this machine, he was not instructed as a boy like him should have been, or, in other words, that he was not sufficiently instructed, and that in this respect the defendant failed in his duty to him in view of the youth and inexperience of the plaintiff, the complicated nature of the machine, the number and character of the operations required in working it, the necessity that each should be properly done, in order that the machine should work smoothly, the rapid revolution of the revolving parts, the consequent strength of the centrifugal force, and the injury likely to happen, if by any reason thereof any of the parts should be projected from the machine. It cannot be said, as matter of law, that there was no failure of duty on the part of the defendant. A jury

may well conclude that only by reiterated teachings and careful watching for some time could such a boy be brought to the degree of knowledge of such a machine as to enable him to work on it with reasonable safety. The question whether the defendant was negligent in its duty to instruct the plaintiff was one of fact for the jury.

Verdict set aside.

(189 Mass. 442)

BROWNELL v. ANTHONY.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 27, 1905.)

TRUSTS—MANAGEMENT OF TRUST PROPERTY—DIVIDENDS FROM CAPITAL.

Where a bank consolidated with other banks, and in doing so liquidated its affairs and used a part of the assets to pay for stock in the consolidated bank, a cash dividend of the remaining assets declared from the surplus and profit and loss accounts constituted a distribution of capital and not of income; and one who held stock in the bank in trust to pay the income to a certain person for life should treat such dividend as capital, and pay only the income thereof to the life tenant.

Cases Reserved from Supreme Judicial Court, Bristol County.

Petition for instructions by Ezekiel J. Brownell, trustee under the will of Richard Borden, 2d, against Rhoda M. B. Anthony and others. In the Supreme Judicial Court, the case was reserved for the full court. Decree awarded.

L. Elmer Wood and Guilford C. Hathaway, for respondent Anthony. N. Hathaway, Jr., for other respondents.

KNOWLTON, C. J. In the winter of 1903, the petitioner had in his possession 31 shares of the capital stock of the National Union Bank, a banking corporation organized under the laws of the United States. These he held under a trust to pay the income to the respondent, Rhoda M. B. Anthony, for life, and after her death to turn over the remainder to the three sons of the testator, by whose will the trust was created. In February, 1903, this bank and the Pocasset National Bank and the Massasoit National Bank took steps to consolidate the three banks, and form a new corporation, to be called the Massasoit-Pocasset National Bank. In March, 1903, a committee of conference decided that the consolidation of the three banks was desirable, and a circular letter was issued to the stockholders of the National Union Bank advising the adoption of their plan. The letter then proceeded as follows: "To do so, it will be necessary to liquidate the old bank, use the assets to pay for stock in the new, making a cash dividend of surplus remaining. The stockholders of the National Union Bank will be entitled to the following option: New stock in the proportion of three new shares for each four of old, and a dividend in addition, as soon as possible, in liquidation, of probably \$20 per share; or, if new stock

is not desired, the cash value in liquidation of about \$135 per share, payable as soon as the assets can be collected." On May 15, 1893, in pursuance of this plan, the first dividend was declared by a vote as follows: "Voted, that a dividend of \$35.50 per share be declared by this bank, from profit and loss and surplus accounts, payable June 1st, 1903, or at a date that may be agreed upon between the Pocasset National Bank, the Massasoit National Bank, and this bank; said dividend being for the purpose of enabling stockholders to pay assessments on stock subscribed by them in the Massasoit-Pocasset National Bank." Subsequently a vote was passed to liquidate the bank, and dividends were voted in liquidation. Previously dividends had been declared to stockholders from the earnings of the bank, amounting for the last two or three years to 5 per cent. per annum, and before that time to 4½ per cent. per annum. On May 15, 1903, the bank had a surplus fund and earnings in a profit and loss account, but the amount of earnings was not enough to enable it lawfully to declare this dividend on that day in the regular course of its business. Rev. St. U. S. §§ 5199-5204 [U. S. Comp. St. 1901, pp. 3494, 3495]. The question before us is whether the dividend of May 15, 1903, and the subsequent dividends in liquidation, all of which have been received by the trustee, are to be treated as income belonging to the life tenant, or as capital to be held for the remaindermen.

The principles applicable to this question were discussed at length in *D'Ooge, Trustee, v. Leeds et al.*, 176 Mass. 558, 57 N. E. 1025. See, also, *Hemenway v. Hemenway*, 181 Mass. 406, 63 N. E. 919; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423. In regard to investments in the capital stock of corporations, we find this language in the opinion, in the first of these cases: "Everything is made to turn upon the action of the corporation. A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital. * * * The simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or of capital to be held as an investment in the corporation." This language was used of corporations continuing in existence and retaining their capital for the purpose of exercising their corporate powers. Obviously, it has no application to dividends of the assets, made in liquidation of a corporation which has been or is to be dissolved.

The dividends with which we are now dealing, that of May 15th, as well as the later ones, were not made as a separation of income from capital, but as a part of the plan for winding up the affairs of the corporation. The stockholders were compelled to change their investment, either by taking the proceeds of the property of the old corporation in stock in the new corporation, with a small balance in cash, or by taking the entire proceeds turned into cash. In either case, the

proceeds were to be received as capital which they could use or reinvest as they chose. The vote of the dividend of May 15th was a step in the liquidation of the corporation, no less than the subsequent votes. Prior to the vote, the surplus fund and the money represented by the profit and loss account, although derived from earnings, were held as a part of the capital. Only the prior dividends had been separated and made income by corporate action. The votes now in question were not intended to change the character of the property from capital to income, and they did not change its character. We are of opinion that the petitioner should be instructed to treat all of these dividends as capital, of which the income only is to be paid to the life tenant.

Decree accordingly.

(218 Ill. 97)

BECKETT et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS — PUBLIC IMPROVEMENTS—ORDINANCE.

In an action to confirm a special assessment, evidence held to show that the term "flat stones," as used in an ordinance in describing the material for bedding the curbstones, was understood by contractors to mean limestone blocks about 6 inches thick and 12 to 16 inches square, as nearly uniform as can be obtained.

2. SAME — CONFIRMATION OF ASSESSMENTS—REVIEW—SECOND APPEAL.

On second appeal, objections to the sufficiency of the description of an improvement in an ordinance, which existed at the time the original judgment of confirmation of an assessment was appealed from and which were not then raised, cannot be considered.

3. SAME — PUBLIC IMPROVEMENTS — ORDINANCE.

In determining the question whether or not an ordinance providing for a special assessment is valid on its face, the fact that the improvement thereunder was not constructed in accordance with the ordinance is immaterial.

4. SAME — ASSESSMENT ROLL — CONCLUSIVE-NESS.

Under City and Village Act, art. 9, § 24 (Acts 1871-72, p. 251), in proceedings to enforce a special assessment, the assessment roll is conclusive as to the apportionment of the costs between the public and the property assessed.

Appeal from County Court, Cook County; Wm. H. Hinebaugh, Judge.

Action by the city of Chicago against James D. Beckett and others. Judgment for plaintiff, and defendants appeal. Affirmed. Rehearing denied December 6, 1905.

This is a special assessment proceeding, in which judgment of confirmation was entered on May 3, 1905, from which the present appeal is prosecuted. The special assessment was for paving Ogden avenue from Warren avenue to West Twelfth street.

George A. Wilbur, for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

MAGRUDER, J. This case has been before this court three times, as may be seen by reference to *Holden v. City of Chicago*, 185 Ill. 526, 56 N. E. 1118; *City of Chicago v. Holden*, 194 Ill. 213, 62 N. E. 550, and *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435. In the first case, which was brought here by writ of error, the judgment was reversed upon the ground that the ordinance failed to state the nature, character, locality, and description of the improvement with sufficient certainty, as required in *Lusk v. City of Chicago*, 176 Ill. 207, 52 N. E. 54; that is to say, upon the ground that the flat stones, upon which the curbstones of the roadway were to be bedded, were not described in the ordinance, either as to the kind or size or shape of such flat stones. In the second case, the judgment was reversed because, when the cause came on for trial in the county court after being redocketed, the city offered to prove that the term "flat stones," as used in the ordinance, had a definite, well-known and established meaning in the city of Chicago with reference to street improvements, but the court refused to permit the proof to be made; and it was there said that the object of the proof was to show that the term "flat stones" was not, in view of the alleged local meaning in which it is claimed to have been used in the ordinance, indefinite or uncertain as a matter of description, and that, if proof of this character could have been produced by the petitioner, it should have been received by the court, and that the exclusion of it was error. *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307. When the case went back, and was again redocketed, a new assessment was made, under sections 57 and 58 of the Local Improvement Act (Starr & O. Ann. St. Supp. 1902, c. 24) and the city failed to adduce any proof to cure the uncertain description in the ordinance, but judgment was rendered by the county court, affirming the new special assessment to pay an alleged deficiency for the paving of a part of Ogden avenue in Chicago; and such judgment of the county court was reversed chiefly because of the making of the levy of the new assessment. In the third case of *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435, speaking of the second judgment remanding the cause in the second case of *City of Chicago v. Holden*, 194 Ill. 213, 62 N. E. 550, we said (page 291, of 212 Ill., page 435 of 72 N. E.): "The judgment of this court remanding the cause was not a final judgment disposing of the cause, or holding that the assessment was annulled or set aside, or that the ordinance was so insufficient that the collection of the assessment made under it was impossible, but, on the contrary, it was said that if the proof, which it was proposed by the city to make upon the second hearing, that the term 'flat stones' had a well-known and commercial meaning among people engaged

in the business of constructing such improvements, could be made, it was not only possible, but entirely proper, that the assessment should be sustained; and to determine that question the cause was remanded." Since the remandment of the cause by the decision in *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435, it has been redocketed and retried. The present appeal is prosecuted from the judgment rendered on such retrial. Before the trial in the court below, resulting in the judgment of May 3, 1905, the petitioner, the city of Chicago, dismissed the supplemental petition, upon which the new assessment proceeding, referred to in the last-named case, was based.

First. Under the decision in *Holden v. City of Chicago*, 212 Ill. 289, 72 N. E. 435, it would seem that the only question here to be determined is whether or not the term "flat stones," as used in the original ordinance passed by the city council of Chicago on May 25, 1896, had a well-known and commercial meaning among people engaged in the business of constructing such improvements as are here involved. Upon this question proof was introduced by the present appellee, the city of Chicago, for the purpose of showing that the term "flat stones," as used in the city ordinance, had a definite, well-known and established meaning in the city of Chicago with reference to street improvements. The ordinance of May 25, 1896, upon which the present proceeding is based, is for the improvement of Ogden avenue from Warren avenue to West Twelfth street, and provides as follows: "The curb walls now in place on either side of said roadway between said points to be plastered on their street face from the top surface down and for a space of five feet. * * * The curbstones now in place on either side of said roadway shall be reset, so as to be on a line with the street face of said curb walls; the spaces on either side of said roadway, where no curb walls or curbstones exist, shall be curbed with the best quality of limestone curbstones. Said curbstones to be four feet long, three feet deep, and five inches in thickness with top edge full and square. Each curbstone to have a straight base the whole length, and to be firmly bedded upon flat stones. Each curbstone to be bush-hammered on the top surface and for a space of twelve inches down from the top." If the proof introduced shows that the descriptive term "flat stones," used in the ordinance, has a well-known and established meaning, the apparent defect in the description in the ordinance will be removed. *Kuester v. City of Chicago*, 187 Ill. 21, 58 N. E. 307. The nature of that defect is thus stated in *Lusk v. City of Chicago*, supra: "It is not mentioned in the ordinance here what kind of stones the flat stones shall be, upon which the curbstones

are to be bedded. Whether they are to be granite, sandstone, limestone or of some other quality is not disclosed by the ordinance, nor is there any specification of the size or shape, except that they are to be flat and machine dressed. No intelligent estimate could be made by the commissioners of the cost of the stones, unless the length, width, thickness, and kind or quality were disclosed by the ordinance. * * * As to the flat stones, nothing is said in regard to their nature or character."

We are of the opinion that the proof, introduced by the appellee upon the last trial of the cause was sufficient to remove the defect in question under the decisions already referred to. The testimony, so introduced, showed that the term "flat stones" has a well-known and commercial meaning among people engaged in the business of constructing street improvements; that such stones are flat blocks of stone used as supports for curbstones, which are set upon the streets in Chicago; that these blocks are limestone, about 6 inches thick and 15 inches square; that is to say, 15 inches on each side; or, as one of the witnesses expresses it, "6 inches thick—supposed to be always about that—stone running 6 inches thick and 15 by 15. The quality of the stone is limestone. They come as near being uniform as we can get them." One of the witnesses, giving the thickness as 6 inches, states that they would sometimes be 12 or 16 inches square, instead of 15 inches square. But this difference does not weaken the force of the testimony as to the meaning of the term used. One witness says of these flat blocks of stone: "They are known as flat stones for this purpose in connection with curbing. * * * The term 'flat stones' is a well-known term in connection with the business of setting stone curbing. * * * In the paving business, and particularly in the stone curbing business, these flat stones are well known." No testimony whatever was introduced by the appellants upon the trial below to contradict that of the city upon this question.

Second. It is furthermore contended on the part of the appellants that the ordinance is defective, because it does not give the height of the curbstones. This point cannot be raised at this time, as it was not presented when the case was before the court before. In *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878, it was held that, upon the reversal of a judgment of confirmation upon the ground of insufficient description of the improvement, new objections, which existed when the assessment was confirmed, cannot be urged to the validity of the ordinance when the cause is redocketed, nothing having been done in the meantime to call for new objections; and in that case it was said (page 188 of 211 Ill., page 880 of 71 N. E.): "The original appeal to this court was upon the ground that the original ordinance of 1893 was invalid. The ground, upon which

it was then attacked, was that it did not sufficiently describe the 'flat stones,' and it is now insisted that, upon the remanding and redocketing of the cause, appellants were entitled to further attack the validity of the same original ordinance which, upon the other appeal, this court had passed upon. We think not. It is a well-settled rule that when a cause is litigated, and that litigation prosecuted to a court of appeals and passed upon, all questions that were open to consideration and could have been presented, relating to the same subject-matter, are res judicata, whether they were presented or not. In other words, and as applied to the case at bar, the validity of the original ordinance of 1893 was attacked upon the first appeal upon the ground that it did not sufficiently describe the improvement. When the cause was redocketed, the validity of the same ordinance was attacked upon another ground. This, we think, cannot be done."

Third. One of the witnesses of appellee upon the trial below stated upon cross-examination that these flat stones were "placed, one under each end of the curb—never put in more than one under each end. I have constructed the curb on Ogden avenue. Under the curbstones on Ogden avenue I did not put a continuous line of these bedding stones from one end of the curb to the other, and never saw any bedding stones used in that way." In *White & Gleason v. City of Chicago*, 188 Ill. 392, 58 N. E. 917, where the description in the ordinance of the foundation, upon which the curbstones were to rest, was claimed to be so indefinite that the ordinance was void, it was said: "The ordinance provides each curbstone shall be four feet long, three feet high, and five inches thick, shall have a straight base its whole length, and shall be 'firmly bedded' upon flat limestone blocks, said blocks to be one foot in length, eight inches in width, and six inches in thickness. It is urged that the number of limestone blocks necessary to be used in order the said curbstones may so be 'firmly bedded' is not given. Our construction of the ordinance is that it requires that the base of each curbstone, along the full length thereof, shall rest and be bedded on limestone blocks of the dimensions specified. Supporting the curbstone on such limestone blocks placed at the ends, only, of the curbstone, or at the ends and center only, or otherwise in such manner as that all parts of the base of each curbstone would not be bedded on such limestone blocks, would not answer the requirements of the ordinance. It was not necessary the number of limestone blocks to be used should be given. The dimensions of the limestone blocks and the length of the curbing being known, the number of blocks to be used was but a matter of arithmetical calculation." It is said that, under the proof here, each curbstone is supported at the ends only, and not by a continuous line of bedding stones, and that

therefore, under the decision in *White & Gleason v. City of Chicago*, supra, the ordinance here is defective. The ordinance here, as in the case referred to, is silent as to the number of flat stones or bedding stones. If it is to be interpreted as requiring a continuous line of flat stones under the curbs, instead of one at each end of each curb, the proof merely shows that, in the improvement now under consideration, as many flat stones were not put under the curbstones as a correct interpretation of the language of the ordinance would require.

The question, however, is not as to what was done under the terms of the ordinance, but whether the ordinance itself is invalid in not specifying the number of flat stones required. The present ordinance is not defective for the reason thus urged against it, even if such defect can be considered at this time or upon this hearing. The fact that an improvement is not made in accordance with the requirements of an ordinance has no effect upon the determination of the question, whether the ordinance itself is valid or not upon its face. If it be admitted that the ordinance here requires a continuous line of flat stones under the curbing, instead of one flat stone at each end of each curb, the proof shows that a less number of flat stones were put in than the ordinance required, and, this being so, the property owner is compelled to pay for a fewer number of flat stones than he would have been obliged to pay for if the ordinance had been strictly complied with. Appellants, therefore, cannot complain that they are injured in any way. It may be said, however, of the point thus made, as is said above in regard to the point that the height of the curb was not specified, that it cannot be raised at this time. *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 878.

Fourth. Appellants furthermore complain that they were not permitted to introduce proof to show the amount of public benefits. The assessment roll, introduced in evidence, showed the proportion of the total cost of the improvement, which would be a benefit to the public and assessed to the city of Chicago, to be "no dollars"; the total cost of the improvement being \$74,500. Appellants proposed to prove that the public benefit, instead of being "no dollars," was really about 50 per cent. of the total amount of the assessment. We are of the opinion that the court committed no error in refusing to allow testimony upon this subject, for the reason that the assessment roll in this case was conclusive upon this question.

Section 47 of the local improvement act of June 14, 1897, provides that, "upon objection or motion for that purpose, the court, in which said proceeding is pending, may in a summary way inquire * * * whether or not the assessment, as made and returned, is an equitable and just distribution of the cost of said improvement, first, between the public and the property; and second, among the

parcels of property assessed." *Starr & C. Ann. St. Supp. 1902, c. 24, p. 179*. In *Mercy Hospital v. City of Chicago*, 187 Ill. 400, 58 N. E. 353, in construing section 47, we held that the action of the county court in refusing to inquire into the apportionment of costs between the city and private owners is subject to review, although said section 47 provides that the county court's determination of the correctness of such apportionment shall be conclusive; and, in that case, substantially overruled *City of Jacksonville v. Hamill*, 178 Ill. 235, 52 N. E. 949, where it was decided that the court had no power to modify or change the assessment in this respect, as made and returned by the proper officers. But the *Hamill* Case, supra, was only overruled, so far as it concerned section 47 of the improvement act of 1897, as applied to special assessment proceedings, instead of special taxation proceedings. In construing paragraph 139, c. 24, *Hurd's Rev. St. 1902*, being section 24 of article 9 of the city and village act of 1872 (Acts 1871-72, p. 251), this court held in a number of cases that the action of the commissioners was conclusive, in so far as it fixed the relative amount of the cost of the improvement that was to be respectively borne by the municipality and the owners of the property benefited. *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Billings v. City of Chicago*, 167 Ill. 337, 47 N. E. 731. In *Billings v. City of Chicago*, supra, we said (page 342 of 167 Ill., page 732 of 47 N. E.): "This court has held in a number of cases that, where the commissioners have acted and made their report, as was done here, their finding is conclusive, in so far as it fixes the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited. *Bigelow v. City of Chicago*, 90 Ill. 49; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Walters v. Town of Lake*, 129 Ill. 23, 21 N. E. 556." In *Mercy Hospital v. City of Chicago*, supra, it was held that the decision in *City of Jacksonville v. Hamill*, supra, was wrong in applying the construction thus given to paragraph 139 of said chapter 24 to section 47 of the local improvement act of 1897. But the decisions, to the effect that the finding of the commissioners is conclusive in so far as it fixes the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited, still stand as correct interpretations of paragraph 139 of chapter 24 of the city and village act of 1872, and apply to proceedings had under and in pursuance of the act of 1872.

Section 99 of the local improvement act of 1897 provides "that the laws subsisting at the time of the taking effect of the local improvement act of June 14, 1897, shall continue to apply to all proceedings for the * * * confirmation of special assessments, * * * for local improvements which were pending

in any court in this state at the time of the taking effect of the local improvement act of June 14, 1897"; and it also provides that, "where proceedings for local improvements to be made by * * * special assessment shall have been instituted when this act shall take effect, and where the assessment provided for therein has not been confirmed by any court, all future proceedings thereunder shall be as herein provided, with the same effect as if such proceedings had been commenced in accordance with the provisions herein provided," etc. 4 Starr & C. Ann. St. Supp. 1902, c. 24, par. 136, p. 203; Gray v. Town of Cicero, 177 Ill. 459, 53 N. E. 91; City of Chicago v. Nicholes, 192 Ill. 489, 61 N. E. 434; Yaggy v. City of Chicago, 194 Ill. 88; 62 N. E. 316; Markley v. City of Chicago, 190 Ill. 276, 80 N. E. 512; Gage v. City of Chicago, 195 Ill. 490, 63 N. E. 184. The ordinance upon which the present proceeding is based was passed on May 25, 1896. The petition in the original proceeding herein was filed on July 25, 1896, and the assessment roll herein was filed on September 4, 1896. Therefore this proceeding was pending when the act of 1897 went into force on July 1, 1897. It must also be true that the original judgment of confirmation entered in this proceeding was so entered before July 1, 1897, when the local improvement act went into force. When the clerk made up the record in the case at bar, he did not make a full record of all the proceedings, but only inserted certain proceedings and orders named in the *præcipe* of counsel. He did not insert in the record such original confirmation judgment. There is, however, inserted in the record an order entered on July 2, 1897, the day after the local improvement act went into force, reducing the assessment 20 per cent. as to certain property. This order contains the following words: "It is considered and ordered by the court that the judgment of confirmation, heretofore rendered herein, as to and in so far as the same affects the lots, pieces, and parcels of land and property hereinafter described, be, and the same is hereby, vacated," etc. In this order of July 2, 1897, there is a reference to "the judgment of confirmation heretofore rendered herein." There was therefore a judgment of confirmation entered therein before July 2, 1897. The affidavits in regard to the mailing and posting of notices, and the certificate of publication, are in the record, and were filed in the proceeding on September 21, 1896. These affidavits and notices show that the final hearing for the confirmation of the assessment was had at the September term, 1896, of the county court, commencing on September 14, 1896. The presumption is that the judgment of confirmation was entered at the September term, 1896. At any rate, it is clear that it was entered before the local improvement act went into force on July 1, 1897. Therefore, as this proceeding was pending on July 1, 1897, and as the judgment of

confirmation herein had been entered before July 1, 1897, the present proceeding, so far as it has reference to the action of the commissioners in the respect above named, is governed by the act of 1872, and not by the act of 1897. Consequently, the assessment roll in this case, which found that the proportion of the total cost of the improvement, which would be of benefit to the public and assessed to the city, was "no dollars," is conclusive upon that subject. That assessment roll having been filed and confirmed 1896, the finding of the commissioners, who made the same, "is conclusive, in so far as it fixes the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited." *Billings v. City of Chicago*, supra.

Inasmuch, therefore, as section 47 of the local improvement act of 1897 has no application here, and inasmuch as the act of 1872 upon the point here involved is the act which does have application, the court below committed no error in refusing to allow the appellants to prove that the public benefit was other or different from what it was found to be in the report, or assessment roll, of the commissioners, as filed in 1896.

The judgment of the county court is affirmed.

Judgment affirmed.

(218 Ill. 149)

WELLS & FRENCH CO. v. KAPACZYNSKI.
(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—FINDING OF APPELLATE COURT—CONCLUSIVENESS.

Under Practice Act, § 87 (Hurd's Rev. St. 1903, c. 110), providing that the finding of facts by the Appellate Court is conclusive, the Supreme Court cannot review the Appellate Court's finding of facts, but can only determine whether its judgment was proper on the facts so found.

2. MASTER AND SERVANT—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where an injury to a servant was caused by the wrongful and negligent order of his master, the servant himself being without fault, there is no room for the application of the doctrine of assumed risk.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 538.]

Cartwright, C. J., and Scott and Hand, JJ., dissenting.

Appeal from Appellate Court, First District.

Action by Martin Kapaczynski against the Wells & French Company. From a judgment of the Appellate Court affirming a judgment for plaintiff (110 Ill. App. 477), defendant appeals. Affirmed.

Rehearing denied December 6, 1905.

This was an action on the case brought by the appellee against appellant to recover for personal injuries. The substantial averments in the declaration are that the defendant was possessed of, using, controlling, and operating a certain factory, building, and plant, commonly called "carshops," which then and

there contained certain machinery, operated by steam power, used and operated in the conduct of the business of the said defendant; that the plaintiff was in the employ of said defendant as a planer, under the orders and direction of a certain foreman or boss of defendant, and whose orders and commands in the premises plaintiff was obliged to obey, and that on the day aforesaid said foreman or boss of the defendant then and there ordered and directed him to work at and on a certain machine, to plane certain pieces of wood there; that, in pursuance of such order, he then and there did proceed to do said work at and upon said machine; that thereupon it became and was the duty of the defendant to have seen that said machine was a reasonably safe and proper one for the performance of said work, and that it was suitable for the performance thereof, and would not subject the plaintiff to unnecessary exposure of loss of life or limb in the performance of his duties as servant of the defendant; that the said defendant, in disregard of its duty in this behalf, did not see to it that said machine was a reasonably safe, proper, and suitable one for the performance of such work, inasmuch as the tables of the said machine were allowed to be and remain at a great distance apart, to wit, at a distance of $3\frac{1}{4}$ inches, whereby and by means of the premises and the wrongful and negligent order and command of said foreman or boss, and while plaintiff, in the exercise of due care and caution for his safety, was planing certain pieces of wood on said machine, said wood was caught and tipped into the knives of said machine, and the fingers and left hand of plaintiff were then and there thrown against said knives, and by means thereof three of the fingers of plaintiff were then and there cut off and amputated, and the plaintiff was otherwise greatly and permanently wounded, disabled, and injured, etc. To the declaration a plea of not guilty was filed, and two verdicts rendered in favor of the plaintiff were set aside. Upon the third trial the court, on motion of defendant, after all the evidence was introduced, directed a verdict in its favor, and entered judgment thereon. It was thereupon stipulated by the parties that upon an appeal to the Appellate Court, if the case should be reversed upon the ground that the plaintiff was entitled to recover under all the evidence introduced on the trial and submitted to the jury, then judgment should be entered in that court against the defendant and in favor of the plaintiff for the sum of \$3,000. Plaintiff prosecuted his appeal to the Appellate Court for the First District, where the judgment of the trial court was reversed, and a judgment entered in favor of the plaintiff for \$3,000 in pursuance of said agreement. The Appellate Court, having found the facts different from that of the trial court, made the following finding of the ultimate facts: "First, that appellee wrongfully and negligently ordered appellant to perform certain work,

and that in obeying such order appellant was injured, all as charged in the declaration; second, that the appellant was not guilty of any negligence which caused or contributed to such injury." The defendant prosecuted this further appeal.

F. J. Canty (J. C. M. Clow, of counsel), for appellant. Edward Maher, for appellee.

WILKIN, J. (after stating the facts). Appellant relies upon two propositions for a reversal in this court: First, that, by plaintiff's own testimony, he was told by the foreman that he could take his choice of going ahead and doing the work or going home, and it is said that, if he chose to remain and go on with the work, he did so at his own risk, and that the only constraint under which he proceeded was moral constraint, which the law does not and cannot recognize, and that there is no legal coercion; and, second, that the claim of the plaintiff of assurance of safety cannot be applied to the case, for the reason that the plaintiff was as well aware of the danger of using the machine as was the boss or foreman who, it is claimed, ordered him to proceed with the work; and it is urged that the only question for our consideration is whether the Appellate Court was justified in finding that the verdict should have been for the plaintiff instead of for the defendant. Both propositions insisted upon by counsel must necessarily depend upon the facts of the case, and the Appellate Court having found the facts adversely to the defendant below, the legal questions attempted to be raised cannot be considered. Under the provisions of section 87 of the practice act (Hurd's Rev. St. 1903, c. 110), and the repeated decisions of this court, the finding of facts by the Appellate Court is conclusive upon this court, and the only question which we can consider is whether the judgment as entered by the Appellate Court was such as should have been rendered under the facts so found by it. Accepting as true the finding that defendant negligently ordered the plaintiff to perform certain work, and that in obeying such order the plaintiff was injured, all as charged in the declaration, and that the plaintiff was not guilty of any negligence which caused or contributed to such injury, there can be no serious question but that the judgment of the Appellate Court was the only one which could, under the law, have been properly entered. As to the binding effect of the finding of facts by the Appellate Court upon this court, see *Supple v. Agnew*, 202 Ill. 351, 66 N. E. 1069, and cases cited. The injury to the plaintiff having resulted, according to the finding of the Appellate Court, from the wrongful and negligent order of the defendant, and the plaintiff himself being without fault, the doctrine of assumed risk can have no application whatever to the case. *Chicago Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, 36 N. E. 572; *Dallemand*

v. Saalfeldt, 175 Ill. 510, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214; Western Stone Co. v. Muscial, 196 Ill. 382, 63 N. E. 664, 98 Am. St. Rep. 325; Chicago & Eastern Illinois Railroad Co. v. Heerey, 203 Ill. 492, 68 N. E. 74.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CARTWRIGHT, O. J., and SCOTT and HAND, JJ. (dissenting). The facts, as they appear from the evidence most favorable to the plaintiff are as follows: The defendant was engaged in manufacturing cars in the city of Chicago. Plaintiff was a woodworker in its employ. He was an experienced mechanic, of mature years, and for the three years preceding the date of the accident had been constantly working on a machine which is referred to as a "Universal woodworking machine," which was made entirely of iron and steel, the top of which consisted of two flat surfaces, which stood about $3\frac{1}{2}$ feet high, each of which was about 2 feet wide and 6 or 8 feet long. These surfaces are referred to as "tables." They stood side by side, with a space between known as a "throat." These surfaces were adjustable. They could be raised and lowered, and moved nearer to or farther from each other. The head of the machine was in the space known as the "throat." It was turned by machinery, and could be made to revolve at the rate of 3,500 revolutions per minute; and in the head many different kinds and shapes of knives could be fitted, so that the machine could be used for planing, grooving, sawing, gaining, and for other purposes. Shortly before the plaintiff received the injury of which he complains, the defendant's foreman directed him to take certain pieces of wood, 8 inches in length, 2 inches in thickness, and octagonal in form, and plane them on this machine. When the machine was to be used for planing, proper knives were placed in the head, and the front table was so adjusted as to be as much lower than the rear table as the thickness of the shaving which was to be planed away. The piece to be planed was then placed upon the front table, and passed backward over the revolving head to the back table; the upper edges of the knives, as they came to the highest point in revolving, being on a level with the surface of the back table. The operator placed the piece of wood on the front table, with one end toward the knives, and pushed it against the knives. When enough of the piece had been planed so that the planed portion would reach across the throat, the front end of the piece would rest upon the back table, and the piece would then have a bearing upon each table until the rear end of the piece would pass off of the front table. When the plaintiff was directed to do this work, he said to the foreman that the throat was too wide for planing such short pieces. The foreman then

brought the tables as near together as he could get them, narrowing the throat to $3\frac{1}{4}$ inches. There was another planing machine on another floor in the defendant's establishment, and, after this throat had been adjusted to $3\frac{1}{2}$ inches, plaintiff said to the foreman, "There is too big an opening there," and called attention to the fact that the machine on the other floor had a smaller opening. Thereupon the foreman said the machine which he had adjusted was all right, and directed the plaintiff to do the work on that machine, and concluded with these words: "If you don't want to do it, go home." The plaintiff then went to work in the manner directed, and while working on the second or third piece his hand slipped into the knives and was injured.

Plaintiff testified that at the time of this conversation with the foreman, immediately preceding the accident, he knew that this machine was not intended to do this kind of work, because the opening in the machine was too big; that it was more dangerous to work with short pieces over a large opening than over a small one; and that the danger to the operator was greater with a $3\frac{1}{2}$ inch throat than with a narrower one, when planing pieces but 8 inches in length, on account of the greater difficulty in holding the piece in proper position until the front end of it would reach the back table.

Plaintiff first urges that the findings of fact made by the Appellate Court are conclusive upon this court under section 88 of chapter 110 of Hurd's Revised Statutes of 1903, and that there is nothing for this court to consider. The motion for a peremptory instruction presented to the circuit court a question of law, and the court's action on that motion was a finding that there was not in the record evidence which, with all the inferences that the jury could justifiably draw therefrom, was sufficient to support a verdict in favor of the plaintiff. *Foster v. Wadsworth-Howland Co.*, 168 Ill. 514, 48 N. E. 163; *Foster v. McKeown*, 192 Ill. 339, 61 N. E. 514; *Illinois Central Railroad Co. v. Swift*, 218 Ill. 307, 72 N. E. 737.

In order to render judgment for the plaintiff, the Appellate Court necessarily found, first, that there was in the record evidence which, with the inferences which the jury could justifiably draw therefrom, was sufficient to support a verdict in favor of the plaintiff; and, second, that, upon a consideration of all the evidence in the case, the evidence in support of the declaration preponderates over that which supports the plea of the defendant. The first of these findings is upon a question of law. Jurisdiction to make that finding was conferred upon the Appellate Court by the appeal prosecuted by the plaintiff, and the Appellate Court had jurisdiction to make that finding without any regard to the stipulation; and that finding, being one of law, is reviewable in this court. The motion made in the circuit

court to direct a verdict presented and preserved a question of law, and therein this case is distinguishable from *Supple v. Agnew*, 202 Ill. 351, 66 N. E. 1069, relied upon by plaintiff. The second finding, to the effect that the evidence preponderates in favor of the plaintiff, is one which in this case the Appellate Court could make only by virtue of the stipulation, and is a finding of fact not open for consideration here, and finally determines the right of plaintiff to recover if the finding of the Appellate Court upon the question of law presented by the motion to direct a verdict was correct. The same question of law is presented for our determination, precisely as though the motion for a peremptory instruction had been overruled by the circuit court, and there had been a verdict and judgment for \$3,000 in favor of the plaintiff, which had been brought to us for review, by the appeal of the defendant, after a judgment of affirmance in the Appellate Court, upon an assignment of error questioning the action of the circuit court in overruling the motion for a peremptory instruction.

The burden was upon the plaintiff to show that he did not assume the risk. *Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74. The question for our determination therefore is, is there in this record any evidence which, with the reasonable inferences which the jury could justifiably draw therefrom, was sufficient to support a finding by the jury to the effect that the plaintiff did not assume the risk which resulted in his injury? It plainly appeared from the testimony of the plaintiff that he was familiar with this machine, and was entirely cognizant of the danger attendant upon planing 8-inch pieces over a 3½-inch throat. To him the danger was plain and obvious. He had as full and complete knowledge regarding the peril prior to the injury, and when he began planing these short pieces, as any one could have. But it is said that the statement of the foreman to him that the machine was all right was an assurance of safety upon which he had a right to rely, and that for this reason this case falls within an exception to the doctrine of assumed risk. This exception exists only where the servant does not have complete knowledge of the danger, and where he therefore relies upon the knowledge of the master, which is superior to his own, or which he believes or assumes to be superior to his own. Where, as here, the servant knows exactly what the danger is, he cannot be said to rely upon an assurance that the danger does not exist, because he knows that it does exist. It is only where the plaintiff has been misled by the assurance of the defendant that the exception exists. *Rohrabacher v. Woodward* (Mich.) 82 N. W. 797; *Toomey v. Eureka Iron & Steel Works*, 89 Mich. 249, 50 N. W. 850;

Anderson v. Akeley Lumber Co., 47 Minn. 128, 49 N. W. 664; *Rais v. Struck*, 64 S. W. 729, 23 Ky. Law Rep. 1113; *Breckenridge & P. Syndicate v. Murphy*, 38 S. W. 700, 18 Ky. Law Rep. 915; *Haas v. Balch*, 56 Fed. 984, 6 C. C. A. 201; *Showalter v. Fairbanks, Morse & Co.*, 88 Wis. 376, 60 N. W. 257.

The case of *Rohrabacher v. Woodward*, supra, seems to be squarely in point. There the plaintiff was working upon precisely the same kind of machine that the plaintiff in the case at bar was using, and was required to plane short pieces of wood thereon. He called the attention of the defendant to the fact that this was a dangerous operation, but was assured by the defendant that the work was entirely safe. His right to recover was denied upon the ground that he could not continue to operate a machine which he knew to be dangerous, simply upon the assurance of his master that it was not, when he himself had complete knowledge of the danger arising from its operation.

It is next urged that the order of the foreman was negligent in its character, and brings the case within another exception to the doctrine of assumed risk, and we are referred to a number of cases decided by this court in which it has been held that the primary duty of the servant is obedience, and that when the master commands the servant to do a particular work or to use particular appliances, and the servant is injured, the master is liable; and that in such cases it is not necessary that the servant shall balance the degree of danger, and decide with absolute certainty whether he should do the act or refrain from doing it. An examination of these cases shows that they are cases where the employé did not have full and exact knowledge of the danger he was about to encounter, or cases where the order was peremptory and required him to act immediately, without an opportunity to weigh the probable consequences of so doing. Here, as the plaintiff approached this task, he was fully acquainted with the peril attendant upon its performance. Under the law, without any reference to the order given him, he could do the work and assume the risk, or leave the employment; and, under such circumstances, if he did the work, he assumed the risk. The order was an order to do the work, or quit the employment. With full and complete knowledge of the danger, and upon deliberation, he elected to do the work. Under the circumstances, the order simply presented to him the same alternative that he had under the law, and he must therefore be regarded as having deliberately elected to incur a known danger rather than leave the employment of his master. The case therefore does not fall within this exception to the doctrine. *Leary v. B. & A. R. Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733;

Sweeney v. Berlin & Jones Envelope Co., 101 N. Y. 520, 5 N. E. 358, 54 Am. Rep. 722; *Lamson v. American Ax & Tool Co.*, 177 Mass. 144, 58 N. E. 585, 83 Am. St. Rep. 267; *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich. 478, 30 N. W. 109; *Dougherty v. West Superior Iron & Steel Co.*, 88 Wis. 343, 60 N. W. 274; *Atchison, Topeka & Santa Fé Railroad Co. v. Schroeder*, 47 Kan. 815, 27 Pac. 965; *Worlds v. Georgia Railroad Co.*, 99 Ga. 283, 25 S. E. 646; *Bradshaw v. Louisville & Nashville Railway Co.*, 21 S. W. 346, 14 Ky. Law Rep. 688.

In *Lamson v. American Ax & Tool Co.*, supra, an employé complained of an appliance as unsafe, and was told that he might either continue to use it, or leave. With full knowledge of the peril, he continued in the employment, and was held to have assumed the risk arising from the unsafe appliance.

(218 Ill. 34)

CHICAGO CITY RY. CO. v. LOWITZ.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIERS — INJURIES TO PASSENGERS — EVIDENCE.

In an action for injuries sustained by a passenger on a street car by being thrown to the ground by the sudden starting of a car as he was alighting therefrom, testimony of a common practice among passengers to get off cars at that place was competent.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1303.]

2. SAME—RULES OF CARRIER.

In an action against a street railroad for injuries to a passenger sustained while alighting from the car during a stop at a railroad crossing, rules of defendant requiring cars to be stopped at a certain distance from railroad crossings, giving the motorman charge of the car while the conductor goes ahead to the crossing, and forbidding the motorman to start the car without seeing that no person is getting on or off, are admissible on the issue of defendant's negligence in starting the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1305.]

3. EVIDENCE—OPINIONS OF WITNESSES.

In an action against a street railroad for injuries to a passenger caused by a sudden start of the car while he was alighting, a question asking witness whether it was physically possible for the motorman to see anybody getting off the rear platform in the nighttime was subject to the objection of calling for an opinion.

4. SAME—EXPERT TESTIMONY.

Testimony of a physician that in an examination of plaintiff he found "an apparent inability" to use the hip was properly allowed to stand, where witness subsequently stated that he could only form an opinion on the subject.

5. CARRIERS—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.

In an action against a street railroad for injuries to a passenger, where a rule of defendant relating to the conduct of employes at railway crossings was read in evidence, a charge that the rule was not admitted, and should not be considered as furnishing a substantive ground of complaint and base of recovery, was properly refused.

Appeal from Appellate Court, First District.

Action by Elias Lowitz against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied December 6, 1905.

The Appellate Court has made the following statement of facts in this case as a preface to its opinion deciding the case, to wit: "Appellant was engaged in operating an electric line of street railway upon and along Indiana avenue in the city of Chicago. Indiana avenue runs north and south and Fortieth street runs east and west, crossing Indiana avenue at right angles. Running along Fortieth street are steam railroad tracks which cross Indiana avenue at grade. Immediately south of Fortieth street the South Side Elevated Railroad runs east and west across Indiana avenue. On the southeast corner of Fortieth street and Indiana avenue there is constructed an entrance and stairway to the elevated structure. Appellee claims that, on the evening of October 11, 1899, in company with his two sons and one D. C. Thickston, he visited at the house of a friend on Princeton avenue between Forty-Seventh and Forty-Eighth streets, and between 10 and 10:30 o'clock they started to return to their homes. They walked to Forty-Seventh street and took a car going east on the Forty-Seventh street line. Upon arriving at Indiana avenue they transferred to a north-bound car on Indiana avenue. When they reached Fortieth street, the car stopped, as is the custom, before crossing the railroad tracks at Fortieth street, for the purpose of enabling the conductor of the car to go forward and ascertain if it was safe for the street car to pass over the tracks. As soon as the car stopped, the conductor went ahead to see if there was any danger, and, seeing that the way was clear, signaled the motorman to start ahead. The motorman in charge of the car started the car forward, and took it across the railroad tracks. Appellee claims that when he entered the Indiana avenue car the conductor was informed that they wished to stop on the south side of Fortieth street. When the car stopped, appellee and his son William left their seats in the car and went out upon the rear platform of the car. The son stepped off the car safely. Appellee, following closely behind him, had one foot on the step and the other upon the ground in the act of alighting from the car, and the car started, and he was thrown to the ground, receiving the injuries complained of." The trial below resulted in verdict and judgment in favor of appellee. An appeal was taken to the Appellate Court, and the Appellate Court has affirmed the judgment of the trial court. The present appeal is prosecuted from such judgment of affirmance.

William J. Hynes and Edward C. Higgins (Mason B. Starring, of counsel), for appellant. Wing & Wing (Franklin B. Hussey, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The appellant in this case urges three grounds why the judgment of the Appellate Court should be reversed: First, that the trial court erred in its admission of alleged improper evidence against the objections of appellant; second, that the trial court erred in refusing to give to the jury the instruction, hereinafter set forth, in regard to the rule of the appellant company read in evidence upon the trial below by the appellee's attorney; and third, that the appellee was injured through his own act in attempting to leap from the car on the occasion in question, and not by or through any remissness of duty on the part of the appellant. In disposing of these objections, thus made by appellant to the action of the trial court, the Branch Appellate Court, speaking through Mr. Justice Smith, delivered an opinion which, with the exception of certain portions thereof, discussing questions of fact not proper to be considered in this court, is as follows:

"It is urged by appellant that improper evidence, prejudicial to appellant, was admitted during the trial at various times. Appellee was permitted to introduce evidence to show that it was customary, or a common practice, for people to get off the cars of appellant on the south side of Fortieth street, when such cars came to a stop for the purpose of 'making the crossing,' for the purpose, among others, to take the elevated train at that point. Evidence of this character was elicited on cross-examination of Coley, who at the time of the accident was a conductor in the employ of appellant; and also from Latchman and McFarland, called by appellee in rebuttal. Several witnesses had been called by appellant on this point. At the close of appellant's case and while appellee was putting in his rebuttal, counsel for appellee offered to prove that, at and prior to the time of the accident it was the custom and a usual thing for passengers to alight on the south side of the tracks and take the elevated and boulevard trains. Thereupon counsel for appellant said: 'I will let counsel prove that fact if he can. I will make no objection to that, to show the sincerity of the offer.' It would seem that whether this line of testimony introduced by appellee was proper rebuttal or not, the objection to it was waived by appellant. We do not think the case of South Chicago City Railway Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075, cited by appellant on this objection, is in point. The question there decided was that it was not competent to prove a custom and practice of people to get upon cars, while they were in motion, at a certain crossing of railway tracks. The question decided in that case was very different from the one now before us. The reasonable practice of stopping the north-bound cars at the south side of Fortieth street before attempting to cross the steam railroad tracks, for the purpose of ascertaining whether there was any

danger in crossing, would have a tendency to induce the practice or custom for passengers to get on and alight from the cars at that point. If that was a fact, then under the rule laid down in North Chicago Street Railroad Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849, it became appellant's duty to run its cars 'in reference to the practice which it recognized and aided.' We find no reversible error in admitting the evidence.

"Appellant insists that it was error to admit in evidence a part of section 26 of the rules of appellant regarding the duties of motormen and conductors when about to cross steam railroad crossings, and the bringing of cars to a full stop between 15 and 25 feet from steam railroad crossings, and that the gripman, motorman, or driver is responsible for the management of the train or car during the absence of the conductor. We think the rule was admissible to show a practice and custom of stopping the cars at the point of injury, and as tending, with the other evidence in the case, to show negligence in the management of the car. Lake Shore & Michigan Southern Railway Co. v. Ward, 135 Ill. 511, 28 N. E. 520. It was not competent for the purpose of founding a substantive cause of action upon its breach, but as throwing light upon the question of the degree of care that was exercised by appellant in starting its car while appellee was in the act of alighting from the car. Such a practice and custom, known and relied upon by appellant and its employes and by the public, would necessarily enter into and become a part of the res gestae of the injury complained of. It was held in St. Louis National Stockyards v. Godfrey, 198 Ill. 283, 65 N. E. 90, where evidence was admitted by the trial court as to the usual manner of conducting the business of appellant and others in appellant's yards, that 'the environment and usual manner of conducting the business involved at the place of injury is competent as shedding light on the acts and conduct of the parties.' The cases of North Chicago Street Railroad Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077, and Lake Shore & Michigan Southern Railway Co. v. Brown, 123 Ill. 162, 14 N. E. 197, 5 Am. St. Rep. 510, hold to the same general effect that the existence of a custom enters into the consideration of the question of negligence, and that evidence of the custom is proper. That part of the rule, which provides that, 'in the absence of the conductor, the gripman, motorman, or driver is responsible for the management of the train or car,' and that 'before starting, know positively that no person is attempting to get on or off, and indicate to the conductor the passengers, who enter the train or car while the conductor is examining the railroad crossing,' tends to show an admission on the part of appellant that the exercise of due care for the safety of its passengers required the motorman, in the absence of the conductor from the car for the purpose indicated in the rule, to be respon-

sible for the management of the car, and to know positively before starting that no person was attempting to get on or off the car. In this view, as stated in the Ward Case, *Supra*, the rule was clearly admissible. We do not think it was material to cross-examine the witnesses Aye and Wolck as to their familiarity with the above rule, but it was harmless error. These witnesses had testified to a conclusion rather than a fact as to whether there was a stopping place for letting off passengers near the elevated station on the south side of the railroad tracks. The cars always stopped there, and passengers had a right to alight there. The fact that the witnesses were familiar with the rule would not tend to carry the inference to the jury that the failure to observe the rule constituted, in itself, an act of negligence. The question of negligence is one thing. As to whether or not the witnesses were familiar with the rule is an entirely different question, and has no bearing upon the question of negligence. Knowledge of the rule on the part of these witnesses would neither convict nor excuse appellant for the act in question.

"It is also insisted that the trial court erred in permitting the redirect examination of the witness Thickston, as to a conversation with Dr. McCutcheon. We think the door was opened for this examination by the cross-examination of the witness in which fragments of the conversation had been drawn out. Appellee, by the familiar rule, was entitled to the whole conversation.

"The question put to the witness Hagstrom as to whether it was physically possible, in the nighttime, for the motorman on the front of the car to see anybody getting off the rear platform of a box car, called for a mere matter of opinion, and the objection to it was properly sustained.

"Appellant complains that Dr. Ferguson, a witness for appellee, was permitted to state that, in an examination of appellee made by him the day he testified, he 'found deformity, and abnormal mobility of the hip, an apparent inability to use it'; the objection being to the last clause of the answer. The witness, before this evidence was given, had testified to the same thing without objection. Subsequently he testified without objection as follows: 'I have seen a limb with the fracture of the neck of the femur where there was nonunion, where they were able to use it fairly well, and I have seen others where they could not use it at all. How it is in this case he will have to testify to. I do not know that. I could only form my opinion on that. My examination would not reveal that.' It is clear from this evidence that Dr. Ferguson was giving his opinion in the expression which was objected to. He expressly disclaims any knowledge of the fact, and says that his examination would not reveal the fact one way or the other. He was competent to give an opinion as an expert. The

court did not err in allowing the testimony to stand.

"We do not think there was reversible error in allowing the son of appellee, William J. Lowitz, to testify that appellee complained of pain in his left leg. From the context of the testimony of this witness it appears that the time referred to by the witness was somewhere from the time of the accident to about an hour thereafter, when the witness left his father's house to go to his brother's home. It may have been near enough to the time and place of the accident to make it a part of the *res gestæ*. That does not clearly appear from the record. But, conceding that the answer was an improper one, in view of the uncontradicted testimony in the case as to the character of the injury received by appellee, we do not think that it was of such prejudicial character that a different result would have followed had it been excluded. *West Chicago Street Railroad Co. v. Carr*, 170 Ill. 478, 48 N. E. 992.

"Appellant requested, and the trial court refused to give to the jury, the following instruction: 'The jury are instructed that the rule read in evidence by plaintiff's attorney, claimed to be a rule of the defendant relating to the conduct of conductors and motormen at railway crossings, was not admitted by the court, nor should it be considered by the jury, as furnishing a substantive ground of complaint to the plaintiff, and there can be no recovery in this case on said rule.' In *West Chicago Street Railroad Co. v. Petters*, 196 Ill. 298, 63 N. E. 662, the court said: 'We think the appellant was not prejudiced by the refusal of the trial court to give this instruction to the jury. This class of instructions, which select one item of evidence or one fact disclosed by the evidence and state that a certain conclusion does not follow as a matter of law, from that fact, are calculated to mislead and confuse a jury. * * * If an instruction of this nature were held proper, it would be possible for a defendant to select each 'mere fact' constituting the entire chain of facts by which negligence was proved, and enable the court to instruct the jury that each of these links in the chain did not of itself, constitute negligence, and while each particular link might not of itself constitute negligence, yet the whole taken together would, and thereby the court would be enabled to instruct the jury on the facts, and take away the consideration of facts from them.' The instruction, commented upon in the above language was to the effect that no presumption of negligence arises against the defendant from the mere fact that the plaintiff was injured in connection with defendant's cars. We regard the comments of the court as equally applicable to the refused instruction in this case. One is as correct, in point of law, as the other. The plaintiff in that case could not have made out his case by proving that he was injured in connection

with defendant's cars. The plaintiff in this case could not make out his case by proving the rule of the defendant. If this instruction had been given, the jury might easily have concluded that the court meant to tell them that there could be no recovery in the case, based on the act of the motorman in starting up the car, while appellee was in the act of alighting therefrom, without using proper care to ascertain that no passenger was attempting to get on or off the car. Or, to speak more generally, the jury might easily mistake the language of the requested instruction to mean that there could be no recovery, based on the violation of the rule of duty imposed by law upon appellant, which was sought to be enforced by the rule of appellee. We do not think there was error in refusing the instruction.

"It is insisted by appellant that, under the evidence disclosed by the record, appellee was injured through his own act in attempting to alight from the car, and that no remissness of duty in the premises is shown on the part of the appellant. These were questions of fact for the jury under instructions of the court. At the instance of the appellant 27 instructions were given to the jury covering every possible aspect of the case. The evidence, * * * its weight, and preponderance, were for the jury to determine under the instructions. Appellee was within his legal rights in attempting to alight from the car after it had stopped on the south side of Fortieth street. *West Chicago Street Railroad Co. v. Manning*, 170 Ill. 417, 48 N. E. 958; *Springfield Railway Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *North Chicago Street Railroad Co. v. Brown*, 178 Ill. 187, 52 N. E. 864; *Chicago West Division Railway Co. v. Mills*, 105 Ill. 63. * * * The judgment is affirmed."

We concur in the foregoing views expressed by the Branch Appellate Court, and adopt the same as the opinion of this court in this case. Accordingly, the judgment of the Branch Appellate Court is affirmed.

Judgment affirmed.

(218 Ill. 92)

CHICAGO CITY RY. CO. v. HENRY.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. TRIAL—DIRECTING VERDICT.

Where plaintiff's testimony as to the manner in which he was injured while attempting to board a street car is improbable, and defendant's evidence tends to show that he was injured on a different day and in an entirely different manner, it is error to take the case from the jury.

2. DAMAGES—PERSONAL INJURIES—EXPENSES.

A passenger, injured on a street car by the negligence of the railroad company, may recover all reasonable doctor's and surgeon's fees, and may show that a further surgical operation may be necessary.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1338; vol. 15, Cent. Dig. Damages, § 243.]

3. SAME—EVIDENCE.

Where, in an action for personal injuries, there is no evidence that a surgical operation has been performed or is necessary, evidence that a man in plaintiff's station of life would have to have \$200 to be operated upon is incompetent.

4. TRIAL—OBJECTIONS TO EVIDENCE.

Defendant objected to a question asked of a witness, and the court allowed the witness to answer after the question was put in a different form. *Held* in effect an overruling of the objection, and on defendant's exception the ruling is preserved for review.

5. EVIDENCE—DECLARATIONS AGAINST INTEREST.

In an action for personal injuries, evidence of statements of plaintiff made out of court to a doctor as to the cause of certain physical disorders prior to the accident in which the injuries were received, being in the nature of admissions against interest, was erroneously excluded.

Appeal from Appellate Court, First District.

Action by James F. Henry against the Chicago City Railway Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Reversed.

Rehearing denied December 6, 1905.

William J. Hynes, Samuel S. Page, and Watson J. Ferry (Mason B. Starring, of counsel), for appellant. George E. Gorman, for appellee.

CARTWRIGHT, C. J. This is an action of trespass on the case, brought by appellee in the circuit court of Cook county against appellant, to recover damages for personal injuries alleged to have been sustained by plaintiff while attempting to board one of the defendant's electric street railway cars on August 2, 1902, at the corner of Wentworth avenue and Twenty-Fifth Place, in the city of Chicago. The act of the defendant relied upon for a recovery was expressly starting the car while plaintiff was getting on, and his injuries were alleged to have resulted from his being thrown upon the ground. The plea was the general issue, and there was a verdict for \$2,500, upon which judgment was entered. The Branch Appellate Court for the First District affirmed the judgment, and the case is brought here by a further appeal.

It is argued on behalf of appellant that the trial court erred in refusing to direct a verdict of not guilty at the close of all the evidence, on the ground that the evidence for the plaintiff was of such a character as not to impress reasonable minds with its probability or truth. The plaintiff and one witness testifying in his behalf gave testimony that the car came to a stop, and that while plaintiff was in the act of getting on, and had one foot on the ground and one on the step of the rear platform and had hold of the handles, the car was started and he was thrown to the ground. The defendant claimed that the accident did not occur on August 2d, but on August 4th; that in-

stead of attempting to board the car he attempted to alight from it while it was in motion without notifying either the conductor or the motorman of his intention, and that whatever injuries he sustained were caused by his own negligence in so attempting to leave the car. There was testimony of six witnesses that an accident occurred in the manner claimed by the defendant, and which tended to prove, more or less directly, that plaintiff was the person injured. The real ground of the motion to direct a verdict was that the plaintiff's description of the manner in which the accident occurred was so improbable as to demonstrate that it was not true, that in view of the common observation and experience he should not have been believed by the court and jury, and that the testimony of the plaintiff and his witness was clearly overcome by the evidence on the part of the defendant. If all that is claimed in that respect should be conceded, the court would not have been authorized to direct a verdict of not guilty. The question raised is only one of credibility or probability as to the facts, which would be a proper question to be considered by the court on a motion for a new trial or by the Appellate Court, but which is not open for our consideration. There was nothing in plaintiff's account of the transaction inconsistent with or repugnant to the fixed laws of nature, or of such a character that no amount or kind of evidence would induce a reasonable person to believe it. There was no error in refusing to direct a verdict.

One of the two principal injuries which plaintiff claimed he had suffered from the accident was a hernia. The doctor who had treated him, testifying in his behalf, described the hernia and stated to the jury its effect upon his health, both in the past and in the future. He testified that it would weaken the plaintiff and make him nervous, and that he had recommended him to have an operation performed, but none had ever been performed, and there was no evidence tending to show that one was contemplated or would be required. It was not a case where the surgical operation must be performed, but was a case where the plaintiff could have it performed or not, as he saw fit. The doctor testified to the usual, ordinary, and customary charge for medical and surgical services which he had rendered to the plaintiff, and he was then asked what such an operation as he referred to for curing the hernia would cost. The defendant objected to the question. The court, before ruling on the objection, asked the witness if he knew what a man in plaintiff's station in life would have to have to be properly operated upon by a competent surgeon. The witness answered that he did, and the court then said that he could tell the jury. The defendant excepted to the

ruling, and the witness answered, "About \$250." The question was improper and the evidence incompetent in any view of the case. Not only had no expenses for a surgical operation been incurred, but there was no evidence that any operation was contemplated, and the question was not what would have been a reasonable charge for such an operation, but how much a man in the station of life of the plaintiff would have to have to be operated upon by a competent surgeon. The question was not even what plaintiff would be charged for the service, or what would be a usual, ordinary, or reasonable charge. One who has been injured by the wrongful act of another may recover all reasonable expenses which he has incurred for doctor's or surgeon's fees, medicines, and nursing rendered necessary in endeavoring to be cured of his injuries. *City of Chicago v. Langlass*, 66 Ill. 361; *Village of Sheridan v. Hibbard*, 119 Ill. 307, 9 N. E. 901; *Consolidated Coal Co. v. Haenel*, 146 Ill. 614, 35 N. E. 162; 8 Am. & Eng. Ency. of Law (2d Ed.) 645; 13 Cyc. 78. He must exercise reasonable care to effect a cure and mitigate the effect of the wrongful act and is entitled to recover all legitimate expenses incurred for that purpose, and, if it is proved that further expenses for a surgical operation or medical treatment or attendance will necessarily be required, the jury may take that fact into account. It was competent for the plaintiff to show, by evidence, the value of the expenses which he had incurred for medical and surgical services, and if he would be subject to like expenses in the future it would be competent to prove the fact. But that was not done. There was evidence of what the future effect of the hernia upon the plaintiff would be, and under an instruction given at the instance of the plaintiff the jury were authorized to assess damages on the ground that plaintiff suffered, and would suffer in the future, from the hernia. They were authorized to give damages for future suffering and loss of health on account of the injuries proved, including the hernia, and in addition the court permitted proof that plaintiff would have to have \$250 to be operated upon by a competent surgeon. The principal answer to the assignment of error is that the defendant did not object to the question when asked by the court. The question asked by counsel as to what an operation such as he referred to would cost was objected to. The court put the question in different shape, and asked the witness if he knew what a man would have to have to be properly operated on by a competent surgeon, and when the witness said that he knew, the court said that he might tell. This was overruling the objection, and the defendant by excepting did all that was required to obtain a review of the ruling.

There are some other complaints of rulings, in excluding evidence of statements of the plaintiff made out of court to a doctor as to the cause of certain physical disorders, and as to his previously having worn a belt or bandage about his abdomen. The evidence being in the nature of admissions or declarations against interest, the court erred in excluding the evidence.

For the error above pointed out, the judgments of the Appellate Court and the circuit court of Cook county are reversed, and the cause is remanded to the circuit court.

Reversed and remanded.

(218 Ill. 158)

BIRD et al. v. BIRD et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. EQUITY—PLEADING—WAIVER OF OBJECTIONS.

An objection that a bill is multifarious is waived by filing answers to the bill and voluntarily submitting the cause for a hearing on the merits after the overruling of a demurrer to the bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 663.]

2. EVIDENCE—DECLARATIONS AGAINST INTEREST.

In a suit to set aside a will and also certain deeds made by testator, declarations made by a grantee in a deed, who was not a legatee under the will, that he considered the grantor of unsound mind, are competent on the issue of the validity of the deed to the declarant.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1067, 1106.]

3. TRIAL—INSTRUCTIONS—RESTRICTION OF EVIDENCE.

Where evidence competent on certain issues is admitted, a party who desires to have such evidence restricted to those issues should ask an instruction to that effect.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 632.]

4. APPEAL—PRESERVATION OF ERRORS—NECESSITY FOR OBJECTION—SUITS IN CHANCERY.

Since a suit to cancel deeds is a proceeding in chancery, and the verdict of the jury is merely advisory, it is not necessary that a formal objection and exception be made and taken to rulings admitting incompetent evidence, in order to preserve the same for appellate review.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 745-748.]

5. SAME—MATTERS NOT IN RECORD—RECITALS IN MOTION FOR NEW TRIAL.

Improper remarks by the trial judge and other alleged errors, which appear solely from the recitals of the motion for new trial, cannot be considered by the Supreme Court.

6. SAME—HARMLESS ERROR—ABSENCE OF GENERAL VERDICT.

The fact that a jury in a will contest returned only answers to special interrogatories, and did not return a general verdict, did not render the decree fatally erroneous, where the answers to the special interrogatories contained the substance of the general verdict, and no objection was made to the absence of a formal general verdict.

7. EQUITY—TRIAL BY JURY—VERDICT.

3 Starr & C. Ann. St. 1896, p. 3167, providing that in all trials by juries in civil pro-

ceedings the jury may render in their discretion a general or special verdict, had no application to a suit in chancery, where the verdict of the jury, if rendered, is but advisory to the court.

Appeal from Circuit Court, Lawrence County; P. A. Pearce, Judge.

Bill in chancery by Nettie A. Bird and others against John Bird and others. From a decree for the former, the latter appeal. Affirmed.

Rehearing denied December 6, 1905.

C. J. Borden, George Huffman, and Tohill & Kingsbury, for appellants. Gee & Barnes, J. E. McGaughey, and J. D. Madding, for appellees.

PER CURIAM. This was a bill in chancery filed in the circuit court of Lawrence county to contest the will of John Bird, Sr., deceased, and also for a decree in chancery canceling certain deeds described in the bill.

John Bird, Sr., died March 25, 1903, aged about 84 years. On August 30, 1901, he executed two deeds; one purporting to convey 80 acres of land to John Bird, Jr., his son, and the other purporting to convey another tract of like extent to Jeremiah Miller, his son-in-law. On May 23, 1903, he executed his last will. The bill charged that the said John Bird, Sr., at the time of the execution of these deeds and of his will, was lacking in mental capacity to execute the instruments, and each of them, and also charged that he was unduly influenced by his said son, John Bird, Jr., to execute the will and the deeds. A demurrer was presented, and it was urged that the bill was multifarious. The court overruled the demurrer, and answers were filed denying the charges, and a jury was impaneled and a hearing had, and a decree was entered declaring John Bird, Sr., was mentally incapable to execute the will and each of the deeds, and that such instruments were without legal force or efficacy. The proponents have prosecuted this appeal to reverse the decree. Having filed answers to the bill and voluntarily consented to the submission of the cause for hearing on the merits, the objections raised by the demurrer that the bill is multifarious must be regarded as waived. *Ring v. Lawless*, 190 Ill. 520, 60 N. E. 881.

The issues as to the validity of the will and of the deeds were submitted to the jury together. Proof of certain admissions made by Jeremiah Miller, being against his interest, were properly receivable in evidence on the issue as to the mental capacity of John Bird, Sr., to execute the deed to him (Miller). The admissions were to the effect that Miller did not regard John Bird, Sr., as possessed of a sound, disposing mind, and the jury could have considered them as bearing on the issues as to the validity of the will, as well as on the issues as to the deed to Miller. But it does not appear that objection was made

or any exception taken to the introduction of this proof as to the declarations of Miller. The declarations were proper as to the issue of the validity of the deed to Miller, and, as no objection or exception was entered in the trial court to the admission of the testimony, it cannot now be urged in this court that the introduction of the proof of such declarations constitutes reversible error. The proceeding, so far as the attack on the deeds is concerned, is an ordinary chancery proceeding, and the findings of the jury as to the issues relative to the validity of the deeds were advisory, merely, to the chancellor. The rules of chancery practice applied, and it was not necessary, in order to preserve for review the contention that incompetent evidence was admitted, that that objection should have been formally made and an exception entered to the ruling of the court thereon. *Smith v. Newland*, 40 Ill. 100; *Miller v. Whelan*, 158 Ill. 544, 42 N. E. 59.

Two witnesses testified to declarations made by Miller. One witness testified that the conversation with Miller was about the time the deed was made to him (Miller). The other witness testified to a conversation with Miller in 1902, shortly after the deed had been made to Miller, and both alleged declarations were before the will had been executed. The testimony was proper for the consideration of the jury in arriving at a conclusion as to the issue as to the deed to Miller, and there seems little reason to believe that the jury would have understood it otherwise, especially in view of the fact that Miller was not a legatee under the will. The evidence being competent for the one purpose, if the appellants feared the jury might think it competent for another, they should have asked the court to direct the jury, by an instruction, that the proof was proper to be considered with reference to the validity of the deed to Miller.

It is urged appellants' cause was improperly prejudiced by remarks of the trial judge in the presence of the jury. These alleged remarks are set forth in the motion for a new trial, and do not otherwise appear in the record. It is a familiar rule of practice that alleged errors cannot thus be preserved for review.

In the brief of appellants in chief complaint is made of the instructions, but in the reply brief it is conceded these alleged errors have not been preserved for revision by this court.

It is complained that the court submitted to the jury 12 special interrogatories calling for findings by the jury on questions of fact, and that such requests or questions of fact were not submitted to the appellants at any time, in violation, as appellants contend, of the express provisions of the statute. *Hurd's Rev. St. 1903*, p. 1407. Here, again, the appellants rely solely on recitations made in the motion filed by them for a new trial to show

that the interrogatories or special verdicts were not presented to them, and, aside from all other considerations, the contention cannot be considered for the reason the alleged improper action of the court has not been preserved in the certificate of the trial judge, by which we are to be governed as to the occurrences of the trial. We may remark, however, that in *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113, we held that interrogatories in no material respect different from those here under consideration could not be regarded as within the meaning of the act in relation to special findings.

It is urged that the jury did not return a general verdict, but only answers to special interrogatories, and that the court erroneously proceeded to enter a decree without any general verdict on which to base the same. The court submitted to the jury the following questions, to be answered by them: No. 1. "Was the writing offered in evidence purporting to be the last will and testament of John Bird, Sr., the last will and testament of the said John Bird, Sr.?" No. 2. "At the time of the making of the purported will was the said John Bird, Sr., of sound mind and disposing memory?" No. 3. "At the time of the making of the purported will offered in evidence was any undue influence used upon John Bird, Sr., to control him in making said will?" The jury answered each of these questions by writing the word "No" in the space left after each interrogatory for the answer thereto.

In *Harp v. Parr*, supra, we held that like questions were not within the meaning of the statute in relation to special verdicts. We think all suits in chancery wherein the statute provides the issues made may be tried by a jury (as a bill to contest a will, a bill for divorce, etc.), in which the verdicts rendered have the force and effect of the verdict of a jury in an action at law, are "civil proceedings," within the meaning of those words as employed in the statute in relation to the verdicts of juries in civil cases, being the act which provides for the submission of special questions of fact to be answered by juries. That act provides that in all trials by juries in civil proceedings in courts of record the jury may render, in their discretion, a general or special verdict. 8 Starr & C. Ann. St. 1898, p. 8167. The statute has no relation to suits in equity in which an issue of fact is made and submitted to a jury for a verdict which, when rendered, is but advisory to the court, as were the verdicts in the case at bar which related to the validity of the deeds. In such cases the sole function of the jury is to determine certain questions of fact which are framed and submitted to them for a finding, by which the court may be advised, but by which he may or may not be controlled in entering the decree, as his sound

judicial discretion may determine. In the preparation, submission, and decision of such issues of fact for advisory verdicts the rules of chancery practice apply, and the statute in question has no application. All of the interrogatories submitted were of this character, except the three which we have hereinbefore set out. The first of the questions, relative to the issue as to the validity of the will, contained the substance of a general verdict finding that the instrument purporting to be the last will of decedent was not his last will. It was answered by the jury in the negative, and the second finding of the jury, that said John Bird, Sr., was not of sound and disposing mind when the alleged will was executed, disclosed the ground on which the jury rested the conclusion that the instrument was not the valid will of the deceased. It does not appear that any objection was interposed in the trial court to the reception by the court of these findings of the jury when returned, nor that it was suggested that there was no general verdict or that a verdict in that form was necessary. It is clear that the appellants were not in anywise prejudiced by the omission of a formal general verdict. In view of all this, we think the objection that no general verdict was returned should not be considered tenable.

In response to the insistence that the decree is not supported by the evidence, we have carefully read the testimony as printed in the abstract. In point of number of witnesses the preponderance was with the appellees. That alone is not the criterion; but, in addition to that, we find the evidence to be conflicting, and, so far as we can discover, the witnesses for the respective parties were of equal credibility. Some had longer and more intimate acquaintance with the deceased than others, and were therefore better qualified to form reliable judgments as to his mental power and capacity than others, and some had what seemed exceptional opportunities for testing the strength of mind of the deceased. But these witnesses who were thus better qualified to judge of the power of the deceased to make a valid will or valid deeds entertained contradictory and conflicting views as to his mental condition. There was abundant proof, if standing by itself, to sustain the action of the jury and of the court, and after a thorough investigation of all of the testimony we are unable to say that the verdict and findings of the jury are palpably or manifestly wrong. A recitation of the testimony would not be of benefit to the parties, their counsel, or the profession. Our duty is to accept the verdict and decree as correct.

The decree must be, and is, affirmed.

Decree affirmed.

(218 Ill. 62)

McLANNAN et al. v. CITY OF CHICAGO.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ORDINANCES—NECESSITY OF PUBLICATION.

Under Local Improvement Act, § 11 (Hurd's Rev. St. 1903, p. 393), requiring improvement ordinances to be referred to a committee and published in proceedings of the council, where the estimate of costs exceeds the sum of \$100,000, the court costs, which are to be paid by the city by general taxation, are not to be considered in determining whether the ordinance shall be referred and published.

2. SAME—RESOLUTION FOR IMPROVEMENT—SUFFICIENCY.

A resolution for a local improvement, describing the improvement in a general way with such certainty, when considered with the estimate, as to reasonably advise the property owners as to the nature of the improvement, is sufficient, without containing all the details required in an ordinance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 811.]

3. SAME—PROCEEDINGS—VARIANCE.

A first resolution for a public improvement, stating that the right of way of a street railway in a street to be improved was excepted from the improvement, did not materially vary from a notice of public hearing which failed to so state.

4. SAME—REASONABLENESS OF ORDINANCE—FINDINGS.

A decision of the county court that an ordinance requiring a new pavement at the intersection of streets was not unreasonable would be sustained, where the preponderance of evidence showed that the pavement at the place in question was old and worn out.

5. SAME—PROCEEDINGS—EVIDENCE—ASSESSMENT ROLL—OBJECTION.

An objection to an assessment roll on the ground that no affidavit showing compliance with Local Improvement Act, § 41 (Hurd's Rev. St. 1903, p. 400), had been filed, as required by such section, was properly overruled, where affidavits were attached to the assessment roll, and the objector did not point out wherein they were defective.

6. SAME—VERDICT.

Under Local Improvement Act, § 49 (Hurd's Rev. St. 1903, p. 403), providing that, if it shall appear that the premises of an objector are assessed more than they will be benefited by the improvement, the jury shall so find, a verdict declaring that the property of the objectors is not assessed more than it will be benefited, nor more than the proportionate share of the cost of the improvement, is sufficient, without stating that the property was "specially benefited."

Appeal from Cook County Court; O. N. Carter, Judge.

Application by the city of Chicago for the confirmation of an assessment against John A. McLannan and others. From a judgment of confirmation, defendants appeal. Affirmed. Rehearing denied December 6, 1905.

F. W. Becker, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

RICKS, J. The county court of Cook county confirmed an assessment against certain property of appellants for paving Cottage

Grove avenue, in Chicago, and appellants appeal from the judgment of confirmation.

On the 12th day of April, 1904, appellants were ruled to file objections, if any they had, to the proceeding or assessment. On the 14th of the same month they filed 11 objections. The cause was called for trial on April 3, 1905, on legal objections, when appellants asked leave to file 6 more legal objections. No reason was shown why any of them, except the twelfth, had not been filed within the year that the case had been pending. The twelfth objection was, in effect, that the ordinance was unreasonable, in that it provided for the paving of the intersection at Sixty-Seventh street and Cottage Grove avenue, which was already paved. Counsel, upon oath, stated that he was not aware that that intersection was paved until recently before the hearing, and for that reason did not file the objection sooner. The court permitted the filing of the twelfth objection, and denied leave to file the others. With reference to them, counsel stated at the time that the points sought to be made by the additional objections had arisen and been discussed since the filing of the original objection. We have looked into them, and are satisfied that the court did not abuse its discretion in refusing to allow them to be filed.

The legal objections filed were overruled, and it is insisted that the court erred in overruling five of them. It is urged that the estimate of the cost of the improvement exceeded \$100,000, and that the ordinance was not referred to a committee and published in the proceedings of the council, as required by section 11 of the local improvement act (Hurd's Rev. St. 1903, p. 393). That section has no application, unless the "estimate of cost shall exceed the sum of \$100,000, exclusive of the amount to be paid for land to be taken or damaged." It is admitted that the estimate of the engineer of the cost shows an even \$100,000, but appellants say that there is in addition to that the court costs, which are not shown by the estimate, and that they are to be taken into consideration in determining whether the ordinance shall be referred and published. We think not. According to the language of the statute itself, the duty to refer and publish depends upon the estimate of the engineer, and such course is only required where the estimate exceeds \$100,000. The estimate in this case does not exceed \$160,000, and by the terms of the statute it was not necessary to refer the ordinance or publish it. So far as the property holders are concerned in the matter of assessment, the court costs would form no part of it, as they are to be paid by the city by general taxation. *McChesney v. City of Chicago*, 205 Ill. 528, 69 N. E. 38; *Gage v. City of Chicago*, 195 Ill. 490, 63 N. E. 184.

It is next said there was a variance between the first resolution and the ordinance. Both the resolution and the ordinance provide for

curbing, grading, and paving with asphalt Cottage Grove avenue, and the roadways and intersecting streets and alleys, from the curb line to the street line. Appellants urge that the first resolution also provides that the intersecting streets and alleys shall have a "granite concrete combined curb and gutter" from the curb line to the street line, and that the ordinance does not contain such provision. We find that it does in express terms.

It is next pointed out that the ordinance goes into greater detail as to the sewer connections and furnishings than does the resolution. It is not necessary that the resolution shall contain all the details in the ordinance, but it is sufficient, if the resolution describes the improvement in a general way, and with sufficient certainty, taken in connection with the estimate of the cost, to reasonably advise the property holders of the nature of the proposed improvement. The estimate was a part of the first resolution, and contained the item "adjustment of sewers, catch-basins, and manholes, and constructing fifty new catch-basins." The variance charged arose from the elaboration in the ordinance of this item as to catch-basins. There was no willful or substantial variance.

It is next urged that there was a variance between the notice of public hearing and the first resolution. The particular point made as to that is that the notice is to the general effect that Cottage Grove avenue is to be improved by catch-basins and pavement, while the resolution excepts from the improvement the street railway company's rights of way, and that the notice does not contain a statement that the rights of way of street railways are excepted from the improvement. We regard this objection as hypercritical, and of too unsubstantial a character to be allowed to prevail.

Under the objection that the ordinance was unreasonable the court heard the testimony of three witnesses on the part of the petitioner, and one witness testified for the objectors. The evidence on the part of the petitioner was to the effect that the pavement at the intersection at Sixty-Seventh street was a cedar block pavement that was put down in 1894, and was old and worn out, while the witness for the objectors stated that it was in good condition. The matter depended upon a question of fact, and the greater weight of the evidence was for the petitioner, if the witnesses were to be accredited; and, as there is no attack upon them, we must concur with the court in holding that the ordinance was not unreasonable. When the assessment roll was offered in evidence, appellants objected to it, and urged that no affidavit showing a compliance with the requirements of section 41 of the local improvement act (Hurd's Rev. St. 1903, p. 400) had been filed, as required by that section. The court overruled the objection, and appellants excepted. Appellants say in their brief and argument

that "it lacked a necessary formality to give it validity, and should no more be offered by the petitioner to make out its prima facie case than a roll without any signature or any verification of the commissioner or any compliance with the provisions of the act." The above is all that is said upon that subject. We have examined the record and find that the assessment roll has attached to it the affidavit of John A. May, who made the assessment, and the affidavit of David H. Pigott as to his examination of the books of the collector of the said county showing the payment of general taxes during the last preceding year, etc. We are unable to comprehend the point made by appellants, and, as they have not pointed out wherein those affidavits are defective, we must hold the court properly overruled the objection.

The court instructed the jury that the only question to be determined was whether the premises of the objectors were assessed more than they would be specially benefited by the improvement or more than their proportionate share of the cost of said improvement. Appellants say that this instruction is wrong because it ignores the provision of section 59 of the act, which relates to supplemental assessments, and is to the effect that the fact that a prior assessment had been levied against the property shall be no defense to a supplemental assessment "unless it shall appear that in such prior cause, upon proper issue made, it was specially found, in terms, that the property objected for would be benefited by said improvement no more than the amount assessed against it in such prior proceedings." It is sufficient to say of that objection that no such issue was made as contemplated by that section and no evidence was introduced upon it, and the court properly ignored it in giving the instructions. The instruction that the municipal authorities are the sole and only judges of the necessity for and of the manner and extent of the improvement was unnecessary in that proceeding, as the jury had nothing to do with either the necessity for or the mode or manner of making the improvement. That question was not before them and the instruction was harmless. Other objections are urged to the instructions which we regard so trivial as not requiring discussion.

It is complained that the verdict was not responsive to the issues. The substance of it was that the property of the objectors is not assessed more than it will be benefited nor more than its proportionate share of the cost of said improvement. Section 49 of the act (Hurd's Rev. St. 1903, p. 403) provides for a trial by jury, and the last clause is as follows: "The hearing shall be conducted as in other cases at law, and if it shall appear that the premises of any objector are assessed more than they will be benefited by the said improvement or more than its pro-

portionate share of the cost of such improvement, the jury shall so find," etc. Appellants say that the words "specially benefited" ought to have been incorporated in the instruction, and cite *Louisville & Nashville Railroad Co. v. City of East St. Louis*, 134 Ill. 656, 25 N. E. 962, to support this contention. That case has no application whatever to the question here raised, and the verdict was in strict accord with the provision of the statute.

The judgment of the county court is affirmed.

Judgment affirmed.

(213 Ill. 289)

GLOS et ux. v. AMBLER.

(Supreme Court of Illinois. June 23, 1905.)

1. TAXATION—TAX DEED—SUIT TO SET ASIDE—PARTIES.

Testator devised a lot to trustees to partition and convey one-quarter thereof to others as trustees for his two grandchildren. The grandchildren subsequently filed a bill against their trustees for an accounting, and a receiver was appointed, to whom the premises were conveyed, and who thereafter tendered to defendant, who held tax deeds on the premises, and who had commenced an action in ejectment, later dismissed, against the receiver, the amount due under the deeds, and filed a bill to set the same aside. Subsequently the receiver and the two trustees conveyed to the grandchildren. Held, that the grandchildren and their trustees were not improper parties to the suit by the receiver, who at the time of filing the bill merely held the title under an order of court pending the determination of the bill for an accounting, the legal title having been in the trustees and the equitable title in the grandchildren.

2. SAME—TENDER OF TAXES DUE.

The tender by the receiver inured to the benefit of the grandchildren after the title was conveyed to them.

3. SAME—COSTS.

As it is sufficient that complainant in a bill to set aside a tax deed make a tender to defendant, and allege in his bill that he is willing to pay whatever amount may be found due the holder of the deed on entering a final decree, this suffices to place defendant in the wrong, and require him to pay the costs.

4. SAME—DECREE.

Where, pending a suit to set aside tax deeds, defendant conveyed to his wife an undivided one-third of the land involved, a decree setting aside the deeds and providing that the amount due thereon should be paid into court for the use of defendant and his assigns, without reimbursing the wife her proportionate share of such amounts, was not erroneous.

Cartwright, C. J., and Hand, J., dissenting.

Appeal from Circuit Court, Cook County;

El. F. Dunne, Judge.

Bill by Mittie C. Ambler against Jacob Glos and another. Decree for complainant, and defendants appeal. Affirmed.

Rehearing denied December 14, 1905.

On April 4, 1900, James Furlong, as receiver, filed his bill in the circuit court of Cook county to set aside two tax deeds issued by the county clerk of Cook county to appellant Jacob Glos for lot 25, block 47, in Carpenter's addition to Chicago. Theodore

F. Bliss and Phineas L. Hanscom, trustees under the last will and testament of Philo Carpenter, deceased, and Alice M. Dickson and Mittie C. Ambler, were made parties complainant with Furlong. The bill alleged that on July 23, 1887, Anna A. Cheney and Sarah G. Hildreth, as executrices under the last will and testament of Philo Carpenter, deceased, conveyed said lot to Bliss and Hanscom, trustees under the will of Carpenter, and that said trustees held the title to the lot until April 10, 1899, when, in pursuance of an order of the circuit court of Cook county, they conveyed said lot to Furlong, as receiver. The bill then set out certain grounds and reasons why the tax deeds were invalid, which were, generally, that the affidavits filed as a basis for the issuance of the deeds did not show service of notice as required by law, and that certain illegal taxes were included in the tax levied, under which the premises were sold. The bill further alleged that on March 28, 1900, Furlong tendered to Glos \$1,250, being the amount advanced on account of said tax deeds, interest and cost, which amount was refused, and was then brought into court for the benefit of appellants. A demurrer was filed to the bill, and the same was overruled, and on December 30, 1901, an amended and supplemental bill was filed, setting out substantially the same facts as alleged in the original bill; also, that since the filing of the original bill said Furlong had conveyed said premises to the complainants Alice M. Dickson and Mittie C. Ambler, pursuant to an order of the circuit court; that on January 30, 1900, the said Glos began a suit in ejectment against the said Furlong, which suit was subsequently dismissed. A demurrer was filed to this amended supplemental bill, which demurrer was overruled, and upon the cause being referred to the master he made his report recommending a decree as prayed in the bill. One hundred and eighteen objections were filed to the report of the master, substantially all of which were overruled, and a decree was entered as recommended. From this decree an appeal has been prosecuted to this court.

Jacob Glos, pro se. John R. O'Connor, for Emma J. Glos and of counsel. Bulkley, Gray & More, for appellee.

WILKIN, J. (after stating the facts). There are some 40 assignments of error upon the record but only eight of these are urged as grounds of reversal, viz.: (1) Alice M. Dickson and Mittie C. Ambler were improperly joined as complainants in the original bill, and can claim no right or benefit thereunder, for the reason that only the owners of property can maintain such a bill. (2) There was no privity of estate between Furlong, as receiver, and Alice M. Dickson and Mittie C. Ambler, as would entitle them to the benefit of the tender made by Furlong. (3) The tender was not made by the owner or the parties in interest. (4) There has been no

tender by Alice M. Dickson and Mittie C. Ambler, or by either of them. (5) The defendant Emma J. Glos, wife of Jacob Glos, should have been reimbursed her proportionate share of the amounts expended at the tax sale and for subsequent tax, with interest. (6) An unaccepted tender will not stop the running of interest unless the money is placed at the disposal of the defendant. (7) The deposit of a certified check with the clerk of the court is not a payment of money into court pursuant to the terms of the decree. (8) The receiver was not authorized to file the original bill joining others with him as co-complainants.

It will be observed that these several alleged errors resolve themselves into the questions whether Alice M. Dickson and Mittie C. Ambler were proper parties complainant to the bill and whether the tender was sufficient. The evidence shows that Philo Carpenter, by his will, devised the lot in question to Anna A. Cheney and Sarah G. Hildreth, as trustees, to partition and convey one-quarter thereof to Theodore F. Bliss and Phineas L. Hanscom, as trustees, for Alice M. Dickson and Mittie C. Ambler, the children of his deceased daughter. These conveyances were made, and on September 22, 1899, Alice M. Dickson and Mittie C. Ambler filed a bill in the circuit court of Cook county against Bliss and Hanscom, trustees, for an accounting. On September 28, 1899, James Furlong was appointed receiver of the property by the circuit court, and on September 29, 1899, the premises were conveyed to him by the trustees. On March 28, 1900, Furlong tendered the amount due under the tax deeds to Glos, and on April 8, 1900, filed this, his bill to set the deeds aside. On August 23, 1901, Furlong, as receiver, and Bliss and Hanscom, as trustees, conveyed to Alice M. Dickson and Mittie C. Ambler the premises in question. On May 18, 1904, Alice M. Dickson conveyed all her interest to Mittie C. Ambler. At the time the premises were sold for taxes and at the time the tax deeds were issued the legal title was in the trustees. At the time the tender was made by Furlong to Glos, and at the time the bill was filed in this case, the legal title was in Furlong. Furlong made Bliss and Hanscom, the two trustees, and Alice M. Dickson and Mittie C. Ambler, parties complainant to the bill. We are unable to see how appellants were in any way injured by this fact. All of these persons, while they may not all have been necessary parties, were not improper parties. The title, at the time the bill was filed, was in Furlong, but he merely held under the order of the circuit court pending the determination of the bill for an accounting. The legal title had been in the two trustees, while the equitable title was in Alice M. Dickson and Mittie C. Ambler. A tax deed had been obtained by Glos, and he had commenced the suit in ejectment to get possession of the premises. It was desirable that an action should be

commented to set the deeds aside. With the title in this complicated condition, it would have been sufficient for Furlong, as receiver, and as the holder of the legal title, to have commenced the action alone. The other persons who were joined with him as complainants were not wholly disinterested in the matter; at least not to the extent of making them improper parties. Moreover, it wholly fails to appear where these appellants were injured by their being so joined.

Before the suit was commenced Furlong made a tender to Glos of the amount due on the tax deed, which amount covered all principal, interest, and cost. It is not now claimed that the tax deeds were improperly set aside, but it is contended that the tender did not inure to the benefit of Alice M. Dickson and Mittie C. Ambler after the title was conveyed to them. Before the termination of the case, as already stated, the title was conveyed to Alice M. Dickson and Mittie C. Ambler, and finally to Mittie C. Ambler, and the case proceeded with them alone as complainants. The tender was made in the same case, for the same tax deeds, and practically between the same parties. It ought, therefore, to inure to the benefit of the parties complainant who subsequently acquired title to the premises.

The original tender was made to Glos in cash, before the commencement of the suit. He refused to accept it. We have held that it is sufficient that the complainant make a tender to the defendant, and allege in his bill that he is willing to pay whatever amount shall be found due to the holder of the tax deed upon the entering of a final decree, and that this is sufficient to place the defendant in the wrong, and require him to pay the costs. *Gage v. Goudy*, 141 Ill. 215, 30 N. E. 320; *Cotes v. Rohrbeck*, 139 Ill. 532, 28 N. E. 1110; *Mcartney v. Morse*, 137 Ill. 481, 24 N. E. 576, 26 N. E. 376; *Glos v. Gould*, 182 Ill. 512, 55 N. E. 369. The complainant Furlong not only signified his willingness to pay the amount found due upon rendition of the decree, but he tendered this amount before the suit was commenced and offered by his bill to pay the same at any time, also after the decree was rendered paid the money into court subject to the order of appellants. This was sufficient to stop interest on the amount, and also to render appellants liable for costs. *Webster v. French*, 11 Ill. 254; *Board of Supers v. Henneberry*, 41 Ill. 179. The case is distinguishable from *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 764.

At the time the bill was filed, Emma J. Glos, wife of Jacob Glos, had no interest in the property other than her inchoate right of dower. Pending the suit her husband conveyed to her an undivided one-third of the premises. In her answer she claimed her right of dower, but denied that she was a proper or necessary party to the bill. The decree provided that the money should be said into court for the use of Jacob Glos and

his assigns. If Emma J. Glos is one of the assigns of Jacob Glos, she can easily produce evidence to that effect and obtain her share of the money.

We find no reversible error, and the decree of the circuit court will be affirmed.

Decree affirmed.

CARTWRIGHT, C. J., and HAND, J. (dissenting). The complainant having failed to keep his tender good by bringing the money into court, we are of opinion that the defendant was entitled to interest on the amount tendered up to the date on which the decree was entered. *Rankin v. Rankin*, 216 Ill. 132, 74 N. E. 764.

(218 Ill. 178)

HILL et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—TIME FOR FILING BOND.

A statute fixing the time within which an appeal bond is to be filed is mandatory, and the court from which the appeal is taken cannot extend the same.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2065, 2066, 2068.]

2. SAME—EXTENSION.

Where the statute requires the court to fix the time for filing an appeal bond in the order authorizing the appeal, the court has power, before the expiration of such time, to extend the time for filing the bond.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 2068.]

3. SAME.

Where the time granted by the court for filing an appeal bond has expired without an extension, the right of appeal is lost.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2065, 2066.]

4. SAME.

An order fixing the time for filing an appeal bond is not extended by an order extending the time for filing a bill of exceptions.

Appeal from Cook County Court; O. N. Carter, Judge.

Action by the city of Chicago against Rosa B. Hill and others. Judgment for plaintiff, and defendants appeal. Dismissed.

Rehearing denied December 7, 1905.

Horace G. Parkins, for appellants. Robert Redfield and Frank Johnston, Jr. (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

CARTWRIGHT, C. J. Appellants prayed an appeal to this court from a judgment of the county court of Cook county entered at the February term, 1905, confirming a special assessment against their property, and on February 28th an order was entered allowing an appeal upon filing an appeal bond within 30 days, and the same time was fixed for filing a bill of exceptions. The time limited for filing the bond expired on March 30th, and the time was not extended by any order of the court, but on March 31st, after the expiration of the time allowed, a bond

was approved by the judge and filed with the clerk of the court. At the March term of said court, an order was entered on March 28th, extending the time for filing the bill of exceptions up to and including April 1st, but the order made no reference to the bond. Appellee has moved to dismiss the appeal for the reason that the bond was not filed within the time limited by the order of the court.

The right of appeal is purely statutory, and the statute granting such right must be strictly complied with. In cases where the statute fixes the time within which the appeal bond must be filed, the provision is mandatory and jurisdictional; and the court from which the appeal is taken is without power to extend the time. *Rozier v. Williams*, 92 Ill. 187; 2 Cyc. 800; 2 Ency. of Pl. & Pr. 239. In cases like this one the statute does not fix the time within which the bond must be filed, but requires the court granting the appeal to fix such time by its order allowing the appeal. The provision is that the party praying the appeal shall, within such time, not less than 20 days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is prayed an appeal bond. If an appeal bond is not filed within the time limited by the court, the appeal must be dismissed. *Wormley v. Wormley*, 96 Ill. 129. The statute regulating the right of appeal does not in terms authorize the court to extend the time limited when the appeal is allowed, but it has been considered that the court retains its jurisdiction over the question until the expiration of the time limited by the order, and may, either at the term when the appeal is allowed or a subsequent term, before the expiration of the time allowed, extend such time. The same rule has been applied to the bond and the bill of exceptions, and it has been held that the time allowed may be extended, where the court has not lost jurisdiction; but, if the time fixed in the order as made or extended has expired, the jurisdiction is lost, and the act of the court in approving the bond or settling and signing the bill of exceptions is a nullity. *Hake v. Strubel*, 121 Ill. 321, 12 N. E. 676; *Village of Marseilles v. Howland*, 136 Ill. 81, 26 N. E. 495; *Pardridge v. Morgenthau*, 157 Ill. 395, 42 N. E. 74. In the case of *Pardridge v. Morgenthau*, the time for filing an appeal bond had been extended by an original order and two subsequent orders, properly made, to August 30, 1894, and an appeal bond was approved as of September 17, 1894, and filed on October 3d. The court said, referring to the orders extending the time to August 30th (page 401 of 157 Ill., page 76 of 42 N. E.): "The bond was not filed within the time as so extended. Fifteen days after the period fixed for filing it had expired, the court on September 14, 1894, assumed to grant a further extension of five days from the last-mentioned date. This the court could not do. It had lost jurisdiction for any such purpose from and after the expiration of the

time last limited; no new extension having been allowed prior to such expiration." That is the rule where the statute in express terms authorizes this court to extend the time for filing a transcript on appeal, and there seems to be no good reason why it should not apply where express power is not given by any statute.

Counsel for appellants does not dispute the existence of the general rule, but says that this case comes within an exception, for the reason that the order allowing the appeal and limiting the time to file the bond and bill of exceptions to 30 days extended the jurisdiction of the court to March 30th, within the March term; that within the time fixed the court on March 28th extended the time for filing the bill of exceptions; and that the order of March 31st, approving the bond, merely modified the previous order entered at the same term. He relies upon the decision in the case of *Plotke v. Chicago Title & Trust Co.*, 175 Ill. 234, 51 N. E. 754, to maintain his position. In that case the time for filing the appeal bond expired on February 17, 1898, and on February 23d the time to file the bond and bill of exceptions was by order of court extended one day, and on February 28th the appeal bond was approved and filed. Counsel for appellee in that case seem to have conceded that the court had jurisdiction to enter the order of February 23d, but contended that its effect was to extend the time only one day from February 17th. It was decided that such was not the effect of the order, but the decision was upon the ground that the court at the February term, having extended the time for filing the appeal bond, might at the same term set aside the order and enter another and different one, and that the approval of the bond amounted to the same thing. In this case there was no order relating to the bond at the March term which the court might during the term set aside, modify, or change; but, although that case is not precisely the same as this, we are of the opinion that the rule that a court may, during a term, set aside orders in a pending cause, and make new and different ones in their stead, was misapplied.

Public policy and the interest of litigants demand that the rule previously adopted shall be adhered to, and that where a court, after final judgment, fixes the conditions of an appeal, jurisdiction over the order is retained only until the expiration of the time fixed. If the time for filing an appeal bond has been limited by the court, and the time has expired without an extension, the right of appeal has been lost by failure to comply with the condition imposed by the statute. There would be no protection whatever to purchasers or persons dealing with property which has been involved in litigation, where the record shows that the conditions of an appeal have not been complied with, if the court can afterward grant a right of appeal by entering a new and different order. The

exercise of such power would interfere materially with business transactions and the transfer of property, and be contrary to the public interest. It is clear that the order extending the time for filing the bill of exceptions could not operate to extend the time for filing the appeal bond. There is no connection between the two, and an extension of the time for settling a bill of exceptions does not extend the time for perfecting an appeal. *Cook v. Cook*, 104 Ill. 98. The purpose of a bill of exceptions is to make the matters contained in it a part of the record for the purpose of review, either upon writ of error or appeal, and an appeal may be perfected either with or without a bill of exceptions.

The appeal is dismissed.

Appeal dismissed.

(218 Ill. 171)

MAHON et al. v. PEOPLE ex rel. ROBERTSON.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. HABEAS CORPUS—REVIEW—ORDERS APPEALABLE.

A final order in habeas corpus proceedings for the custody of a child is subject to review. [Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 104.]

2. SAME—PARTIES ENTITLED TO APPEAL.

In habeas corpus proceedings for the custody of a child, defendants, though not related to the child by consanguinity, may sue out a writ of error to review a final order removing the child from their custody.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 105.]

3. SAME—CUSTODY OF CHILD—INTEREST OF CHILD.

In habeas corpus proceedings for the custody of a child, the best interests of the child, considered not merely from a financial standpoint, but as a whole, should be considered, especially where the contesting parties are not the parents of the child.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 84.]

4. SAME.

In order to sustain the award of the custody of an American orphan child to a maiden aunt, a stranger to the child, residing in a foreign country and intending to take the child there, it must clearly and satisfactorily appear that the child's best interests will be subserved by the change.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Habeas Corpus, § 84.]

Cartwright, C. J., dissenting.

Error to Appellate Court, First District.

Petition by the people, on the relation of Margaret Robertson, as next friend of Emelie Wallace Robertson, for writ of habeas corpus to be directed against Minnie S. Mahon and another. There was a judgment of the Appellate Court affirming an order for petitioners, and respondents bring error. Reversed.

Rehearing denied December 7, 1905.

This was a petition for a writ of habeas corpus, filed in the superior court of Cook county by Margaret Robertson, as the next friend of Emelie Wallace Robertson, a fe-

male child six years of age, against Minnie S. Mahon and Thomas Mahon, in whose custody the child had been since it was two months of age, for the purpose of gaining the possession of the person of said child, to the end that said Margaret Robertson might permanently remove said child from the United States to the city of London, in the kingdom of Great Britain, of which country the father of said child was a subject at the time of his death, and where the said Margaret Robertson and the other relatives of the deceased father of said child resided at the time of the filing of said petition. The writ issued on the filing of the petition. Minnie S. Mahon and Thomas Mahon were duly served with process, and an answer to the petition, which was treated as a return to the writ, was filed by said Minnie S. and Thomas Mahon, and upon a hearing the issues were found for the petitioner, and the custody of the said child was taken from Minnie S. Mahon and Thomas Mahon and awarded to Margaret Robertson, from which order the said Minnie S. and Thomas Mahon prosecuted an appeal to the Appellate Court for the First District, where without objections the cause was heard upon its merits and a judgment was entered in that court affirming the order of the superior court, and a certificate of importance having been granted by the Appellate Court, a writ of error, which was made a supersedeas, has been sued out if this court to review the judgment of the Appellate Court.

Rosenthal, Kurz & Hirschl, for plaintiffs in error. Lynden Evans, for defendant in error.

HAND, J. (after stating the facts). A motion has been made in this court to dismiss the writ on the ground that the court is without jurisdiction to hear and determine this case, which motion has been reserved to the hearing, and two grounds are relied upon in support of said motion: (1) That the appeal from the superior court of Cook county to the Appellate Court was improvidently taken, and that the writ of error from this court to the Appellate Court was improperly sued out, as, it is said, the order of the superior court disposing of the custody of said child cannot be reviewed by appeal or writ of error; (2) that said Minnie S. Mahon and Thomas Mahon have no interest in the subject-matter of this proceeding, and cannot, by reason of want of interest, prosecute said writ.

As to the first ground, in *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, it was held that a habeas corpus proceeding, in this state for the custody of a child in a civil proceeding, and that the order of a court of competent jurisdiction in such proceeding, disposing of the custody of a child, is a final order and res judicata of the question of the custody of the child on a subsequent application of the same petitioner by habeas

corpus, when the conditions surrounding the child remain the same at the time of the filing of the second petition as they were at the time the order was made in the first proceeding, and that the final order of such court disposing of the custody of a child in habeas corpus proceedings may be reviewed by writ of error by the appropriate appellate tribunals of this state. The conclusion reached in that case, and the principles there announced, are controlling in the case at bar. It was agreed in the Appellate Court that the case should be heard by that court upon the merits, if the court was of the opinion that it had jurisdiction either on appeal or writ of error. The case, therefore, will be treated by this court as having been heard upon writ of error by the Appellate Court, and it will not be necessary to consider here whether or not an appeal will lie from the final order of the circuit or superior courts of this state in habeas corpus proceedings relating to the custody of a child. Suffice it to say that such orders may be reviewed by writ of error, which disposes of the question raised in this case.

As to the second ground, the general rule is that a writ of error may be sued out by any person who was a party to the action below. *Hauger v. Gage*, 168 Ill. 365, 48 N. E. 142. Here the defendant in error filed her petition against plaintiffs in error and brought them into court by the service of process. She averred she was entitled to the custody of said child and that the custody of the child was unlawfully withheld from her by the plaintiffs in error. The plaintiffs in error, who had the custody of the child, were not only proper but necessary parties to said proceeding, and, being necessary parties to the proceeding and the decision of the court having been adverse to them upon the merits, they clearly have the right to have the record made against them in the trial court reviewed by writ of error in the courts of review of this state. *McIntyre v. Sholty*, 139 Ill. 171, 29 N. E. 43; *Anderson v. Steger*, 173 Ill. 112, 50 N. E. 665; *Union Nat. Bank of Chicago v. Barth*, 179 Ill. 83, 53 N. E. 615.

The question of jurisdiction having been disposed of, we will next consider the case upon its merits. William McG. Robertson, the father of Emelle Wallace Robertson, was born in Glasgow, Scotland, in the year 1867, and came to the United States when he was about 25 years of age. He afterwards married in Chicago, and said child was born as the result of that marriage, on August 13, 1898. Four days thereafter its mother died, and on October 12th, following, the father placed the child in the custody of Minnie S. and Thomas Mahon, where it has since remained. The father paid to plaintiffs in error for clothing and caring for the child \$25 per month up until the time of his death, which occurred March 24, 1904. He left a will, in which, after pro-

viding for the payment of several small legacies, he gave the remainder of his estate to four trustees who resided in Chicago, for the benefit of the child, who were authorized to use the income and such portion of the principal as in their opinion might be necessary for the support, education, and maintenance of the child until she should attain the age of 25 years, then one-half of the estate is to be paid to the child and the rest held in trust until she reaches the age of 40 years. The will also contains the following paragraph: "In the past I have always paid Mrs. Thomas Mahon twenty-five dollars (\$25) per month for the support, education and clothing of my said infant daughter, but this shall be a question with the trustees as to what payments can be made with the moneys at hand. I have always held the right that as my said daughter was my only child, I have refused to promise or grant to Mrs. Thomas Mahon, or any other person, the contract or right to care for my said daughter, Emelle, through her life, and I trust the trustees will see fit to carry out the same arrangement during her minority." The estate amounted to about \$6,000, in which amount is included a \$2,000 insurance policy upon the life of the father, which is not now and may never be available for the benefit of the child. At the time Minnie S. and Thomas Mahon assumed the care of said child it was a puny, sickly child, and remained so for two years. The Mahons reside in their own home, in a small suburb adjoining the city of Chicago. Thomas Mahon is 55 years of age, is a machinist by occupation, has a fair education, and earns \$75 per month. Minnie S. Mahon is 43 years of age, was educated in the grammar school, attended school two years in a ladies' seminary, taught school two years, and is connected with the bureau of charities at Woodlawn in the city of Chicago, and it appears that said child has been tenderly nurtured and cared for by Mrs. Mahon, and that Mr. and Mrs. Mahon are strongly attached to the child and that she fully reciprocates their attachment, and that prior to the present contest over her custody she had entered and was in attendance upon the public schools of Fernwood, the suburb in which the Mahons reside. Subsequent to the death of the father the trustees of his will arranged that the child should remain with the plaintiffs in error, and that as compensation for her care and clothing the Mahons were to receive the net income of the estate in the hands of the trustees, and upon the hearing the plaintiffs in error offered to care for and clothe the child without compensation, if the court and trustees desired them so to do, if they could be permitted to retain her custody. William McG. Robertson left him surviving Margaret Robertson, the relator; and two other unmarried sisters who reside in London, England, and who since his death have express-

ed a desire to have the custody of said child, although prior to his death, for some reason not explained in the record, they did not desire to take the child, and the said Margaret is now in this country awaiting the termination of this litigation. The relator and her family appear to be people of means and refinement.

The controlling question in this case is, what is for the best interests of the child? The aunt, who desires to obtain the custody of the child, and the Mahons, who desire to retain its custody, have no vested interest in the child, and their desires cannot control the decision of the court. In reaching a conclusion it must be borne in mind that the father of this child was permanently domiciled in the United States from 1892 to 1904; that he married the mother of the child in this country; that the child was born in the city of Chicago; and that at the common law and under the Constitution of the United States said child is an American citizen (*United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890); and, while it is perhaps true that a court in a habeas corpus proceeding may have the power to award the custody of said child to a person who intends to remove the child from the United States to a foreign country, it ought not to exercise such power unless the proof is clear and satisfactory that the best interests of the child require that the court take such action. It is admitted this child is now in the custody of the family with whom she has always made her home; that Mrs. Mahon, her foster mother, is the only mother she has ever known; that the bonds of affection existing between the child and Mr. and Mrs. Mahon are very strong; that they have no small children of their own; that they are worthy people; and that they are willing to care for and clothe this child without compensation rather than that she should be taken from them. The only reason urged why the custody of the child should be changed and transferred to the sister of the father, who resides in England, is that the child, if such change be made, will be afforded better educational advantages and more flattering prospects of inheriting wealth than she will if she remains in this country in the family where she has lived substantially from her birth to the present time. The questions of education and wealth are proper matters for the consideration of the court in determining with whom the custody of this child shall rest, but they are in no way controlling. As we view the law, the defendant in error has not made by the proofs such a clear case as would justify the court, under the circumstances disclosed in this record, in interfering with the custody of this child and transferring it to said aunt, who resides in a foreign country and who is a stranger to the child in fact though not in blood. The child is now in the hands of good people.

She has a comfortable home, is well cared for, is being educated in the common schools, and the trustees appointed to handle her estate and her estate are here, and that estate, if properly cared for, will educate and maintain her until she has reached the age of discretion and is able to contribute to her own support and obtain by her own efforts, if she so desires, the benefits of a higher education. That she is surrounded by working people, that she attends the public schools, that it may become necessary for her to work in order to support and educate herself, does not show that her environment is un-American, and furnishes no sound reason why her domicile should be changed.

We do not agree with the conclusions reached by the superior and appellate courts. The order of the superior court and the judgment of the Appellate Court will therefore be reversed, and the cause will be remanded to the superior court, with directions to dismiss the petition and to restore said Emelle Wallace Robertson to the custody of Minnie S. Mahon and Thomas Mahon.

Reversed and remanded, with directions.

CARTWRIGHT, C. J., dissents.

(218 Ill. 125)

STAUNTON COAL CO. v. BUB.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. WITNESSES — CROSS-EXAMINATION — CONFINEMENT TO DIRECT EXAMINATION.

Cross-examination of witnesses is properly confined to matters having reference to the testimony given in the examination in chief.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 949.]

2. MASTER AND SERVANT — COMPETENCY OF FELLOW SERVANTS — EVIDENCE.

On the issue of the competency of a hoisting engineer, through whose negligence injury to a co-employee was claimed to have resulted, testimony as to complaints made of the negligent engineer and as to other injuries caused by his acts was properly excluded.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 930.]

3. SAME.

On the issue of the competency of a hoisting engineer, through whose negligence injury to a co-employee was claimed to have resulted, letters of recommendation of the negligent employee and evidence as to his having invented and patented a boiler attachment are immaterial.

4. SAME.

On the issue of the competency of a hoisting engineer, through whose negligence injury to a co-employee was claimed to have resulted, evidence as to the engineer's starting the machinery without signal on several occasions is proper, whether his acts in so doing resulted from mental lapse or from carelessness or lack of skill.

Appeal from Appellate Court, Fourth District.

Action by William Bub against the Staunton Coal Company. From a judgment of the

Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied December 7, 1905.

This is an action on the case brought by William Bub in the circuit court of Madison county against the Staunton Coal Company to recover for personal injuries sustained. The fourth count of the declaration, upon which the case was tried, alleges that the defendant was the operator of the coal mine at which the plaintiff was employed as a cager, at the bottom of the shaft, to place cars and boxes of coal on the cage and to remove boxes and cars therefrom; that the cage was operated by steam power and was raised and lowered in the shaft by means of an engine, and it was the duty of said defendant not to place in charge of said engine any other than a competent engineer and one who would not hoist the cage from the bottom until he had received the signal so to do, and that, regardless of this duty, defendant placed and kept in charge of said engine an engineer who was not competent and who did not regard the said signals, and who habitually hoisted the said cage without any signal, and had been in the habit of so doing to the knowledge of the defendant; that, while the plaintiff, in the exercise of due care and caution, was performing his duties as an assistant cager, and was assisting in loading a box of coal on said cage, the engineer, on account of said incompetency and on account of his disregard of the signals, suddenly started to hoist the cage, and thereby plaintiff was brought with great force and violence between the shaft and the ascending cage, and was dragged upwards against the side of the shaft for a distance of 150 feet, whereby his arm, collar bone, and jaw bone were broken and his ear torn, and he was otherwise injured, to his damage of \$5,000. Upon a trial before the court and a jury judgment was rendered against the defendant for \$3,200. The same has been affirmed by the Appellate Court and a further appeal prosecuted to this court.

Percy Werner (Travous, Warnock & Burroughs, of counsel), for appellant. Burton & Wheeler and Jett & Kinder, for appellee.

WILKIN, J. (after stating the facts). Proper motions were made to instruct the jury to find for the defendant, which were overruled, and the question therefore arises whether or not there is any evidence in the record fairly tending to prove that the engineer (King) was incompetent, that the defendant knew of such incompetency, and that the plaintiff, while in the exercise of due care, was injured by the negligence of said engineer; these being the material and substantial facts of plaintiff's case. Appellee was assistant cager at the bottom of the shaft, and on the day of his injury an attempt had been made to place a box of coal on the cage. It left the track, or was derailed, at the point

where the track on the bottom met the points of the rails on the cage. In his efforts to assist other laborers to replace the car on the rails, plaintiff stood on the cage near the side or end, in a stooping posture, with his back to the car. While in this position and so engaged, the engineer hoisted the cage, and one of the men by the name of Bayliss was thrown off and killed, and plaintiff was carried up and injured by being dragged against the side of the shaft. There is no dispute as to the fact that the injury was caused by the untimely hoisting of the cage by King, the engineer. All of the men working at the bottom of the shaft, being the only persons by whom a signal to raise the cage could properly be given, testified that no signal was given. Several other witnesses, who had worked in the mine for various lengths of time, testified that during the time in which King was hoisting engineer he hoisted the cage without signal on many different occasions. Two of these witnesses, Allen and Vanderberry, testified that the defendant had actual notice of the manner in which King handled the cage without signal. This evidence tended to prove the allegations of the declaration with reference to the incompetency of the engineer and the knowledge of defendant of this fact. The evidence also shows that plaintiff was in the exercise of due care and caution for his own safety at the time of the accident. The motion to take the case from the jury was therefore properly overruled.

Objection is made to the exclusion of evidence by the trial court. Many of the questions asked on cross-examination of witnesses, to which objections were sustained, were not proper cross-examination. For example, plaintiff and a witness named Sardino were asked whether they made any objection or complaint to the defendant about the incompetency of the engineer, or whether they hesitated to ride on the cage when he was in charge, or if he was not always careful, so far as they knew. Neither of these witnesses was asked anything with reference to these matters in their examination in chief, and therefore the cross-examination was not proper. The mine manager, Ramsey, and his assistant, Wilson, were asked to state what complaints, if any, were ever made to them with reference to the incompetency of the engineer in hoisting without signal, and what other injury, if any, had been occasioned by his acts, both of which questions were excluded by the court. These witnesses were permitted to testify to King's general reputation as an engineer, and in other ways to cover the same ground sought to be proved by the excluded testimony. Their evidence, at most, was properly confirmed to his general reputation, not to specific acts. King, the engineer, upon his own examination in chief, was asked to produce certain letters of recommendation which he presented to the defend-

ant at the time of his employment, and these were offered in evidence, and the court sustained objections to them. Evidence was also excluded as to his having invented some attachment for steam boilers and having obtained a patent upon the same. We do not see that either the letters or the patent threw any light whatever upon the question as to his competency as a practical engineer. The charge in the declaration was that he was incompetent because he habitually hoisted and lowered the cage without signal, and that this habit was known to defendant. It was not, under these allegations, so much a question of his skill as an engineer as his diligence in using that skill. The plaintiff and Sardigo, a witness for the plaintiff, and Page, after the accident made certain written statements, which defendant sought to offer in evidence, but which were excluded by the court, except in so far as they tended to contradict the evidence of the witnesses given on the trial. Where there was any conflict between the testimony and the statements, the court permitted the contradiction to be presented to the jury. Defendant certainly was not injured by this ruling, and has no cause for complaint.

Many other objections to the action of the court in the exclusion of evidence have been called to our attention. They are so numerous that it would be impossible, within the reasonable limits of an opinion, to notice each of them separately. It is sufficient to say that we have examined the record in each instance pointed out by these objections and find none of them of substantial merit. In fact, the record is unusually free from error affecting the rights of the defendant in the admission and exclusion of testimony.

Complaint is made of the refusal of the court to give the seventh instruction offered by the defendant. It stated that, even if the jury believe that the engineer had at other times started the cage without signal, yet, if they believe that such acts were the result of mere lapses and that the engineer thoroughly understood his duties and was essentially fit for his duties, then their verdict should be for the defendant. It is claimed that it should have been given on the testimony of the engineer, who stated that he never consciously moved the cage without a signal, and, if he ever did move it without a signal, he did so unconsciously and it was a lapse or trick of mind, and, notwithstanding this, he fully understood his duties and was a competent engineer. This testimony and the instruction seem to proceed upon the idea that competency in an engineer depends wholly upon knowledge and skill, ignoring entirely the quality of attention, care, and diligence. The court very properly refused the instruction, which was highly calculated to mislead the jury. If the engineer was in the habit of moving the cage without signal, this was evidence of his incompetency, no matter whether

such acts resulted from lapses, carelessness, or want of skill, and this was proper to be taken into consideration by the jury in determining whether or not he was incompetent, as charged in the declaration.

Complaint is also made of the refusal of the defendant's ninth instruction, which sought to tell the jury that the sole and only question before the jury is whether or not the defendant was guilty of negligence in employing the engineer in that position on the day of the injury. It was properly refused for two reasons: First, because the negligence of the defendant in employing the engineer was not the sole and only question to be determined by the jury; and, second, the word "employed," as used in the instruction, was very indefinite in its meaning, and while its meaning might have been clear to the court it might have been misunderstood by the jury as meaning the employment originally entered into long before the accident, rather than his being employed at the time of the accident.

No reversible error is shown upon this record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(218 Ill. 73)

CLEVELAND v. MARTIN.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INJUNCTION—GROUNDS—COMPARATIVE INJURY.

Complainant is not entitled to an injunction to restrain a publisher from marketing a medical book written by him, on the ground that the character of the publisher's work was so inferior that it would bring ridicule upon the complainant and injure his reputation, where the contract as to the mechanical work was uncertain, and there is no evidence of any injury, and defendant's damages would exceed any benefit complainant might derive from the injunction.

2. SAME—BREACH OF CONTRACT.

Where the terms of a contract are so uncertain that it could not be specifically enforced, its breach will not be enjoined.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 114.]

Appeal from Appellate Court, First District.

Bill by Franklin H. Martin against George H. Cleveland. Decree for plaintiff, and defendant appeals. Reversed.

Rehearing denied December 7, 1905.

This is a bill filed on November 13, 1903, in the superior court of Cook county by the appellee against the appellant to enjoin the appellant and his agents and employees from selling, giving away, delivering, or exhibiting to any person or corporation whatsoever any copy of a medical work, entitled "A Treatise on Gynecology," of which appellee, who is a physician, is the author, and of which the appellant, who was also a physician—though not practicing, as he is engaged in publishing medical works—had undertaken the publication. The bill alleges in substance that the appellant had not pub-

lished the book in such form as the parties had agreed upon; that is to say, it is alleged that there was a breach of the contract, and the bill is filed to restrain such breach. An answer was filed to the bill by the appellant, and replication was filed to the answer. On December 4, 1903, the court rendered a decree substantially denying the relief prayed for. An appeal was taken from this decree to the Appellate Court. The Appellate Court reversed the decree of the superior court, and remanded the cause to the latter court, "with directions to that court to enter a decree according to the prayer of the bill." The present appeal is prosecuted from such judgment of reversal with directions, so entered by the Appellate Court.

The bill alleges that the complainant, appellee herein, is a physician, and had for a number of years made a specialty of operative gynecology; that he had for many years been secretary of the medical faculty of the Post Graduate Medical School of Chicago; that as such he had lectured on the subject of gynecology before a large number of medical practitioners throughout the Western states who attended said school for post graduate instruction; that he gave clinics before said students and other students of medicine at several medical institutions in Chicago; that his experience had been such as to render probable a demand for any production from him on that subject; that early in 1903 the appellant, doing business under the name of the "Cleveland Press," desired to publish in book form a series of lectures then about to be delivered by appellee at said school on said subject; that it was agreed between appellee and appellant that the latter should produce said lectures in book form, using finished paper and making the same thoroughly well bound; that appellee was to furnish manuscript and drawings, and appellant was to make the necessary plates and furnish all the material for the production of a first-class book to be sold by appellant; that afterwards it was agreed between them that a text-book covering the entire field of gynecology should be prepared, appellee furnishing manuscripts and drawings, and appellant making the necessary plates and furnishing the material necessary for the issuance of a first-class book; that it was stated by appellant that the book should, in the matter of workmanship, compare favorably with the text-book of Howard A. Kelly, M. D., on *Operative Gynecology*, a standard authority published in 1898 by D. Appleton & Co. of New York; that appellant "should print, bind, offer for sale, and extensively advertise an edition of 2,000 copies thereof, and quarterly report to Martin the sale of such books; that Martin was to receive no royalty on the first edition of 2,000 volumes, but in lieu of royalty was to receive a certain number of copies of said text-book, and after the edition of 2,000 volumes had been printed the interest of Cleve-

land in said text-book was to cease"; that appellee furnished the manuscript and drawings necessary; that the appellant had plates made from the drawings, and caused the manuscript to be set in type and printed; that appellant caused an announcement of the publication to be made in various medical journals, and appellee, with appellant's consent and at his own expense, caused to be printed 10,000 copies of a certain chapter of said text-book, together with the illustrations thereof, which were distributed at the appellee's expense among practicing physicians and surgeons in Illinois and other states; that on the back of the reprint was printed the advertisement of appellant, and by means thereof a large number of orders were received at the sum of \$5 per copy; that on November 10, 1903, a copy of said text-book, entitled "A Treatise on Gynecology," was delivered at appellee's office by appellant; that said book was printed on inferior paper from inferior type; that a very low grade of ink was used; that the plates, made from the drawings prepared under appellee's directions at an expense to him of nearly \$1,000, are inferior in every respect and printed on inferior paper; that the binding is very crude and inferior in every respect; that said book in its workmanship as a whole is wholly inferior to Kelly's book; that appellant has already delivered a number of said books to persons who had ordered them, and is about to deliver others and to send copies to medical book reviewers; "that the mechanical crudeness of the book will excite unfavorable criticism, and subject Martin to ridicule, and prevent the successful marketing of the book"; that the advertisements expressly stated that the letterpress, paper, and binding were of the highest class; that appellee was frequently called into consultation in special cases by physicians and surgeons residing and practicing in other cities; that such persons will be among the first to procure copies of said book, and, finding themselves defrauded by appellant's misrepresentations, will conceive a hostility towards appellee, supposing him to be responsible for the foisting of so crude a production; that physicians and surgeons, generally, who may order said work, will entertain towards appellee a feeling of hostility; that such persons will in the future refrain from calling appellee into consultation, to his great loss and injury, to remedy which the law is wholly inadequate; that appellee has spent \$1,500 in the preparation of said text-book and drawings, together with great labor extending over a period of about 10 months; that the only compensation he was to receive from appellant in exchange for permission to publish and sell 2,000 copies of said book was that appellant should issue a book first-class in every respect, and extensively advertise it, so as to create a demand therefor, whereby appellee might sell subsequent editions at large profit to himself;

but that the book as issued is so inferior that, if appellant is permitted to place it upon the market, purchasers thereof will be imposed upon, and will speak harshly of Martin and his book; that the appellant, without appellee's knowledge and consent, has procured a copyright on said volume in his own name. The prayer of the bill, in addition to such portion of the same as is above set forth, asks that Cleveland and his assigns and agents may be compelled to return to the persons who have already purchased the said volumes the several amounts paid by them therefor, and, so far as possible, secure from them the return of said book; that they may be directed to turn over to Martin all the plates, electrotypes, drawings, etc., used in the publication of said volume; that they may be decreed to assign to Martin the aforesaid copyright, and for general relief.

The answer of appellant states that he was approached by appellee with reference to said publication, and admits that he was to publish the same in first-class form, and for which appellee was to furnish the manuscript and drawings, and appellant was to have made the necessary plates and furnish all the material for the production of such text-book. The answer admits that it was afterwards agreed between appellant and appellee that a text-book covering the entire field of gynecology should be prepared, appellee to undertake to furnish the manuscript and drawings, and appellant to have made the necessary plates and to furnish the material necessary for the publication of the book in first-class form; that appellant "should print, bind, offer for sale, and extensively advertise an edition of 2,000 copies of said work, and that Martin should receive no royalty for the first edition of 2,000 volumes of said text-book, but in lieu of royalty he should receive 25 printed and bound copies of such text-book, and that, after said edition of 2,000 volumes had been printed and sold, the interest of said Cleveland in said text-book should cease." But the answer denies that the appellant made any agreement or representations regarding the paper to be used in said book, except that a finished paper be used, and that the book be thoroughly well bound; denies that the book to be printed by appellant should in every respect compare with Kelly's book; admits that appellee furnished the manuscript and drawings, and appellant had plates made therefrom and caused the manuscript to be set to type and printed, and that appellant and appellee caused announcement to be made of the forthcoming publication. The answer denies that the book was printed on inferior paper, or that a low grade of ink was used, or that the plates were of an inferior kind or were printed on inferior paper, or that the binding of the book was crude and inferior, but alleges that said book was printed and bound in first-class manner, and compares favorably with books in general pub-

lished for distribution and sale throughout the medical profession; also denies that the mechanical part of the book will excite any unfavorable criticism of appellee, or subject him to ridicule, or prevent the successful marketing of the book, or that any hostility will be created towards appellee by the publication of the same; alleges that appellant has performed his part of the contract and published the book in first-class manner, and that the publication of the same will cause no hostile criticism of appellee, and lead to no injury to his professional reputation, and will in nowise injure the sale of said book or damage him; denies that he procured a copyright without appellee's consent and knowledge, but avers that, with appellee's knowledge and consent, he procured the copyright thereof to be assigned to appellee whenever appellant's rights in the subject-matter of said copyright were at an end, and appellant disclaims all permanent and enduring title to said copyright.

The decree of the superior court found that the appellee had not maintained the allegations of the bill, so as to entitle him to have the injunction theretofore issued in the case made perpetual, and accordingly the interlocutory injunction, which had been issued, was dissolved. The decree of the court found that the right of appellant to print, publish, and market the book was limited, and was a right to print, publish, and market an edition of said book to the number of 2,000, and no more, and that the whole of said edition had been printed, but had not been marketed. The decree also found that there was an agreement between the appellee and appellant, whereby the latter was granted the exclusive right to print, publish, and sell the "Treatise on Gynecology" for a period of one year from the day of the first publication of said book, to wit, from November 10, 1903, provided appellant should not print, publish, or sell, or otherwise distribute more than 2,000 copies thereof, including 25 copies to be given to complainant; that in pursuance of such agreement a copyright of said "Treatise on Gynecology" was applied for and procured by the appellant in the name of "Cleveland Press," and that appellant is entitled to the protection which such copyright affords only so far as the first edition of said book, to the number of 2,000 copies thereof, is concerned, and that for all other purposes such copyright belongs to the appellee; and it is ordered and adjudged therein that appellant be perpetually enjoined from printing, or causing to be printed, any more copies of said treatise, and from selling, giving away, or in anywise distributing any more copies thereof than the 2,000 copies already in print; that appellant forthwith assign to appellee the copyright of said treatise, provided that such assignment shall not inure to the benefit of appellee, so as to permit him to print, publish, or sell, or cause to be printed, published, or sold, any edition

of said treatise, or copies thereof, until on and after November 10, 1904; and that appellee recover the costs of the proceeding.

Schmitt & Wise, for appellant. Frank Crozier, for appellee.

MAGRUDER, J. (after stating the facts). The appellee is a physician and a medical lecturer, whose specialty is operative gynecology. The proof shows that he is a man of high standing in his profession, or that particular branch of it to which he is devoted. He first on January 27, 1903, made an agreement with the appellant, a publisher of medical books, to publish certain medical lectures to be delivered by himself "in first-class form, using a finished paper thoroughly well bound, and placed through our traveling representatives and the trade," in lieu of royalty the appellant to furnish appellee 25 copies of said book gratis, and to have all plates made, and to return to the appellee the original drawings, if he should desire, but manuscript and drawings to be furnished with reasonable promptness, and the work completed on the part of appellee before August 1, 1903, appellee to agree, in protection of appellant, not to write a work for another publisher upon the same or similar subject within a period of at least a year from date of publication of the work in appellant's hands; and it was understood that the appellant was to make a quarterly report to appellee of the number of sales made, the first installment to be sent by appellee on February 4, 1903. Subsequently, in April, May, or June, 1903, it was agreed that, instead of the lectures, a text-book covering the entire field of gynecology should be prepared; and, by the terms of this subsequent agreement, appellee undertook to furnish the manuscript and drawings for the book, and appellant undertook to have made the necessary plates, and to furnish the material necessary for the publication of the book in first-class form. Appellant was to print, bind, offer for sale, and extensively advertise an edition of 2,000 copies of the work, and appellee was to receive no royalty on the first edition of 2,000 copies of the book, but in lieu of royalty was to receive 25 printed and bound copies of said text-book, and, after such 2,000 copies of said book had been printed and sold, the interest of Cleveland in said text-book should cease.

The proof shows that the appellant has printed, bound, and is offering for sale the 2,000 copies of said text-book, as above mentioned. The proof also shows that he has already sold 120 copies of said book. The first copy of the text-book seen by the appellee was delivered to him on November 10, 1903, and appellee at once objected to the book as not being the kind of book which the contract, as he interpreted the contract, called for. It is not shown that appellee received the whole of the 25 copies which he was to receive, but it is not shown that the appellant

has not been willing at any time to deliver to him the whole number of the copies which he was to receive. The object of the present bill was to enjoin the appellant from selling or disposing of any more of the first edition of 2,000 copies than the 120 copies already sold by him.

First. It is said by counsel for appellee all through his argument that the object of the present bill is to enjoin a breach by appellant of the contract between appellant and the appellee. It is to be observed, however, that the contract has already been partially performed. That is to say, as we understand the evidence, the 2,000 copies have been printed and bound and offered for sale, and 120 thereof have actually been sold. The object of the injunction is to prevent the sale of any more of said first edition of 2,000 copies. The evidence does not show clearly and definitely the terms of the contract between appellee and appellant. A certain Dr. Kelly had written and published a work on Operative Gynecology, which is shown by the proof to have been a standard authority, and to have been a first-class and well-bound publication. Appellee contends that appellant agreed to publish appellee's work on gynecology, so that it would compare favorably with Kelly's book on the same subject, so far as mechanical execution was concerned. Appellant denies that he agreed to any such thing. A young lady, who acted as secretary for appellee, states substantially that appellant was to make the book written by appellee of the same character as Kelly's book. She states that, when appellant was present at one time in the office, appellee took down from one of the shelves of his library Kelly's book and showed it to appellant, and that appellant then stated that his publication would be equal to the Kelly book. Appellee's evidence, however, tends strongly to show that the book, taken down from the shelf of the library and shown to the appellant upon the occasion mentioned was not Kelly's book, but was a book written by Dr. Davis, which has been introduced as an exhibit in this cause. As appellant and appellee contradict each other as to any agreement to make the new publication equal to the Kelly book, and as the secretary's evidence is not a conclusive confirmation of appellee's statement upon the subject, the mind is left in doubt whether or not there was any agreement that a book equal to Kelly's book should be published by appellant.

Appellant, however, admits that the book to be printed for appellee was to be published in first-class form, and that finished paper should be used, and that it was to be thoroughly well bound. The testimony of appellee tends to show that the book, as published by appellant, was not of the first-class character thus agreed upon, while the testimony of appellant tends to show that it was such a book as the agreement, actually made, called for. It will be impossible for us with-

in the limits of this opinion to analyze all the testimony upon this subject. Besides the testimony of himself and his secretary, appellee produced only two witnesses, who swore that the book printed by appellant was not a first-class publication. The witnesses thus testifying were expert bookmakers, but not special publishers of medical books. Their testimony relates chiefly to alleged defects in appellant's publication, which would be apparent to expert bookmakers, but would not necessarily be apparent to the ordinary reader, medical or otherwise. On the contrary, the appellant, besides his own testimony, produced four witnesses, who swore substantially that the book was well and neatly bound, and that it was better than the average medical scientific book of that character, selling at that price, to wit, \$5 a volume. Two of these witnesses were physicians, who had practiced as such for many years. One of them had been engaged in the city of Chicago for 30 years in the selling and publishing of medical books, and the other was an experienced bookbinder. If the testimony of the four witnesses thus produced by appellant be true, then the publication in question came up, in character and quality, to the requirements of the contract between the parties, so far as its mere mechanical execution was concerned. We do not feel called upon to determine whether the statements made by the witnesses produced by the appellant are to be taken as correct. It is sufficient to say that the testimony leaves it uncertain as to what the real terms of the contract were.

Second. It is clear to our minds from the evidence that the appellee could, and did suffer no injury from what is alleged by him to have been a breach of the contract. As to the first edition of 2,000 volumes, appellee admits that he was to receive no royalty, but only 25 copies of the book. If the contract had been that he was to receive a certain proportion of the money realized from the sale of the first edition, then his damages, if any, could be easily ascertained. If the appellant printed and published a book, which was not such a first-class book as the contract called for, it might be possible to determine how much less per volume such a book would sell for than a book which did come up to the requirements of the contract. It appears in evidence in this case that Kelly's book sold for \$7 or \$8 per volume, and was admitted to be a first-class publication; and that it did sell for \$7 or \$8 per volume was known to the appellee. It was agreed between appellant and appellee that the book here in controversy should be sold for \$5 per volume, and it is difficult to understand how it could have been expected that it would be equal in character to the Kelly book. But appellee claims that the only consideration which he expected to receive from the sale of the first 2,000 copies by the appellant was the increase and extension of his

reputation as a physician. He says that he was called into consultations with other physicians, and he supposed that, if this first edition was put upon the market and sold, it would increase his practice by increasing the number of calls for the exercise of his professional skill. The only injury which, as he says in his testimony, was expected to result to him from the publication and sale of this book by the appellant, was that he would be brought into ridicule among his professional brethren, and be subjected to criticism by them for putting forth and permitting to be sold such a publication as that issued by the appellant. The testimony is clear and overwhelming to the effect that he did not suffer and could not have suffered any injury in this respect.

Dr. Nathan S. Davis, who had been a practicing physician for more than 66 years, states in regard to the present book as follows: "The general aspect of it is just about the same as the average of publications from good publishing houses. * * * I do not see how there could be any harm done to the reputation of Dr. Martin by the circulation of this book in this form, assuming the text of the book to be scientifically excellent and valuable. * * * Witness knows Dr. Martin, and, so far as he knows, Dr. Martin's reputation as a physician is good. Q. And now that you have viewed this book and examined it here in court, have you conceived any less good opinion of Dr. Martin's attainments as a physician? A. Why, certainly not. If the text is all right—I have not read it—if it is all right, I should consider it a credit." William T. Keener, one of the witnesses above named, publisher and seller of medical books, states in his evidence that he had copies of the Martin book at his store for sale, and that he had sent out about 10 copies of the same, which he had previously sold, and had not heard anything one way or the other from the purchasers. After stating that the book was better than the average, the following appears in the testimony of this witness: "Q. Well, supposing the book to be sold, and the book to be excellent; what effect would the cheap appearance of the book, if it was sold, have upon the doctor who wrote it? A. I should think it would help him. No one would hold the doctor responsible, as a rule, for the mechanical appearance of it. * * * The binding of the Martin book, for its class, is of the highest class. It is very good; better than the average." Dr. Joseph M. Patton, who practiced medicine in Chicago for 20 years, and was acquainted with the reputation of the appellee, which, as he stated, was good, says that, from his examination of the Martin book, it compared with medical books generally very favorably; and he further says: "Do not know of any damage that might result to Martin's reputation from the distribution of his book by reason of any me-

chanical imperfections, provided that the text is scholarly and correct. The average physician in buying a book considers, first, its contents; secondly, its author; third, the quality of the paper, and readability, and general appearance. A doctor would most decidedly be less governed by the mechanical part of a book than by the text, if he knew what he wanted. Assuming that complainant has an excellent reputation and high standing as a gynecologist, and assuming that the text of the book bore out that reputation, witness cannot conceive of any way in which the distribution of the book would cause hostility toward him, or in any way damage his professional reputation or character. Q. So that in your opinion, if this book should go into general circulation, and its text should prove to be scientifically correct and of a high standard of excellence, you, as a doctor of long standing, would say that the book—that the distribution of the book—would tend rather to increase than to prejudice his reputation? Is that true? A. I should, most assuredly. * * *

Witness has sufficient knowledge of medical books to state that the Martin book is a book up to the average medical scientific book of that character for that price.

The only damage or injury which the appellee refers to in his testimony as likely to result to him from a sale of the book in question is merely a supposed criticism upon his professional attainments. As the testimony is clear and conclusive that the circulation of the book would not thus injure in any way his professional standing, then, so far as this record shows, there is no injury or damage which has been or could be established by proof. Indeed, the appellee himself impliedly admits that his reputation would not thus be injured by the following statement in his testimony, to wit: "Is not sure that the book as published would destroy any reputation already gained, but is certain that it would not help such reputation." He also says in another part of his testimony that the amount of the damage which he would suffer would be "purely speculative."

Third. What is the law applicable to the state of facts above set forth? In the American and English Encyclopedia of Law (2d Ed., vol. 16, p. 360), it is said: "To entitle a person to injunctive relief he must establish as against the defendant an actual and substantial injury, and not merely a technical and inconsequential wrong entitling him to nominal damages only. * * *

To warrant the allowance of a writ of injunction, it must clearly appear that some act has been done, or is threatened, which will produce irreparable injury to the party asking an injunction." High in his work on Injunctions (3d Ed., vol. 1, §§ 9, 22) says: "Substantial and positive injury must always be made to appear to the satisfaction of a court of equity before it will grant an

injunction, and acts which, though irregular and unauthorized, can have no injurious result, constitute no ground for the relief.

* * * An injunction, being the 'strong arm of equity,' should never be granted, except in a clear case of irreparable injury, and with a full conviction on the part of the court of its urgent necessity." See, also, *Citizens' Coach Co. v. Camden Horse Railroad Co.*, 29 N. J. Eq. 299; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *Whittlesey v. Hartford Railroad Co.*, 23 Conn. 433. In *Bigelow v. Hartford Bridge Co.*, supra, it was held that, "to authorize a court of equity to interpose its power by the summary, peculiar, and extraordinary remedy of injunction, there must be not only a violation of the plaintiff's right, but such a violation as is or will be attended with substantial and serious damage." It has been said that "an injury is irreparable either from its own nature, as when the party injured cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or when it is shown the party who must respond is insolvent, and for that reason incapable of responding in damages." *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335. In the present case, it is shown that no such damages will result to appellee or to his reputation as a physician as he anticipates. In other words, it does not appear here that he will in any way suffer "an actual and substantial injury." It not only does not appear that he will suffer any irreparable injury, within the meaning of the definition above given, but it does not appear that he will suffer any injury at all. Whatever acts on the part of appellant have been shown here to be irregular or unauthorized, if any, can have no injurious result, and therefore they constitute no ground for the relief asked for.

Fourth. While it is true that, in the exercise of its jurisdiction by injunction to restrain the violation of contract, equity is not governed by considerations of relative convenience and inconvenience of the parties likely to result from granting or withholding the relief, yet, when the terms of the contract insisted upon by the complainant are not clear and free from doubt, and where the complainant's right to an injunction, as is true in this case, is not entirely clear, but is involved in doubt, and where the injury alleged to be a consequence of a breach of the contract is remote and problematical and speculative, or, as is the case here, not at all probable or even possible, then "it is the duty of the court to consider the inconvenience and damage that will result to the defendant, as well as the benefit to accrue to the complainant by the granting of the writ; and where the defendant's damages and injuries will be greater by granting the writ than will be the complain-

ant's benefit by granting the writ, or greater than will be complainant's damages by the refusal of it, the court will, in the exercise of a sound discretion, refuse the writ." *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 71 N. E. 335. In other words, the rule that, in the exercise of its jurisdiction by injunction to restrain the violation of contracts, equity is not governed by considerations of the relative convenience or inconvenience to the parties likely to result from granting or withholding the relief, "is to be accepted with the qualification that considerations of the relative convenience and inconvenience to the parties are rejected only when the covenants themselves are clear and free from doubt and their violation is clearly established, and where irreparable injury is likely to result, unless the breach is restrained. But, if these conditions do not coexist, the question to be determined is one of comparative injury, and the court will be governed by considerations of the relative inconvenience likely to result to the parties from granting or refusing the relief. And upon an application for an interlocutory injunction to restrain a breach of covenant, if the question is involved in doubt, the burden rests upon the party complaining to show that the balance of convenience is in favor of granting the injunction." 2 *High on Injunctions* (3d Ed.) § 1136. In the case at bar it is apparent that the appellant will suffer considerable damage from the granting of the injunction, while no benefit will result to the appellee from the granting of it, and no damage will be caused to his interests by the refusal of it. Two thousand copies of the book have been printed and bound, and are ready for sale. The printing and binding of them has been an expense to the appellant, and, if he is not allowed to dispose of them, all his work will be lost. A court of equity will take this view of the case into consideration in determining the question whether or not the injunction ought to be granted. It is evident that the question here to be determined is one of comparative injury, and, in view of the uncertain and indefinite nature of the contract, the relative convenience and inconvenience of granting an injunction to the parties interested should be considered. It is to be noted in this connection that none of the 120 copies of the book which have been sold by appellant have been returned, and no complaint has been made of them, or of any one of them, by any purchaser or purchasers thereof.

It has been said that "an injunction restraining the breach of a contract is a negative specific enforcement of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance. Both are governed by the same doctrine and rules. It may be stated as a general proposition that, whenever the contract is one

of a class which will be affirmatively specifically enforced, a court of equity will restrain its breach by injunction, if this is the only practical mode of enforcement which its terms permit. It is plain that, as a general rule, to enjoin one from doing something in violation of his contract, is an indirect mode of enforcing the affirmative provisions of such contract, although such an injunction may often fall short of accomplishing its object." 3 *Pomeroy's Eq. Jur.* § 1341; *Welly v. Jacobs*, 171 Ill. 624, 49 N. E. 723, 40 L. R. A. 98; *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616. In the case at bar there could be no specific performance of this contract enforced. Appellant could not be compelled by injunction to print and bind 2,000 copies of the book in question, so as to make such copies of a higher and better grade than those already printed and bound. In addition to this, it is also a matter of sound legal discretion with a court of equity whether or not it will enforce the specific performance of a contract. The court will only interpose by injunction "In cases where the subject of it is clear, definite, and certain." *Howell Co. v. Pope Glucose Co.*, 171 Ill. 350, 49 N. E. 497. In his work on *Injunctions* (3d Ed., vol. 2, § 1137) Mr. High says: "Certainty is an essential element in the contract whose enforcement is sought by injunction, and, where a covenant is indefinite and uncertain in its provisions, no injunction will be allowed." In the case at bar the terms of the contract are in dispute, and it is impossible for a court of equity to say from the evidence what kind of a book was to have been made. Even if it be admitted that the book in question was to be a first-class book, it cannot be determined definitely what character of book a first-class book of the kind here to be published is. In *Mackovsky v. Manhattan Railroad Co.*, 11 N. Y. 649, where a contract used the term "first-class funeral," it was held that such a term, "when applied to a particular individual, generally has reference to the previous social status and pecuniary condition of the person to be interred; for what might be considered extravagant in one case would be seemingly moderate in another." So, here, what might be considered a "first-class" book to adorn the library of a literary man might not be first-class when it was to be used by a doctor in his everyday work. The term "first-class" is relative in its meaning, and depends upon the use to be made of the book, and upon the character of the persons who are to use it. In *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634, a vendee, in a contract to purchase real estate, stipulated that the title should be "first-class," and it was held that the words there could mean nothing more than that the title should be "marketable." If the term "first-class," as applied to the publication here under consideration, be regarded as

meaning "marketable," all the proof in the record tends to show that the publication in question was marketable, and that the defects charged against it by the appellee in this case did not render it unmarketable. Courts of equity will not always enforce the specific performance of a contract, unless the contract is reasonably certain as to its subject-matter, its stipulations, its purposes, its parties, and the circumstances under which it was made. *Clipson v. Villars*, 151 Ill. 165, 37 N. E. 695; 2 Beach on Modern Eq. Jur. § 584. "The terms of the contract must be distinctly alleged, so as to leave none of its essential details in doubt or uncertainty. So, in like manner, the proof is required to be clear, definite, and satisfactory." *Id.*

For the reasons above stated, the judgment of the Appellate Court is reversed, and the decree of the superior court of Cook county is affirmed, except in so far as it finds that there was "an agreement between complainant and defendant whereby the defendant was granted the exclusive right to print, publish, and sell the 'Treatise on Gynecology' for a period of one year from the day of the first publication of said book, to wit, from November 10, 1903, provided defendant should not print, publish, or sell, or otherwise distribute more than 2,000 copies thereof, including 25 copies to be given to complainant." There is no evidence in the record, so far as we have been able to discover, which justifies any such finding as the one thus made by the superior court.

Judgment reversed.

(218 Ill. 123)

PACAUD et al. v. WAITE et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—PARTIES ENTITLED—PRESIDENT OF CORPORATION.

Where the president of the Board of Trade is made a party, as a representative of the board, to a suit involving the validity of by-laws of the board, he may prosecute an appeal from a decision adverse to the validity of such by-laws.

2. EXCHANGES — BY-LAWS — OPERATION ON MEMBERS.

Members of a board of trade, who, as a condition precedent to membership, bind themselves in writing to obedience to the rules and by-laws of the board, are bound by such rules and by-laws.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchanges, §§ 4, 7.]

3. SAME — BY-LAWS — SETTLEMENT OF DISPUTES—VALIDITY.

A rule of a board of trade which provides that the president of the board shall appoint a committee to determine a dispute between parties as to the person to whom a margin, deposited to secure a transaction, shall be paid, and further provides that the committee's determination, when certified to the depository by the president of the board, shall authorize payment by such depository, is a valid rule, and, in the absence of fraud on the part of the committee, its determination is binding upon the parties.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchanges, §§ 4, 13.]

4. CONTRACTS — ARBITRATION AGREEMENTS — VALIDITY.

A contract to submit questions in dispute to the arbitrament of persons or tribunals other than the regularly organized courts are valid and enforceable.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 611.]

Appeal from Appellate Court, First District.

Bill by Charles Waite and others, doing business as Waite, Thorburn & Co., against A. Duncan Pacaud and others. From a judgment of the Appellate Court affirming a decree for complainants, defendants appeal. Reversed.

Rehearing denied December 7, 1905.

James E. Munro, for appellant Picaud. Henry S. Robbins, for appellant Jackson. Lynden, Evans & Sears and Meagher & Whitney, for appellees.

HAND, J. On the fifth day of August, 1902, Charles Waite and Robert H. Thorburn, doing business as Waite, Thorburn & Co., filed a bill in chancery in the superior court of Cook county against A. Duncan Pacaud, William S. Warren (president of the Board of Trade of the city of Chicago), and the Bank of Montreal, for an injunction and an accounting. It was averred that the complainants and the defendant A. Duncan Pacaud on May 2, 1902, were members of said board of trade; that on that day the complainants, subject to the rules of said board, contracted to sell to the defendant A. Duncan Pacaud 5,000 bushels of "standard" oats at 37 cents a bushel, also 5,000 bushels of "old style" oats at 34½ cents per bushel, both of which said sales were made for July, 1902, delivery; that the complainants deposited with the Bank of Montreal the sum of \$2,350 to margin said contracts pursuant to the rules of said Board of Trade; that thereafter the market for July oats advanced, and on the last day of July the price for "standard" oats in 5,000 bushel lots was 64 cents per bushel and that of "old style" oats in 5,000 bushel lots was 47½ cents per bushel. The bill alleged that these high prices were the results of manipulations of the market and the creation of a "corner" by persons other than the defendants; that the complainants had failed to deliver said oats; that said A. Duncan Pacaud was about to take steps to have said margins paid to him by said Bank of Montreal upon the basis of said fictitious prices under the rules of the said Board of Trade, and prayed that A. Duncan Pacaud be enjoined from taking any steps to secure the indorsement of said margin certificates which evidenced said deposit; that the president of the board of trade be enjoined from indorsing or delivering said certificates to A. Duncan Pacaud under the rules of said Board of Trade, and that said Bank of Montreal be enjoined from

paying said margins to A. Duncan Pacaud. The bill also sought an accounting between the complainant and A. Duncan Pacaud upon the basis of the real market prices of said oats as distinguished from the alleged fictitious prices thereof at the time the contracts matured. The said complainants offered to pay to said A. Duncan Pacaud, in satisfaction of said contracts, the difference between the contract prices and the actual market prices of oats of those grades in the city of Chicago on the 31st day of July, 1902. Answers and replications were filed, and the court, upon a hearing, entered a decree finding that on July 31, 1902, the market prices of said two grades of oats on the Board of Trade in the city of Chicago were so manipulated by certain operators other than the parties to this suit as to be in a condition commonly known as "cornered," whereby the prices for oats in 5,000 bushel lots were stimulated in an abnormal degree, and that the reasonable market prices of "standard" oats and "old style" oats for July delivery were on July 31, 1902, only 42½ cents and 33 cents per bushel, respectively, and decreed that \$275 of said margins held by said Bank of Montreal be paid to A. Duncan Pacaud and the balance thereof to complainants, and that the margin certificates evidencing the deposit of said margins be surrendered and canceled. An appeal was prosecuted to the Appellate Court for the First District, where the decree of the superior court was affirmed, and a further appeal has been prosecuted to this court by A. Duncan Pacaud and William S. Jackson, the now acting president of the Board of Trade.

The Board of Trade of the city of Chicago is a voluntary association, which was incorporated by special act of the Legislature on February 18, 1859, and whose objects are stated in its by-laws to be, "to maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to inculcate principles of justice and equity in trade; to facilitate the speedy adjustment of business disputes; to acquire and to disseminate valuable commercial and economic information, and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." And by section 1 of its charter it is declared to be a body politic and corporate, with power to sue and to be sued, implead and be impleaded, receive and hold property not to exceed in value \$200,000, to have a common seal, and to make such "rules, regulations, and by-laws, from time to time, as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land," and sections 4, 6, 7, 8 and 12 of its charter are as follows:

"Sec. 4. The said corporation is hereby authorized to establish such rules, regulations, and by-laws for the management of

their business, and the mode in which it shall be transacted, as they may think proper."

"Sec. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof.

"Sec. 7. Said corporation may constitute and appoint committees of references and arbitration and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations, or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association or by other persons not members thereof. The acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

"Sec. 8. When any submission shall have been made in writing and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-laws, then, on filing such award and submission with the clerk of the circuit court, an execution may issue upon such award as if it were a judgment rendered in the circuit court, and such award shall thenceforth have the force and effect of such a judgment and shall be entered upon the judgment docket of said court."

"Sec. 12. Said corporation shall have no power or authority to do or carry on any business excepting such as is usual in the management of boards of trade or chambers of commerce or as provided in the foregoing sections of this bill."

And in pursuance of its charter the said Board of Trade passed a code of rules, regulations, and by-laws for the government of its members, and the regulation and control of the business which they should do, which were in force at the time the parties to said contract became members of said Board of Trade and at the time said contracts were entered into on May 2, 1902, and at the time they matured on the 31st of July of that year, and which are, in part, as follows:

By section 1 of rule 10 each person becoming a member of said Board of Trade is required to sign an agreement to abide by the rules, regulations and by-laws of the association and all amendments that may be made thereto; and section 1 of rule 20, which regulates the margining of future sales, is, in part, as follows: "On time contracts, purchasers shall have the right to require of sellers, as security, a deposit of 10 per cent., based upon the contract price of the property bought, and further security, from time to time, to the extent of any advance in the market value above said price. Sellers shall have the right to

require as security from buyers a deposit of 10 per cent. on the contract price of the property sold, and, in addition, any difference that may exist or occur between the estimated legitimate value of any such property and the price of sale. All securities shall be deposited either with the treasurer of the association or with some bank duly authorized by the board of directors to receive such deposits"—which depositary shall issue a certificate, the form of which is prescribed by said rule.

Section 6 of rule 20 in part is as follows: "Upon the fulfillment or settlement of any or upon the closing of any contract under the provisions of section 5 of this rule, deposits upon which have been made, and when the full adjustment of all differences relating to the same shall have been effected, the deposits shall thereupon be payable to the party depositing the same, and the joint indorsement of both parties upon the certificate shall be a sufficient authority to the party holding the deposit to pay the same to the holder of the certificate; or in case of a failure between the contracting parties to adjust and settle their respective claims upon the deposit within three business days after the maturity of all contracts upon which the deposit is applicable, the matter in dispute shall, upon the application of either party to such contracts, be submitted to a select committee of three disinterested persons, members of the association, to be appointed by the president, which committee shall, without unnecessary delay, summon the parties before them, and hear such evidence, under oath, as either may wish to submit touching their claims to the deposit, and shall by a majority vote decide, and report to the president of the board, in writing, in what manner and to whom the deposit is payable, either wholly or in part; whereupon the president shall indorse on either the original or duplicate certificate an order for the payment of such deposits in accordance with the decision of said committee, and such order shall be a sufficient warrant to the party holding the deposit to pay the same in accordance with such order.

Section 1 of rule 23 reads as follows: "In case any property contracted for future delivery is not delivered at maturity of the contract, the purchaser may, if he shall so elect, consider the contract forfeited, or he may purchase the property on the market for account of the seller by 1:15 o'clock of the next business day, notifying him at once of such purchase, or he may require a settlement with the seller at the average market price on the day of maturity of contract, and any damages or loss due to the purchaser by reason of such purchase or declared settlement shall be due and payable by the seller immediately."

The foregoing provisions are the only ones found in the charter or rules, regulations,

and by-laws of the Board of Trade to which our attention has been called which in any way, even remotely, bear upon the main question presented here for consideration, which is, can a member of the Board of Trade of the city of Chicago resort to a court of chancery to have that court settle the question to whom margins deposited by him under section 1 of rule 20 shall be paid by the depositary before resort has been had to the tribunal provided for in section 6 of rule 20 of said Board of Trade to determine that question, or in the absence of a showing that after such question has been submitted to said tribunal that tribunal has, by fraud or otherwise, refused to proceed to hear and determine such question in accordance with the rules, regulations and by-laws of said Board of Trade.

It is suggested that the appeal should be denied as to the president of the Board of Trade, on the ground that he has no interest in the event of this suit which authorizes an appeal by him. He was sued, and here defends as a representative of said board. The suit involves the validity of section 6 of rule 20 of the rules, regulations, and by-laws of said Board of Trade, and the complainants having made the board, through its president, a party to this litigation for the purpose of determining that question and the decree being adverse to the validity of the rule, it would seem clear that the president of the board has the right to cause said decree to be reviewed in the Appellate and Supreme Courts of this state. The motion to dismiss as to the president of the Board of Trade will be overruled.

The Board of Trade does not buy or sell grain or other produce, but furnishes only a place where its members meet and between certain hours of the day deal with each other in grain or other produce under the rules, regulations, and by-laws passed by the Board of Trade for the government of its members and the regulation and control of the business transacted by its members upon said board. The members of the board agree, in writing, as a condition precedent to membership, that they will abide by the rules, regulations, and by-laws of the association, one of which is, that when a margin is deposited to secure a sale or purchase, if the parties to the contract, after the contract has been closed, cannot agree to whom the margin shall be paid by the depositary, a committee consisting of three members of the board shall be appointed by the president of the board, who shall determine that question, which determination shall be certified to the depositary by the president of board upon either the original or duplicate certificate which evidences the deposit, which indorsement of the president shall authorize the payment as therein directed by the depositary. We see no reason why this rule should not be binding upon the members of the Board of Trade. The object of the

rule doubtless is to provide a method whereby it may be determined promptly, after a contract has been closed, to whom the deposit shall be paid, and thereby relieve the members of the board from the expense and delay of a determination of that question in the courts.

In *People v. Board of Trade*, 45 Ill. 112, Page had been expelled as a member of the board for a failure to pay a promissory note which he had given to Stevens & Brown, also members of the board, in settlement of a contract made upon the board. He sought, by means of mandamus, to be restored to membership. The court, on page 115, after setting out the rule authorizing his expulsion, said: "One of the objects for which the Board of Trade was created, undoubtedly was to promote a high standard of commercial honor and commercial credit in the city of Chicago, by securing among the members of the board a prompt discharge of their pecuniary obligations, contracted in their dealings with each other, without a resort to the expensive and dilatory procedure of a court of law. In order to accomplish this, the charter authorizes the board to create within itself tribunals of reference and arbitration, by whose decision the members shall be bound."

In *Pitcher v. Board of Trade*, 121 Ill. 412, 13 N. E. 187, Pitcher was expelled from the Board of Trade. He filed a bill to restrain the board from interfering with his access to the floor of the board and from carrying on his business in that place. The court, in disposing of the case, held that where a person becomes a member of a voluntary association under and subject to the conditions of its charter, and agrees to be governed by its rules and regulations and by-laws, among which is one providing for the trial and expulsion of members, and he is charged with one of the offenses named and expelled, and the proceedings are regular and in accordance with the rules, regulations and by-laws of the association, the sentence of expulsion will be conclusive on him.

An attempt is made to draw a distinction between those cases and the case at bar, on the ground that they recognize only the right to discipline the member, while this case involves the property rights of the member. We do not think the distinction a valid one.

In *Ryan v. Cudahy*, 157 Ill. 108, 41 N. E. 760, 49 L. R. A. 353, 48 Am. St. Rep. 305, the question to whom the margin should be paid by the depository was submitted to a committee, as provided by section 6 of rule 20. The committee refused, however, to hear evidence that the market price for which the product in question sold on the day the contracts were closed was a fictitious price, and this court held that the refusal to hear such evidence was such an abuse of the committee's power and so far in violation of the rules of the Board of Trade as to justify a court of chancery in assuming jurisdiction

for the purpose of determining the market price of the product on the day the contract was closed and stating an account between the parties. The validity of section 6 of rule 20, however, was not called in question, but the rule was fully recognized as being in force and binding upon the parties to the transaction, and the relief was granted solely on the ground that the committee had not proceeded under said rule 20 in fixing the market value and in determining the question to whom said margins should be paid by the depository.

It is suggested that to hold that the question as to whom said margin should be paid, as between the parties to said contracts, must be submitted to a committee, as provided by said section 6 of rule 20, would be to permit the parties to contract to deprive the courts of this state of jurisdiction over the subject-matter of said deposits. It has been frequently held that parties may agree to submit questions to the arbitrament of persons or tribunals other than the regularly organized courts, and that such contracts are valid and will be enforced. It has thus been held with reference to building contracts which provided that disputed questions should be submitted to the architect and that payment should not be made without his certificate (*McAuley v. Carter*, 22 Ill. 53; *Coe v. Lehman*, 79 Ill. 173; *Arnold v. Bourneque*, 144 Ill. 132, 33 N. E. 530, 20 L. R. A. 493, 38 Am. St. Rep. 419); also in railroad contracts providing that questions in difference should be determined by the engineer (*Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276, 15 Am. St. Rep. 376); also in insurance contracts providing that the amount of loss should be determined by the arbitrators (*Niagara Fire Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105).

It is also suggested that section 6 of rule 20 is invalid by reason of the fact that it provides for compulsory arbitration, while the charter (sections 7 and 8) only authorizes a voluntary submission. The by-law in question was passed by virtue of section 4 of the charter, which authorizes the association to establish rules and regulations, and by-laws for the management of its business, the manner in which it shall be transacted, etc., and not by virtue of sections 7 and 8, which apply to a different class of subjects and which involve only a voluntary submission. When the complainants became members of the Board of Trade they agreed to be bound by its rules, regulations and by-laws, and so soon as they made a deposit of margins under section 6 of rule 20 they became bound to submit the question as to whom such margins should be paid by the depository, in case of dispute, to a committee appointed under said rule, and were bound by the decision of that committee, unless they could show that the committee, as organized, failed and refused to give them a hearing in accordance with said rule 20, but arbitrarily and without reference to the rules

of the Board of Trade refused to consider the question of actual market value and to whom the said depository should pay said margins, in which event, under the authority of *Ryan v. Cudahy*, supra, a court of chancery had jurisdiction to consider those questions, otherwise not. The record before us shows that the complainants are members of the Board of Trade; that when they joined the association, like all other members, they agreed to abide by and be governed by the rules, regulations, and by-laws of the association; that they made the contracts and deposited the margins hereinbefore referred to under section 1 of rule 20; that section 6 of rule 20 provided for a committee to determine to whom the deposit should be paid after the contracts were closed, in case of dispute; that there was a dispute as to whom the margins, or a part thereof, should be paid; that in lieu of submitting that dispute to a committee, as provided by section 6 of rule 20, this bill was filed. We are of the opinion section 6 of rule 20 is a valid by-law of said Board of Trade, and that the bill cannot be maintained.

The judgment of the Appellate Court and the decree of the superior court will be reversed, and the cause will be remanded to the superior court, with directions to dismiss the bill.

Reversed and remanded, with directions.

(218 Ill. 108)

SCHULTE v. WARREN et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MEANDERED WATERS—BOUNDARIES.

The ownership of the bed of a natural lake or body of water meandered by the government is in the state in trust for the people, and a grant of land bounding thereon extends to the water's edge in its natural condition.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 121, 122.]

2. SAME—ACCRETION AND RELICTION.

One who owns land bounded by a meandered lake takes title to accretions gradually formed and loses title to land submerged by gradual encroachments of the water, but does not lose title to lands submerged by a sudden and marked change in the shore line.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 99; vol. 37, Cent. Dig. Navigable Waters, §§ 270-279.]

3. SAME—TEST OF NAVIGABILITY—APPLICATION OF COMMON-LAW RULE.

While the common-law rule as to navigable waters is in force in this state, in so far as it relates to the questions of boundary and ownership, yet, on the question of navigability, the common-law rule that waters are navigable only where the tide ebbs and flows is not the law, and waters navigable in fact are navigable in law; the test being whether they are of sufficient depth to afford a channel for useful commerce or practicable public utility.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 5-11.]

4. SAME—PUBLIC EASEMENT.

Where waters are navigable in fact, the public have an easement of navigation therein, regardless of the ownership of the bed of such waters.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 43-47.]

5. SAME.

A body of water deep enough in places for hunters and fishermen to use it for small boats is not legally navigable as a whole, but there may be a public right of navigation in the places where the water is deep enough for use.

6. SAME—EXTENT OF EASEMENT—RIGHT TO FISH.

The right to hunt and fish in waters is not incident to a right of navigation in such waters.

7. GAME—RIGHTS OF LANDOWNER.

The owner of land has the exclusive right to hunt and fish on his own land, and game and fish found thereon become his property.

8. NAVIGABLE WATERS—OWNERSHIP OF SOIL—RIGHTS OF OWNER.

The owner of land covered by navigable waters has the absolute right to use and enjoy the same, so long as he does not obstruct the public easement of navigation, pollute the stream, or diminish the supply, and the right of the public is limited to a mere easement of navigation.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Navigable Waters, §§ 184-186.]

Appeal from Appellate Court, Third District.

Bill by John A. Schulte against Meredith Warren and others. From a judgment of the Appellate Court affirming a judgment dismissing the bill, plaintiff appeals. Reversed.

Rehearing denied December 7, 1905.

Lyman Lacey, Jr., and Beach, Hodnett & Trapp, for appellant. Wm. A. Potts and Jesse Black, Jr., for appellees.

CARTWRIGHT, C. J. Appellant filed his bill in this case in the circuit court of Mason county alleging that he was the owner in fee simple and was in possession of the lands therein described, amounting to about 2,800 acres, situated in the Illinois river bottom, bounded on the west by said river and on the north by the north line of Mason county; that they were swamp and overflowed lands, which were subject to overflow from the Illinois river in times of high water from natural causes; that prior to the construction of a certain lock and dam in said river and the opening of the canal of the Chicago Sanitary District the lands were valuable for pasture during the larger part of late summer and early fall, when the high waters had subsided, and a small part of the lands had been in cultivation; that by the construction of said dam and lock and canal the water in said river had been raised so as to overflow the said lands and render them practically worthless for pasturing stock; that large flocks of wild fowl frequented the land, and the only remaining value of the lands consisted of the right and privilege of hunting thereon; that such right gave the lands their only market value, and that the appellees, who were insolvent, had repeatedly trespassed upon the lands and hunted over the same and threatened to continue hunting thereon. The bill prayed for an injunction restraining appellees from hunting over the lands of appellant, and a temporary injunction was granted. Appellees answered, al-

leging that, by reason of the construction of the dam and lock in the river and the canal from Lake Michigan to said river, the waters had been raised and covered the lands to a depth sufficient for navigation, and that thereby they and the public at large had acquired the right of navigation and the right of hunting and fishing in said navigable waters. The cause was heard upon evidence taken before the master in chancery, the injunction was dissolved, and a decree was entered dismissing the bill for want of equity.

The following facts were proved: The lands border upon the Illinois river, and within their limits, lying near the river, there is a lake with two long, narrow branches, called Clear Lake, one branch of which is sometimes called Mud Lake. Clear Lake is connected at its southerly end with the Illinois river, and extends, with its two branches, northerly and westerly about two miles and a half. There is a large tract of land between the two branches called the "middle grounds." In surveying the lands, Clear Lake, with both its branches, was meandered by the government, and the lands were sold and are now owned in fee by appellant, who has paid the taxes and been in possession of them. In a natural state the lands were generally overflowed in the spring, and occasionally at other times during high freshets, to a depth of from 6 to 12 feet. The high water generally subsided in the late spring, and the land would then be good for pasture, and about 15 or 20 acres of it was in cultivation. About 1,200 or 1,300 acres was in timber, and the remainder was in willows and buck-brush, with large open spaces. Connected with Clear Lake there were sloughs and low places, and in times of high water canal boats or barges pushed by steam tugs passed up such sloughs to Haven's Landing and Elm Landing, a considerable distance above. These landings had no wharves or warehouses, but were merely points where grain was hauled by farmers, to be loaded on the canal boats or barges and taken away. Some years ago a lock and dam was built at La Grange, below the lands, which raised the water of the lake about 18 inches, and afterward the sanitary district canal was opened, raising the water 3 or 4 feet more, so that the natural stage of the water in the river is about 5 feet higher than in its natural condition. The lands have been overflowed and rendered practically worthless for any purpose, except hunting and fishing. Upon the lands there is wild rice, celery, nut grass, smartweed, lotus, and the like, furnishing abundant food for wild ducks. Appellant has sowed wild grass on the premises for food to attract the ducks, and it is a favorite resort for ducks and wild fowl, and the lands are valuable for a hunting preserve. It is not claimed that appellant owns any of the lands underlying Clear Lake or Mud Lake, both of which were navigable in a natural state

and were meandered in the government survey. The claim of appellant is that he has the exclusive right to hunt upon the premises, of which he has the record title, by reason of his ownership of the soil, that the public generally, having no right, title, or ownership in the lands, have no such right, and that to admit the public to the lands would result in frightening and driving away the game and destroy the only remaining value of the lands. Appellees do not deny that the appellant is the owner in fee simple of the premises and in the lawful possession of them, nor that they are subject to the burden of taxation, but they claim that the public have acquired the right to use the lands for the only purpose for which they have any value. Their position is that by the inundation, resulting mainly from the drainage canal, the waters upon the land have become navigable in fact, that thereby the public have acquired, not only an easement of navigation, but a right to hunt and fish thereon, and that appellant has lost his title as against such rights, so long as the submergence continues. Acknowledging appellant's ownership, the claim of appellees is stated as follows: "It is contended by appellees that by the permanent flooding of the lands in controversy that title was suspended or lost by the original proprietor, so far as excluding the public therefrom in the rights of navigation, hunting, and fishery." That is the question to be determined on this appeal, and, although the bill relates only to the right to hunt over the lands, counsel on both sides have treated the question as though it included the right to fish. They are agreed that if one right exists the other does also, and that they may be considered as concomitant rights, if they exist at all. Counsel for the appellees have also discussed the question whether the appellant has the right to fish and hunt on the waters of the Illinois river within his ownership, but that question is not involved in this case in any manner, and will not be decided. Whether prescriptive rights or usage could or do have any influence in determining the right to hunt or fish on the waters of the river will not be considered.

Both branches of Clear Lake, one of which is frequently called Mud Lake, having been meandered by the government, the title of the complainant before the inundation of his lands extended to the waters of the lake in their natural condition free from disturbing causes, and this would be so whether they were navigable or not. Where land is conveyed extending to a river and bounding upon it, the center of the stream is the line of the boundary; but, in case of a natural lake or bed of water meandered by the government, the grant extends to the water's edge, while the ownership of the bed of the lake is in the state, in trust for all the people for the purpose of fishing, boating, and the like. *Seaman v. Smith*, 24 Ill. 521; *Trus-*

tees of Schools v. Schroll, 120 Ill. 509, 12 N. E. 248, 60 Am. Rep. 575; Fuller v. Shedd, 161 Ill. 462, 44 N. E. 286, 83 L. R. A. 146, 52 Am. St. Rep. 380; People v. Kirk, 162 Ill. 138, 45 N. E. 830, 58 Am. St. Rep. 277; Hammond v. Shepard, 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274. As appellant took title to the water's edge, he also acquired title to any land which might be added by accretions, and, if the waters of the lake, by gradual and imperceptible progress, should encroach upon the surrounding land, he would lose the title to the lands so encroached upon. In either case, to have that effect, the change in the boundary line must be gradual and imperceptible at any particular time. Where there is a gain of land little by little, by small and imperceptible degrees, it goes to the owner of the adjoining land, and where the lands are gradually encroached upon by the waters the title of the adjoining owner extends only to the water's edge. Fuller v. Shedd, supra. Where there is a sudden or marked change in the shore line and the lands of the adjoining owner are flooded or the course of a stream changed, the adjoining owner is not thereby divested of his title. Middleton v. Pritchard, 3 Scam. 510, 38 Am. Dec. 112; Lovingson v. St. Clair County, 64 Ill. 56, 16 Am. Rep. 516. Appellant did not lose his title to the lands by their submergence, and we do not understand counsel for appellees to claim that he did, except as against a supposed public right of navigation, hunting, and fishery. The question whether the public acquired any right of navigation or any other right in the waters overflowing the lands of appellant is conceded to depend upon the question whether such waters are navigable, and on that question appellant insists that they are not navigable in fact, while appellees insist that they are.

At the common law, waters were navigable only where the tide ebbcd and flowed, and streams above tide water were not deemed navigable. The title to the soil under navigable waters was in the crown, and was held for the benefit of all the public for commerce, navigation, and fishery. In navigable waters the shore owner took title to high-water mark, but above tide water he took title to the center of the stream. In this state the common-law rule is not the test whether waters are navigable or not, and waters which are navigable in fact are navigable in law. But, while the common law is not in force here, because not adapted to our condition, so far as relates to navigation, it has been adopted so far as it relates to the questions of boundary and ownership. At common law, the riparian proprietor had the exclusive right to fish in the waters covering the soil owned by him, to the center of the stream, and in Middleton v. Pritchard, supra, the court construed grants by the government according to the principles of the common law, where the government had done no act

to qualify or exclude the right. In this state the public have an easement for the purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil, and the question whether these waters are navigable depends upon the question whether they are of sufficient depth to afford a channel for useful commerce. In some states, where the lumber interest has been regarded of first importance, the courts have held that waters which are capable of floating logs are navigable; but in Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98, this court declined to adopt such a rule, and adhered to the doctrine that navigable waters must be capable of practical general uses. The rule, stated by Lord Hale in his treatise De Jure Maris, that a stream, to be navigable, must furnish "a common passage for the king's people," must be "of common or public use for the carriage of boats and lighters," must be capable of bearing up and floating vessels for the transportation of property conducted by the agency of man, was approved. Joliet & Chicago Railroad Co. v. Healy, 94 Ill. 416. A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for rowboats or small launches, answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable. In this case the evidence shows that a large part of the lands is covered with timber, buck-brush, and willows, and is incapable of use for navigation. The appellees were able to run their boats into such places and conceal themselves for the purpose of hunting, but there are also large open spaces where the water is deep enough for purposes of navigation. It is not necessary that the waters should be navigable in all their parts in order that the public may have a right of navigation, where the waters are deep enough and fit for such use. The evidence sufficiently shows that there are considerable spaces on these lands permanently submerged to such a depth that there is a right of navigation in the public.

The next question is whether the public have a right to hunt and fish where there is such a right of navigation as an incident to the latter right. Appellant insists that, if his lands are subject to a public easement for the purpose of navigation, it does not follow that he has lost his exclusive right to hunt and fish over them, while the position of appellees is that, wherever there is a public right of navigation, there is also a right to hunt and fish. There is no natural or necessary connection between the easement of navigation, which is of the same character as a public highway (3 Kent's Com. 427), and the right to hunt and fish where such easement exists. They are in no manner connected with each other, and the two occupations are not prosecuted by the same individuals

with the same vessels or by the same means. The Supreme Court of Michigan pointed out the difference and the distinction in such rights in the case of *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405, saying: "The complainant claims that he had the right to shoot the wild fowl from his boat, because, as the waters were navigable where he was, he had the right to be there; that, there being no property in wild fowl until captured, if he committed no trespass in being where he was, no action will lie against him for being there and shooting the wild duck. There is a plausibility in the position which, considered in the abstract, is quite forcible, and, if applied to waters where there is no private ownership of the soil thereunder, would be unanswerable. But, so far as plaintiff is concerned, defendant had no right to be where he was, except for the purpose of pursuing the implied license held out to the public of navigating the waters over his land. So long as that license continued, he could navigate the water with his vessel and do all things incidental to such navigation. He could seek the shelter of the bay in a storm and cast his anchor therein; but he had no right to construct a 'hide' nor to anchor his decoys for the purpose of attracting ducks within reach of his shotgun." The court further said: "It does not follow that because a person is where he has a right to be he cannot be held liable in trespass. A person has the right to drive his cattle along the public highway, but he has no right to depasture the grass with his cattle in the highway adjoining the land of another person. * * * The defendant had the right of using the waters of the bay for the purpose of a public highway in the navigation of his boat over it, but he had no right to interfere with the plaintiff's use thereof for hunting, which belonged to him as the owner of the soil. The public had a right to use it as a public highway, but every other beneficial use and enjoyment belonged to the owner of the soil."

The argument that the riparian owner has no property in the particles of water flowing in a stream any more than he has in the air that floats over his land, and that the fish in the stream are not his property any more than the birds that fly over his land, does not tend to sustain the proposition that the public right of fishing is included in or incident of the public right of navigation. If the argument proves anything, it proves too much, since it applies with as much force to waters which are not navigable as to waters which are. If the right to hunt and fish on the lands of an individual is in the public on account of the migratory nature of fowl and fish, the right does not, of course, depend in any way upon the other right of navigation, but the public may take the fowl or fish wherever it can be found. In our judgment, however, that argument has no force as applied to the question here involved.

There is no private ownership of wild game, but the exclusive right of every owner of land to kill and take game found from time to time on his land is indisputable. This was regarded at common law as property *ratione soli*, or, in other words, as property by reason of the ownership of the soil. While there can be no absolute property in animals *feræ naturæ* while at liberty in their natural state, they become the property of the owner of the soil when killed or captured thereon, and the right to kill or capture them is exclusive in such owner. Whenever the owner's right is exercised, the animal killed or captured belongs absolutely to him, and he has a qualified property in game while on his own land. The title to wild game and birds in this state is in the state, as representing all the people, both by common law and by statute. But this is only true so far as such wild game or birds are capable of ownership. The ownership, such as it is, is not that of a proprietor, but of a trustee for the benefit of all the people in common. The general ownership is in the state for the use of the public; but, when wild game or fowl are upon the private grounds of an individual, a qualified or special right of property of the individual attaches to it, with the exclusive right to hunt, kill, or capture while there. *State of Arkansas v. Mallory* (Ark.) 83 S. W. 955, 67 L. R. A. 773. The law does recognize a qualified right of property in wild animals or birds as between the owner of the land on which they are found and a trespasser thereon. So, also, the owner of the soil has the absolute right to use and enjoy the waters flowing over the same, even if navigable, so long as he does not interfere with the public use for navigation or pollute the stream or diminish the supply.

While the fish in the waters and the birds that fly over the land or swim on the surface of the waters are not the absolute property of the owner of the soil, the absolute right to hunt and fish in such waters and on the land was in him by the common law, which is the law of this state, unless we hold that it is not adapted to our condition. The decisions of this court have thus far recognized the existence of the common-law rule. In *Middleton v. Pritchard*, *supra*, although the question was not directly involved, the court recognized the rules of the common law in respect to the right to fish as being in force in this state. In *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146, the right to take fish in a small lake was involved. It does not appear whether the lake was meandered or whether it was navigable, but the court said: "By the common law a right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow that, if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land

extends, to wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law or well-established usage of the state where the premises may be situate." *Braxton v. Bressler*, 64 Ill. 488, recognizes the rule that, if waters are navigable in fact, the public have only a right of easement or passage upon them as a highway, but that every other beneficial use is in the owner of the soil. In *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196, the right of the riparian proprietor on a navigable stream to the ice in front of his land was asserted, and the court recognized the common-law rights of fishery, saying: "In *Adams v. Pease*, 2 Conn. 481, it was held that the owners of land adjoining the Connecticut river above the flowing and ebbing of the tide have an exclusive right of fishery opposite to their land to the middle of the river, and that the public have an easement in the river as a highway, for passing and repassing with every kind of water craft." In *Fuller v. Shedd*, supra, it was assumed that the right of fishery depends upon the ownership of the soil. In *People v. Bridges*, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684, which was a prosecution for a violation of the act for the protection of fish, it was considered that the owner of the soil has the exclusive right to take fish, subject to the legislative power to control and regulate the exercise of that right.

While the precise question involved in this case was not decided in any of those cases, they are all to the effect that the common law relating to the question is in force in this state. The principal argument for appellees is that it is not in force, because these waters are navigable in fact, and the right to hunt and fish is an incident to the right of navigation. The decisions of this court have not rested upon any such ground, but have uniformly been made to depend upon the ownership of the soil, and we see no reason why the right to fish or hunt should depend in any manner upon the existence or nonexistence of an easement of navigation. It was thought by the Supreme Court of Ohio in the case of *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599, that, while a navigable stream is a public highway, the right to its use for that purpose is not obstructed or interfered with by protecting the owner of the fee in the exclusive right to kill game thereon. The right to fish in navigable waters is, of course, subordinate to the right of navigation, and must be so used as not to prejudice that right, but the public easement will not be affected in any manner by protecting appellant in his right to hunt and fish over the water upon his own land. In our opinion appellant was entitled to a permanent injunction as to the lands of which he is the owner.

The judgment of the Appellate Court and

the decree of the circuit court are reversed, and the cause is remanded to the circuit court with directions to enter a decree permanently enjoining appellees from hunting upon the lands of which the appellant has the record title, which have been overflowed or inundated as alleged in the bill of complaint.

Reversed and remanded.

(218 Ill. 68)

BARKER v. SMILEY.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. DOWER—TRUST ESTATES.

A wife has no dower right in property the naked legal title to which is conveyed to the husband in trust for his wife.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, §§ 36, 48.]

2. JUDGMENTS—RES JUDICATA.

A decree setting aside a deed from husband to wife as in fraud of creditors, declaring title to the land to be in the husband, and ordering the land to be sold, and the wife to be paid \$1,000 for her homestead, is *res judicata* upon a subsequent petition by the wife for an assignment of dower in the property.

Appeal from Circuit Court, Cook County; Murray F. Tuley, Judge.

Petition for assignment of dower by Aura W. Barker against Mitchell J. Smiley. From a decree of dismissal, petitioner appeals. Affirmed.

Rehearing denied December 7, 1905.

On January 25, 1904, Aura W. Barker filed her petition in the circuit court of Cook county against Mitchell J. Smiley, praying for an assignment of her dower in certain premises, commonly known as No. 2815 Prairie avenue, in the city of Chicago. The principal facts as alleged in the petition are as follows: On December 26, 1867, the petitioner was married to one Samuel B. Barker, who died on or about December 30, 1903. On April 30, 1886, Samuel B. Barker, for the consideration of \$50,000, acquired the fee-simple title to the premises in question, and from the date of the purchase until March 21, 1900, he and his wife occupied it as a homestead. Notwithstanding the title was taken in the name of Samuel B. Barker, it is claimed that the purchase was for the petitioner, and he held the title in trust for her until February 2, 1891, when, in consideration of love and affection and one dollar, he conveyed the same to her by warranty deed, which deed was delivered to her and afterwards placed in the hands of her husband to be placed on record, which he failed to do, and the deed was not recorded until in May, 1893. Petitioner does not claim that the creditors of Samuel B. Barker had any knowledge or notice of this conveyance, but that on the date it was made he was solvent. Samuel B. Barker was engaged in the lumber business in the city of Chicago, and on May 29, 1893, was insolvent. On that date he again conveyed the premises in question to the petitioner by a war-

ranty deed, which was duly filed for record. On May 31, 1893, the Union National Bank of Chicago obtained a judgment, by confession, against Samuel B. Barker for \$50,732.75, and execution was issued upon the judgment and levied upon the premises in question. On June 28, 1893, P. A. Lane obtained a judgment, by confession, in the superior court of Cook county against Samuel B. Barker for \$3,516.50. Execution was issued upon the judgment, and returned no property found. On July 1, 1893, Lane filed a creditors' bill in the superior court of Cook county against Samuel B. Barker, the Union National Bank, and the petitioner, in which he sought to set aside the deed of May 29, 1893. On July 6, 1893, P. A. Lane recovered another judgment in the superior court of Cook county against Samuel B. Barker for \$2,701.19. An execution was issued upon the judgment, and returned no property found. On July 11, 1893, Lane filed another creditors' bill against the same parties for the purpose of setting aside the deed, and on October 18, 1893, the two cases were consolidated. On December 13, 1893, the Union National Bank filed a creditors' bill in the superior court of Cook county against Samuel B. Barker, A. P. Lane, the petitioner, and other judgment creditors of Barker, for the purpose of setting aside said deed of conveyance. Upon answers being filed in the various cases, a decree was entered, which found that Aura W. Barker was not, as against the complainants and cross-complainants, the owner of the premises, except that she was entitled to the sum of \$1,000 out of the proceeds of said property, when sold, for her homestead rights. The premises were ordered sold free and clear of any right, claim, or interest of Aura W. Barker. On March 21, 1899, the premises were sold by the master in chancery to the Union National Bank for \$35,000. The master paid the \$1,000, as directed in the decree, to Aura W. Barker. On March 21, 1900, the bank conveyed the premises to the appellee, Mitchell J. Smiley, who thereupon entered into possession, and has continued in possession ever since. The further allegation of the petition is that the defendant, Mitchell J. Smiley, combined and confederated with other persons for the purpose of injuring and defrauding the petitioner, and he claims that by virtue of the proceedings between the Union National Bank and A. P. Lane, and the decree therein entered, petitioner's inchoate right of dower was directed to be sold, and was sold, and that the purchaser took the premises clear and divested of her dower. The petition alleges that the premises were sold subject to her dower, that she has a right of dower therein, and prays that the same be set off to her. The defendant, Smiley, filed his answer to the petition, practically admitting the material allegations of the bill, especially those in relation to the execution of the

two deeds by petitioner's husband to petitioner, the obtaining of the judgment, the filing of the creditors' bills, the proceedings therein, the sale under the decree of the circuit court, and the conveyance to Smiley. It alleges, however, that the decree entered in the case of the Union National Bank constituted a complete adjudication of the right, title, interest, claim, or demand, which petitioner, Aura W. Barker, had or claimed to have in and to the premises in question, and that the decree is an absolute bar to her claim of dower; that this decree is in full force and effect; that the defendant, Smiley, is the absolute owner of the premises described in the petition, and that petitioner had no dower or right of dower therein. Upon a hearing in open court upon petition, answer, and evidence offered, the petition was dismissed for want of equity. From this decree an appeal has been prosecuted to this court.

Otto Gresham, for appellant. Charles L. Bartlett and James E. Munroe, for appellee.

WILKIN, J. (after stating the facts). The facts, as above stated, are substantially admitted by the pleadings. The only error urged is that the petition should not have been dismissed, but a decree should have been entered assigning the dower as prayed. At the time the property was purchased by Samuel B. Barker it is claimed that the purchase was made for the petitioner, but the title was taken in the name of the husband in trust for her. If these facts are true, the wife would certainly have no dower interest in the property. Dower, at common law, was an estate for life, to which the wife was entitled, on the death of the husband, in the third part of the legal estates of inheritance, in lands and tenements of which the husband was seised, in deed, or in law, in fee simple, or in fee tale, at any time during coverture, and to which any issue which the wife might have had might by any possibility have been heir. *Sisk v. Smith*, 1 Gilman, 503; 10 Am. & Eng. Ency. of Law (2d Ed.) 125. While this rule of the common law has to some extent been modified by statute, yet these modifications have not materially varied the above rule as it is applicable in this case. The conveyance to the husband was merely in trust for the wife. She had the equitable title, and he held the naked legal title, which she could have compelled him to convey to her. No right of dower attaches to an estate in which the naked legal title is held in trust for a second party. *King v. Bushnell*, 121 Ill. 656, 13 N. E. 245. For this reason, if the title was in the husband in trust for the wife, she could claim no dower therein.

There is another good reason why the decree dismissing the petition is correct. At the time of the hearing upon the creditors' bills the petitioner filed her answer, in which she set up the fact of the original purchase having been made for her, that the title was

held in trust for her by her husband, and that he executed the deed of February 2, 1891, and she asked that her rights be adjudicated. At the time of the hearing she was represented by eminent counsel, who forcibly presented her claim to the court, but, notwithstanding this, the decree upon the merits was against her. It found that the conveyance of May 28, 1893, was in fraud of creditors, that the premises belonged to the husband, ordered a sale, and provided for the payment of \$1,000 to her for her homestead. In pursuance of that decree, the premises were sold and the deed of conveyance made by the purchaser to the appellee. The court had jurisdiction of the person of all of the parties, including the petitioner, and also had jurisdiction of the subject-matter. The decree, as rendered, was never reversed, but is now in full force and effect and fully executed. To now permit appellant to again litigate these questions would be to give no force or effect to a judicial decree to which she was a party and to entirely set aside a judicial sale properly made. The decree as rendered in the former case was res judicata of all the matters set up in this petition.

Complaint is made that the premises were sold as the property of the husband, and therefore the wife is entitled to dower. We have nothing to do with the justice, reasonableness, or correctness of that decree. It cannot be collaterally attacked, and, if it was wrong, it was the duty of appellant to appeal from it and in this way preserve her rights. If she is injured by the decree and has lost her dower, she has no one to blame but herself. If the property was hers originally, she should have had the title taken in her name. When the deed was made to her, she should have filed it for record. If she had attended to these matters at the proper time and in the proper way, she would now be the owner in fee; but as it is she has slept upon her rights, and therefore must bear the burden of her own negligence. She recognized the provisions of the decree by accepting \$1,000 of the purchase money in lieu of her homestead, and it would certainly be as unjust to permit her to have dower as it would be to again permit her to claim her homestead.

We find no reversible error, and the decree of the circuit court dismissing the petition will be affirmed.

Decree affirmed.

(213 Ill. 165)

FORREST v. FEY et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. JUDGMENTS — FOREIGN JUDGMENTS — COLLATERAL ATTACK.

A transcript of a foreign decree, duly certified, cannot be attacked when offered in evidence, except on the ground of jurisdiction, including fraud affecting jurisdiction and discretion to exercise jurisdiction.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1486, 1496.]

2. SAME—CONCLUSIVENESS IN GENERAL.

Where a court of one state has jurisdiction in a proceeding, its decree has the same force and effect in other states as in that state, and concludes the merits of the controversy, notwithstanding the intervention of fraud not affecting the jurisdiction.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1486–1488, 1496.]

3. SAME—FINDING AS TO JURISDICTION—CONCLUSIVENESS.

A finding of a court that it has jurisdiction, and a recital in its decree that the jurisdictional notice has been given, is not conclusive, where the record itself shows that the finding of jurisdiction is insufficient or that notice has not been given as required by law.

4. SAME.

Where the record in divorce proceedings in the court of a foreign state showed that the affidavit of nonresidence required by the laws of the foreign state to be filed as a basis for a warning order was not signed nor sworn to, and there was no finding that the affidavit was filed, and nothing from which it could be presumed that any other paper had been filed as the affidavit, the decree of divorce was void, although the court found that it had jurisdiction, and its decree recited that the warning order had been given.

Appeal from Circuit Court, Ford County; T. M. Harris, Judge.

Action by Mrs. Lou Forrest against Mrs. Fred Fey and others. From a decree of dismissal, petitioner appeals. Affirmed.

Rehearing denied December 7, 1905.

Schneider & Schneider and W. N. Carpenter, for appellant. Cloud & Thompson and Welty, Sterling & Whitmore, for appellees.

CARTWRIGHT, C. J. Appellant filed in the circuit court of Ford county her petition for the assignment to her of dower in 120 acres of land in said county, alleging that she was the widow of Frederick Fey, to whom she was married in Arkansas, and making the appellees, Anna K. Fey, from whom she alleged that Frederick Fey had been divorced before his marriage to her, and the heirs of Frederick Fey and John A. Montelius, defendants. The answers to the petition raised an issue as to the validity of the divorce obtained by Frederick Fey in the chancery court of Arkansas county, Ark., and alleged that it was void for want of jurisdiction in said court. The cause was referred to a special master to take and report the evidence, and upon a hearing of the evidence so taken the petition for dower was dismissed and this appeal was prosecuted.

Frederick Fey was the owner of 200 acres of land in Ford county, in this state, and lived upon it with his wife, Anna K. Fey, and their children. In the spring of 1897 he went to Arkansas, and bought a piece of land and remained there a few weeks. He returned and remained at home with his wife and children until the spring of 1899, when he again went to Arkansas, and came back in the fall of that year. He remained at home with his wife and family for about three weeks, and again left for Arkansas on

November 4, 1899. While at home he and his wife, Anna K. Fey, conveyed the farm to John A. Montellius, who gave back the following contracts, one to Frederick Fey, agreeing to convey to him 120 acres upon his obtaining a divorce from his wife and paying her \$1,000, and the other agreeing to convey 80 acres to Anna K. Fey when her husband obtained a legal divorce from her:

"Piper City, Illinois, Nov. 1, 1899.

"Whereas, Fred Fey and wife have this day decided to me their farm upon this condition, that in order to settle their differences I am to hold the title to said land until Fred Fey procures a legal divorce from his wife and pays to said Anna K. Fey the sum of one thousand dollars as a settlement in full for her dower interest in the east half of the southeast quarter and the southwest quarter of the southeast quarter of section twenty-two (22), town twenty-six (26) north, range nine (9) east of the third principal meridian. When this is done said party of second part agrees to deed this part of the farm to said Fred Fey.

hh
"Fred X Fey.
mark.

"John A. Montellius.

"Witness: George D. Montellius."

"Piper City, Illinois, Nov. 1, 1899.

"Whereas, Fred Fey and Anna K. Fey have decided to me their farm in settlement of their differences, as soon as Fred Fey procures a legal divorce party of the second part agrees to reconvey the east half of the northeast quarter of section twenty-two (22), town twenty-six (26) north, range nine (9) east of the third principal meridian.

"Anna K. Fey.

"John A. Montellius."

On April 24, 1900, Frederick Fey filed in the chancery court of Arkansas county, Ark., his bill for divorce from his wife, Anna K. Fey, and on August 9, 1900, a decree of divorce was entered, finding that said Anna K. Fey abandoned said Frederick Fey in March, 1898, and annulling their marriage. On August 14, 1900, Frederick Fey was married to appellant, Mrs. Lou Walker. In October, 1900, Frederick Fey died, and appellant was afterwards married to Morgan Forrest.

The only question which will be considered is whether the chancery court of Arkansas county, Ark., acquired jurisdiction to hear and determine the suit for divorce of Frederick Fey against Catarina Fey, as Anna K. Fey was styled in that proceeding, and all other questions raised and argued by counsel will be ignored. The defendant Anna K. Fey resided in this state and did not appear in the suit. The service upon her was by publication of a warning order. The statute of Arkansas provides that when it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commence-

ment of an action, that the defendant is a nonresident of the state, the clerk shall make upon the complaint an order warning such defendant to appear in the action within 30 days from the time of making the order. The affidavit required by the statute before a warning order is made and publication thereof, is jurisdictional, and if the affidavit is not made it is fatal to the jurisdiction. *Memphis Land Co. v. Levee District*, 70 Ark. 409, 68 S. W. 242. No affidavit was found in the files or of record in the cause, and there was no finding by the court that such an affidavit was ever filed, but there was attached to the bill of complaint a draft of an affidavit, not signed or sworn to, as follows:

"Now on this day comes the complainant, Frederick Fey, who on his oath says that the foregoing complaint is true. And he further states that the defendant, Catarina Fey, is a nonresident of the state of Arkansas, and asks that a warning order be issued.

"Subscribed and sworn to before me this
— day of April, A. D. 1900.

"No. 400.—Frederick Fey vs. Catarina Fey."

Indorsed:

"Filed in my office and L. C. Smith appointed atty. ad litem, and warning order issued, April 24, 1900.

"L. C. Gibson, Clerk,

"H. B. Dudley, D. C.

"William Carpenter, for Plaintiff."

The warning order so issued, dated April 24, 1900, and signed by the clerk, was published in a newspaper for four successive weeks. In the decree for divorce the court found that the defendant had been properly served by a warning order published in fit and ample time, but found nothing as to the affidavit.

One of the grounds upon which it is contended that the decree of divorce was void is, that Frederick Fey had no legal ground for a divorce and that the decree was obtained by fraudulent averments and proof. Whether he had any legal ground for a divorce, or whether the allegations of his bill of complaint, or the proofs to sustain them, were true or false, does not affect the validity of the decree if the court had jurisdiction to enter it. Where a transcript of a decree entered by a court of another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except questions of jurisdiction (*McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 772), including fraud affecting the jurisdiction or the discretion of the court to exercise such jurisdiction (*Dunham v. Dunham*, 162 Ill. 539, 44 N. E. 841, 35 L. R. A. 70). After a court has acquired jurisdiction its findings are conclusive in all collateral proceedings, and a decree rendered by the chancery court of Arkansas, if it had jurisdiction, has the same effect in every other state as in the state where it was

rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened. *Ambler v. Whipple*, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202. In the absence of jurisdiction to pronounce a decree it is absolutely void, and may be attacked either directly or collaterally. Where a court of general jurisdiction proceeds to adjudicate a cause there is a presumption of jurisdiction; but this presumption applies only when the record is silent upon the question, and if there is an affirmative showing in the record that there was no jurisdiction the judgment or decree will be void. Where the decree is silent as to the jurisdiction of the court over the defendants, if there is no evidence showing that the jurisdiction was not acquired, it will be presumed that the court had jurisdiction. *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634. Where a decree is silent as to the service of process, and the summons in the case shows want of or insufficient service, the presumption of jurisdiction is overcome. *Swearngen v. Glick*, 67 Ill. 208. If it appears from the whole record in a case that the court did not have jurisdiction, the presumption in favor of jurisdiction is overcome. *Osgood v. Blackmore*, 59 Ill. 261. When the record itself shows a service which is insufficient and there is no finding from which it may be presumed that there is another service, the presumption in favor of jurisdiction is rebutted. *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. Where the record itself shows that notice was not given as required by law the jurisdiction does not attach, and where it shows that the finding of jurisdiction upon which the court acted was insufficient the finding of the court as to its jurisdiction is not conclusive, and the recital of proper service on the face of the decree makes no difference. *Whitney v. Porter*, 23 Ill. 392; *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652.

Jurisdiction over the defendant in the divorce suit could be obtained by publication in accordance with the statute of Arkansas, but if process was not served or notice given as required by law the court did not acquire jurisdiction and its decree was void. *Goudy v. Hall*, 30 Ill. 109. Where the facts appearing on the face of the record show that the court of another state rendering a decree of divorce had no jurisdiction of the person of the defendant, the decree is void. *Tucker v. People*, 122 Ill. 583, 13 N. E. 809. In this case it appears on the face of the record that there was no affidavit of non-residence as required by the statute of Arkansas. A paper intended to be sworn to, annexed to the bill of complaint, and upon which the filing and notation of the clerk that a warning order was issued appeared, was neither signed nor sworn to. There was no finding by the court that any affidavit was made or filed, and there is nothing from which any presumption can arise that there

was any other paper filed as an affidavit. The complaint with that paper attached was filed and the warning order was issued on April 24, 1900, and it is manifest that the unsworn paper was acted upon by the clerk as a basis for the warning order. It follows that the chancery court in Arkansas had no jurisdiction to enter the decree of divorce and the decree was void. For that reason the court did not err in dismissing the petition.

The decree of the circuit court is affirmed.
Decree affirmed.

(218 Ill. 46)

THOMPSON et al. v. HEMENWAY et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. JUDGMENT—CONCLUSIVENESS OF ADJUDICATION—PERSONS CONCLUDED.

A corporation which, with knowledge that an attorney had filed a bill in its name, allowed the suit to be prosecuted to final decree without objection, was bound by the decree, although the attorney was not specifically employed by it.

2. JUDICIAL SALES—TITLE OF PURCHASER.

In a suit to foreclose a mortgage, a prior judgment creditor was made a party, and the decree declared the judgment to be a prior lien and ordered the property to be sold in satisfaction of both the judgment and the mortgage. The sale was made accordingly. *Held*, that the sale was in execution of the judgment, and the purchaser's title was not restricted to a mere right of redemption under the mortgage.

3. JUDGMENTS—CONCLUSIVENESS—PARTIES CONCLUDED.

Where a prior judgment creditor is made a party to a suit to foreclose a mortgage, complainant in the suit is bound by a decree that the judgment lien is superior to that of the mortgage and ordering a sale of the property to satisfy both the judgment and mortgage.

4. SAME—MATTERS CONCLUDED.

Matters properly involved in a suit and which might have been, even if they were not, raised and determined therein, are concluded by the decree and cannot be raised in a subsequent suit between the parties.

5. JUDICIAL SALES—RELATION BACK.

Where a foreclosure decree found the lien of a judgment to be superior to that of the mortgage, and ordered a sale of property to satisfy both liens, the title of the purchaser related back to the date of the judgment as against a junior mortgagee who was a party to the foreclosure proceeding.

Hand, J., dissenting.

Appeal from Circuit Court, Rock Island County; Emery C. Graves, Judge.

Action by Benjamin F. Thompson against Charles F. Hemenway. From a judgment for defendants, plaintiff appeals. Reversed. Rehearing denied December 7, 1905.

This was a suit in ejectment, brought by appellants against appellees in the circuit court of Rock Island county. The object of the suit was to determine whether the appellants, who were the plaintiffs below, or appellees, who were the defendants below and in possession of the property, were the holders of the superior legal title to the property in question when the suit was commenced. It

is conceded that both parties claim under the title formerly held by the J. S. Keater Lumber Company. Appellants claim paramount title as purchasers at a sale under a decree of the circuit court of Rock Island county rendered in a proceeding for the foreclosure of a mortgage which was made by the Keater company under date of February 20, 1892, to a large number of its creditors for various amounts. It also appears that on March 31, 1888, appellants obtained a judgment in the United States Circuit Court for the Northern District of Illinois against the J. S. Keater Lumber Company for \$15,568.99, and that a writ of error was sued out of the United States Supreme Court, where in 1892 the judgment was affirmed by that court. 12 Sup. Ct. 639, 36 L. Ed. 495. The writ of error was made a supersedeas. It appears that the mortgage above described from the J. S. Keater Lumber Company to Charles H. Deere and others on the property in question was to secure the payment of several claims and notes aggregating \$39,645.21, and on April 22, 1892, proceedings were begun by the Rock Island National Bank, the holder of one of the claims secured by the mortgage to Charles H. Deere (hereinafter designated the Deere mortgage), to foreclose the same, and appellants, with others, were made defendants to this foreclosure proceeding. This mortgage was recorded two days after the United States Supreme Court affirmed the Thompson and Root judgment. An amendment was filed to the bill, and on September 29, 1892, Thompson and Root filed their answer to the bill as amended, setting up their judgment, and claiming a senior lien on the premises in question. It further appears that, pending the writ of error from the Thompson and Root judgment, on December 11, 1891, the J. S. Keater Lumber Company gave to the Moline State Savings Bank a mortgage on the property in question to secure the payment of a note of \$6,000, and which was prior to the Deere mortgage that was foreclosed by the Rock Island National Bank and others. On January 31, 1893, Ira O. Wilkinson, who was the attorney for the estate of one Wheelock, who was surety to the Moline State Savings Bank on a \$2,500 note given by the J. S. Keater Lumber Company to said bank, and who, on account of being surety on this \$2,500 note, as well as others, had been indemnified by the Deere mortgage, filed, in the name of the Moline State Savings Bank, an appearance, in which the bank is purported to be owner of one of the notes secured by the Deere mortgage. On the same day a second amended bill was filed, in which the Moline State Savings Bank became one of the complainants, averring that the Moline State Savings Bank was the owner of one of the notes secured by the Deere mortgage, describing it as a \$2,500 note, a copy of which note was attached and marked "Exhibit M," and on the same day Thompson and Root filed an amended answer denying

the complainant's right to a foreclosure of the mortgage in question, unless subject to the lien of their judgment. No cross-bill was filed or affirmative relief prayed. On December 21, 1893, proceedings for the foreclosure of the \$6,000 mortgage to the Moline State Savings Bank were begun by said bank, and Thompson and Root, with others, were made defendants, and on May 16, 1894, Thompson and Root filed their answer to the bill to foreclose the \$6,000 mortgage, averring that their judgment lien was prior to this mortgage. But the proceeding seems to have been suspended, awaiting the outcome of the contest between Thompson and Root and the complainants in the proceeding to foreclose the Deere mortgage.

On November 17, 1896, a decree for foreclosure was entered in the proceeding to foreclose the Deere mortgage. The court in this decree found that the \$2,500 note from the J. S. Keater Lumber Company to the Moline State Savings Bank, described in the amended bill and being the only note described in the amended bill in which it was claimed by any one said bank had any interest, had been paid prior to the entering of the decree, and that the lien of the Thompson and Root judgment was the first or senior lien, and then directed the sale of the premises free from the lien, and expressly transferred their judgment lien to the proceeds of the sale, and then proceeded to find the amount, in order of priority, of the claims of the respective parties, and to direct the payment of such claims in the order of the priority as adjudicated. The decree contains the following recitals or findings: "That the equities of said Thompson and Root are superior to those of the complainants, and also to those of all other defendants in this case"; that the property is to be sold and the proceeds applied, first, to the costs of the sale, and the balance, if any, to be paid to the other parties as provided for in the decree; "that said sale be free of and from the lien of said judgment in favor of the said Thompson and Root, as well as of and from the liens of the said complainants under their said mortgage described in said bill of complaint as amended, and from all right, title, and interest in said lands of the defendants, except the right to redeem, etc., and that the lien of said judgment in favor of Thompson and Root shall be transferred to and become and be a lien upon and against the proceeds of said sale; that each and any of the parties to the suit may become purchasers at such sale; that, in case the said Benjamin F. Thompson and Homer Root shall become purchasers at such sale, then they shall be held to pay in cash to the said master only so much as shall be necessary to pay the fees, disbursements, etc., of said master on such sale, and the officers of this court their costs in this suit, and also such portion of their bid for and as shall exceed the sum of said master's fees, disbursements, commissions, and

costs last mentioned, and the amount to be paid to the said Thompson and Root as aforesaid, in which case the said Thompson and Root shall give to said master, to be filed with his report of sale, their receipt for the rest and remainder and amount of their bid, which, under the terms of this decree, they are entitled to have paid upon the amount due and owing to them, as aforesaid, upon their said judgment." It further provides that, if the premises be not redeemed within 15 months, the master shall execute and deliver to the holder of the certificate a good and sufficient conveyance in fee of the premises, and that upon the execution of such conveyance the grantees in such deed shall have possession of the premises conveyed in such deed, and that any of the parties to said cause, who shall be in possession of said premises, or any part thereof, and any person who may have come into possession under them since the commencement of this suit, shall deliver possession of and surrender said premises to such grantee upon production of such deed of conveyance. Nowhere in the pleadings, evidence, master's reports, or decree is the note secured by the \$6,000 mortgage of the Moline State Savings Bank mentioned, except in the description of the premises in the Deere mortgage, where it is said it was subject to the \$6,000 mortgage. From the decree an appeal was carried to the Appellate Court and affirmed, and thence to this court, and was by this court affirmed at the June term, 1898. *Rock Island Nat. Bank v. Thompson*, 173 Ill. 593, 50 N. E. 1089, 64 Am. St. Rep. 137. On December 17, 1898, and after the affirmance of said decree by this court, a sale was had under the decree of the Deere mortgage, and appellants bid in the property for less than the amount of their judgment. On December 26th a master's report of sale was filed and approved, and on April 7, 1900, a deed to the premises in question was executed to appellants. Appellees hold as purchasers at a sale under a decree of the same court foreclosing the prior mortgage made by the same party under date of December 11, 1891, upon which mortgage foreclosure proceedings were begun December 21, 1893, to which the appellants filed their answer, which was afterwards dismissed as to them against their objection, and a decree was entered on July 8, 1898. On September 18th the premises in question were sold under this last decree. On April 11, 1901, a deed to the premises in question was made to Porter Skinner, assignee of the Moline State Savings Bank, who was purchaser at the sale under the foreclosure proceeding.

The above are in substance the facts proven on the trial, from which both appellants and appellees claim title. The cause was tried before the court without a jury, and various propositions of law were submitted both by appellants and appellees, and those submitted by appellees were held to

be the law, and those submitted by appellants refused. Judgment was accordingly entered for appellees, and appellants excepted thereto, and this appeal is prosecuted to reverse that judgment. At the request of appellees the court held in substance (1) that they were the holders of the legal title in fee simple of the premises in question; (2) that the lien of the judgment of the United States court was never perfected into a title, and that no title passed to appellants by virtue thereof; (3) that the lien of the judgment of the circuit court of the United States could only have been enforced and the title thereunder obtained by the method prescribed by the statutes of the United States; (4) that the Moline State Savings Bank was not a complainant in the proceeding to foreclose the Deere mortgage; (5) that the Moline State Savings Bank mortgage was not affected by the proceedings in the foreclosure of the Deere mortgage; (6) that the lien of the savings bank mortgage was superior to the lien of the Deere mortgage, and the savings bank was not a necessary or proper party to the bill to foreclose the Deere mortgage, and its interest under its mortgage was not affected by the proceedings in that case; (7) that the only effect of a decree in the foreclosure of the Deere mortgage was to bar the rights of redemption under the Deere mortgage; (8) that the sale under the decree in the Deere mortgage proceeding was not a sale under the judgment of appellants; (9) that plaintiffs (appellants) are not entitled to possession of the premises.

Plaintiffs offered, and the court refused to hold, nine propositions as the law in the case. These propositions were in substance as follows: First. That the Moline State Savings Bank was a party to the suit to foreclose the Deere mortgage, and is bound by the decree rendered therein. Second. That, if it did not expressly authorize its counsel to enter its appearance and make it a complainant in that bill, still it had notice for at least three years prior to the rendition of the decree that it was a complainant, and did not repudiate its appearance, but remained a party complainant until the entry of the final decree and is bound thereby. Third. The final decree of the foreclosure proceedings of the Deere mortgage was in a suit in which the savings bank was a party complainant and appellants were parties defendant, and is binding and conclusive on all matters and questions that were actually determined in that suit, as well as all other matters which might have been determined therein; that it was determined therein that appellants' judgment became and continued to be a lien upon said premises to the time of said final decree; that said lien was a first lien on said premises; that the equities of Thompson and Root were superior to those of appellees, and that in case of sale under

the decree the purchaser should be entitled to a good and sufficient conveyance in fee of the premises, and also to possession of said premises as against all parties to said suit. Fourth. That in the Deere foreclosure proceedings the complainants, of which the savings bank was one, having by their bill prayed for a sale of the real estate in question, and having prayed that upon a sale the money arising therefrom be brought into court to be distributed among the parties thereto according to law, and a final decree having been entered in which the validity of the prior lien of Thompson and Root was involved and determined, and the amount due on said judgment ordered paid out of the proceeds of the sale, it follows that one of the matters properly involved in that suit, and which might have been raised and determined therein, was as to the right or interest the savings bank had to the premises and the money arising from such sale by virtue of its \$6,000 mortgage which it then held, and that the decree is *res judicata* as to the rights of appellees and appellants, and appellees are estopped thereby. Fifth. The effect of the sale under the final decree in the Deere foreclosure proceeding was to vest in the purchasers at such sale title to said premises freed from the lien of the savings bank mortgage, under which appellees claim. Sixth. Appellants having purchased the premises in question pursuant to said final decree, and having received a deed thereunder, they became the owners of the fee in the premises and entitled to possession. Seventh. That the sale under said decree having been made to appellants, and all the proceeds thereof having been applied in part payment of the judgment in favor of appellants in the United States court, which was the first lien, and appellants having received a deed for the premises, their title is not only supported by the mortgage foreclosed in that suit, but is also based upon and supported by the lien of said judgment; and such title relates back to March 31, 1888, the date of said judgment, and vests the title in fee in appellants paramount and superior to that of appellees. Eighth. Thompson and Root being the purchasers under a decree of sale prayed by the savings bank as complainant, the title which they acquired to the premises under such purchase was all the right, title, and interest held by all parties to that suit. Ninth. That the title of Thompson and Root is prior, paramount, and superior to any right, title, or interest of appellees.

James Wickham, James O'Neill, and Jackson, Hurst & Stafford, for appellants. Charles M. Osborn, George W. Wood, and Burton F. Peek, for appellees.

RICKS, J. (after stating the facts). The contention of appellants is that the Moline

State Savings Bank, which foreclosed the \$6,000 mortgage and purchased the property at the sale, and Porter Skinner, the assignee thereof and testate of appellees, who received the assignment of said certificate of purchase from said bank, were parties complainant in the suit of the Rock Island National Bank and others against the J. S. Keater Lumber Company and appellants and other persons, and are bound by the provisions of the decree entered in that suit; that the effect of the sale under the decree in that suit was to vest in appellants, who were the purchasers at that sale, title to the premises, both under the mortgage foreclosed and under the lien of appellants' judgment in the federal court, and also of the interests in the premises held by the various parties to the suit; that the decree in that suit is *res judicata* as to rights of the parties in the premises; that the decree of foreclosure of the Moline State Savings Bank's mortgage was entered on July 8, 1890, after appellants had become the purchasers at the sale under the decree in the suit of the Rock Island National Bank et al. against the Keater Lumber Company et al., and that said decree, under which appellees claim title, was had and entered without appellants being made parties thereto, and that the only effect of such decree and sale was to vest in Porter Skinner, under the master's deed, an equitable assignment of the mortgage of the Moline State Savings Bank.

Appellees deny that the Moline State Savings Bank was a party to the decree in the foreclosure of the Deere blanket mortgage at the suit of the Rock Island National Bank and others, and say that, if it shall be held that said bank was a party to said proceeding, the decree therein was only binding upon said bank and those claiming through or under it, as far as the matters in that case were actually litigated; that the rights of the Moline State Savings Bank under the mortgage through which appellees claim title were in no manner in question in that suit, and that the decree did not and could not make the lien of the Deere blanket mortgage superior to the lien of the prior mortgage held by the Moline State Savings Bank; that the judgment in favor of appellants in the United States Court was not and could not be enforced by a decree of the state courts, and that all the title that appellants got must depend upon and relate to the Deere blanket mortgage, which was a junior mortgage to that of the Moline State Savings Bank, and that under it appellants could only obtain the right of redemption from the mortgage through which appellees claim. It therefore becomes material to first inquire whether the Moline State Savings Bank was a party to the foreclosure proceedings under the Deere blanket mortgage.

While it is true that some of the bank officers say that they do not think Judge Wilkinson was actually employed by the bank to enter its appearance and prosecute and join it in the prosecution of the bill in that case, it does appear that Judge Wilkinson, at the time the second amended bill was filed, in January, 1893, signed the bill as solicitor for all the parties complainant, including the bank; that Mr. Charles F. Hemenway, its cashier, and Mr. Porter Skinner, who was president of the bank, were also parties complainant, and a copy of the note, marked "Exhibit M," which the bill alleged belonged to the bank and was secured by the Deere blanket mortgage, was in the handwriting of Mr. Hemenway, the cashier of the bank. Judge Wood, one of the attorneys of the Moline State Savings Bank, who foreclosed the mortgage through which appellees claim, testified that about the time he filed the bill to foreclose that mortgage, which was in December, 1893, he knew that the Moline State Savings Bank was a party to the foreclosure proceeding in the other case, and discussed the matter with the officers of the bank, and the record shows that a decree was not entered in the former proceeding until November, 1896, so that the officers of the bank and its attorney, Judge Wood, had notice, more than three years before the termination of the suit, that it was a party and, so far as the record or evidence discloses it remained a party to it, and without any effort to dismiss or any protest, until the final decree and during the appeal of the case to this court. Not only did it remain a party to the suit with the Rock Island National Bank under the Deere blanket mortgage, until the final determination thereof, but the record also shows that the proceeding for the foreclosure of its own mortgage was suspended and no decree taken until after the affirmation by this court of the decree under the Deere blanket mortgage. By the allegations in the bill of the Deere mortgage foreclosure proceeding, the validity and lien of appellants' judgment in the federal court were put directly in question, the complainants in their bill alleging that, if appellants had any lien, it was subordinate to the Deere mortgage, and that mortgage on its face purported to be subordinate to the mortgage of the savings bank, and it was a matter of material interest to the savings bank that appellants' judgment, which was prior in date to both, should be declared subservient to the lien of the Deere mortgage, as that would also make it subservient to the lien of the savings bank mortgage. The Deere mortgage case was earnestly contested at every stage, and the officers of the savings bank, as individuals, were materially interested in the proceeding and parties complainant to it, and it is incredible that they would be ignorant of the fact

that the bank which they represented, and which claimed to have an interest in the fund secured by the mortgage, was a party thereto. It was not necessary that the savings bank should specifically or particularly employ Judge Wilkinson and authorize him to join it as complainant in the bill with the Rock Island National Bank in the foreclosure of the Deere mortgage in order to bind it as a party. It is sufficient that the suit was prosecuted in its name with its knowledge, and decree rendered therein after such knowledge without objection on its part. 2 Ency. of Pl. & Pr. 682; 24 Am. & Eng. Ency. of Law (2d Ed.) 737; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; Carpenter v. Carpenter (Mich.) 99 N. W. 395. The witness Hemenway, upon whom appellees rely to show that Judge Wilkinson was not the counsel of the savings bank and was not authorized to join it as complainant in said foreclosure proceeding, did not remember that he himself was a party to said proceeding, or that the Moline State Savings Bank, of which he was an officer, and which was granted material relief, was also a party. From the whole record we are of opinion that the Moline State Savings Bank was a party complainant to that suit and was actively concerned with it.

In the foreclosure suit it was expressly found by the court that appellants had recovered a judgment against the J. S. Keater Lumber Company in the United States Circuit Court for the Northern District of Illinois on March 31, 1888, for \$15,568.99, and that the same became a lien upon all real estate, lands, tenements, and hereditaments of said lumber company, including the lands described in the bill of complaint, as amended, and that said judgment continued to be, and was at the time of said decree, a lien upon all lands of said lumber company and the lands described in said bill. In that finding lay the chief bone of controversy in that case. It was contended by the complainants in that case that the judgment in the federal court entered in Cook county was not a lien upon lands in Rock Island county, that execution had not issued on the judgment in time to preserve the lien, and that the circuit court could not in that proceeding enforce the lien and make it superior to the lien of the blanket mortgage. The circuit court decided adversely to those contentions, and the Appellate Court and this court sustained it. No cross-bill was necessary in that case to enforce the lien of appellants' judgment. It was proper to do so under their answer. It was so held by this court in that case.

Appellees say that the only benefit or title appellants obtained to the land in question by virtue of the proceedings in the foreclosure of the Deere mortgage was the right of redemption under that mortgage; that the title of appellants cannot re-

late back to the date of their judgment, because, first, the decree in that case does not purport to enforce the judgment, and, second, the judgment has never been enforced by the levy of an execution and sale thereunder in the manner prescribed by the statute of the United States. We cannot agree with the contention that the court did not in that decree purport to enforce the judgment. It finds that it became a lien on March 31, 1888, that it continued to be a lien, and was a lien, at the time of the entry of the decree; and, while it is true that the decree says that the lien of the judgment should "be transferred to and become a lien upon and against the said proceeds of the sale," that language is only used in connection with the manner of the sale. It was made manifest to the court that it was important to sell the land, not subject to, but for, the judgment, as well as the mortgage debt; and the order is that it be sold "free and clear of and from the lien of said judgment, * * * as well as from the lien of said * * * mortgage." We think this order not different from that ordinarily made, where a judgment creditor is made a party to the foreclosure proceeding. If it can be said to have had any effect upon the judgment of appellants in addition to its enforcement, it was to make the lien of it specific as to the property involved in that suit. No case has been cited—and we should be averse to follow it, if it were—in which it is held that where a judgment creditor is brought into a foreclosure proceeding, and the order of sale is for the satisfaction of both the judgment and the mortgage, the sale is not in execution of the lien of the judgment. There was nothing before that court but the question of liens, the lien or liens created by the mortgage, and the lien of appellants' judgment. If a prior judgment creditor should be made a party to a foreclosure proceeding by a mortgagee who took his mortgage subsequent to the judgment lien, and the sale was decreed for the satisfaction of both the mortgage and the judgment lien, it would seem puerile to urge that the only title the purchaser obtained was by virtue of the mortgage lien. The power of a court of chancery to adjust the rights of various lienholders, if one of them is such as gives the court jurisdiction, and to dispose of the property affected by the lien to the benefit of the holders according to priority, has been so long recognized that it would seem to be now beyond question. When the court has jurisdiction, it acts upon the substance and not upon the form, and preserves, instead of destroying, rights. If it had the power at all to sell the property under the judgment lien in favor of appellants, then it had the power, and we must hold that it intended to preserve to appellants the

benefit of that sale. The savings bank, being a party complainant to that proceeding, is bound by it as far as the chancellor or this court could bind it.

Whether the judgment of appellants in the United States Circuit Court could be enforced by a decree of a state court without a cross-bill, or whether it could have been enforced by a decree of a state court at all in any manner, or whether the only manner in which the lien could be enforced was by execution issued on the judgment and levy on the land, were matters properly involved in that suit, and might have been, if they were not, raised and determined in it, and as to them that decree is *res judicata*. *Hamilton v. Quimby*, 46 Ill. 90; *Kelly v. Donlin*, 70 Ill. 373; *Gage v. Ewing*, 107 Ill. 11; *Scates v. King*, 110 Ill. 456. What was done there was done at the request and prayer of the savings bank, and it, or those claiming under it, will not be heard to say that they are not bound by it.

There is much force in the argument of appellants that appellees are estopped to assert any lien of the savings bank mortgage as against this sale. The savings bank mortgage was dated December 8, 1891, was due in one year, with interest payable semiannually in advance, and conditions of forfeiture on failure to pay interest. At the time the savings bank asked to be made a party complainant in the foreclosure of the Deere mortgage (January 31, 1893), the mortgage it held was wholly past due and unpaid, except the first semiannual payment of interest, which was paid, presumably, at the time the mortgage was made, so that, when the savings bank became a co-complainant with the Rock Island National Bank and others in the foreclosure of the Deere mortgage, the mortgage of the savings bank could have been foreclosed and its rights adjusted in the same proceeding.

Appellants invoke the well-recognized rule that the doctrine of *res judicata* embraces not only what had actually been determined in the former suit, but also extends to any other matter properly involved and which might have been raised and determined in it, and contend that as the savings bank was a party, and suffered a decree ordering the sale of the property in fee without having its rights under its mortgage saved by the terms of the decree, it is now estopped to say that its lien was superior to the lien of the blanket mortgage. Appellees answer this by saying that it did not lie within the powers of the circuit court to decree the lien of the blanket mortgage a prior lien to the lien of the savings bank mortgage, which was prior in date and recording. Whether the rule of *res judicata* can be carried to the extent contended for by appellants seems to us not controlling in this case, and we do not decide it. We think it clear that the chancellor in the prior foreclosure proceeding did determine that appellants had a lien upon the land under their

judgment; that that lien dated back to the date of the judgment in 1888, which was prior to both mortgages; that the sale was as much to satisfy that lien as it was to satisfy the lien of the second mortgage, and that the proceeds of the sale, which in this case happened to be the land itself, did not amount to as much as the judgment in favor of appellants, which was the first lien, and that therefore there was nothing realized under the sale upon the second or blanket mortgage. We also hold that for the preservation of the title of appellants, and in determining who is possessed of the superior or paramount title as between appellants and appellees, appellants' title will and should relate back to the date of their judgment. Rorer on Judicial Sales, § 368; 5 Cruise on Real Prop. 510; Kruse v. Scripps, 11 Ill. 98.

We regard the power of the circuit court to enforce the lien of the judgment in favor of appellants under the proceeding to foreclose the blanket mortgage as settled by the decree in that case, and its affirmance by this court on that record, on the principle of *res judicata*. The doctrine of relation is necessarily applicable to the preservation of the title claimed under such sale. Then if we do not go to the extent of holding that the lien of the savings bank mortgage, under which appellees claim, was lost or made subservient to the lien of the second or blanket mortgage by the proceedings through which appellants purchased the land, it leaves appellees with their mortgage still subject and subservient to the lien of the judgment in favor of appellants as it was before any of the proceedings were begun, and the right of the savings bank, under its said mortgage was to redeem from the sale made by virtue of the lien of appellants' judgment. Before any decree had been taken in the foreclosure of the savings bank mortgage, appellants had become the purchasers of the land at the sale under the prior decree. Their right, then, to the land by virtue of that sale was fixed, and appellees could have exercised their statutory right of redemption through that sale, which included no part of the moneys or fund represented by the second or blanket mortgage. This they did not see fit to do, but proceeded to take a decree of sale without appellants being made parties to the proceeding or dismissing them therefrom after they had answered. We are of the opinion that that proceeding did not give them any right as against appellants, and certainly not a superior right or a superior title to that of appellants. We are also of the opinion that the circuit court was in error in making its holdings in favor of appellees and rendering judgment for them.

The judgment of the circuit court will be reversed and judgment entered in this court for appellants, as we think no different result should or could be had by remanding the cause.

Judgment reversed.

HAND, J., dissents.

(218 Ill. 130)

CHICAGO UNION TRACTION CO. v. SAWUSCH.

(Supreme Court of Illinois, Oct. 24, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE APPLIANCES.

A street railway company is liable for an injury to a servant because of the negligence of another servant in delivering a car without a motor handle, or with a handle which does not fit the car and with which the car cannot be reversed.

2. SAME—FELLOW SERVANT—VICE PRINCIPAL.

If an injury to a servant is caused in part by the negligence of a fellow servant, yet the negligence of a vice principal contributed to the injury, the master is liable.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 515.]

3. TRIAL—INSTRUCTIONS.

Where instructions given for defendant sufficiently cover an instruction asked by it and refused, the refusal is not cause for reversal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651-659.]

Appeal from Appellate Court, First District.

Action by Adolph Sawusch against the Chicago Union Traction Company. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Rehearing denied December 6, 1905.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellant. Pinckney, Tatge & Abbott and Thomas A. Leach, for appellee.

BOGGS, J. In an action on the case by the appellee against the appellant company, judgment was entered in the superior court of Cook county in favor of the appellee in the sum of \$12,000, which, on appeal, was affirmed by the Appellate Court for the First district in the sum of \$10,000, a remittitur of \$2,000 having been entered, and a further appeal has brought the record into this court. Two grounds for reversal are urged: First, that the trial court erred in refusing to direct a peremptory verdict, as requested by the appellant company; and, second, that the court erred in refusing to give instruction No. 1 asked by the appellant company.

The contention of the appellant company as to the facts proven by the testimony is stated by its counsel as follows: "The evidence in this case is practically harmonious, and shows the following undisputed facts: The accident occurred July 3, 1901, about 11 o'clock at night, on Van Buren street between State street and Plymouth Place. The defendant has a double street car track in that part of Van Buren street, together with a switch track connecting the two main tracks. There are two lines of cars running on that street, the Van Buren street cars, which run east and west on Van Buren street from State street to Kedzie avenue, and the Twelfth street cars, which run east and west on Van Buren street from State street to

Fifth avenue and then turn off into another street. Both these lines are operated by means of an overhead trolley. At the time of the accident the plaintiff was a conductor running on the Van Buren street line, and had been running on that line for about five years. The cars are trolley cars, capable of running in either direction and with a fender at each end, the fender at the rear of the car being usually fastened up and the one in the front of the car extended while the car is running. Of course, when the car changes from one direction to the other it is necessary to put down one fender and raise the other. At the time of the accident the plaintiff's car, which was east-bound, had nearly reached the terminus of its run, and was about to switch over into the other track on its return trip. It was standing still at the time, on the east end of the southerly track, the motorman being still at the east end of the car. The plaintiff reversed the seats in the car preparatory to the return trip, and then got off and went to the rear of the car in order to let down the fender at that end, which had been fastened up while the car was going east. This, he says, was his duty. When he reached that point he found that a Twelfth street car, which had also just come in from the west, was so close to his car that he could not lower the fender. He therefore asked the motorman of the Twelfth street car, with whom he was acquainted, having met him at that point nearly every evening, to move his car back. The motorman promised to do this, but in attempting to turn the handle so as to reverse the power he unintentionally made the car go forward instead of backward, with the result that the plaintiff's leg was caught between the two cars.

The cause of the unexpected motion of the Twelfth street car was this: On the defendant's lines there are in use trolley cars having two different sizes of motors, and these different motors have different kinds of handles. These handles are removable, and whenever these cars are in the barns the handles are taken off and put in a place by themselves, ready to be used again when occasion requires. The motor on the Twelfth street car in question was a small motor, and the handle which the motorman was using was one adapted to the large motor. With such a handle it was possible apparently to make the car go forward and also to stop it, but if the attempt was made to reverse the car the handle was liable to slip, so as to cause the car to go forward instead of backward, and that is what happened on this occasion. The cause of the motorman's having the wrong handle on this occasion is thus explained: He had been running another car that day, but something went wrong with his car and his conductor telephoned to the car barns for another car. The other car was sent out to him in charge of a man employed in the barns, and when the two

cars met at a point about a mile from the barns, the barn man took the disabled car on to the barns and the motorman proceeded on his way back with the new car. The car which he had been operating had a large motor while the car in which he now found himself had a small motor, and it is clear that in transferring from the one car to the other he carried his motor handle with him, instead of leaving it in the car and taking the motor handle which had been used in the other car. This matter is sworn to directly by one witness, the conductor on this car in question, who said they 'changed the handle,' and it clearly appears by necessary inference from the evidence in the record. Thus Anderson, the barn man, swore that when he took the car in question out of the barns that night he had a motor handle that fitted the motor in that car. He turned that car over to this motorman, and yet it clearly appears that at the time of the accident the motorman on the Twelfth street car had a handle which did not fit the motor on his car. The only possible explanation of this phenomenon is, that in the hurry of changing cars the motorman kept and transferred the motor handle which he had been before using, instead of leaving the motor handle on the car which it fitted. Both Anderson (the barn man) and Hunt (the motorman) say that they do not remember whether they changed handles at the time when they changed cars or not. The motorman did not discover that he had the wrong handle until the accident happened. The motor itself, the handles, car, and other apparatus were all right, in good repair."

The contention that Hunt, the motorman, and the appellee were fellow servants may be conceded. Anderson, the barn man, was clearly not a fellow servant of the appellee. He had no duty to perform which had any connection with the duties of the appellee. The car which the motorman, Hunt, had been operating proved to be out of repair, and in order to enable Hunt to perform the work of the master the latter undertook to send him another car. Anderson, the barn man, was chosen by the master to select the car to be sent to Hunt and to take it out on the line of the road and there deliver it to Hunt. Anderson was therefore, while engaged for the master in supplying to Hunt a car, performing a duty which devolved on the master to perform. It was the duty of the appellant company to furnish the cars to be operated by its servants. The law charged upon it the positive obligation to furnish reasonably safe cars and with no necessary part omitted therefrom, and holds it responsible for any failure to discharge that obligation and makes it liable for the failure of any servant it may employ to discharge that obligation. Any servant so employed is engaged in the performance of a duty or obligation of the appellant company and is acting as the representative and agent of the appellant company, and

for any want of proper caution on the part of any such agent or representative the appellant company is liable as for its own personal negligence. The neglect to properly perform that duty by such a representative or agent of the master is not a peril which other servants of the master assume. *Chicago & Alton Railroad Co. v. Maroney*, 170 Ill. 520, 48 N. E. 953, 62 Am. St. Rep. 396.

We think it clearly deducible from the proof, either that Anderson, the barn man and the representative of the appellant company, delivered to Hunt the car which he (Anderson) brought from the barn with the improper handle thereon which was on that car when appellee was injured, or that Anderson delivered that car to Hunt without any handle on it. Anderson returned the defective car to the barn, and Hunt ran the car which came to him from the barn on his trip on appellant's tracks on the street, and both of the cars must have had motor handles after the change was made. If the handle remained on each car when the cars were changed, then Anderson, the representative of the appellant company, delivered to Hunt a car supplied with an improper handle, and this negligence was that of the appellant company and was the cause of the injury to the appellee. If, when the cars were changed, each motorman carried with him the handle from the car he was operating, then Anderson delivered to Hunt a car without any handle, which was a negligent act on the part of the appellant company and the proximate cause of the injury to appellee. We think it very clear that each motorman, when the cars were changed, carried away with him the handle he was using, and hence that each man got a car without a handle. If Hunt carried the handle which was on the defective car to the car which Anderson delivered to him and Anderson had not taken the handle therefrom, Hunt would have had two handles and the car which he delivered to Anderson would have been without any handle, and Anderson could not have run it back to the barn, as he did. Anderson, however, ran that car which he got from Hunt, back to the car barn, and it follows either that Hunt did not carry the handle from that car and Anderson used the handle he found upon it, or that Anderson carried the handle from the car he had brought from the barn and used that handle, and consequently delivered the other car to Hunt unprovided with any handle.

These conclusions do not result from mere conjecture or speculation as to what may have occurred, but are logically and reasonably to be deduced from the existence of facts that are established by the proofs. It may be that it is fairly to be deduced also from the evidence that Hunt, the motorman, if he had exercised due care, would have discovered that the car which was delivered to him by Anderson, the barn man, was operated by a different and smaller motor requiring a different and smaller handle than the car he had

been operating, and the injury received by the appellee may have been, in part, chargeable to this lack of due care on the part of Hunt, a fellow servant. But if the negligence of Anderson, who was the representative of the appellant company and whose negligence was its negligence, contributed to the injury, and the injury would not have occurred but for the lack of care of Anderson, the appellant company would be liable. *Chicago & Northwestern Railway Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117; *Armour v. Golkowsky*, 202 Ill. 144, 66 N. E. 1037. The trial court did not, therefore err in refusing to direct a verdict as a matter of law.

By instruction No. 1, asked by the appellant company and refused, the court was requested to direct the jury that the motorman, Hunt, and the appellee, were fellow servants, and that the appellee could not recover under the first count of the declaration even if the jury should believe that Hunt was guilty of negligence in the manner in which he operated the car at the time and place when and where the appellee was injured. The first count in the declaration charged that "defendant, by its said servants, so carelessly, negligently, and improperly drove and managed the said motor or trolley car, that by and through such carelessness, negligence and improper driving of said motor or trolley car said car then and there ran and struck with great force and violence upon and against the plaintiff." No instructions were asked in behalf of the appellee. Twenty-four instructions were asked in behalf of the appellant company. In these instructions the relation of fellow servants, what constituted the relation, and when it existed, were fully made known to the jury in language selected by counsel for the appellant company, and the question whether that relation existed between the motorman, Hunt, and the appellee, was fully and fairly submitted to the jury, to be determined from the testimony under concededly correct instructions of the court; and the jury were expressly instructed in instruction No. 5, that if they believed, from the evidence, "under the instructions of the court, that the plaintiff and the servant or servants in control of and operating such car, at the time and place in question, were fellow servants as defined in these instructions, then the plaintiff cannot recover under the first count of his declaration." This instruction, under the conceded facts of the case, secured to the appellant company all benefit that could have resulted from instruction No. 1 had it been given.

The verdict is entirely consistent with the view that the jury concluded that Hunt and the appellee were fellow servants, and followed the direction of the court given in instruction No. 5, but found, from the evidence, that the appellant company furnished to such fellow servant an improper, unsafe and defective motor or trolley car, and that the injury was occasioned by such failure of the appel-

lant company to discharge its duty as master, as charged in the second count of the declaration.

We think there is no error in the record reversible in character. The judgment is affirmed.

Judgment affirmed.

(218 Ill. 9)

CHICAGO UNION TRACTION CO. et al. v. MEE.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. CARRIER'S—INJURY TO PASSENGER—PRESUMPTIONS.

There is no presumption of negligence on the part of a street car company, on proof that a passenger using due care was injured as the result of a collision between the car and a passing wagon.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283, 1287.]

2. SAME—BURDEN OF PROOF.

In an action for injuries to a passenger on a street car by collision with a wagon, where the evidence is conflicting as to whether the car ran into the wagon or the wagon backed into the car, it is error to refuse an instruction that the burden of proof is on plaintiff to show by a preponderance of evidence that defendant was guilty of negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1283, 1312.]

Appeal from Appellate Court, First District.

Action by Thomas Mee against the Chicago Union Traction Company and others. Judgment for plaintiff, affirmed by the Appellate Court, and defendants appeal. Reversed. Rehearing denied December 6, 1905.

This is an action in case, brought by the appellee against the appellant companies to recover damages for a personal injury resulting from a collision between a street car and a wagon. The plea to the declaration was the general issue. The trial of the cause resulted in judgment and verdict in favor of the appellee for \$8,000. This judgment has been affirmed by the Appellate Court, and the present appeal is from such judgment of affirmance. The declaration as finally amended alleges, among other things, as follows: "That on September 9, 1901, the Chicago West Division Railway Company was the owner of a certain street railway extending along Twelfth street in the city of Chicago, and that before that time the said Chicago West Division Street Railway Company had surrendered and delivered possession and control of said railway to the West Chicago Street Railroad Company, and said latter company afterward, and prior to the time of the injury complained of, delivered and surrendered possession and control of said railway to the defendant, the Chicago Union Traction Company; that the last-named company from said time to, and subsequent to the time of the injury aforesaid, was possessed of and operated said railway and certain street cars thereon as a common carrier of passengers for hire; that

the plaintiff at the time and place aforesaid became and was accepted by the defendant, the Chicago Union Traction Company, as a passenger for hire on one of said defendant's street cars, which it was then and there operating eastward on said railway; that, when said car reached the vicinity of May street and said railway, the defendant, the Chicago Union Traction Company, through its servants in charge of the management and operation of said car, then and there so recklessly, carelessly and negligently ran, managed and operated said car that as a direct result, and in consequence of said reckless, negligent and careless manner in which said servants ran, managed and operated said car, the said car then and there ran into and collided with great force and violence against a certain wagon then and there on said street, and the plaintiff, while he was riding on said car as such passenger for hire, and while he was exercising ordinary care and caution for his own safety, was thereby then and there, as a direct result of said collision, crushed and injured, and his left arm was crushed, sprained, dislocated and broken," etc.

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellants. James McShane, for appellee.

MAGRUDER, J. (after stating the facts). When the injury for which damages are sought in the present suit happened to appellee, he was riding on one of appellants' cars, traveling eastward on Twelfth street. There were two tracks in the street. On the north one of these tracks cars ran westward, and on the south track cars ran eastward. Appellee was in the car on the south track and was approaching May street, which crosses Twelfth street and runs north and south. There was a fire engine and truck house on the south side of Twelfth street just west of May street, and partly in May street itself. The accident happened on September 9, 1901, and the car in which appellee was riding was an open car with an aisle running through the center and short seats on either side of the aisle, some facing towards the front of the car and some facing towards the rear of the car. Appellee was sitting on the first seat next to the partition, which was partly glass, between the front platform of the car and the body of the car. He was facing westward, and therefore had his back towards the front of the car. As the car going eastward approached May street, there was a wagon proceeding eastward in front of the car, and upon the south track of the appellant companies, in Twelfth street. Just before the car reached the engine house on May street, the driver of the wagon turned south with a view of leaving the track. The wagon was what was known as a hay wagon, used for hauling hay, and upon it was a large platform some 16 feet long, and projecting two or three feet on

each side over the wheels of the wagon. It is conceded that, when the accident occurred, the driver had turned his horses and also the front wheels of the wagon out of the track southward. The dispute between the parties is whether or not the driver had driven his wagon entirely off the track before the collision occurred, or whether the car advanced against the wagon before it left the track. The front of the car appears to have passed the wagon without injury, but the middle of the car struck the northwest corner of the wagon, and several of the stanchions of the car were broken, and one or more of the seats were torn out, and plaintiff was thrown out of the car and injured.

The theory of the appellee is that the motorman who was propelling the car ran the car into the end of the wagon before it had left the track, and while a part of the rear of the wagon was still on the track. The theory of the appellants is that the wagon had left the track, and had gone a sufficient distance south of the south rail of the track to justify the motorman in moving the car along with a view of passing the wagon; that, after the driver of the wagon had driven his wagon off the track, he ran against a telephone or telegraph pole, standing on the south side of Twelfth street and near the sidewalk curb, and was thereby forced to back his wagon, so as to run against and strike the car. Appellants contend that, when the horses or the pole of the wagon ran against the telephone pole, either the driver backed his wagon, or the horses themselves involuntarily backed, so as to push the wagon against the car. It is urged in support of this theory that the front part of the car was not struck, but the middle of the car was struck, showing that a portion of the car had passed the wagon before the collision occurred. On the one side, it is contended that the motorman ran his car into the wagon before it left the track, and, on the other side, it is contended that the motorman was moving his car along after the wagon had left the track, but that the wagon backed in the way stated, and struck his car. If the theory of the appellee is correct, then the appellants were guilty of negligence in attempting to move the car or train of cars along the track before the wagon had left it. If, however, the theory of the appellants is true, then the collision occurred because of the backing of the wagon onto the track after it had left the same and the consequent striking of the car by the wagon, in which latter case the collision was not the fault of the appellants, but was either the fault of the driver of the wagon, or was an inevitable accident. The appellee introduced testimony on the trial below tending to show that the wagon had not left the track when it was struck by the car. The appellants introduced testimony tending to show that the wagon left the track and then backed against the car and struck it. There

was a sharp conflict in the testimony as to whether or not the wagon had actually left the track when the collision occurred, or whether it backed up against the car after it had left the track. In view of this conflict in the evidence it was important that the jury should be correctly instructed as to the law of the case.

Appellants assign as error the giving of certain instructions on behalf of the appellee by the trial court, and the refusal of certain instructions asked by the appellants. In the view we take of the case it is only necessary to consider the action of the court in refusing to give instructions Nos. 8 and 9 asked by the appellants. Those instructions are as follows: (8) "The court instructs the jury that the burden of proof is not upon the defendants to show that they are not guilty of the specific negligence charged in the declaration, or in some count thereof, but the burden is upon the plaintiff to prove that the defendants are guilty, and also to prove that he himself was in the exercise of ordinary care for his own safety, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in considering the evidence and coming to a verdict the jury should adhere strictly to said rule." (9) "The jury are instructed that the plaintiff is required by law to establish his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so established his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendants, then, in either of these cases, the verdict should be not guilty."

The accident in this case was the result of a collision between a car of the appellants and a wagon upon the street. In *Chicago City Railway Co. v. Rood*, 163 Ill. 477, 45 N. E. 238, 54 Am. St. Rep. 478, it was held as follows: "Proof that a passenger was injured while exercising ordinary care is not sufficient to raise a presumption of negligence against the carrier, unless it is shown that the cause of the injury was in some manner within its control. The fact that a passenger on a street car, while exercising ordinary care, was struck by a passing wagon and injured, does not of itself raise a presumption of negligence against the street car company." And in the *Rood Case*, supra, it was said (page 482 of 163 Ill., page 240 of 45 N. E.): "Where the injury occurs by reason of any defect in the machinery, or cars, or apparatus, or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this

presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of *vis major*, or the tortious act of a stranger, tending to produce the accident, no such *prima facie* case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence." In the case at bar, therefore, there was no presumption in favor of the negligence of the appellants, so as to throw upon the appellants the burden of proving that they were not negligent. On the contrary, the burden of proof was upon the appellee to show that the defendants were negligent. Consequently, the eighth instruction was correct in telling the jury that the burden of proof was upon the appellee to show that the defendants were guilty of negligence; and the instruction should have been given.

It has been said that the term "burden of proof" has two distinct meanings. "It is used to refer, first, to the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case, whether civil or criminal, in which the issue arises, and, second, to the duty of producing evidence at the beginning, or at any subsequent stage of the trial, in order to make or meet a *prima facie* case." 5 Am. & Eng. Ency. of Law (2d Ed.) p. 22. In *Egbers v. Egbers*, 177 Ill. 82, 52 N. E. 285, after quoting the foregoing extract from the American and English Encyclopedia of Law, we said (page 88 of 177 Ill., page 287 of 52 N. E.): "Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and, unless he meets this obligation upon the whole case, he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end." Here, the burden of proof was upon the appellee to show that the defendants were guilty of negligence, and was not upon appellants to show that they were not guilty of negligence, and this burden of proof did not shift during the trial, but remained with the appellee to the end. "The burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the plaintiff." 5 Am. & Eng. Ency. of Law (2d Ed.) p. 22. It is true that the appellee introduced evidence tending to show that the appellants were guilty of negligence in running their car against the wagon before it had left the track; and after that the defendants introduced evidence to rebut the case made by the appellee, and tending to show that the wagon backed up against the car after it had left the track. In some of the text-books and decisions it is said that,

by reason of the introduction of this rebutting testimony by the defendant in the case, the burden of proof is shifted, but "all that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue; and this burden remains throughout the trial." Jones on the Law of Evidence, § 175.

Instruction No. 9 should have been given in connection with instruction 8, as requested by the appellants. We see no objection to this instruction No. 9, as it told the jury that the appellee must establish his case by a preponderance of the evidence before he could recover. It was sufficiently apparent from instructions given to the jury and not here objected to that the appellee was bound to prove that he was in the exercise of ordinary care for his own safety when he was injured, and that he was injured in consequence of the negligence of the defendants. Therefore the jury would necessarily understand that to establish his case the appellee must prove the exercise of ordinary care on his part, and that the defendants were guilty of negligence, which caused the injury. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 358, 3 N. E. 456; *Chicago, Burlington & Quincy Railroad Co. v. Warner*, 123 Ill. 53, 14 N. E. 206; *Village of Mansfield v. Moore*, 124 Ill. 183, 16 N. E. 246; *Lake Shore & Michigan Southern Railway Co. v. Hessions*, 150 Ill. 546, 37 N. E. 905; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Atchison, Topeka & Santa Fe Railroad Co. v. Feehan*, 149 Ill. 202, 36 N. E. 1036; *Chicago Terminal Railroad Co. v. Schmelling*, 197 Ill. 619, 64 N. E. 714; *Beidler v. King*, 209 Ill. 302, 70 N. E. 763, 101 Am. St. Rep. 246. In *North Chicago Street Railway Co. v. Louis*, 138 Ill. 9, 27 N. E. 451, it was held to be a requirement of the law that in civil cases the plaintiff must prove his case by a preponderance of the evidence, and it was there held to be error for the court to refuse an instruction to the effect that the plaintiff must make and establish his case by a preponderance of the evidence.

Inasmuch as there was evidence tending to show that the accident which caused the injury to the present appellee, was the result of a collision between a car of appellants and a wagon driven by a third person or outside party, and inasmuch as the wagon and the driver thereof were not under the control in any way of the appellants, and inasmuch as no presumption of negligence on the part of the appellants necessarily arose because of the injury, and inasmuch as the burden of proof was for that reason upon the appellee to show that the appellants were guilty of negligence in producing the injury, and such burden of proof continued to rest upon the appellee even after the appellants had introduced their rebutting testimony and through-

out the whole of the trial, it was, in our opinion, error for the trial court to refuse to give instructions 8 and 9 asked by the appellants. It cannot be said that the substance of these instructions was embodied in any other instructions which were given for either party. Counsel for appellee refers in this connection to instruction No. 18, given for the appellants, as announcing the doctrine embodied in the refused instruction No. 8. Instruction No. 18, however, only states that the burden of proof was upon the appellee to show by a preponderance of the evidence that he was in the exercise of due care, but does not state that the burden of proof was upon him to show that the appellants were guilty of the negligence which caused the injury. The other instructions referred to by counsel for appellee, as embodying the same principle announced in the refused instruction No. 8, say nothing whatever about the burden of proof. We are, therefore, unable to say that the appellants were not prejudiced by the refusal of the court to give instructions Nos. 8 and 9.

For the reasons above stated, the judgments of the Appellate Court and superior court of Cook county are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(218 Ill. 40)

**CITY OF CHICAGO v. NORTHWESTERN
MUT. LIFE INS. CO.**

(Supreme Court of Illinois. Oct. 24, 1905.)

**1. WATERS AND WATER COURSES — WATER
RATES—LIEN.**

Water rates due a city are not a lien on property delinquent as to such rates as against a purchaser after the delinquency.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 298.]

2. PAYMENT—RECOVERY BACK—GROUNDS.

Where a purchaser of property paid back water rates to a city to prevent it from carrying out its threat to shut off the water supply, it may recover the same, with interest, in an action against the city.

3. INTEREST—WHEN ALLOWED.

Where a city wrongfully exacts back water rates, and is compelled to repay them in an action at law, it is liable for interest thereon.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Interest, § 23.]

Appeal from Appellate Court, First District.

Action by the Northwestern Mutual Life Insurance Company against the city of Chicago. Judgment for plaintiff was affirmed by the Appellate Court, and the city appeals. Affirmed.

Rehearing denied December 6, 1905.

Appellee brought an action of assumpsit against appellant, in the superior court of Cook county, to recover for certain water charges paid by it under protest. An agreed state of facts was entered of record, and, up-

on the case being submitted to the court without a jury, judgment was entered against appellant for \$1,849, together with interest and costs of suit. This judgment has been affirmed by the Appellate Court, and a further appeal has brought the case to this court. The agreed state of facts shows that the city of Chicago has for more than 10 years been operating a water system and furnishing its inhabitants with water, and it is the only corporation, firm, or person within the limits of the city owning or operating a waterworks system. Section 32 of the ordinances provides that any person failing to pay his water rates within the time prescribed shall not be entitled to any discount, and if the rate is not paid within 60 days after the first day of the current assessment period the water shall be shut off from the premises, and in case of failure of the water bureau to shut off the supply on or before 30 days prior to the expiration of the current collection period, the water bureau shall lose any lien it may have against the premises as to 75 per cent. of the frontage rate and all extra fixtures, and shall collect the same by an action at law. The appellee is a corporation organized under the laws of the state of Wisconsin, and obtained title to a number of pieces of property in the city of Chicago at various times through foreclosure proceedings. The city of Chicago presented to appellee separate bills for water supplied upon each piece of property, thus seeking to charge appellee not only for the water supplied to it upon the particular property to which said bill related, but, in addition thereto, seeking to charge it with back water rates for water supplied to former owners or tenants prior to the ownership or occupancy of appellee, and which the former owner or tenant had failed to pay. In each case, upon the presentation of the bill, appellee tendered to appellant the amount of charges for water furnished since the particular piece of property had been transferred to appellee and denied any liability for the back water rates furnished other tenants or occupants, and appellee remonstrated with the authorities of the city of Chicago against the charges for back water rates, but was informed by appellant that unless the particular bill or bills were paid as rendered, the appellant would proceed at once to shut off the water from the particular premises, and in some instances the water was shut off from certain premises by the appellant. Thereupon appellee made payment to appellant of each of said water bills, aggregating the sum of \$1,564.94, including the back water rates, and also including a charge for shutting off the water in places where the water had actually been shut off. Each of said payments was made by a check inclosed in a letter stating that said payment was made under protest, and for the sole reason that appellant had threatened to shut off, or had shut off, the supply of water from the premises to which the par-

ticular bill so paid related. Each of the particular pieces of property to which the several bills related was improved, at the time, with buildings used as stores, flats, and residences, furnished with tubs, boilers, wash-basins, and a system of water pipes and faucets connected with and supplied by water from the system of water pipes of appellant.

William D. Barge (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Hoyne, O'Connor & Hoyne, for appellee.

WILKIN, J. (after stating the facts). The sole question is as to the right of appellee to recover the sum thus paid under protest. It is not claimed that the city had any lien on the lots for the back taxes or that appellee was under any obligation to pay the same, but it is claimed by appellant that the city had a right to say that it would not furnish a future supply of water unless its old bills were paid, and that the payments were made by appellee with full knowledge of all the facts, and were therefore voluntary and not under protest, and cannot be recovered.

Appellant is a municipal corporation. Its corporate powers do not require it to furnish water to its inhabitants, but it has the right so to do when it sees fit. But when it does thus furnish its inhabitants with water, it is not by virtue of the exercise of the power of sovereignty, but it is a business which is public in its nature, and belongs to that class of occupations or enterprises upon which public interest is impressed. The water rates are imposed and collected, not as a tax, but as a compensation to be paid by those who choose to receive and use the water. The city cannot arbitrarily establish its rates, but they must be, to a certain extent, uniform, reasonable, and just. Neither can the city arbitrarily select its patrons, but it must serve all who may apply on equal terms. *Wagner v. City of Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519. Appellee became the owner of the pieces of property at various times, covering a period of several years. Under the law it had a right to be treated the same as other residents of the city. When payment was demanded for back taxes, it offered to pay what other inhabitants of the city paid for like services, but refused to pay the rate in arrears. Demand was made for the whole amount, and a part payment would not be

accepted. Appellant and appellee did not stand upon the same footing, as appellant had the power and means to deprive appellee of its water supply, and had threatened to exercise this power, and had in some instances actually shut off the water. The various pieces of property were occupied as residences and stores, which required water, and to shut the water off from them would entail great damage to appellee, as it had no other means of supplying them. The bills were not contracted by appellee, and it was under no more obligation to pay them than it was to pay any other bills of any other person. The back tax was not a lien upon the premises, and appellee had in no way, as required by law, promised to pay the same. It is the well-settled rule of this state that, where one is compelled to make payment of money which the party demanding has no legal right to receive, in order to prevent injury to his person, business, or property, such payment is, in law, made under duress, and may be recovered from the party receiving it; and it makes no difference that the payment was made with full knowledge of all the facts, provided it was made under duress. Appellee, at the time of payment, expressly stated that it was made under protest, and to avoid trouble and damage to its property. The payment was illegally exacted, and appellee had a right to recover in an action of assumpsit. *Westlake v. City of St. Louis*, 77 Mo. 47, 46 Am. Rep. 4; *St. Louis Brewing Co. v. City of St. Louis*, 140 Mo. 417, 37 S. W. 525, 41 S. W. 911.

Complaint is made that the court allowed interest on the various amounts from the date of payment by appellee to the date judgment was rendered. We do not think there was any error, for the reason that appellant wrongfully took from appellee the sum of \$1,564.94, and had in its possession from that time until the present. As a general rule, a municipal corporation is not liable for interest unless so required by special contract, or by statute, but in case where a municipal corporation wrongfully exacts money, and holds that money without just right or claim, it is liable for interest on the same. *Vider v. City of Chicago*, 164 Ill. 354, 45 N. E. 720; *City of Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. 224.

We find no reversible error, and the judgment will be affirmed.

Judgment affirmed.

(118 Ill. 18.)

GOODRICH et al. v. CITY OF CHICAGO.
(Supreme Court of Illinois: Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS—REASSESSMENT.

Under Laws 1871-72, p. 256, art. 9, § 46, authorizing a city to levy a new assessment for a municipal improvement where the original assessment has been set aside, the dismissal of the original petition by the county court because the city failed to make the proof required by the Supreme Court on remand is not res judicata as to the new assessment.

2. SAME.

Under Laws 1871-72, p. 256, art. 9, § 46, a judgment sustaining an assessment for special improvement has been set aside, so as to authorize a new assessment, where the ordinance under which the work was done has been held defective by the Supreme Court, but not void, and the original petition has been dismissed.

3. SAME—LAW GOVERNING.

Where a judgment of confirmation in a special assessment proceeding was entered in 1896, and reversed by the Supreme Court in 1898, and was pending when the local improvement act of 1897 (Laws 1897, p. 101) took effect, a new assessment is governed by the act of 1872 (Acts 1871-72, p. 218), under which the original assessment was made, and not by the act of 1897.

Appeal from Cook County Court; W. H. Hinebaugh, Judge.

Action by the city of Chicago against Horace A. Goodrich and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Rehearing denied December 7, 1905.

On June 8, 1896, the city council of the city of Chicago passed an ordinance for the paving of Warren avenue from Homan avenue to Fall street. An assessment of the cost of the pavement was levied by the commissioners, and this assessment was confirmed, over the objection of the property owners, by the county court; but the judgment of confirmation was reversed and the cause remanded by this court upon writs of error in the cases of *Holden v. City of Chicago*, 172 Ill. 268, 50 N. E. 181, and *Mills v. City of Chicago*, 182 Ill. 249, 54 N. E. 987. Upon the case being remanded to the county court new objections were filed in lieu of all others previously filed, and upon a hearing the county court sustained the objections and dismissed the petition. A writ of error was prosecuted to review that judgment, and the same was affirmed by this court in the case of *City of Chicago v. Holden*, 196 Ill. 153, 63 N. E. 1123. Subsequently the city made a new assessment under the law of 1897, but the petition was dismissed by the county court, upon objection of the property owners, upon the ground that the new assessment should have been commenced under the law of 1872. Another petition was then filed under the law of 1872 and an assessment levied. Objections were filed by appellants, which were overruled by the county court, and the assessment confirmed. To review the judgment so rendered this appeal has been prosecuted.

George W. Wilbur, for appellants. William M. Pindell (Edgar Bronson Tolman, Corp. Counsel, and Robert Redfield, of counsel), for appellee.

WILKIN, J. (after stating the facts). It is first insisted by appellants that the judgment of the county court sustaining the objections filed to the assessment, and the affirmation of that judgment by this court in the case of *City of Chicago v. Holden*, 196 Ill. 153, 63 N. E. 1123, is res judicata of the last assessment, and the county court should have sustained those objections and dismissed the petition. We cannot agree with this contention. The judgment of the county court sustaining the first or original assessment was reversed by this court because the ordinance did not sufficiently describe the height of the curb to be constructed on each side of the roadway. After the cause was remanded, and upon the rehearing in the county court, the city attempted to prove that the descriptive terms used in the ordinance as to the height of the curb had such a well-known meaning that the omitted specification was in fact included in the description given in the ordinance. The county court held that the testimony offered failed to sufficiently supply the omission, sustained the objections, and dismissed the petition, which order was affirmed by this court. 196 Ill. 153, 63 N. E. 1123. The objections were therefore sustained in obedience to the order of this court reversing and remanding the original cause.

Section 46, art. 9, of the act of 1872 (Hurd's Rev. St. 1883, p. 237) provides that, if any assessment shall be annulled by the city council or board of trustees or set aside by any court, a new assessment may be made and returned and a like notice given and proceedings had as therein required in relation to the first assessment. The assessment levied under the original petition, upon being reversed, was subsequently dismissed by the county court. We have held in many cases that this is not res judicata, but that the city has the right, under section 46, to immediately levy a new assessment. In the case of *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 896, we said, on page 502 of 216 Ill., page 897 of 72 N. E.: "The first cross-error assigned is that the county court erred in overruling the motion to dismiss the petition. We do not agree with such contention. The record in *Gorton v. City of Chicago*, 201 Ill. 534, 66 N. E. 541, is the same as the record in this case, so far as it applies to the original assessment, with the exception that, when the confirmation judgment was reversed and remanded and the cause reinstated in the county court, no attempt was made to review in this court the action of the county court in dismissing the petition. The judgment of this court in the *Sherman*

Case added no force to the judgment of the county court; it being simply an affirmance of the judgment of that court. If a supplemental petition could be properly filed in the Gorton Case, we see no reason why this petition was not properly filed. To the same effect is the case of *City of Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786. We regard the question settled by those cases, and it need not here be further considered." Under section 46, supra, the city had the right to levy the new assessment, and the order of the county court dismissing the original petition was not *res judicata*, and the county court committed no error in so holding.

It is next insisted that the assessment was never annulled by the city council or set aside by any court, as contemplated in said section 46, but that the original petition was dismissed by order of the court, and under these conditions a new assessment could not be made and returned; also, that there was no valid ordinance in existence at the time the work was done. What we have just said applies, in a measure, to this contention. The record shows that after the ordinance was passed and the original petition was filed a contract was let and the improvement made in substantial compliance with the ordinance. There is a distinction made between cases where there was no ordinance in existence at the time the work was done or the ordinance under which the work was done was void, and cases where the ordinance was merely defective. In the latter class of cases the ordinance may be defective or insufficient to support an assessment, but not absolutely void, and may be amended or the defect cured by a supplemental ordinance and a reassessment made. *City of East St. Louis v. Albrecht*, 150 Ill. 506, 37 N. E. 934. The original assessment in this case was set aside, not on the ground that the ordinance was absolutely void, but merely because it did not sufficiently describe the curb. The work was done under the ordinance, and the reversal of the judgment and final dismissal of the petition were a setting aside of the assessment as contemplated in section 46, and the new one could be legally levied under its authority.

Section 99 of the local improvement act of 1897 (*Hurd's Rev. St. 1903*, p. 415) provides that the laws subsisting at the time of the taking effect of the local improvement act of June 14, 1897, shall continue to apply to all proceedings which were pending in any court in the state at the time of the taking effect of the latter local improvement act. It is insisted that the present proceedings were not pending in any court when the act of June 14, 1897, went into effect, and hence

the petition should not have been filed under the act of 1872. It is apparent that counsel for appellants has advocated both sides of this question, as one petition of his clients was dismissed by the county court on June 13, 1904, upon objection that the petition should have been filed under the act of 1872 instead of under the act of 1897. The contention then was certainly inconsistent with the position now urged. The record, however, shows that the original assessment was confirmed on October 7, 1896, and reversed by this court on April 21, 1898; and upon the authority of *Markley v. City of Chicago*, 190 Ill. 276, 60 N. E. 512, the cause was pending at the time the act of 1897 went into effect, and the petition, therefore, was governed by the act of 1872.

It is further insisted that the assessment was not made in accordance with section 46, for the reason that it is made payable in one installment, whereas the original assessment was divided into five installments. Section 55 of the act of 1872 (*Hurd's Rev. St. 1893*, p. 276) provides that the amount of any special assessment for any local improvement in any city, incorporated town or village may be divided into installments. Under this section the question as to the number of installments in which the assessment shall be payable, whether in one or more than one, is a question which rests solely within the discretion of the legislative body of the city, and hence there was no error in requiring it all to be paid at one time.

Appellants contend that the issue as to public benefits was tendered by the petitioner in the oath of the commissioners and the certificate to the assessment roll, that the offer was made by appellants to prove that there were public benefits on Warren avenue of at least 25 per cent. of the amount of the assessment, that the trial court refused to receive the evidence, and that such refusal constituted reversible error. Without going into a discussion of that question, we think the question is settled against appellants' position by the case of *Lusk v. City of Chicago*, 211 Ill. 183, 71 N. E. 876, and that the court ruled correctly on the question. The record on this point does not show that appellants offered any specific evidence which was competent upon the subject, but in a general way offered to prove the fact without submitting the proposed evidence, and the question, even if it had been competent, was not properly presented or preserved for review by objections and exceptions.

We find no reversible error in this record, and the judgment of the county court will be affirmed.

Judgment affirmed.

(218 Ill. 45)

NOYES v. CITY OF CHICAGO.

(Supreme Court of Illinois. Oct. 24, 1905.)

Appeal from Cook County Court; T. N. Cofer, Judge.

Action by the city of Chicago against W. O. Noyes. Judgment for plaintiff, and defendant appeals. Affirmed.

R. W. Burns and William Garnett, for appellant. Robert Redfield and Frank Johnston (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellee.

PER CURIAM. This is an appeal from the judgment of the county court of Cook county confirming an assessment in a supplemental proceeding levied to meet a deficiency caused by the contract price of paving Seventy-Fourth street from Yates avenue to Bond avenue, being in excess of the amount confirmed in the original proceeding.

The original ordinance provided that the estimated cost of the improvement should be divided into five installments. The ordinance upon which the supplemental proceedings were based provided that the supplemental or additional assessment should be payable in one payment. The sole question in this case raised by counsel for appellant is that the ordinance in the supplemental assessment is invalid, because it did not divide the assessment into five installments, in the same manner as the original assessment was divided. This question has been settled adversely to appellant's contention in the case of *Goodrich v. City of Chicago*, 75 N. E. 805; and for the reason set forth in that opinion the judgment of the county court of Cook county will be affirmed.

Judgment affirmed.

(218 Ill. 33)

SWICK v. COLEMAN et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. ADOPTION — INHERITANCE BY ADOPTIVE PARENT.

Under 1 Starr & C. Ann. St. 1896, p. 353, relating to adoption, section 6 providing that the adoptive parents shall inherit from the adopted child such property, with the accumulations and profits, as shall have been taken by the adopted child through its adoptive parents, the right of inheritance is not restricted to the particular property received by the adopted child, but includes the proceeds thereof.

2. SAME—ILLEGITIMATE CHILD.

Where an adopted illegitimate child receives by devise from an adoptive parent a farm, and sells the same and has the proceeds on hand at the time of her death, leaving an illegitimate child which survives only a few months, the heirs of the adoptive parent, and not the natural mother of the adopted child, will inherit under 1 Starr & C. Ann. St. 1896, p. 353, § 6.

3. STATUTES—CONSTRUCTION.

The rule that the expression of one thing in a statute is the exclusion of another will never be applied to defeat the plainly indicated purpose of the Legislature.

[Ed. Note.—For cases in point, see vol. 44 Cent. Dig. Statutes, § 273.]

Appeal from Appellate Court, First District.

In the matter of the estate of Myrtle J. German. From an order of the probate court ruling that James Coleman and others were entitled to take by inheritance, Jennie Swick appeals to the circuit court. From a judgment of the circuit court holding that Jennie Swick succeeded to the title, the other parties appeal to the Appellate Court. From an order reversing the judgment of the circuit court, Jennie Swick appeals. Affirmed.

Rehearing denied December 6, 1905.

Eugene Clifford, for appellant. Williams, Lawrence & Welsh and Alvah S. Green (Ashcraft & Ashcraft, of counsel), for appellees.

BOGGS, J. Nellie, the illegitimate daughter of the appellant, was legally adopted by Betsie E. German and John E. German, husband and wife, as their child. Betsie E. German was the owner in her own right of a farm in Knox county. She died intestate, leaving her husband and said Nellie. The title to the farm thereupon descended to Nellie, subject to the dower right of John E. German. Said John E. German remarried and became the father of two children, and died intestate. The dower interest of John E. German in the farm ceased at his death, and Nellie became the sole owner thereof. Nellie sold the farm which she thus inherited, and subsequently gave birth to an illegitimate daughter, Myrtle J. Nellie survived the birth of Myrtle but a short time, and soon after her death Myrtle also died, being then of the age of only four months. At the time of her death Nellie had the proceeds of the sale of the farm intact and had no other property. It is conceded by all parties that at the death of Nellie this property descended to and became the property of Myrtle. As before stated, Myrtle died while an infant of the age of but four months, and left the property in the same form and condition as it was when her mother, Nellie, died. Upon the death of Myrtle the probate court of Cook county was called upon to determine to whom the estate of Myrtle should be distributed. Myrtle had no other kindred by blood than the appellant, Jennie Swick, the mother of Nellie and the grandmother of Myrtle. Betsie E. German, deceased, left surviving brothers and sisters. John E. German left surviving him two children. All of these parties appeared in the probate court as claimants, and the court ruled that Jennie Swick was not entitled to take by inheritance, but that the estate descended to the brothers and sisters of Betsie E. German and the two children of John E. German. This decision was satisfactory to all of the parties in interest, except Jennie Swick, who prosecuted an appeal to the circuit court of Cook county. The circuit court held that Jennie Swick succeeded to the title to the entire estate. The brothers and sisters of Betsie E. and the

children of John E. German perfected an appeal to the Appellate Court for the First district to reverse the judgment of the circuit court. The Appellate Court reversed the judgment of the circuit court and affirmed the order and judgment entered in the probate court. Jennie Swick has perfected this appeal from the judgment of the Appellate Court. All parties in interest, except Jennie Swick, have abided the judgment of the probate court. The action taken by that court has, then, become conclusive as to all, except her. Whether the probate court should have held her entitled to the property as the only heir of Myrtle J. is the sole question here to be obtained.

The general statutes of descent do not apply to the descent of property owned by a deceased illegitimate person. Section 2 of chapter 30 (2 Starr & C. Ann. St. 1896, p. 1429), entitled "Descent," controls the descent of the property of illegitimates. The second, fourth, and fifth subdivisions of section 2 are as follows: "Second. The estate, real and personal, of an illegitimate person, shall descend to and vest in the widow or surviving husband and children, as the estate of other persons in like cases. * * * Fourth. When there is no widow or surviving husband, and no child or descendants of a child, the estate of such person shall descend to and vest in the mother and her children, and their descendants—one-half to the mother, and the other half to be equally divided between her children and their descendants, the descendants of a child taking the share of their deceased parent or ancestor. Fifth. In case there is no heir as above provided, the estate of such person shall descend to and vest in the next of kin to the mother of such intestate, according to the rule of the civil law."

Myrtle J. left no child, descendants of a child, husband, mother, child of her mother, or descendants of a child of her mother, to take, and the appellant, Jennie Swick, the mother of Nellie and the grandmother of Myrtle, in the view of the circuit court, became entitled to inherit the property under the provisions of the fifth subdivision of said section 2. But we think the descent of this particular property here involved does not fall within the range of the statute regulating, in general, the descent of the property of a deceased illegitimate person. The property here to be distributed is that which Nellie, the mother of Myrtle J., the deceased intestate and the adopted daughter of Betsie E. German, received for a farm, of which farm Nellie became the owner by inheritance, as the adopted daughter of said Betsie E., by virtue of the provisions of chapter 4 of the statute of this state (1 Starr & C. Ann. St., p. 353) authorizing her adoption as the child of said Betsie E. German. This statute of adoption further provided for the devolution of such property as, under its provisions, should be inherited by the adopted

child from the adoptive parent, and it is to that statute the courts must look in order to determine to whom such property descends. Sections 5 and 6 of the said statute, entitled "Adoption," are as follows:

"Sec. 5. A child so adopted shall be deemed, for the purpose of inheritance by such child, and his descendants and husband or wife, and other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.

"Sec. 6. The parents by adoption and their heirs shall take by descent, from any child adopted under this or any other law of this state for the adoption of children, and the descendants, and husband or wife, of such child, only such property as he has taken or may hereafter take from or through the adopting parents, or either of them, either by gift, bequest, devise or descent, with the accumulations, income and profits thereof; and all laws of descent and rules of inheritance shall apply to and govern the descent of any such property, the same as if the child were the natural child of such parents; but the parents by adoption and their heirs shall not inherit any property which such child may take or have taken, by gift, bequest, devise or descent, from his kindred by blood."

Section 6 governs the descent of property which an adopted child has inherited or may inherit from the adoptive parent. This section first declares that the parents by adoption and their heirs shall take by descent from the adopted child or any child or descendants of such adopted child, and from the surviving husband or wife of such adopted child, all such property as shall have passed from the adoptive parents, or either of them, to the adopted child by gift, devise, bequest, or descent. It is then further provided in the section that the laws of descent and rules of inheritance shall apply to and govern such property as the adopted child shall have received from the adoptive parents, the same as if the child were the natural child of such parents. Under the operation of this latter provision of this statute property so acquired by an adopted child from an adoptive parent, on the death of the adopted child leaving, as did Nellie, a living child born of her body, would descend to such child, and by the earlier provision of the section the adoptive parents and their heirs would, on the death of the child of the adopted child, become the heirs of such last named child (in the absence of surviving husband and wife), so far as the right of inheritance in and to such property is concerned. Therefore, upon the death of Nellie, the proceeds of the sale of the farm which

she had inherited from her adoptive mother descended to her child, Myrtle, and on the death of Myrtle (without a surviving child, descendants of a child, or surviving husband), if the proceeds of the farm are subject to the operation of said section 6 as property received from the adoptive mother, such proceeds would pass by the rules of inheritance established, as we have seen, by said section 6, to the heirs of the adoptive parent or parents. Whether to the heirs of the adoptive mother only, from whom, in this instance, the property descended, or to the heirs of both the adoptive father and mother, is not presented; the heirs of both of the adoptive parents having voluntarily abided the decree, which held the property descended to the heirs of both adoptive parents. As to such proceeds, if the property, as we have said before, is to be considered as property acquired from the adoptive parents, within the meaning of section 6, the heirs of the adoptive parents would become the heirs of the said Myrtle, the same as they would had Nellie been the natural child of said adoptive parents. The appellant did not, therefore, on the death of Myrtle, inherit any property which the mother of said Myrtle received by inheritance from her adoptive mother, Betsie E. German, and which came to Myrtle by inheritance from her mother, Nellie.

But it is said Nellie disposed of the farm which she inherited from her adoptive mother, and that that which Myrtle inherited was not the property which Nellie had inherited from her adoptive parent, and that for this reason section 6 of the adoption statute does not apply, but that section 2 of the general statute regulating the descent, generally, of the property of illegitimates has application, and under the fourth subdivision thereof the appellant is entitled to succeed to the ownership of the assets of the estate of Myrtle, her illegitimate granddaughter. The record shows the assets of the estate of Myrtle, the infant, consist wholly of that which her mother, Nellie, received from the sale of the farm which passed to Nellie by inheritance from her adoptive mother, Betsie E. German—whether notes of the purchaser or cash paid by the purchaser does not appear. But we do not understand section 6 of the adoption statute to apply only to the identical property which has passed by inheritance to an adopted child.

Such a construction is not required by the language of the act, and is plainly not consistent with the spirit and intent of the enactment. Here we are required to direct the disposition of the identical property that was received from the sale of the farm, and we are to consult as our guide a statute which manifestly intends that the natural kindred, by blood, of the original owners of the farm, the adoptive parents, shall not be supplanted in the inheritance and ownership of property which came to the adopted child from the adoptive parents by those who are strangers to the blood of such adoptive parents, and who do not bear the relation of child or descendants of a child or surviving husband to the deceased. Section 6 unmistakably discloses the legislative intent to be that the beneficial interest in property which an adopted child has acquired by gift or inheritance from an adoptive parent shall, when the adopted child is dead and no child or descendants of such adopted child and no husband or wife survives, return to said adoptive parents, or their legal heirs if they be no longer living. To hold that this rule of inheritance should only apply to the identical property which had so passed from the adoptive parent, and not to the identical thing which the adopted child had received for the particular property which came from the adoptive parent, would be too technical and narrow and altogether inconsistent with the well-disclosed legislative intent and spirit. Section 6 provides that the accumulation, income, and profits of property so acquired by an adopted child shall be inherited by the adoptive parents, and we think the proceeds of such property should also be deemed to be within and governed by said section.

The argument that the inclusion in the section of the "accumulation, income and profits" of such property precludes the idea the section was intended to apply to "proceeds," under the maxim that the expression of one thing is the exclusion of another, cannot avail. This maxim, as is said in 26 American and English Encyclopedia of Law, 605, is useful, and is to be applied only when it appears to point to the legislative intent, and never to defeat the plainly indicated purpose of the lawmaking body.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(218 Ill. 246.)

LEATHE v. THOMAS.

(Supreme Court of Illinois. June 23, 1905.)

1. APPEAL—OBJECTIONS NOT MADE BELOW.

An objection that the judgment exceeds the amount of damages claimed cannot be made for the first time on appeal.

2. JUDGMENT—ACTION ON FOREIGN JUDGMENT—SET-OFF.

Under Hurd's Rev. St. 1903, c. 110, § 19, allowing set-offs in actions on judgments, a set-off is a defense to an action on a foreign judgment rendered in a state where set-offs are not allowed in actions on judgments.

3. EVIDENCE—JUDICIAL NOTICE.

The court does not take judicial notice of the statutes of another state.

4. APPEAL—EXCEPTIONS—SUFFICIENCY.

An exception to a referee's report complaining that the referee failed to find that a claim made the basis of a set-off had been formerly adjudicated in favor of plaintiff and against defendant, and an assignment of error to the effect that the court erred in overruling exceptions to the report of the referee, were too general to properly raise the question of former adjudication.

5. SAME—INTERMEDIATE COURT—DECISION ON THE FACTS.

A judgment of the Appellate Court affirming a judgment of the circuit court approving the report of a referee is conclusive as to the facts on appeal to the Supreme Court.

6. SAME.

The mere fact that a referee made a certain judgment in favor of defendant and against plaintiff the basis of a finding as to the amount due defendant on a counterclaim based upon the judgment and upon other allegations did not show that the judgment was the only evidence upon which the findings in defendant's favor could have been based; and hence a holding that the fact that plaintiff was not liable to defendant on the judgment was res judicata did not necessitate a reversal of the finding in defendant's favor on the counterclaim.

Hand, J., and Cartwright, C. J., dissenting.

Error to Appellate Court, Fourth District.

Action by Samuel H. Leathe against Edward L. Thomas. From a judgment of the Appellate Court (109 Ill. App. 434) affirming a judgment for defendant, plaintiff brings error. Affirmed.

Rehearing denied December 13, 1905.

The plaintiff in error brought suit in the circuit court of St. Clair county against the defendant in error upon two judgments, aggregating the sum of \$3,202.38, rendered in his favor by the circuit court of the city of St. Louis, state of Missouri, against the defendant in error. The defendant in error did not contest the validity of the judgments, but filed a set-off, and sought judgment against plaintiff in error. The case, by agreement, was referred to a referee to take proofs and report his conclusions as to the facts and the law. The referee filed a report, upon which the court, after overruling exceptions thereto, rendered judgment in favor of the defendant in error for \$71,326.37, which judgment has been affirmed by the Appellate Court for the Fourth District, and the plaintiff in error has sued out a writ of error from this court.

The facts out of which the alleged set-

off of defendant in error arose are, in brief, as follows:

The defendant in error, in connection with one William A. Adams, was engaged in constructing a railroad between Belleville and East St. Louis, the corporate name of which was the Belleville & St. Louis Railway Company. Adams died in 1891, at which time it was claimed he had invested in the enterprise \$23,000, and the defendant in error \$50,000. The defendant in error, upon the death of Adams, applied to the plaintiff in error for financial assistance to complete the road. After some preliminary negotiations, on January 24, 1893, an agreement in writing was entered into between the plaintiff in error, the defendant in error, Bart S. Adams, a son of William A. Adams, and the representative of the Adams estate, and Lucien M. Chipley, who had become interested in the construction of the road, which agreement was as follows:

"St. Louis, January 24, 1893. It is agreed that we will transfer to Samuel H. Leathe \$255,000 of the stock of the Belleville and St. Louis Railway Company and to Lucien M. Chipley \$78,300 of said stock, said Samuel H. Leathe and Lucien M. Chipley to put up funds to carry on said enterprise and to negotiate and sell \$500,000 five per cent. bonds of said company, the present bonds, \$150,000, to be placed in the hands of Samuel H. Leathe to hold until other bonds are issued, he to advance the amount necessary to take up four bonds now held by Mrs. Johnson, \$2,000, with interest, and Third National Bank, \$750, with interest, in St. Louis. Same proportion of stock to be maintained in coal or other companies organized to carry out the project, as per letter of January 12, 1893, to S. H. Leathe by Edward L. Thomas. Edward L. Thomas to have \$104,000 of stock, Bart S. Adams \$50,000 and John T. Taylor \$12,700, each party to receive back amounts advanced to the enterprise as soon as bonds are sold. Said Thomas and Adams to receive amounts as per statement rendered and said Leathe to receive amount to be advanced by him, and balance to go into the treasury of the railway company. First proceeds of bonds to be applied to payments of amounts advanced by said Leathe until satisfied. Edward L. Thomas. Bart S. Adams. Samuel H. Leathe. Lucien M. Chipley. Dated January 24, 1893.

"In consideration of the above agreement, I agree to leave in the hands of Mr. Leathe all sums coming to me as a guarantee of the statements made in my letter of January 12, 1893, and as security, to hold until all matters are fully arranged and paid for which I am responsible, as per said letter and statement rendered. Edward L. Thomas."

Immediately after the execution of said agreement, plaintiff in error commenced the construction of said road. In March, 1893, it was determined by the parties in interest

to abandon the charter under which the defendant in error had commenced the construction of said road, and thereafter to operate under a charter authorizing the construction and operation of a railroad between Belleville and East St. Louis, known as the Belleville City Railway Company, granted prior to the adoption of the constitution of 1870, which was controlled by Charles W. Thomas, a brother of the defendant in error. On the 25th day of March, 1893, a meeting was held by the parties who owned and controlled the stock in the Belleville & St. Louis Railway Company and the Belleville City Railway Company, and the assets of the Belleville & St. Louis Railway Company were transferred to plaintiff in error by deed, which recited a consideration of \$1 and "other valuable considerations to it from him moving," and the plaintiff in error immediately transferred to the Belleville City Railway Company said assets; and the capital stock of said Belleville City Railway Company was issued, share for share, to the parties who had before that time held the stock of the Belleville & St. Louis Railway Company. The railroad was completed, and on November 8, 1895, the Belleville City Railway Company and the Crown Coal & Tow Company, the stock of which was owned and controlled by the parties who owned and controlled the stock of the Belleville City Railway Company, were sold and transferred to Elbert H. Gary, who represented certain undisclosed principals, for the sum of \$500,000, which amount was divided among the shareholders of said railway company and coal company in proportion to their holdings of stock in said corporations.

In the year 1893 the defendant in error brought suit against the Belleville & St. Louis Railway Company to recover for moneys advanced by him for the use of said company prior to the death of Adams. The plaintiff in error was notified of the commencement of said suit, and that he could defend in the name of the company if he saw fit. He employed counsel, and in the name of the company defended against the claim of the defendant in error. He also filed a bill in chancery, in the name of himself, the Belleville & St. Louis Railway Company, and the Belleville City Railway Company, to enjoin the prosecution of said suit. The cases were tried together before the court, without a jury. The bill was dismissed for want of equity, and on December 21, 1893, judgment for \$53,022.23 was rendered against the company in favor of defendant in error. Thereafter suit was brought in the circuit court of St. Clair county by the defendant in error, in the name of the Belleville City Railway Company, for the use of Edward L. Thomas, against plaintiff in error, to recover the amount of said indebtedness, on the ground that, at the time of the transfer of the assets of the Belleville & St. Louis Railway

Company to plaintiff in error, he agreed to pay the debts of said company, including its debt to defendant in error. The case was removed to the United States Circuit Court for the Southern District of Illinois, where, upon a trial before the court without a jury, a judgment was rendered in favor of the plaintiff in error, which judgment was affirmed by the United States Circuit Court of Appeals. 84 Fed. 103, 28 C. C. A. 279. The claim sought to be offset in this suit, and upon which judgment was rendered in favor of the defendant in error, is the indebtedness of the Belleville & St. Louis Railway Company to defendant in error, and which it is claimed was, in part, the "other valuable considerations to it from him moving," specified in the deed from the Belleville & St. Louis Railway Company to the plaintiff in error, and which claim, it is said, the plaintiff in error assumed and agreed to pay.

The basis of computation of the referee, and the amount for which he recommended judgment in favor of the defendant in error, were as follows, as appears from his report:

Defendant's judgment, December 21, 1893	\$53,022 23
Interest to January 11, 1902, 8 years and 20 days, 5 per cent.	21,356 17
	\$74,378 40
Deduct Plaintiff's Judgments.	
Judgment March 5, 1896	\$2,278 63
Interest on \$337.27, 8 per cent., 5 years, 10 months, 6 days	157 83
I. 41.36	681 40
Judgment January 5, 1897	923 75
Interest, 6 per cent., 5 years and 6 days	278 04
	4,319 65
Balance	
	\$70,058 75

To this amount was added interest on the amount found due February 14, 1902, to June 30, 1902, making the amount for which judgment was rendered \$71,326.37.

B. H. Canby, Victor Koerner, Dill & Wilderman, and Gustavus A. Koerner, for plaintiff in error. Charles W. Thomas, for defendant in error.

PER CURIAM. It is first contended that the judgment exceeds the ad damnum of the pleas upon which judgment was rendered in favor of the defendant in error. The attention of the trial court was not challenged, by exception or otherwise, to the fact that the amount found by the referee to be due the defendant in error, and for which amount he recommended that defendant in error have judgment, exceeded the amount of the ad damnum of the pleas. Had the court's attention been called to that fact the pleas could readily have been amended and the error avoided. In *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767, it is said that an objection to the report of a referee, not made in the trial court by exception, which might have been obviated by amendment, will not be considered on appeal or writ of error. In

Metropolitan Accident Ass'n v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; *Prairie State Loan & Building Ass'n v. Gorie*, 167 Ill. 414, 47 N. E. 739, and *Wheatley Buck & Co. v. Chicago Trust & Savings Bank*, 167 Ill. 480, 47 N. E. 711, it was held that an objection that the judgment exceeds the amount of the ad damnum of the declaration cannot be raised for the first time on appeal. In *Wheatley, Buck & Co. v. Chicago Trust & Savings Bank*, supra, the point was made that the judgment exceeded the ad damnum laid in the declaration. The court, on page 484 of 167 Ill., p. 712 of 47 N. E., said: "This, indeed, was error. But the error cannot now be taken advantage of. The objection must be considered as waived by reason of its not having been made in the trial court. Had that court's attention been called to the matter, the objection could readily have been obviated. *Metropolitan Accident Ass'n v. Froiland*, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; *Utter v. Jaffray*, 114 Ill. 470, 2 N. E. 494. Counsel, on the contrary, made no mention of the error in either the motion for a new trial or the motion in arrest of judgment." By reason of the failure of the plaintiff in error to raise the question in the trial court, the objection was waived, and cannot now be taken advantage of in this court.

It is next contended that the pleas of set-off presented no defense to the action, and that the court had no jurisdiction to entertain them; and it is urged that the court, by rendering judgment thereon in favor of the defendant in error, violated section 1 of article 4 of the Constitution of the United States, which provides, "full faith and credit shall be given, in each state, to the public acts, records and judicial proceedings of every other state," as it is said a set-off against a judgment is not permitted by the laws of the state of Missouri. The validity of the judgments rendered in favor of plaintiff in error by the Missouri court, and upon which suit was brought, was not attacked, but full faith and credit were given thereto. Under the statute of this state (Hurd's Rev. St. 1903, c. 110, § 19), demands upon simple contracts may be set off against demands upon judgments, which statute includes a judgment rendered by a court of the state of Missouri as well as a judgment rendered by a court in this state. It has uniformly been held that each of the states of the Union may pass a law limiting the time within which an action may be brought in said state upon a judgment rendered in a court of another state, without thereby depriving the judgment of the full faith and credit which it is entitled to under the Constitution of the United States. This holding is based upon the ground that a statute of limitations affects only the remedy, and that a limitation law is a law of the forum, and must control. *Metcalf v. City of Watertown*, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861. It is also

held that a plea of set-off is a plea to the remedy. *Mineral Point Railroad Co. v. Barron*, 83 Ill. 385; *Davis v. Morton*, 5 Bush, 160, 96 Am. Dec. 845; *Second Nat. Bank of Cincinnati v. Hemingray*, 31 Ohio St. 168. That being true, the statute of the state wherein the action is brought controls as to what character of set-off, if any, may be pleaded. When, therefore, suit is brought upon a judgment of another state in the courts of this state, as the statute of this state permits demands upon simple contracts to be offset against judgments, the statute of this state will control. Furthermore, the statute of the state of Missouri upon the subject of set-off was not in evidence, and the courts of this state, without proof, will not take judicial notice thereof. In *Chicago & Alton Railroad Co. v. Wiggins Ferry Co.*, 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519, it was said: "Whenever it becomes necessary, under this requirement of the Constitution (article 4, § 1), for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state, but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review is matter of fact here. This was expressly decided in *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535, in respect to the faith and credit to be given by the courts of one state to the judgments of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another."

A third ground of reversal urged is that the liability of plaintiff in error to pay the defendant in error the debt due him by the *Belleville & St. Louis Railway Company* was determined in favor of plaintiff in error in the suit brought by said company, for the use of defendant in error, against plaintiff in error, in the circuit court of St. Clair county, and removed by the latter to the United States Circuit Court, and judgment there rendered in his favor, which judgment was affirmed by the Circuit Court of Appeals, and therefore that question is in this suit *res judicata*. The exception to the referee's report which is claimed to raise this question is the fifth, as follows: "The referee failed to find that the claim made that *Leathe* absolutely promised to pay the debts of the *Belleville & St. Louis Railway Company* had been adjudicated in favor of said *Leathe* and against said *Thomas*, as shown by the evidence." The only error assigned

in the Appellate Court which can be said to present for decision the ruling of the court on that exception is the general assignment of error: "The court erred in overruling exceptions of appellant to the report of the referee." While the exception and assignment of error are entirely too general to properly raise the question of former adjudication insisted upon in the argument, if the objection had been aptly made, the Appellate Court considered and decided that question. In the original argument in this court the defendant in error did not urge the point, and, in passing upon the foregoing alleged error, we reached the conclusion that, as applied to the third and fourth pleas, the circuit court erred in overruling the exception, and, the argument on that branch of the case being mainly directed to those pleas, we reversed the judgments of the circuit and Appellate Courts, and remanded the cause; inadvertently overlooking the issues made on the first and second pleas. As already shown, the first plea was the common counts in assumpsit, and the second was a special plea or count setting up facts showing that the plaintiff below was indebted to the defendant upon a certain contract between them and other parties, which had no relevancy whatever to the alleged promise of the plaintiff to pay the debts of the Belleville & St. Louis Railway Company. The agreement set up in the second count bears date January 24, 1893, and was executed by Edward L. Thomas, Samuel H. Leathe, Bart S. Adams, and Lucien M. Chipley, by which the other parties agreed to transfer to Samuel H. Leathe \$255,000 of the stock of the Belleville & St. Louis Railway Company, and to Lucien M. Chipley \$78,300 of said stock; they to furnish funds to carry on the construction of the railway, and to negotiate and sell \$500,000 of 5 per cent. bonds of said company. The plea then shows that, in pursuance of and in carrying out the objects and purposes of that agreement, certain things were done by the parties and by said railway company, and concludes with the averment that the plaintiff sold said bonds in said contract mentioned for the sum of \$500,000, which said sum he then and there received; that the plaintiff expended in building said railway under said contract the sum of \$300,000; that there was at the time of making said contract due defendant a large sum of money, to wit, the sum of \$65,000, which was to be paid said defendant as in said contract specified; that said plaintiff, after receiving said sum so expended by him under said contract and agreement, had remaining in his hands, and still has, as the proceeds of the sale of said bonds, a large sum of money, to wit, \$200,000, out of which, by the terms of said contract, said sum so due said defendant as aforesaid was due and payable, by means whereof plaintiff became liable to pay to said defendant said sum of \$65,000, which said sum of money so due

from the plaintiff to the defendant as aforesaid exceeds the damages sustained by the plaintiff by reason of the nonpayment by the defendant of the said several judgments in said declaration mentioned, "and out of which said sum of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff," etc. The sufficiency of this and the preceding plea is in no way questioned as presenting subsisting causes of action, and it is not denied that a general judgment on the whole evidence is unaffected by the failure to sustain any other count. Our practice act expressly provides that no judgment shall be reversed on the ground of a defective count if there remains a sufficient one to sustain the verdict, and it would seem to follow that no judgment should be reversed for a failure to prove one or more causes of action where others have been proven. The findings of the circuit and appellate courts are conclusive in this case that the evidence sustained the first and second counts of the declaration. In fact, it is not claimed that there was an absence of evidence fairly tending to prove the allegations of the first and second pleas. We have held that the finding of the referee is entitled to the same weight and credit as the verdict of a jury, and that the judgment of the Appellate Court on appeal from that of the trial court on his finding is final as to the questions of fact. *Story v. De Armond*, 179 Ill. 510, 53 N. E. 990; *Butler v. Cornell*, 148 Ill. 276, 35 N. E. 767. We have carefully examined the exceptions filed to the referee's report, and find no one of them which can be applied to the issues under the first and second pleas.

It is insisted on behalf of plaintiff in error that these issues were ignored upon the trial: that the real question decided arose on the third and fourth pleas, and that the referee based his conclusions upon the findings of fact; that the plaintiff in error agreed, as a consideration for the conveyance to him, to pay the debts of the railway company. There is a volume of evidence in the record, not abstracted, on the issues made on the second plea. There is also sufficient testimony shown by the record and abstract to authorize a recovery under the first plea, independent of the judgment of December 21, 1893. The finding of the referee is not based on any particular plea. That finding and the judgment thereon are as well supported by the first as by either the third or fourth plea. While the referee made the judgment for \$53,022.23 in favor of the defendant the basis of his finding as to the amount due him, that fact does not prove that such judgment was the only evidence in the record upon which it could have been based. We have no means of determining on this record that the first and second pleas were not treated as presenting substantial issues in the case. The judgment of the Circuit Court of the United States, affirmed by the Circuit Court of Appeals, cannot affect the right of recovery

under the first and second pleas, and evidently counsel for plaintiff in error so understood, the replication being general as to them, and the prior adjudication only applied to the third and fourth pleas by replication. We think, therefore, that the judgment of the Appellate Court must be affirmed without reference to the third and fourth. In fact, counsel for plaintiff in error virtually concede that the cause of action set up in the second count is not barred by any former adjudication. They say: "It may be that Thomas has a right to an accounting under the contract of January 24, 1893, set up by him in his second plea of set-off. So far as the opinion of this court may be construed to deprive Thomas of this right, we concede, the opinion should be modified."

The question of damages is one of fact, to be determined from the evidence, not reviewable in this court.

Our conclusion is that the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

HAND, J., and CARTWRIGHT, C. J. (dissenting). In this case the defendant in error filed four pleas of set-off. The first consisted of the common counts for money had and received, interest, and an account stated. The second was based on the agreement of January 24, 1893, set out in full in the statement preceding the majority opinion. The third is based on the consideration for the conveyance to plaintiff in error made March 25, 1893, by the Belleville & St. Louis Railway Company, of certain property, etc., named in its deed, for one dollar and "other valuable considerations," which other valuable considerations, it was averred, included the promise of plaintiff in error to pay the defendant in error the debt due him from said company; and it was alleged that at the September term, 1893, of the St. Clair county circuit court, defendant in error brought suit against said company for the amount so due him; that the company notified plaintiff in error to defend, and that he employed counsel and defended the suit; and that the defendant in error recovered judgment for \$53,022.23, which judgment is still in full force and effect. It also sets up plaintiff in error's efforts to enjoin the prosecution of said suit, the issues presented, the full hearing by the court, and the dismissal of the bill. The fourth plea was as follows:

"Fourth plea. And for further plea in this behalf, defendant says that the said plaintiff was before and at the time of the commencement of this suit, and is still, indebted to him (the defendant) in a large sum, to wit, the sum of \$65,000, upon a contract theretofore entered into by said plaintiff and the Belleville & St. Louis Railway Company for the benefit of the defendant; and defendant avers that on, to wit, the 25th day of March, 1893, said Belleville & St. Louis Railway Company executed and delivered to said

plaintiff a deed as follows, that is to say:

"The grantor, the Belleville and St. Louis Railway Company, a corporation of the State of Illinois, in consideration of one dollar to it in hand paid by Samuel H. Leathe, of the city of St. Louis, Missouri, and of other valuable considerations to it from him moving, hereby grants, bargains and sells, conveys and confirms unto the said Samuel H. Leathe all the following described lands, situated in the county of St. Clair and State of Illinois: All that tract of land conveyed by the St. Louis, Alton and Terre Haute Railroad Company to the said grantor by deed dated December 12, 1890, and recorded herewith, reference being made to said deed for a more particular description thereof; also all the rights of way, easements, grading and superstructure thereon, acquired by or for the grantor for the purpose of building a railroad between Belleville and East St. Louis. And the grantor covenants and agrees to and with the said Leathe, that it will, upon demand, convey, by good and proper deed of conveyance, to said Leathe and his assigns, any land, easements and right of way, privileges or immunities, it may hereafter acquire.

"Dated this 25th day of March, A. D. 1893.

"The Belleville and St. Louis Railway Co.,

"By Edward L. Thomas,

"President. [Seal.]

"Attest: Henry M. Needles, Secretary.

"We, the undersigned, being all the stockholders of the Belleville and St. Louis Company, hereby ratify and confirm the foregoing deed. Bart S. Adams, Henry M. Needles, John T. Taylor, A. Boling, Edward L. Thomas, Josephine Johnson, by Edward L. Thomas, Proxy.

"State of Illinois, St. Clair County ss.: Before me, A. F. Miller, a notary public in and for said county, this day appeared Edward L. Thomas and Henry M. Needles, personally known to me to be the persons whose names are subscribed to the foregoing instrument, and who, being by me duly sworn, upon oath state that said Thomas signed the name of the Belleville and St. Louis Railway Company to the said instrument for the uses and purposes therein set forth, as president of said company; that he is president of said company, and executed said deed as president by order of the stockholders of said company, whose names are subscribed thereto also; that said Needles is secretary of said company, and that he attached the seal of said company to said instrument by direction of said stockholders.

"In witness whereof I have hereunto set my hand and notarial seal this 25th day of March, A. D. 1893. A. F. Miller, Notary Public.

"Filed March 25, 1893, at 2:27 o'clock p.m."

"And defendant avers that said deed was then and there accepted by said plaintiff; and defendant further avers that the property described in said deed was, at the time of the

executing and delivering of the same to plaintiff as aforesaid, of great value, to wit, of the value of \$100,000; and defendant avers that said Belleville & St. Louis Railway Company was at the time of the making, executing, and delivering of said deed, and the acceptance thereof, indebted to divers persons in large sums of money, to wit, in sums aggregating the sum of \$90,000; and defendant avers that part of the indebtedness of said railway company was its indebtedness to this defendant, in the sum of, to wit, \$65,000; and defendant avers that at the time of the making, executing, delivering, and accepting of said deed to and by said plaintiff, said plaintiff had notice of said indebtedness of said railway company, and he had full knowledge of the amount thereof; and defendant avers that the consideration in said deed moving from said plaintiff to said railway company was the agreement and promise of the said plaintiff, then and there entered into and made with the said railway company, that said plaintiff, as the consideration and payment for the property thereby to him conveyed, would pay and satisfy the said indebtedness of the said railway company to said divers parties, among whom was this defendant, and that said plaintiff, in consideration thereof, agreed and promised to pay to said defendant, within a reasonable time thereafter to elapse, the said indebtedness of said railway company to this defendant, amounting to said sum of, to wit, \$65,000, which time has long since elapsed, and the plaintiff has not paid said sum, nor any part thereof, to the defendant, by means whereof the plaintiff has become liable to pay to said defendant said sum of money, to wit, \$65,000, which sum of money so due from the plaintiff to the defendant, aforesaid, exceeds the damages sustained by the plaintiff by reason of the nonpayment by the defendant of the said several judgments in the said declaration mentioned, and out of which said sum of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff the full amount of the damages; and this the defendant is ready to verify, wherefore he prays judgment," etc.

Demurrers were overruled to said pleas, whereupon the plaintiff in error filed a general replication thereto, and a special replication to the third and fourth pleas, which was in part as follows: "The plaintiff says that the defendant heretofore impleaded him (the plaintiff) in an action in assumpsit begun in the name of the Belleville & St. Louis Railway Company, for the use of Edward L. Thomas, in the circuit court of St. Clair county, Illinois, to the April term, A. D. 1894, in a plea of trespass on the case on promises, to the damage of the plaintiff of \$60,000, for not performing the very same promises in said third and fourth pleas of set-off mentioned, and such proceedings were thereupon had that at the same term of said court said cause was

removed to the Circuit Court of the United States for the Southern District of Illinois, and afterwards, in said court last named, which had jurisdiction of the persons and the subject-matter, such proceedings were had that by the consideration of said court the issues were found for the defendant in said cause (the plaintiff herein), and that the said plaintiff herein recovered his costs by him in defense of said cause expended." To the replication nul tiel record was pleaded.

The declaration in the case of the Belleville & St. Louis Railway Company, for the use of Edward L. Thomas, against the plaintiff in error, tried in the United States Circuit Court, originally contained three counts. The first count was dismissed, and the case tried upon the second and third counts of the declaration, which were, in substance, as follows:

"Second Count. And whereas, also, the defendant on the 25th day of March, 1893, at the county of St. Clair aforesaid, being then and there the owner of a large tract of valuable real estate, conveyed the same, by deed of that date, duly executed and acknowledged and delivered, to Samuel H. Leathe, the defendant, for a consideration of one dollar and other valuable considerations moving from him, the said Samuel H. Leathe, defendant, to it, the said Belleville and St. Louis Railway Company, plaintiff; and plaintiff avers that the said defendant then and there accepted said deed; and plaintiff further avers that the other valuable consideration moving from said defendant to said plaintiff was the promise and agreement of said defendant then and there made in consideration of said deed, and as payment of the purchase money of the property conveyed by said deed, that he (the defendant) would then and there satisfy and pay the indebtedness of the plaintiff then and there existing and due from the plaintiff to divers parties; and plaintiff further avers that it was then and there indebted to Edward L. Thomas in a large sum of money, to wit, in the sum of \$60,000, of which the defendant then and there had full notice; and plaintiff further avers that the said indebtedness of the plaintiff to Edward L. Thomas was part of the indebtedness of plaintiff then and there promised and agreed to be paid by said defendant as part of the consideration of said deed; and the plaintiff further avers that at the September term, 1893, of the circuit court in and for said county of St. Clair and state of Illinois (a court having full jurisdiction over such matters), the said Edward L. Thomas commenced an action against the said Belleville & St. Louis Railway Company to recover said amount due him; and plaintiff further avers that it caused the said defendant to be notified of the pendency of said suit, and authorized the said defendant to use its said name in defending said suit; and plaintiff

further avers that said defendant, in pursuance of said notice, employed counsel, and filed pleas, and entered into and upon the defense of said cause; and plaintiff further avers that the issue in said cause was whether the amount claimed by said Thomas was then due and payable to him, the said Edward L. Thomas; and plaintiff further avers that after trial of the said cause, upon evidence introduced by said defendant as well as by said Edward L. Thomas, the said court rendered judgment on said cause for said Thomas in the sum of \$53,022.23, which said judgment is in full force and effect, and which the plaintiff is ready to show by the record thereof, here now shown in court; and plaintiff avers that such judgment has not been paid, but remains still due and unpaid and in full force and effect; and plaintiff avers that afterwards, to wit, on the day and year aforesaid, said defendant, in consideration thereof, promised the plaintiff to pay it the said amount of said judgment, according to its legal tenor and effect, for the use aforesaid, when thereunto afterwards requested.

"Third Count. And whereas, also, the plaintiff on the 25th day of March, 1893, at the county of St. Clair aforesaid, being then and there the owner of a large tract of valuable land, conveyed the same by deed of that date, duly executed and acknowledged and delivered, to Samuel H. Leathe, the defendant, for and in consideration of one dollar and other valuable considerations moving from him, the said Samuel H. Leathe, defendant, to it, the said Belleville & St. Louis Railway Company, plaintiff; and the plaintiff avers that the other valuable considerations moving from said defendant to said plaintiff were the promise and agreement of said defendant then and there made in consideration of said deed, and as payment of the purchase money of the property conveyed by said deed, that he (the defendant) would then and there satisfy and pay the indebtedness of the plaintiff then and there existing and due from the plaintiff to divers parties; and the plaintiff further avers that it was then and there indebted to Edward L. Thomas in a large sum of money, to wit, in the sum of \$60,000, of which the defendant then and there had full notice; and plaintiff further avers that the said indebtedness of the plaintiff to Edward L. Thomas was part of the indebtedness of plaintiff then and there promised to be paid by said defendant as part of the consideration of said deed; and plaintiff further avers that at the September term, 1893, of the circuit court in and for said county of St. Clair and state of Illinois, and the court having full jurisdiction over such matters, the said Edward L. Thomas commenced action against the Belleville & St. Louis Railway Company to recover said amount due him; and plaintiff further avers that it caused the said defendant to be notified of the pendency of

the said suit, and authorized the said defendant to use its said name in defending said suit; and plaintiff further avers that the defendant, in pursuance of said notice, employed counsel and filed pleas, and entered into and upon the defense of said cause; and plaintiff further avers that the issue of said cause was as to whether the amount claimed by said Thomas was then due and payable to him, the said Thomas; and plaintiff further avers that after the trial of said cause, upon evidence introduced by the said defendant as well as by said Edward L. Thomas, the said court rendered judgment on said cause for said Thomas in the sum of \$53,022.23, which said judgment is in full force and effect, and which plaintiff is ready to show by the record thereof, here now shown in court; and plaintiff avers that said judgment has not been paid, but remains still due and unpaid, and in full force and effect; and plaintiff further avers that before the trial of the said cause, and while the same was standing for trial, the said defendant, in his name and in the name of the Belleville & St. Louis Railway Company and the Belleville City Railway Company, filed in said court a bill for injunction against the said Edward L. Thomas, to enjoin him from proceeding with said cause, and from recovering a judgment against the said Belleville & St. Louis Railway Company on said indebtedness; that, among other things, one of the issues made by said bill and answer thereto was as to whether the amount claimed by said Thomas from said Belleville & St. Louis Railway Company was then due and payable, and whether said defendant had assumed, by reason of said deed and as a consideration therefor, the payments of the debts of the said Belleville & St. Louis Railway Company, of which the amount claimed by said Thomas was one; that upon said issue a full hearing was had, and it was then and there fully adjudicated, and said injunction was denied, and said bill dismissed, and thereupon said judgment was rendered in said suit brought by the said Thomas against the Belleville & St. Louis Railway for said sum of \$53,022.23, and costs of suit; and plaintiff avers that it was then and there fully determined and adjudicated by said court that said sum was due and payable to the said Thomas, and that the said defendant had assumed the payment of said indebtedness of said Belleville & St. Louis Railway Company in consideration of the conveyance to him of said property by said deed as aforesaid, and that the court determined and adjudicated the same upon the voluntary coming into said court by the said defendant, and asking by said bill an adjudication thereof, all of which the plaintiff here now shows to the court by the record and proceedings and judgment and decree of said court in said cause, here now presented to the court; and plaintiff avers that afterwards, to wit, on the day

and year aforesaid, at the county aforesaid, said defendant, in consideration thereof, promised the plaintiff to pay it the said amount of said judgment according to its legal tenor and effect, for the use aforesaid, when thereunto afterwards requested, and, although often requested, defendant has not paid said several sums of money, or any or either of them, or any part thereof, to plaintiff, for the use aforesaid, but to do so has hitherto and still doth refuse, to the damage of the plaintiff, for the use aforesaid, of \$60,000, wherefore it brings suit," etc.

The defendant pleaded the general issue, and a jury was waived, and the case was tried by the court. The plaintiff introduced the record in the action at law in the St. Clair county circuit court, wherein Edward L. Thomas was plaintiff, and the Belleville & St. Louis Railway Company was defendant, in which action the plaintiff recovered judgment against the defendant for \$53,022.23, and proved that the plaintiff in error was given notice to defend, and that he did defend in the name of the railroad company; also the record in the chancery suit, wherein the plaintiff in error the Belleville & St. Louis Railway Company and the Belleville City Railway Company were complainants, and the defendant in error was defendant, in which suit the evidence was preserved in the decree, and rested. The defendant introduced no evidence, but at the close of the plaintiff's evidence moved the court to exclude the evidence and render judgment for the defendant. The court took the case under advisement, and thereafter sustained said motion to exclude the evidence, and rendered judgment for the defendant and against the plaintiff for costs, which judgment, upon writ of error, was affirmed by the United States Circuit Court of Appeals. 84 Fed. 103, 28 O. C. A. 279.

No evidence was introduced to sustain either the first or second pleas filed by the defendant in error, and the recovery was had under the third and fourth pleas, as clearly appears from the report of the referee referred to in the majority opinion. If the judgments of the circuit and appellate courts can be sustained, they must be sustained under the third and fourth pleas, to which a replication of *res judicata* was interposed, and which replication, if good, is a bar to a recovery under the third and fourth pleas, and defeats the defendant in error's set-off.

We think it clear, if the defendant in error had recovered a judgment in the United States Circuit Court against the plaintiff in error upon the case made there, and that judgment had been satisfied, it would be a bar to a recovery upon the cause of action set up in the third and fourth pleas of set-off filed in this case, as it is evident from the declaration filed in the case of the Belleville & St. Louis Railway Company, for the use of Edward L. Thomas, against Samuel

H. Leathe, and the third and fourth pleas of set-off filed in this case, that the defendant in error in each case was attempting to recover judgment against the plaintiff in error for the same demand, viz., the debt of the Belleville & St. Louis Railway Company to the defendant in error, which it was averred the plaintiff in error had agreed to pay. The defendant in error failed in the case in the United States Circuit Court by reason of the fact that he did not prove that the plaintiff in error had agreed to pay said debt. In that suit the defendant in error relied upon the record in the action at law brought by him against the Belleville & St. Louis Railway Company, and the record in the chancery suit brought by the plaintiff in error and said railroad companies against him, to establish his debt and the plaintiff in error's promise to pay it, but the court held the proof was not sufficient to entitle him to recover judgment against plaintiff in error. The United States Circuit Court found the issues for the defendant, and rendered judgment against the plaintiff for costs, which was a final judgment.

In *Zimmerman v. Zimmerman*, 15 Ill. 84, a judgment was entered by a justice of the peace showing that the parties appeared before the justice and went to trial, and after hearing the testimony he rendered judgment against the plaintiff for costs. This was held to be a judgment in bar, and constituted a good defense to a subsequent suit brought upon the same cause of action. The defendant in error failed in the United States Circuit Court because his evidence was insufficient to establish his right to judgment. The defendant in that case, in effect, by his motion, demurred to the evidence. The court, in passing upon that motion, held the evidence insufficient to entitle the plaintiff to recover, and gave judgment for the defendant. Where the plaintiff fails to make a case, and the court gives a peremptory instruction in favor of defendant, and the court renders judgment upon a verdict of the jury returned under such direction, it cannot be doubted the judgment is final and upon the merits, and can be pleaded in bar of another action based upon the same facts. We see no difference between the legal effect of such judgment and the judgment rendered by the United States Circuit Court. The fact that the plaintiff in the case in the United States Circuit Court failed to prove by sufficient or competent evidence that the defendant promised to pay to him the debt of the Belleville & St. Louis Railway Company, and judgment was rendered in favor of the defendant by reason of the failure to make such proof, did not leave that question an open one, subject to be retried in another suit. A plaintiff cannot try his case by piecemeal. In the case at bar the defendant in error submitted proof of the alleged parol promise of the plaintiff in error to pay the debt due

him by the Belleville & St. Louis Railway Company, and that said debt was included within the provision "other valuable considerations to it from him moving," contained in the deed of March 25, 1893. Under the declaration on file in the case in the United States Circuit Court, the question of the promise of the plaintiff in error to pay said debt, and that the same fell within the said provision contained in said deed, was put in issue by the plea filed in that case, and the same evidence would have been material and admissible there. The defendant, however, saw fit to rely upon the record evidence only, and in this case he is bound by the record made in that case.

The doctrine of *res judicata* embraces not only what has been actually determined in the former suit, but also extends to any other matters properly involved and which might have been raised and decided in that suit. *Bennett v. Wilmington Star Mining Co.*, 119 Ill. 9, 7 N. E. 498. In *Umlauf v. Umlauf*, 117 Ill. 580, on page 584, 6 N. E. 455, on page 456 (57 Am. Rep. 880), the court said: "No principle is better settled than that, where a question proper for judicial determination is directly put in issue and finally determined in a legal proceeding by a court having competent authority and jurisdiction to hear and determine the same, such decision and determination of the question will be deemed final and conclusive upon the parties and their privies in all future litigation between them in which the same question arises, so long as the judgment remains unreversed or is not otherwise set aside." In *Bailey v. Bailey*, 115 Ill. 551, at page 557, 4 N. E. 894, at page 897, the court said: "As said in *Rogers v. Higgins*, 57 Ill. 244, the controversy cannot be reopened to hear additional reasons which before existed, and were within the knowledge of the party, in support of the same cause of action. The principle of *res judicata* embraces not only what actually was determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it." And in *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, at page 133, 13 N. E. 161, at page 164 (5 Am. St. Rep. 502), the court quoted with approval the language of the Supreme Court of the United States in *Town of Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205, where it was said: "The principle of *res judicata* reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented."

From an examination of this record, we have been forced to the conclusion that the circuit and appellate courts erred in holding that the judgment of the Circuit Court of the United States was not a bar to the defendant in error's right of recovery

in this case under the third and fourth pleas of set-off filed by him, as we think it apparent the question whether or not the plaintiff in error agreed to pay to the defendant in error the debt due him by the Belleville & St. Louis Railway Company was in issue in that case, and was decided therein adversely to the defendant in error, and that that judgment was a final judgment upon the merits, and binding upon the defendant in error, and is *res judicata* of the question presented by said third and fourth pleas of set-off, and that there can be no recovery under the first and second pleas for want of evidence.

(73 Ohio St. 1)

CINCINNATI TRACTION CO. v. FORREST.

(Supreme Court of Ohio. Oct. 31, 1905.)

1. TRIAL—INSTRUCTIONS.

The rule that the court ought to adapt its charge to the issues made by the pleadings and the evidence forbids the introduction into the charge of instructions upon an issue not so raised.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 584-612.]

2. SAME—ISSUES RAISED.

Where, in a suit to recover for personal injuries occasioned by the alleged negligence of the defendant, the petition, after stating the facts upon which the plaintiff bases his action, avers that the plaintiff was free from fault and the answer is a general denial, there is no issue of contributory negligence, and where, in such case, the testimony introduced by the plaintiff does not tend to show contributory negligence, it is error for the court to introduce the element of contributory negligence in its charge to the jury and give instructions thereon; and where it is apparent that the jury may have been misled by such charge to the prejudice of the defeated party, the judgment will be reversed and a new trial awarded. (Syllabus by the Court.)

Error to Superior Court of Cincinnati.

Action by Nellie Forrest against the Cincinnati Traction Company to recover for personal injuries by reason of alleged negligence of the company. A verdict was rendered in her favor, and judgment thereon entered. This judgment was affirmed by the superior court in general term, and the company brings error. Reversed.

Joseph Wilby, for plaintiff in error.
Charles W. Baker, for defendant in error.

SPEAR, J. In her petition the plaintiff, as cause of action, alleged that she was a passenger on a street car on the track of the company's line in Cincinnati; that desiring to alight at the corner of Findlay and Vine streets she signaled the conductor to stop at that point; that, in response to said signal, thereupon the car did stop at that point; that she started to alight from the car, when, just as she was about to step from the running board on to the ground, the conductor negligently, and before she was able to alight from the car, signaled the car to go on, and thereupon the motorman started the

car, all before plaintiff was able to alight from the same to the ground and while she was in the act of so alighting; and thereupon the car so suddenly starting threw plaintiff to the ground before she was able to alight from the same, all without fault and negligence upon her part, and wholly by reason of the negligence of the conductor and motorman, who were in charge of the operation of the car and operating the same for the defendant company; she was violently thrown upon the ground and badly injured and bruised; that her left arm was broken, and that she suffered great pain and injury therefrom, and loss of time. The answer of the company admitted the allegation that it is a corporation organized under the laws of Ohio, and, excepting this, denied each and every allegation in the petition contained. Testimony was given by plaintiff at the trial tending to support her claim as made in the petition, and by defendant tending to disprove her claim by showing that, if she were the person who met with an accident at the time and place stated, it did not occur in the manner alleged in the petition, but did occur by reason of the plaintiff undertaking to alight before the car had come to a stop, and while it was still in motion, and that was the sole cause of her injury.

The issue thus made was a simple one. Did the accident happen by reason of the negligent starting of the car while the plaintiff was in the act of alighting from it? If it did, then she was entitled to recover. If it did not, she was not. It is true that the petition contained an averment that the accident occurred without fault or negligence on the part of the plaintiff and that this was denied by a general denial, but such denial was not the equivalent of an allegation of contributory negligence, because the entire incident itself as pleaded was denied. The element of contributory negligence could not, in the nature of things, become a feature of an event which did not occur at all. From this it follows that there was no issue in the pleadings respecting contributory negligence. Nor was such issue raised by the evidence. The plaintiff's testimony was in direct support of her cause of action as stated in the petition, and no fact tending to show negligence on her part appeared, so that there was nothing of that character to be rebutted. If the jury believed the plaintiff's evidence, a recovery was inevitable; if it disbelieved her, she was not entitled to recover, not because of contributory negligence, but because she had failed to sustain the cause of action made in her petition. In this condition of the pleadings and proof, the trial court charged the jury, in a charge otherwise properly covering the case, that, if the jury should find that upon her own motion the plaintiff stepped off the car while it was moving so fast as to render the act dangerous, the plaintiff was not in the exercise of ordinary care, and, contributing thus to the injury, cannot

recover. And, in another part of the charge, that to entitle the plaintiff to recover she must not only have made it appear that she was not at fault—that is, that at the time of the injury she was in the exercise of ordinary care—but she must also have satisfied the jury that the proximate cause of the injury was the negligent act of the employees of the company, and further on there was again introduced the element of contributory negligence by a statement that if the accident happened while the plaintiff was alighting from the car and before she had a reasonable opportunity for leaving the car in safety, without fault on her part, then, if the injury happened because of the negligence of defendant's employees, she could recover.

Contributory negligence on the part of a plaintiff implies negligence on the part of the other party. It cannot exist without. It is the want of ordinary care by a person injured by the negligence of another, concurring with such negligence, and thus contributing to the injury as a proximate cause. See 7 Am. & Eng. Emcy. Law, 371; *Montgomery Gaslight Co. v. Railway Co.*, 86 Ala. 372, 5 South. 735; *Moakler v. Willamette Railway Co.*, 18 Or. 189, 22 Pac. 948, 6 L. R. A. 656, 17 Am. St. Rep. 717; *Southern Bell Tel. Co. v. Watts*, 66 Fed. 460, 18 C. C. A. 579. The plaintiff's negligence may be the sole proximate cause of the injury, but it is not in such case contributory negligence, because to contribute is to have a share in some act or effect, to lend assistance, or aid. Hence, if no act occurs to be aided, there can be no act which is contributory. Taken all together, it is apparent, as it seems to us, that the jury may have inferred from the charge that if the plaintiff, instead of having received her injuries by alighting from a car which had at her request stopped and had been negligently started, had in fact undertaken to alight while the car was still in motion, and yet in doing so had exercised ordinary care, she might recover. In so charging we think the learned trial court erred, to the prejudice of the defendant. It was entitled to have the real issue presented to the jury without qualification or complication. The sympathy of jurors is apt to be, and naturally so, with the injured person, especially if such person be a woman. This fact makes it all the more the duty of the courts to give the simple law of the case as presented by the pleadings and the evidence, so that both parties may have equal opportunity before the law.

Attention is called to that part of the record in which the defendant's counsel, after the charge was given, requested the court to charge more specifically respecting the matter of contributory negligence, as though this action in some way estopped counsel to complain of the charge in that respect. We think it does not have that effect. The counsel could not help what the court had already said on that subject, and the court declined to further charge upon it.

It is urged, also, that there is in the record no sufficient exception by the defendant to the charge. It is true that the desire to except is not stated in the usual way, but we think the purpose is sufficiently expressed, and that both court and counsel so understood it at the time.

The judgment will be reversed, and the cause remanded for further proceedings according to law.

Reversed.

DAVIS, C. J., and SHAUCK and SUMMERS, JJ., concur.

(106 Ind. 478)

BOWMAN v. OLRICK et al. (No. 20,600.)
(Supreme Court of Indiana. Nov. 15, 1905.)

1. EXECUTORS AND ADMINISTRATORS — ALLOWANCE TO WIDOW—ACCEPTANCE UNDER WILL.

Under Burns' Ann. St. 1901, § 2424, giving to a widow \$500, whether the husband dies testate or intestate, the mere acceptance by a widow of a testamentary provision does not deprive her of the statutory allowance, unless the testamentary provision is expressly or impliedly intended to be in lieu of the statutory right.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 669, 696.]

2. SAME—WAIVER.

Where a husband devised to his wife for life all his property, except an interest in land of the value of only \$100, and the widow accepted the will, she thereby waived the benefit of Burns' Ann. St. 1901, § 2424, giving a widow \$500, whether the husband dies testate or intestate.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 669, 696.]

Appeal from Circuit Court, Lake County; W. C. McMahan, Judge.

Action by Fred Bowman, as administrator with the will annexed of the estate of William Hoofhouse, deceased, to obtain an order for the sale of real estate, in which Jennie Olrick filed a cross-complaint to quiet title. From a judgment for cross-complainant, plaintiff appealed to the Appellate Court, from whence the cause was transferred to this court under Burns' Ann. St. 1901, § 1837u. Affirmed.

H. S. Barr, for appellant. Bruce & Bruce, for appellee.

MONTGOMERY, J. Appellant, as administrator with the will annexed of the estate of William Hoofhouse, deceased, brought this action to obtain an order for the sale of real estate to make assets for the payment of expenses of administration, legacies, and a statutory claim of \$500 prosecuted by the administrator of the decedent's widow. Appellee, Jennie Olrick, filed a cross-complaint, praying that her title to said real estate as the devisee of William Hoofhouse be quieted. The cause was tried upon the issues joined,

upon appellant's petition and appellee's cross-complaint. At the request of the parties the court made a special finding of facts, upon which conclusions of law were stated. The question involved is presented by the assignment that the court erred in its first conclusion of law.

The material facts found were: That William Hoofhouse died testate, at Lake county, August 4, 1888, the owner in fee of the S. W. ¼ of the S. W. ¼ of section 13, township 33, range 9, and also an undivided one-half of lot No. 1, in section 9, township 32, range 7, in said county. That his last will was as follows:

"Eagle Creek, Lake County, Indiana,

Aug. 4th, 1888.

"This is to certify that I, William Hoofhouse, do make my last will and testament in which Effie Hoofhouse (my wife) is to have our homestead containing (40) acres, with rents and profits therefrom, including the present year 1888, during her lifetime, after which time such estate will go to my daughter Jennie L. Alreck, or her children; but if said daughter or her children should not live to inherit said estate, then it is to be divided equally between my wife's children, Fred Bowman and Ida (Bowman) Ross, or their heirs. Also if said daughter of (or) her children should live to inherit said estate, then said daughter or children shall pay Fred Bowman and Ida Ross one hundred and fifty dollars (\$150) in cash, each or their

his
heirs. "William X Hoofhouse.

mark

"Witnesses: W. W. Temple. John Black. Jerome Temple."

That on August 7, 1888, said will was duly probated and recorded. That at the time of his death, and for more than 10 years prior thereto, the decedent occupied said 40-acre tract of land in section 13 as a homestead. That his widow never made or filed any election to take under the provisions of said will. That at the time of his death said decedent owned no property other than said tracts of land, and his surviving heirs were his widow, Effie Hoofhouse, and his daughter, Jennie Olrick, named in said will as Jennie L. Alreck. That on March 3, 1902, said widow executed a warranty deed conveying her interest in said lot No. 1 to Benj. Gifford for the sum of \$80, and on May 28, 1902, said Jennie Olrick executed a warranty deed conveying her interest in said lot to said Gifford for the sum of \$80. That \$160 was the fair cash value of an undivided one-half of said lot from the time of decedent's death to the date of said conveyances. That on February 25, 1903, appellant was appointed and qualified as administrator of the estate of said decedent, with the will annexed; that no personal property of said decedent has come into his hands. That at the time of the commencement of this proceeding neither of

the legacies provided for in said will had been paid, nor had the statutory allowance, or any part thereof, been paid to the widow of said decedent, or to any one else for her, either in property or money, and that there was no personal estate out of which the same might be collected. That on the 27th day of April, 1903, after the commencement of this proceeding, appellee in open court paid into the estate of said decedent \$300 for the use of the legatees named in said will. That on March 6, 1903, said Effie Hoofhouse died intestate, and on March 19, 1903, Oliver B. Ross was appointed and qualified as administrator of her estate, and as such on March 31, 1903, filed a claim of \$500, being the widow's statutory allowance, against the estate of the decedent William Hoofhouse, which was allowed by appellant and remains unpaid. That the decedent, William Hoofhouse, left no debts, other than the claim of his widow for \$500 and said legacies of \$300. That said widow never made any written election to take either under the will or the law, but as such widow remained in possession of the whole of said 40-acre tract of land continuously from the date of her husband's death until her death, and each year during said period collected and received the rents and profits arising therefrom, including that part of the year remaining after the death of said decedent. That on the 1st day of February, 1904, the cross-complainant, Jennie Olrick, executed and filed her bond in the sum of \$100, payable to the administrator of the estate of William Hoofhouse, conditioned to pay all liabilities, eventually due from the said estate with all charges of administration so far as the personal estate is insufficient, and said bond was on said day approved by the court.

The court stated as a conclusion of law upon these facts: "First. That the land mentioned in the plaintiff's complaint, to wit, the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, township 33, range 9, is not subject to sale for the payment of a statutory allowance of \$500, or any part of it, claimed to be due Effie Hoofhouse as widow of William Hoofhouse."

Section 2424, Burns' Ann. St. 1901, gives to a widow \$500 payable in property or money at her option, whether her husband die testate or intestate. The mere fact that she has elected to accept a testamentary provision made for her by her husband will not deprive her of this absolute statutory allowance. *Shipman v. Keys*, Adm'r, 127 Ind. 353, 26 N. E. 896, and cases cited. If the testamentary provision was intended by her husband to be in lieu of her statutory rights to his estate, then her acceptance of such provision will operate as a waiver of her rights under the statute. This intention of the testator need not be declared in so many words, but may be deduced or implied when the enforcement of the widow's claim under the law would be plainly inconsistent with the will. *Hurley, Adm'r, v. McIver*, 119 Ind. 53, 21 N. E. 325; *Shafer v. Shafer*, Exec., 129 Ind.

394, 28 N. E. 867; *Buffington v. Buffington*, Exec., 151 Ind. 203, 51 N. E. 328; *Cameron v. Parish*, 155 Ind. 333, 56 N. E. 547; *Langley v. Mayhew*, 107 Ind. 198, 6 N. E. 317, 8 N. E. 157; *Snodgrass v. Meeks*, 12 Ind. App. 70, 38 N. E. 833. The decedent left no personal estate, and his widow made no written election respecting the same. The real estate owned by the decedent was all devised by his will except his interest in one tract of the value of \$160, as to which he died intestate. The widow made no written election to reject the provisions made for her benefit by his will, and therefore, by the express terms of the statute, must be regarded as having taken under the will. Section 2666, Burns' Ann. St. 1901. The court has found as a fact that the widow did receive and enjoy all the benefits of the testamentary provisions made for her, during her entire lifetime. The enforcement of her statutory claim for \$500 during her life would have necessitated a sale of the homestead, and deprived her of that comfortable provision which her husband intended she should enjoy, and defeated the devise over to his only daughter, and thus in great measure, if not wholly, overthrown the plain intent of the will. No effort to enforce this claim was made for nearly 15 years after it accrued, which does not accord with the spirit of the statute in providing an allowance evidently intended for the immediate use of the widow, but, unexplained, rather confirms the waiver which the law implies.

In the case of *Hurley v. McIver*, supra, the court pertinent to the matter under consideration, said: "The land which the administrator is seeking to sell was devised to the testator's son, without any suggestion that it was subject to any other incumbrance than the life estate previously devised to his mother. It is manifest, if it is now subject to be sold to pay \$500 to the administrator of the widow, that the intention of the testator will be, to that extent, set aside and disregarded, and the provisions of the will thrown into confusion and disorder." We quote from the case of *Snodgrass v. Meeks*, supra, the following: "The appellee cannot properly claim the \$500 unless the widow could have claimed it. If the widow had elected to take under the will and could also have collected her \$500, the real estate in which she had a life interest would necessarily have to be sold to make assets for that purpose. This would give the widow enough of the proceeds of the real estate to make the \$500, but would also give her a life estate in the remainder, which is absolutely inconsistent with the provisions of the will. To claim the \$500, therefore, she would have to elect to take under the law and reject the provisions of the will."

The decedent, Hoofhouse, did not dispose of his entire estate by will, but the value of the lands undeviseed was small and wholly inadequate to pay the claim now prosecuted. The acceptance and enjoyment of the provisions of the will by the widow was there-

fore inconsistent with the holding and enforcement of this claim, and the claim was accordingly waived. It follows that the conclusion of law to which appellant excepted was, upon the facts stated, correct.

The judgment is affirmed.

GILLETT, J., did not participate in this decision.

(165 Ind. 392)

LOW et al. v. DALLAS et al. (No. 20,603.)
(Supreme Court of Indiana. Oct. 26, 1905.)

1. APPEAL—BRIEFS—SIGNATURE.

Where the argument of appellants' counsel is bound with the required parts of their brief, and counsel sign the whole document at the close of the argument, the brief is sufficiently authenticated to meet the requirements of the rules of the Supreme Court, without an additional signature of counsel at the conclusion of the statement of points and authorities.

2. SAME—PROPOSITIONS IN BRIEF.

The manner of stating propositions in a brief for the consideration of the Supreme Court is largely within the discretion of counsel; and, while a failure to present questions in accordance with the rules of court may prevent their consideration, yet the brief will not be rejected on an objection that the propositions contain matters of fact rather than of law, where such propositions indicate with sufficient certainty the points in dispute.

3. MUNICIPAL CORPORATIONS — STREET IMPROVEMENTS—COLLECTION OF ASSESSMENTS — PLEADINGS—SUFFICIENCY.

Under Acts 1901, pp. 363, 364, c. 170, providing that no action shall be maintained for the enforcement of a street assessment, unless at least 10 days before the commencement of the action the owner of the land assessed, if known, was notified of such assessment, including the amount thereof, with interest, and where the same is payable, a complaint alleging "that more than 10 days before the bringing of this suit the plaintiffs notified said defendant in writing of said assessment, and the amount thereof, with interest, and where the same was payable," was sufficient, without further averring a demand prior to the bringing of suit.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1252, 1268, 1277.]

4. SAME.

A complaint for the enforcement of a street assessment lien, which shows that the assessment is due, need not show that defendants were given time within which to elect whether they would pay the assessment in installments or at once; but defendants, if they took the steps necessary to secure the right to pay the same in installments, should allege the necessary facts by way of answer.

5. SAME.

A complaint, in an action to foreclose a street assessment lien, need not minutely state every step in the proceedings creating the lien; but it will be presumed that the public officers have performed their duty in the matter.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1277, 1278.]

6. SAME — ELECTION OF TRUSTEES — CERTIFICATE OF ELECTION—NECESSITY OF FILING—CONSTRUCTION OF STATUTE.

Burns' Ann. St. 1901, § 4331, requiring a certificate of the election of town trustees to be filed in the office of the clerk of the circuit court before any valid ordinance can be passed

by them, applies, in view of section 4333, providing for the election of only a part of the trustees at any one time, only to the first election of town trustees which is held upon the incorporation of the town, and has no application to subsequent elections.

7. SAME — LOCAL IMPROVEMENTS — ENFORCEMENT OF ASSESSMENTS — ANSWERS—SUFFICIENCY.

In an action to enforce a street assessment lien, an answer attacking the proceedings looking to the improvement on the ground that the town trustees who acted in the proceedings had not filed the certificate required by Burns' Ann. St. 1901, § 4331 (which applies only to the first election of trustees held upon the incorporation of a town), was insufficient, where it did not disclose when the town was incorporated, nor when the trustees were elected or appointed, nor by what authority they claimed to act.

8. SAME — TRUSTEES—ELECTION—COLLATERAL ATTACK.

The fact that town trustees have not filed the certificate required by Burns' Ann. St. 1901, § 4331, which provides that no act or ordinance of any board of trustees shall be valid until such certificate has been filed, is not available, in a collateral proceeding, to defeat a local improvement assessment levied by the board.

Appeal from Circuit Court, Pulaski County; Harry Beruetha, Special Judge.

Action by Charles Dallas and others against James E. Low and others. From a judgment for plaintiffs, defendants appeal. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Borders and Burson & Burson, for appellants. H. A. Steis, for appellees.

MONTGOMERY, J. This action was brought by appellees to foreclose a statutory lien for street improvements made by them as contractors in the town of Medaryville. Appellees' counsel ask that appellants' brief be rejected, because it is not signed at the conclusion of the statement of points and authorities, but only at the close of the argument, which is bound with the brief proper, and for the further reason that the propositions stated contain matters of fact, rather than of law. When the argument of counsel is bound with the required parts of a brief, and the whole signed by counsel, as in this case, the document is sufficiently authenticated to meet the requirements of the rule; and no useful purpose would be subserved by requiring an additional signature at the place suggested. The manner of stating propositions for the consideration of this court must be left largely to the discretion and taste of counsel. Rules have been made and furnished for their guidance, and a failure to present questions in accordance with such rules may prevent their consideration; but in this case the propositions stated indicate with sufficient certainty the points in dispute, and the objection to their form and substance is no ground for the rejection of the brief.

The assignment of errors is predicated upon the overruling of appellants' demurrer to

the complaint and the sustaining of appellees' demurrer to the second paragraph of answer. It will be unnecessary to set out the complaint at length, as in form and substance it is like those heretofore held sufficient. It is insisted that no demand prior to bringing the suit is alleged. The complaint avers "that more than 10 days before the bringing of this suit the plaintiffs notified said defendant in writing of said assessment and the amount thereof, with interest, and where the same was payable." This is all that the statute requires, and is clearly sufficient. Acts 1901, pp. 363, 364, c. 170; *Ross v. Van Natta* (Ind. Sup.) 74 N. E. 10.

It is next urged that the complaint fails to show that appellants were given two weeks' time after the assessment was made within which to elect whether they would pay the same in installments or at once. The complaint shows that all notices required by law to make a valid assessment lien upon the property described were given, and proceeds upon the theory that appellants failed to exercise their option to pay such lien in installments. From the averments of the complaint it appears that the assessment was due; and, if appellants took the steps necessary to secure to themselves the right to pay the same in installments, they should have alleged the facts by way of answer.

It is further suggested that it is nowhere alleged that the orders and resolutions mentioned were made a part of the records of the town of Medaryville. It is presumed that public officers do their duty, and it is unnecessary, in an action to foreclose a street assessment lien, to state in the complaint every step in the proceedings creating the lien in minute detail. The complaint was sufficient, and appellants' demurrer thereto for want of facts was correctly overruled.

Appellants' second paragraph of answer was as follows: "And for a second and further answer to the complaint the defendants say: The plaintiffs ought not to recover anything on the claim sued on, nor should the defendants be compelled to pay said claim or any part thereof, for the reason that such claim is invalid, in this, to wit: That all the pretended proceedings of the town of Medaryville in ordering the improvement made, in entering into the alleged contract with plaintiffs herein, and in assessing the property of the defendants to pay for the same, and all the pretended resolutions, orders, and notices in that behalf made, issued, and given, were not made or entered into by a board of trustees of the town of Medaryville, as alleged in the complaint, for the reason the gentlemen who pretended to be the trustees of said town, and to pass such resolutions and ordinances, and give the notices and enter into the contract mentioned in the complaint, were not in truth and in fact the board of trustees of said town, and had no authority from any

source to appear and act for said town in such capacity; and all their pretended acts in ordering the improvements made, as set out in the complaint, are null and void and of no effect, for the reasons, first, that they or neither of them were elected to the office of said trustee, and, second, that no certificate of the election of either of them was ever filed in the office of the clerk of the circuit court of said county, as required by law." It was held in the case of *Dinwiddie v. Rushville*, 37 Ind. 66, that the provisions of section 4331, Burns' Ann. St. 1901, upon which it is asserted that this answer is based, requiring a certificate of the election of town trustees to be filed in the office of the clerk of the circuit court before any valid ordinance could be passed by them, applied, not only to the first, but to all subsequent, elections of town trustees. The law governing the election of town trustees has been changed since that decision was rendered, and by the provisions of section 4333, Burns' Ann. St. 1901, at town elections held subsequent to the first, a part only of the trustees are to be chosen at any one election. If it be conceded that the interpretation of the statute in the case above mentioned was at the time correct, we are clear that since the enactment of section 4333, supra, the provisions of section 4331, supra, with regard to the question under consideration, must be limited to the first election held upon the incorporation of a town.

The answer does not disclose when the town of Medaryville was incorporated, nor when the trustees whose acts are challenged were elected or appointed, nor by what authority they claimed to be acting; and it is too indefinite and uncertain to show that the proceedings assailed were illegal by reason of the provisions of the above statute.

The answer was insufficient for the further reason that it was a collateral attack upon the proceedings of the town board, and the facts alleged are not available as a defense in this action. *Deane v. Indiana Macadam, etc., Co.*, 161 Ind. 371, 377, 68 N. E. 686.

We may also observe that before the proceedings in question were initiated the incorporation of the town of Medaryville, the election of its officers, and all their official acts and ordinances were duly validated by an act of the General Assembly. Acts 1901, p. 13, c. 11. It is apparent that the answer is insufficient in substance and without merit.

The judgment is affirmed.

(185 Ind. 710)

SLOCUM et al. v. DALLAS et al.
(No. 20,604.)

(Supreme Court of Indiana. Oct. 31, 1905.)

Appeal from Circuit Court, Pulaski County; Harry Beruetha, Special Judge.

Action by Charles Dallas and others against Frank G. Slocum and others. From a judgment for plaintiffs, defendants appeal.

Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Borders and Burson & Burson, for appellants. H. A. Steis, for appellees.

MONTGOMERY, J. The only questions presented by the record in this case are in all respects the same as those decided in the case of *Low et al. v. Dallas et al.* (No. 20,603, at this term), 75 N. E. 822; and upon the authority of that case the judgment in this case is affirmed.

(165 Ind. 710)

HARMON et al. v. DALLAS et al.
(No. 20,605.)

(Supreme Court of Indiana. Nov. 2, 1905.)

Appeal from Circuit Court, Pulaski County; Harry Beruetha, Special Judge.

Action by Charles Dallas and others against Elizabeth Harmon and others. From a judgment for plaintiffs, defendants appeal. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Borders and Burson & Burson, for appellants. H. A. Steis, for appellees.

MONTGOMERY, J. The only questions presented by the record in this case are in all respects the same as those decided in the case of *Low et al. v. Dallas et al.* (No. 20,603, at this term) 75 N. E. 822; and upon the authority of that case the judgment in this case is affirmed.

(165 Ind. 710)

NICHOLS et al. v. DALLAS et al.
(No. 20,606.)

(Supreme Court of Indiana. Nov. 3, 1905.)

Appeal from Circuit Court, Pulaski County; Harry Beruetha, Special Judge.

Action by Charles Dallas and others against Frank V. Nichols and others. From a judgment for plaintiffs, defendants appeal. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Borders and Burson & Burson, for appellants. H. A. Steis, for appellees.

MONTGOMERY, J. The only questions presented by the record in this case are in all respects the same as those decided in the case of *Low et al. v. Dallas et al.* (No. 20,603, at this term) 75 N. E. 822; and upon the authority of that case the judgment in this case is affirmed.

(165 Ind. 710)

HIGHLANDS v. DALLAS et al.
(No. 20,607.)

(Supreme Court of Indiana. Nov. 2, 1905.)

Appeal from Circuit Court, Pulaski County; Harry Beruetha, Special Judge.

Action by Charles Dallas and others against Isabell E. Highlands. From a judgment for plaintiffs, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

W. W. Borders and Burson & Burson, for appellant. H. A. Steis, for appellees.

HADLEY, J. The pleadings, issues, and questions arising in this case are in all respects the same as those considered and decided in *Low et al. v. Dallas et al.* (No. 20,603, at this term) 75 N. E. 822; and upon the authority of that case the judgment in this case is affirmed.

(36 Ind. App. 491)

DAYTON & W. TRACTION CO. v. MARSHALL. (No. 5,453.)

(Appellate Court of Indiana, Division No. 1. Nov. 14, 1905.)

1. EVIDENCE—JUDICIAL NOTICE.

A court will take judicial notice that a time between 4 and 6 o'clock in the afternoon of September 16th was before sunset.

2. CARRIAGES—EJECTION OF PASSENGER—EXCESSIVE DAMAGES.

Where a passenger was required, without physical force, to leave a car in the afternoon before sunset, on account of a dispute as to the amount of her fare, the conductor explaining that his duty required him to act as he did, and she thereby missed an engagement with pupils in music, and was obliged to walk home a distance of nine blocks, but she suffered no bodily injury or illness as a result of her ejection, an award of \$400 as damages was excessive.

Appeal from Circuit Court, Wayne County; Henry C. Fox, Judge.

Action by Iona Marshall against the Dayton & Western Traction Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Robbins & Starr, for appellant. Jessup & Jessup, for appellee.

MYERS, P. J. Appellee instituted this suit against appellant for damages, on the ground that she had been wrongfully ejected from one of appellant's cars. The issues consist of a complaint in one paragraph, answered by a general denial. The cause was tried by a jury, resulting in a finding, verdict, and judgment in favor of appellee for \$400. The only question presented by this appeal is: Did the trial court err in overruling appellant's motion for a new trial?

One of the causes assigned for a new trial is that the damages assessed by the jury were excessive. Our Supreme Court and this court have many times held that damages assessed by a jury will not be considered as excessive, unless they are such as to induce the belief that the jury, in awarding damages, acted from prejudice, passion, partiality, or corruption (*Creamery, etc., Co. v. Hotsenpiller*, 159 Ind. 99, 64 N. E. 600; *Louisville Ry. Co. v. Miller*, 141 Ind.

533, 37 N. E. 343; *Railway Co. v. Judy*, 120 Ind. 397, 22 N. E. 252; *Southern Indiana Ry. Co. v. Davis*, 32 Ind. App. 569, 69 N. E. 550; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864; *City of Frankfort v. Coleman*, 19 Ind. App. 368, 375, 49 N. E. 474, 65 Am. St. Rep. 412, or that they misunderstood or misapplied the evidence (*Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355). From the record in the case at bar it appears that on August 29, 1903, appellant was engaged in operating an interurban railway over part of Main street in the city of Richmond, Ind., and east through the county of Wayne and to and beyond the line dividing the states of Ohio and Indiana; that appellee on said day of August purchased of appellant a certain coupon book containing 100 coupons, each coupon being good for a ride of five miles over appellant's railway, subject to certain exceptions and conditions stipulated in the contract under which said book was sold; that on September 16, 1903, between 4 and 6 o'clock in the afternoon, appellee entered one of the regular cars of appellant at or near Eleventh street in the city of Richmond, to be carried as a passenger to a station called "Kuth," situated on appellant's line of road and about 4½ miles east of Richmond. Appellee boarded one of appellant's cars at Eleventh street in said city, and between that point and Twentieth street a controversy arose between appellee and appellant's conductor with reference to the number of coupons she should surrender as her fare to the point of her destination. Appellee's account of what occurred is as follows: "I told him [the conductor] I wouldn't pay two fares. 'Then,' he says, 'you will have to leave the car.' And he stood there a few minutes, and then he said: 'You will have to get off.' He rung the bell and stopped the car, and said, 'Get off!' He repeated it a number of times and stood there in the aisle. I waited—I didn't think he would—I didn't suppose he would put me off the car; and he stood back in the aisle and waited, and said: 'You will have to get off.' The car came to a stop, and I left the car and got off. The conductor walked behind me and talked all the way. He said he was doing his duty, and he was ordered by the company to do what he was doing." The conductor's account of what occurred upon the evening of September 16th does not vary materially from that detailed by appellee, except that he claims to have more fully explained to appellee the position he occupied relative to the company, and that it was not a matter personal to him, and that she replied by saying that she attached no blame to him personally. The question of the number of coupons appellant was demanding for her transportation between the same two points had been up on two or

three occasions prior to this time, and upon this occasion she refused to intrust the book to the conductor, but held it in such a manner that he could take one coupon and no more. From the record we think it clear that the controversy was not unexpected to appellee. The general verdict of the jury amounts to a finding in appellee's favor upon the merits of the case, and, this being true, the question of the amount of damages was largely within the discretion of the jury, as the law in cases of this kind does not furnish the jury with any exact guide or measure by which they may determine the same. For this reason, in such cases courts hesitate to interfere with the jury's conclusion, and will not do so unless it is clearly apparent that the jury went wide of the facts and assessed damages which can be sustained only upon the theory of prejudice, partiality, passion, or corruption.

In the case at bar it is charged that by reason of the wrongful act of appellant in ejecting appellee from the car she was prevented from keeping a business engagement with certain scholars on that evening, to whom she was giving instructions in music; that a little before 6 o'clock in the afternoon she had to walk nine squares in returning to her home; that her expulsion from the car and in the presence and sight of a great number of passengers therein caused her great humiliation and mental suffering. Conceding that the wrongful act of appellant resulted in her disappointment as stated, caused her to return home in the manner and under the circumstances charged, and that she was humiliated as averred in the complaint, yet, in the light of all the facts, is not \$400 as damages an extravagant assessment, when the law only purposes to repair the injury done? *Graeter v. Hogan*, 2 Ind. App. 193, 28 N. E. 209. The time when appellee was ejected from the car was after 4 and before 6 o'clock in the afternoon, and the court will take judicial notice that at that time in the afternoon on September 16th was before sunset. *Cincinnati, etc., R. Co. v. Worthington*, 30 Ind. App. 663, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355. In the case at bar there was no bodily injury done appellee, no evil results to her health, no malice or undue display of authority on the part of appellant's conductor; in fact, no element of damages existed on which to base such an assessment, except that the judgment of the jury must have been controlled by motives of charity, prejudice, or partiality, and upon no other grounds can we account for it. When it is apparent that the jury have acted on a motive of this character, as testified to by their verdict, it is one of the highest duties of the court to interfere by setting the verdict aside and submitting the cause to a second jury. It is the unbiased, unprejudiced, and impartial judgment of juries which should

prevail, and as we have heretofore said, great latitude should be allowed them in their estimate of damages; but to this there must be a limit, and this limit is overstepped when, from the facts of the case, it is apparent at first blush that the damages allowed are outrageously excessive. *St. Louis, etc., Ry. Co. v. Myrtle*, 51 Ind. 566, 570; *Union Pac. R. Co. v. Hand*, 7 Kan. 880, 398; *Railroad Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378; *Clapp v. Hudson R. R. Co.*, 19 Barb. 461, 466. From all the facts in this case, in our opinion, appellant's motion for a new trial should have been sustained on the ground that the damages assessed by the jury were excessive.

Judgment reversed, with instructions to the trial court to grant a new trial.

(36 Ind. App. 283)

BOARD OF COM'RS OF MORGAN COUNTY v. CRONE. (No. 5,666.)

(Appellate Court of Indiana, Division No. 2. Oct. 12, 1905.)

1. SHERIFFS—COMPENSATION—PER DIEM ALLOWANCE—ATTENDANCE ON COURT—PAYMENT INTO COUNTY TREASURY—RECOVERY.

A sheriff, who by mistake pays into the county treasury the per diem collected for attendance on the sessions of the circuit court, is entitled to recover the same from the county, by virtue of Burns' Ann. St. 1901, § 7913, providing that, when it shall be made to appear to the satisfaction of the board of county commissioners that any officer has through mistake paid over to the county more money than was justly due, it shall order repayment; the per diem being the sheriff's individual property, and not fees under the fee and salary act.

2. APPEAL—HARMLESS ERROR—PLEADINGS—BAD ANSWER—INFORMAL DEMURRER.

The sustaining of an informal demurrer to a bad answer is an error of which defendant cannot complain.

Appeal from Circuit Court, Morgan County; Joseph W. Williams, Judge pro tem.

Action by William R. Crone against the board of commissioners of Morgan county. From a judgment for plaintiff, defendant appeals. Affirmed.

O. Matthews, R. C. Minton, and S. C. Kevett, for appellant. E. F. Branch and G. W. Grubbs, for appellee.

WILEY, C. J. The questions presented by this appeal arise upon rulings on demurrers to the pleadings. Appellee was plaintiff below, and his complaint as it comes to us is in two paragraphs, to each of which a demurrer for want of facts was overruled. Appellant answered in two paragraphs, the first of which was addressed to the first paragraph of complaint, and the second to the second paragraph thereof. A demurrer to each paragraph of the answer was sustained. Appellant declined to plead further, and appellee recovered judgment as prayed for in his complaint.

Appellant, by its counsel, asserts three

propositions, and seeks to uphold them by argument and authorities, to wit: (1) That neither paragraph of complaint states facts sufficient to constitute a cause of action; (2) that each paragraph of answer is good as against a demurrer for want of sufficient facts; and (3) that the demurrer to the answer does not raise any question because of its insufficiency in form. As the same question is presented by the demurrer to the complaint and also the demurrer to the answer, they have been considered together by counsel, and will be so here.

The propositions above stated will be considered in their order.

It is most earnestly contended by counsel for appellee that appellant has so essentially failed to comply with the requirements of rule 22 of this court (55 N. E. v) that it is not entitled to have the merits of the case determined. The fifth clause of that rule requires that appellant's brief shall contain "a concise statement of so much of the record as fully presents every error and exception relied upon, referring to the pages and lines of the transcript." But little, if any, attempt has been made by counsel for appellant in the preparation of their brief to comply with this requirement, and if we should strictly enforce the rule, for which there is abundant authority and precedent, the judgment would have to be affirmed on the record, or the appeal dismissed. To pursue this course in this case, as in all other cases where a like question is presented, would relieve us of much research and labor, and dispatch the business of the court; and, while we would be fully justified in doing so, we are inclined in this case, on account of the brevity of the record, to waive a strict enforcement of the rule, and go to the merits of the controversy, to the end that the parties may have their respective rights determined.

In his first paragraph of complaint, appellee avers that he was elected sheriff of Morgan county in 1898; that he gave bond and entered upon the duties of his office; that he served as such until November 16, 1900; that as said sheriff it was his duty to attend the sessions of the Morgan circuit court daily, either in person or by deputy, and that he did attend said court during said term 271 days; that he was entitled to, and was allowed by the judge thereof, the sum of \$2 per day for such services, aggregating in all \$542; that said sum was allowed and paid to him by the treasurer of said county; that, as required by law, he filed with the auditor reports of all moneys received by him as such sheriff from all sources on the first Mondays of December, March, June, and September of each year, including in said reports the amounts so received for his services in attending the sessions of the circuit court; that the money received by him from all sources did not equal the salary as provided by law, and that all sums received by him, including said per diem, did

not equal the salary provided by law; that all sums of money received by him for his services as such sheriff, including said sum of \$542, were "by mistake and inadvertence applied upon his salary, and treated and adjudged by said defendant, the board of commissioners, as belonging to said county, and was by said county applied to the extent of and upon the salary of plaintiff as such sheriff, as provided by law." It is then averred that said sum of \$542, so allowed to him by the circuit court and paid to him out of the treasury of said county, "did not belong to said county, was not fees of his office required to be paid into the county officers' fund, or to be received and credited upon his salary as allowed by law, but was compensation provided for and allowed to him in addition to his salary provided by law; that the same belonged to him, and was his individual property." It is further averred that said sum was taken and appropriated by appellant and expended in meeting the general expenses of the county. It is then averred that he filed his claim for said amount with the board of commissioners at its January term, 1904, and that said board refused to allow or pay the same, or any part thereof. The second paragraph of the complaint is in all essential respects like the first, except as to the amounts claimed by appellee, and covers per diem allowances made to him for a second term. The first paragraph of answer admits all of the material averments of the first paragraph of complaint, and concludes with the following averments: "That while acting as such sheriff, he [appellee] was allowed by the Morgan circuit court from time to time, and received, the sum of \$542 as his per diem for his attendance in person and by deputy upon the sessions of said court, and that he did from time to time, upon demand of the board of commissioners of said county, turn over his said per diem to the treasurer of said county; that he paid said sum over to the treasurer voluntarily and without protest, believing at the time that he was required so to do by law, and that the said sum of \$542, with interest thereon, claimed by said plaintiff, is for his per diem allowance for his attendance upon said circuit court while in session, and for no other reason whatever." The second paragraph of answer is identical to the first, except that it is addressed to the second paragraph of complaint.

The whole contention of appellant rests upon the single proposition that the complaint shows that the money which appellee is seeking here to recover was paid over by him into the county fund voluntarily, without legal compulsion, with full knowledge of the facts, and in such case there can be no recovery. The question is presented both by the demurrer to the complaint, attacking its sufficiency for want of facts, and the demurrer to the answer. In the answer, as above indicated, the allegation is "that he

paid said sum over to the treasurer voluntarily and without protest, believing at the time that he was required so to do by law, and for no other reason whatever."

Appellant's first proposition, and upon which all others depend, is in the language of counsel as follows: "If an individual pays an illegal demand made against him, without legal compulsion, with the full knowledge of the facts, and without any fraud or imposition, he cannot reclaim it." It is urged that the act or acts of appellee in paying money into the county treasury, which he was not required to do, was a mistake of law, and that there can be no relief therefrom. There is abundant authority to support these two abstract propositions of law, and counsel for appellee, in their brief, admit that this is the general rule, but urge that such rule has no application to the case in hand, for the reason that appellee is here seeking to avail himself of a statutory right, and that the old rule of the common law does not apply.

It is earnestly contended by counsel for appellee that this case must be governed by the provisions of section 7913, Burns' Ann. St. 1901, being section 1 of the act of March 31, 1879 (Acts 1879, p. 108). That section reads as follows: "No settlements made by the board of commissioners of the several counties of this state with any county, township or school officer shall be conclusive and binding in the state or county, where any such officer has failed, in any manner, to account for any and all moneys which he may have collected or received by virtue of his office, or has failed or omitted to perform any duty required of him by law; and every such officer and his sureties shall be held liable therefor, the same as if no settlement had been made: Provided, that when it shall be made to appear, to the satisfaction of the board of commissioners of any county of this state, that, by reason of any erroneous charges on the tax duplicate, or through inadvertence, mistake, or any other cause, any one of the above-named officers has paid over to such county, or reported, settled or accounted for, more money to such commissioners than was justly or equitably due or owing from such officers, then, and in such case, such board is hereby authorized to order repayment, out of the proper funds, in their proper proportion, so overpaid by such officer, and credit to be given by the auditor therefor. And in case such money has not been paid then by such officer, such board is hereby authorized to remit and release so much of the same, in whatever form of indebtedness it may exist, as, in their judgment, is unjust, inequitable and wrong on account of having grown out of such mistake, inadvertence or overcharge, not, however, releasing such officer or his sureties from the payment of any money ever in fact received by him as such officer, and remaining unaccounted for," etc. It is now settled in this state that allowances provided for by statute

to a sheriff for his per diem attendance upon the sessions of the circuit, criminal, or superior courts in his county is not to be regarded as fees collected by him under the fee and salary act now in force, and that such allowance becomes his individual property, and he is not required to account for it and pay it into the county treasury to be applied on his salary. *Comer v. Board, etc.*, 32 Ind. App. 477, 70 N. E. 179; *Seller v. State ex rel.*, 160 Ind. 603, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448; *State ex rel. Board v. Flynn*, 161 Ind. 554, 69 N. E. 159.

Under the pleadings in this case, it must be accepted as true that the appellee by "mistake and inadvertence" reported the several allowances made to him by the circuit court for attendance on the sessions thereof, and accounted for and paid into the county treasury as other fees collected by him. It must also be taken as true that the county received such sums, applied the same on appellee's salary, or otherwise used it defraying county expenses. Under the authorities cited, the amount of money allowed appellee by the circuit court for his per diem attendance thereon became his individually; the county had no interest whatever in it, and he was not required to account to the board of commissioners for the same, nor to pay it into the county treasury.

The statute under consideration was doubtless passed by the Legislature to serve a double purpose: (1) To protect the interest of the county against the failure of any officer named therein to account to the proper authorities "for any and all moneys which he may have collected or received by virtue of his office, or has failed or omitted to perform any duty of him required by law," and (2) to protect the rights of such officers in case they have through "inadvertence, mistake or any other cause * * * paid over to such county, or reported, settled or accounted for, more money to such commissioners than was justly or equitable due," etc. The money, which it is confessed appellee accounted for and paid into the county treasury, was not "justly or equitably due or owing from" him. In the case of *Board, etc., v. Tichenor*, 129 Ind. 562, 29 N. E. 32, the legal principle involved in this case was decided adversely to the contention of appellant. In that case, the appellee, who had been treasurer of Gibson county, brought an action against appellant to recover for money which he had paid into the county treasury "through mistake and inadvertence," alleging that certain money so paid by him was his own individual money, and that the county was not entitled to it. The court in the decision cited the section of the statute to which we have referred and other sections, to wit, 6510 and 6511, Rev. St. 1881, the latter sections of which provide for the repayment to a county treasurer out of the county treasury any sum or sums of money which a county treasurer might improperly

pay, and also making provision for refunding to such county treasurer from the state treasury any erroneous payments thus made; and in connection therewith said: "We think it was the intention of the Legislature that the county should not profit by the mistakes of its officers, by which it received into its treasury money to which it was not entitled." It was held in that case that under the statute cited the appellee was entitled to recover the amount of money which he had erroneously paid into the county treasury. The proposition upon which appellant rests in this case, and which we have above stated, is not supported by the law, and is contrary to all principles of equity. Our conclusion is that the complaint stated a cause of action and that the demurrer to it was properly overruled. From what we have said, the facts set up in the answer are not sufficient to constitute a defense.

We are confronted, however, with the proposition on behalf of appellant that the demurrer to the answer was not sufficient in form to present any question. It is true that the demurrer is not in the form prescribed by statute, but, under the authorities in this state, this fact cannot affect appellant's rights. In the case of *Bell et al. v. Hiner*, 16 Ind. App. 184, 44 N. E. 576, this court said: "Earlier cases held that it was reversible error to sustain a defective demurrer to an answer without reference to its sufficiency. *Gordon v. Swift*, 39 Ind. 212; *Dugdale v. Culbertson*, 7 Ind. 664. Later and better considered decisions, however, declare the law to be that, although the demurrer be insufficient to test the plea, and might be overruled without error, yet, if it is in fact sustained and the pleading is really bad, then no harmful error occurs. *Wade v. Huber*, 10 Ind. App. 417, 38 N. E. 351; *Foster v. Dailey*, 3 Ind. App. 530, 30 N. E. 4; *Firestone v. Werner*, 1 Ind. App. 283, 27 N. E. 623; *Board, etc., v. Gruver*, 115 Ind. 224, 17 N. E. 290; *Palmer v. Hayes*, 112 Ind. 289, 18 N. E. 882; *Hildebrand v. McCrum*, 101 Ind. 61." In the case of *Blue v. Capital National Bank*, 145 Ind. 518, 48 N. E. 655, the Supreme Court had under consideration this same question, and it was there said: "If it shall be concluded that the pleas did not state a cause of action, the informality of the demurrer could not be asserted to uphold them." As this demurrer was addressed to a bad answer, and conceding that it was informal and not in strict harmony with the statute, the action of the court in sustaining it could not possibly harm appellant. In any event it was not an error of which appellant can complain, for it was not injured by the ruling. *Chicago, etc., Ry. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477.

This disposes of all the questions presented on argument, and, finding no error, the judgment is affirmed.

(36 Ind. App. 706.)

BOARD OF COM'RS OF MORGAN COUNTY v. NEELY. (No. 5,667.)

(Appellate Court of Indiana, Division No. 2. Nov. 15, 1905.)

Appeal from Circuit Court, Morgan County; Jos. W. Williams, Judge pro tem.

Action by Jacob M. Neely against the board of commissioners of the county of Morgan. From a judgment for plaintiff, defendant appeals. Affirmed.

O. Matthews and R. C. Minton, for appellant. Renner & McNutt, for appellee.

WILEY, C. J. Appellee was elected, qualified, and served as clerk of the Morgan circuit court from the 17th day of November, 1898, until the 31st day of December, 1902. During that time he was allowed by the judge of such court \$2 per day for each day that he attended the sessions thereof, either in person or by deputy, which several amounts so allowed him he accounted for quarterly, when he filed his reports of fees collected, etc., and paid said sums into the treasury of the county with other fees so collected. In his complaint he not only avers these facts, but also avers that he paid said sums in the treasury of the county through mistake and inadvertence, and that subsequently he filed with the auditor of said county his verified claim, setting out the several amounts so allowed him and paid into the treasury, and asked that the board of commissioners refund the same to him, which it refused to do. He prosecuted this suit to collect said amounts. A demurrer to his complaint was overruled, and the overruling of that demurrer is the only error assigned.

The identical question presented by the demurrer to the complaint was decided by this court in the case of Board of Commissioners, etc., v. Crone (October 12, 1905), 75 N. E. 826, and upon the authority of that case the judgment is affirmed.

(36 Ind. App. 340)

PITTSBURG, C. C. & ST. L. RY. CO. v. BRYANT. (No. 5,894.)

(Appellate Court of Indiana, Division No. 1. Oct. 25, 1905.)

1. CARRIERS—LOSS OF GOODS—BILL OF LADING.

Where on delivery of goods to a carrier, its agent delivered a receipt describing the goods "to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading," but no bill of lading was ever executed or delivered, the carrier's uniform bill of lading was not thereby made a part of the receipt or contract of shipment.

2. SAME—CONSTRUCTION.

An instrument delivered by a carrier's agent to the shipper, reciting the delivery of certain packages "marked and signed as stated to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading," signed by the shipper

and by the carrier's agent, was a mere receipt for the goods for the purpose of shipping them to the point named in the memorandum following the shipper's signature, and was not a contract by the carrier to ship the goods.

3. SAME—SHIPMENT BEYOND CARRIER'S LINE—IMPLIED CONTRACT.

A common carrier being bound to receive goods for shipment, a contract to ship the goods to a certain point beyond the carrier's line and there deliver them to the consignee, cannot be implied from the fact that it received the goods for shipment.

4. SAME—TERMINUS OF ROUTE—LIMITATION OF LIABILITY.

A carrier, being under no obligation to ship goods beyond its own line, is entitled to make a valid special contract regarding its liability to loss occurring on such line.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 817, 818.]

5. SAME—CONTRACT TO CARRY TO DESTINATION—EVIDENCE.

Mere receipt of goods by carrier, marked for delivery at a point beyond its line, was insufficient to constitute a contract to transport and deliver them at destination.

6. SAME—QUESTION FOR JURY.

Where, in an action for loss of goods shipped, it appeared that the carrier's agent collected the entire charge for the shipment to destination beyond the initial carrier's line, and gave the shipper a writing which in no way indicated that such carrier was not undertaking to ship the goods to destination, whether such agent contracted to carry the goods to destination was for the jury.

7. SAME—AUTHORITY OF AGENT.

Where, in an action against a carrier for loss of goods shipped to a point beyond the initial carrier's line, no attempt was made to show that the carrier's receiving agent had authority to make such contracts, or that there had been any previous similar dealings between such agent and the shipper, or that the carrier had held itself out as a common carrier to a point beyond its line, the agent's authority to contract for extraterminal liability could not be presumed from his authority to receive goods for carriage.

Appeal from Circuit Court, Henry County; Wm. O. Barnard, Judge.

Action by William J. Bryant against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

John L. Rupe, for appellant. Bundy & Morris and Nation & Beard, for appellee.

ROBINSON, J. Appellee sued for the value of certain household goods which he averred were delivered by him to appellant to be shipped by appellant from New Castle, Ind., to appellee at Rockford, N. C., but which it is averred were either lost or destroyed by appellant, and never delivered to appellee. Judgment in appellee's favor. Overruling appellant's motion for a new trial, asked on the ground, among other things, that the verdict is not sustained by sufficient evidence, is the only question argued.

An agent of appellee went to appellant's station agent at New Castle, inquired the rate of freight to Rockford, N. C., and, being told the rate, paid the freight to Rockford,

and offered the goods for shipment. Appellant's agent received the shipment, and issued to the shipper the following: "Form 13. Delivered to the Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., New Castle, Ind. Station, Dec. 10, 1901 the following named articles or packages, marked and consigned as stated, to be shipped as per directions below, subject to the conditions and exceptions of the company's bill of lading. W. J. Bryant, Shipper. Marks, W. J. Bryant, Rockport, N. C. Articles: 1 C. Stove. 1 BBL. H. Hold. gds. 1 S. Mach. 1 W. Stand. 1 Rocker. 5 Stool chairs. 1 H. Chair. 1 Child's Rocker. Paid 6.38. A. R. Sligar, Ag't." [Revenue Stamp.] No other bill of lading was issued for the shipment. Rockford was beyond appellant's line. In regular course the shipment would go over appellant's line to Cincinnati, and there be transferred to the Cincinnati Southern Railroad, and by that company delivered to another line, to be carried to its destination. The goods were all delivered to the Cincinnati Transfer Company, a common carrier, to be delivered to the Cincinnati Southern and all, except the barrel of household goods, were received by that company. The deposition of the agent of the carrier at the point of destination of the shipment, taken May 28, 1902, states that none of the goods had been received, except the barrel of goods, which was received a short time previous to that date, and which was in a damaged condition. At the time of the shipment, appellant had a regular bill of lading, which was the uniform bill of lading used by railroads, and which was read in evidence. This bill of lading contains, among others, a provision that no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after the property is ready for delivery to the next carrier or to the consignee.

We cannot agree with counsel that this so-called "bill of lading" became a part of the written receipt or contract through the reference thereto in the receipt or contract. A bill of lading is defined to be "a written acknowledgment by the common carrier of the receipt of certain goods, and an agreement, for a consideration, to transport and to deliver the same at a specified place to a person therein named, or his order." 4 Elliott on Railroads, § 1415; Union R. Co. v. Yeager, 34 Ind. 1. According to this definition, one of the essentials of a bill of lading is an agreement between the carrier and shipper. No bill of lading other than that above set out was issued. No other agreement was made. Reference is not made in the written instrument to some other contract or agreement executed by the carrier and shipper. It will readily be seen that the reasoning through which a contract may be gathered from writings consisting of a protracted correspondence between the parties has here no application. *Wills v. Ross*, 77 Ind. 1, 40 Am.

Rep. 279. There was no other bill of lading to which reference could be made in the writing that was executed, and, as the carrier did not issue to the shipper any such bill of lading, it must be held to have abandoned that provision in the written instrument that was executed.

The writing that was executed, and which is above set out, when construed as a whole, is, in effect, a receipt for certain goods for the purpose of shipping them to a point named in the memorandum following the shipper's signature. There is no contract contained in this writing to ship the goods to the place designated, or to any other place. The company, as a common carrier, was bound to receive the goods for shipment, so that a contract to ship the goods to a certain point, and there deliver them to the consignee, cannot be implied from the fact that it did receive them for shipment. It cannot be construed to be a bill of lading, and manifestly was not issued as a bill of lading, as reference is made in this writing to the "company's bill of lading." The receipt is evidence of the fact that certain goods had been delivered to the carrier, to be shipped to a place designated, and that the carrier's agent had been paid \$6.38. The writing itself furnished no evidence that the amount paid was the rate through to the place of destination, and the implication does not necessarily arise that it was the through rate. It is true, having received the goods for shipment, the implied obligation of appellant as a common carrier, arising from its relation to the public, rested upon it to ship the goods. But this implied obligation is limited by the termini of its own route, for the reason that a common carrier is not required to deliver goods at a point beyond its lines.

Appellant's legal duty as a common carrier is only commensurate with its franchise; that is, it is confined to its own line. For this reason it might make a valid special contract that it should not be liable for any loss which did not happen on its own line. *United States Ex. Co. v. Rush*, 24 Ind. 403; *Erie Ry. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa, 181, 14 Am. Rep. 514; *Reed v. United States Express Co.*, 48 N. Y. 462, 8 Am. Rep. 581; *Phifer v. Carolina Cent. R. Co.*, 89 N. C. 311, 45 Am. Rep. 687; *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391; *Am. Ex. Co. v. Second Nat. Bank*, 69 Pa. 394, 8 Am. Rep. 268; *Taylor v. Little Rock, etc., R. Co.*, 32 Ark. 399, 29 Am. Rep. 3; *McCarn v. International, etc., R. Co.*, 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; *Dunbar v. Port Royal, etc., R. Co.*, 36 S. C. 110, 15 S. E. 357, 31 Am. St. Rep. 860. Some of the states follow the English rule that the receipt of goods marked to a place beyond the line of the carrier who receives them implies a contract on his part to carry them to their final destination. But the Supreme Court of the United States and

a majority of the state courts have declared the rule that the carrier is only bound, in the absence of a special contract, to carry over its own route, and safely deliver to the next connecting carrier. *Pittsburg, etc., R. Co. v. Morton*, 61 Ind. 539, 28 Am. Rep. 682; *Michigan Cent. R. Co. v. Mineral, etc., Co.*, 16 Wall. 318, 21 L. Ed. 297; *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 26 L. Ed. 679; *Michigan Cent. R. Co. v. Myrick*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; *Elmore v. Naugatuck R. Co.*, 23 Conn. 457, 68 Am. Dec. 143; *Grindle v. Eastern Ex. Co.*, 67 Me. 317, 24 Am. Rep. 31; *Lawrence v. Winona, etc., R. Co.*, 15 Minn. 390 (Gil. 313), 2 Am. Rep. 130; *Grover, etc., Co. v. Missouri Pac. R. Co.*, 70 Mo. 672, 35 Am. Rep. 444; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46; *Hadd v. U. S. Ex. Co.*, 52 Vt. 335, 36 Am. Rep. 757; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228, and note; *U. S. Ex. Co. v. Rush*, 24 Ind. 403; *Railroad Co. v. Condon*, 10 Ind. App. 536, 38 N. E. 71; *Railroad Co. v. Dickson*, 31 Ind. App. 451, 67 N. E. 538; *Chicago, etc., R. Co. v. Woodward (Ind. Sup.)* 72 N. E. 558. "Merely connecting with other routes," said the court in *Pittsburg, etc., R. Co. v. Morton*, supra, "which he does not own, operate, or control, will not make him a common carrier over such connecting routes." See, also, 1 *Elliott on Railroads*, § 308. The evidence shows that the point of destination is not on appellant's line, and as appellant, as a common carrier, was not bound to deliver the goods beyond its line, if there is a liability in this case, it must be by virtue of a special contract.

As the written instrument above set out was not a contract of shipment, the question is whether the evidence shows an oral contract on appellant's part to deliver the goods at the point of destination. A witness testified that, acting for appellee, he delivered the goods to appellant's agent at New Castle; that he asked the agent what the cost would be to ship the goods to Rockford, N. C., and was told it would take \$6.88, which amount he paid, took the receipt, and put the goods in a car. Another witness, who helped take the goods to the station, detailed substantially the same conversation, with the addition that the agent asked something about the weight of the goods. It is not disputed that appellant carried the goods to the end of its line, and delivered them to a common carrier. It is not claimed that any of the goods were lost or injured while on appellant's line. As the goods were lost or injured after they left appellant's line, and while in charge of some connecting carrier, the burden was upon appellee, to establish appellant's liability for such loss or injury, to show a special contract on appellant's part to deliver the goods at the point of destination. By simply receiving the goods marked for delivery at a point beyond its line, appellant did not thereby contract to transport and deliver them at the place of

destination. *Crawford v. Southern Ry. Co.*, 51 Miss. 222, 24 Am. Rep. 626. But we think the evidence is sufficient to authorize the jury to conclude that the agent of appellant undertook to ship the goods to their destination. It was a question of fact for the jury. *Chicago, etc., Co. v. Woodward (Ind. Sup.)* 73 N. E. 810. The agent was told to what point the goods were to be shipped, and was asked the rate to that point, and collected the entire charge. He gave the shipper a writing, which in no way indicated to the shipper that his company was not undertaking to ship the goods to their destination. The fact that the agent, if we assume that he had authority to act, gave the through rate and collected the entire charge, were circumstances strongly tending to show a contract for through transportation by his company, or such a "connection in business" as to make his company liable over the entire route. We think there was competent evidence before the jury that appellant's agent contracted to carry the goods to their destination. See *Page v. Chicago, etc., R. Co.*, 7 S. D. 297, 64 N. W. 187; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Gray v. Jackson*, 51 N. H. 9, 12 Am. Rep. 1; *Root v. Great Western R. Co.*, 45 N. Y. 524; *Weed v. Saratoga, etc., R. Co.*, 19 Wend. 534; *Nashua Lock Co. v. Worcester, etc., R. Co.*, 48 N. H. 339, 2 Am. Rep. 242; *Chouteaux v. Leech*, 18 Pa. 224, 57 Am. Dec. 602; *Candee v. Pennsylvania R. Co.*, 21 Wis. 589, 84 Am. Dec. 566; *Hill, etc., Co. v. Boston, etc., R. Co.*, 104 Mass. 122, 6 Am. Rep. 202.

The question remains whether the agent had authority to bind his company by such a contract. The contract was made with appellant's local station agent at New Castle. No attempt was made to show what authority the agent had as to making contracts for the carriage of goods. It is true that whether the agent had authority to make such a contract was a question of fact for the jury, and we could not disturb this finding of the jury, if made upon evidence legally sufficient to justify it. *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827, and notes. But the substance of the evidence from which the conclusion of authority was drawn is that the local station agent, in answer to a question, named the through rate, collected it, and gave a receipt for goods marked through to destination. It does not appear that there had ever been any previous dealings between appellee or his agent and the company from which such authority might reasonably have been inferred, nor is there any evidence that the company held itself out as a common carrier to a point beyond its own line. The agent might bind the company within the limits of his apparent authority, but as appellant, as a common carrier, was not bound by law to carry and deliver goods beyond its own line, we cannot presume that the agent had authority to bind the company by contract for carriage beyond its own line. His

authority to receive goods for carriage does not imply authority to contract for extraterrestrial liability. Strictly speaking, the business of appellant as a carrier is confined to its own line, and the general scope of the authority of a subordinate agent must be limited to the company's business. No express authority of the agent is shown, and there is not sufficient evidence from which such authority might be implied. See *Grover, etc., Co. v. Missouri Pac. Ry. Co.*, 70 Mo. 672, 35 Am. Rep. 444; *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827; *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Page v. Chicago, etc., R. Co.*, supra; *Patterson v. Kansas, etc., R. Co.*, 47 Mo. App. 570; 4 Elliott on Railroads, § 1437. Judgment reversed.

(38 Ind. App. 637)

COLLINS COAL CO. v. HADLEY.
(No. 5,466.)¹

(Appellate Court of Indiana, Division No. 2,
Oct. 25, 1905.)

1. DEATH — ACTIONS — PARTIES PLAINTIFF — PERSONAL REPRESENTATIVES.

Under Burns' Ann. St. 1901, §§ 7466, 7472, requiring mining operators to take specified precautions for the safety of their employes, and section 7473, providing that in case of loss of life resulting from a violation of the statute a right of action for damages shall accrue "to the widow, children, or adopted children," etc., of the person killed, an action for death, caused by failure to take the statutory precautions, must be brought by the widow, children, or other persons specified in the statute, and the personal representative of the decedent cannot maintain the action, by virtue of Burns' Ann. St. 1901, § 285, which confers on the personal representative of one whose death is caused by the wrongful act of another a right of action to recover damages for such death.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 38.]

2. PLEADING — DEMURRER — PARTIES — WANT OF CAPACITY TO SUE — RAISING QUESTION.

A demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action, raises the question of the right of plaintiff to maintain the action.

3. DEATH — RIGHT OF ACTION — PARTIES — STATUTES.

Burns' Ann. St. 1901, § 285, conferring on the personal representatives of one whose death is caused by the wrongful act of another a right of action to recover damages for such death, does not repeal section 7473, giving a right of action to the widow and children of a miner killed through the failure of a mine owner to take the statutory precautions for the safety of his employes, so as to entitle the personal representative, instead of the widow and children, to bring the action.

Appeal from Circuit Court, Clay County; Presley O. Colliver, Judge.

Action by Louise Hadley, administratrix, etc., against the Collins Coal Company. From a judgment for plaintiff, defendant appeals. Reversed.

Rawley & Hutchinson, George M. Crane, A. L. Miller, and David W. Henry, for appellant. A. W. Knight, Geo. A. Knight, and Jacob Herr, for appellee.

• Rehearing denied, 78 N. E. 353. Transfer to Supreme Court denied.

WILEY, C. J. Appellee brought this action to recover damages resulting from the death of the decedent caused by the alleged negligent acts of appellant. The complaint is in a single paragraph, to which a demurrer for want of facts was overruled. Answer in general denial. Trial by jury, resulting in a general verdict for appellee. Appellant's motion for a new trial overruled, and judgment upon the verdict.

By the assignment of error, appellant is entitled to have considered the action of the court in overruling the demurrer to the complaint and its motion for a new trial. The complaint alleges that the appellee was the duly appointed, qualified, and acting administratrix of the estate of the decedent; that appellant was a corporation existing under the laws of Indiana, and engaged in mining and shipping coal; that appellant was the owner of a certain coal mine in Clay county, Ind., and was engaged in working and operating the same; that the coal was reached and worked by means of a shaft sunk from the surface of the earth, and by driving entries through the same, and turning workrooms off from said entries; that on the 5th of January, 1903, appellant had engaged and working in said mine 100 men, and that the decedent was in its employ as a coal miner, and was engaged in mining coal in one of the rooms in said mine; that it was the duty of appellant to use reasonable care to furnish the deceased with a reasonably safe place to work, and to protect him therein, and to that end it was the duty of appellant to keep constantly on hand at its said mine a sufficient supply of timbers, and to deliver at the working place all props, caps, and timbers, so that decedent might be able to properly secure his room from caving in; that it was the further duty of appellant's bank boss to visit and examine each and every working place in the mine at least every alternate day when the miners were at work, and to examine and see that each and every working place was properly secured by props or timbers, and that safety was in all respects assured, and to see that a sufficient supply of props, caps, and timbers was always on hand at decedent's said room or working place, in order that the same might be propped and made secure and safe; that it was the further duty of appellant to place a blackboard sufficiently large, with the number thereon of every workman employed in the mine, at the most convenient place near the entries, to be used by the workmen in registering thereon such timber for securing their working places as might be required from day to day. It is further averred that appellant did not perform its duty in the particulars set forth, but wholly failed and neglected so to do in this, to wit, that it did not keep constantly on hand a sufficient supply of timber of proper length, and deliver to the said working place of decedent props, caps, and timbers of proper length when

needed and required by decedent, so that he might properly secure said room and working place from caving in; but, on the contrary, it negligently and carelessly refused and neglected to deliver the necessary caps, props, and timbers, although requested often by him so to do. It is next charged that appellant carelessly failed by its bank boss to visit and examine the working place at least each and every alternate day, to see that the same was properly secured by props, etc., and that safety to the miners was in all respects assured, and to see that a sufficient supply of props, etc., was always on hand; but it did not, on the contrary, by its said bank boss, visit said working place more than once a week, and negligently and carelessly permitted the same to remain without props, caps, and timbers, so that by reason thereof the decedent was unable to properly prop and secure the room and working place in which he was engaged. It is further charged that appellant negligently and carelessly failed to have and place a blackboard of any kind or character at the most convenient place near the mine entries, whereon the workmen could register their wants for timbers, and that decedent was compelled to orally make such requisition for said timbers that he needed or required; that by reason of all of such failures, and all of which were well known to appellant, or might have been by the use of reasonable diligence, the said roof of the room in which decedent was working suddenly gave way, caved in, and fell upon him, thereby inflicting injuries which resulted in his death; that decedent's death occurred wholly by the fault and negligence of the appellant, as herein alleged, and while the decedent was in the exercise of due care and caution, and without any fault or negligence on his part or the part of appellee. It is then averred that, prior to said accident there was nothing in the appearance of said roof to indicate immediate danger, and no evidence thereof was discoverable by the usual and ordinary tests, which had been made from time to time, and that the said roof could and would have been made perfectly safe by decedent but for the negligence of appellant, as herein alleged. It is then charged that if appellant had performed its duty, and had visited said working place of decedent by its bank boss, and had seen that safety was in all respects assured, and had seen that timber, props, and caps were always on hand when the same were needed and required, said injury would not have occurred; that had appellant furnished the decedent with timber, caps, and props, as was its duty, decedent could and would have propped and secured the roof so that the same would not have caved in and fallen upon him. It is then averred that the decedent left surviving him the appellee, who is his widow and two minor children, and

that this action is prosecuted for their benefit.

The first question discussed by counsel is the sufficiency of the complaint, and it is most earnestly contended that it is apparent upon the face of the complaint that the appellee, as administratrix, cannot maintain this action. Appellee bases her right of action upon the failure of appellant to perform certain duties specifically enjoined upon it by statute. This statute, commonly known as the "Mining Act," requires a mine operator, etc., where more than 10 men are employed, to keep on hand constantly a sufficient supply of props, caps, and timbers, so that workmen may at all times properly secure the roofs of the mining room from caving in; also that the mining boss shall visit and examine each working place in the mine at least every alternate day, to see that such places are securely propped and safe for workmen, and to see that a sufficient supply of props, caps, and timbers is on hand, etc. And it further requires that such operator, etc., shall have and place a blackboard at the most convenient place near the mine entrance, upon which workmen may register such timber for securing their working places as may be required. Sections 7466, 7472, Burns' Ann. St. 1901. The complaint charges, in definite terms, the violation on the part of appellant of all these four requirements of the statute, and if appellee, as administratrix, can maintain the action, the complaint is not subject to a successful attack of the demurrer. Section 7473, Burns' Ann. St. 1901, being section 18 of the act of June 3, 1891 (Acts 1891, p. 57, c. 49), is as follows: "If for any injury to person or persons or property, occasioned by any violation of this act, or any willful failure to comply with any of its provisions, a right of action against the owner, operator, agent or lessee shall accrue to the party injured for the direct injury sustained thereby, and in case of loss of life by reason of such violation, a right of action shall accrue to the widow, children or adopted children, or to the parents or parent, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for like recovery for damages for the injury sustained by reason of such loss of life or lives." This statute, in case of death of an employé in a coal mine, vests the right of action in the surviving widow or children of the decedent, and not in his administrator or administratrix, and it has been held both by the Supreme and this court that a personal representative of the decedent cannot maintain the action. *Maule Coal Co. v. Partenheimer*, Adm'r, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710, and authorities there cited. Also *Boyd*, Adm'r, v. *Brazil Block Coal Co.*, 25 Ind. App. 157, 57 N. E. 732; *Dickason Coal Co. v. Unverferth*, Adm'r, 80 Ind. App. 546, 66 N. E. 759.

The case of *Couchman*, Adm'r, v. *Frather et*

al., 162 Ind. 250, 70 N. E. 240, is instructive here. There appellant, as administrator, brought an action against a saloon keeper and his bondsman for a violation of the liquor law, prohibiting sales of liquor to a person in an intoxicated state, and the complaint alleged such sales, and that, as a result thereof, the decedent became so intoxicated as to be unconscious of his condition, and while in that condition attempted to drive in a buggy to his home, and that while so doing he fell out of the buggy, breaking his neck, etc. Section 7283, Burns' Ann. St. 1901, provides that "every person who shall sell, barter or give away any intoxicating liquors, in violation of any of the provisions of this act [Nicholson Law] shall be personally liable, and also liable on his bond filed in the auditor's office . . . to any person who shall sustain any injury or damage to his person or property or means of support, on account of the use of such intoxicating liquors so sold, as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction." It was urged by appellant in that case that the action was prosecuted under section 285, Burns' Ann. St. 1901, which confers upon the personal representatives of a decedent, whose death was caused by the wrongful act or omission of another, to prosecute an action to recover damages for causing such death. In deciding the case the Supreme Court used the following language: "A statute giving a remedy which did not exist at common law, not only speaks affirmatively, but it also speaks negatively. In such circumstances the maxim *expressio unius est exclusio alterius* has a particular application. *Southerland, Stat. Constr. § 325*. So far as remedy by way of damages is concerned, the rule is that, when a new right is conferred by statute, and an adequate provision for its enforcement is therein made, the statutory remedy is exclusive. *Storms v. Stevens, 104 Ind. 46, 3 N. E. 401; Sedgwick, Stat. Constr. Law, 94; Endlich, Interp. Stat. § 465; Southerland, Stat. Constr. § 399*." In *Storms v. Stevens, supra*, it was said: "Where a statute creates a new right, and prescribes a mode of enforcing it, that mode must be pursued, to the exclusion of all other remedies. Such has been the settled law in this state for more than 60 years, and such is the law elsewhere." In *Couchman v. Prather, supra*, it was further said: "Complications would arise from the holding that, in the circumstances of a case like this, suit could be maintained under section 285, *supra*. It would result in the action being instituted and controlled by a statutory trustee, instead of by the person injured in his means of support, in his individual capacity, as contemplated by section 7283, *supra*." In this state it is no longer a question of legitimate debate that where a special statute gives a right of action to a designated class or classes of persons, they, and they alone, can maintain such action.

The demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action properly questions the right of the plaintiff therein to maintain such action. *Boyd, Adm'r, v. Brazil Block Coal Co., supra*.

Counsel for appellee seek to avoid the rule established by the cases cited upon the ground that section 285, Burns' Ann. St. 1901, repeals section 7473, *supra*, "as to the person who shall bring the action." Without entering into a discussion of the question thus raised, we are clearly of the opinion that the position assumed by counsel is not tenable. As the personal representative of the decedent in this case has no right under the statute to prosecute the action, the demurrer to the complaint should have been sustained.

The judgment is reversed, with directions to the trial court to sustain appellee's demurrer to the complaint.

(37 Ind. App. 672)

MARION TRUST CO. v. CITY OF INDIANAPOLIS et al. (No. 5,410.)¹

(Appellate Court of Indiana. Division No. 2, Oct. 25, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

A municipality has no inherent power to levy special assessments for street improvements, and a statute conferring it must be strictly construed against the municipality and in favor of the abutting property owners.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1001, 1005.]

2. SAME—CONSTRUCTION OF SIDEWALK—APPORTIONMENT OF COST.

Burns' Ann. St. 1901, § 3845 (Acts 1897, p. 80, c. 55), which provides that, where the board of public works of a city improves only "a part or one side of any street, sidewalk, . . . one half of the cost . . . shall be assessed against . . . the city and the remaining one half . . . shall be assessed against the lands . . . adjacent to such half or side of the street," and that where the board orders the improvement "of any sidewalk" the cost thereof shall be estimated according to its whole length, and shall be apportioned on the lands abutting thereon, authorizes the city, on constructing a sidewalk on one side of a street, to apportion the entire cost thereof on the property abutting thereon; the word "sidewalk" in the first-quoted provision being inserted by mistake.

Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by the Marion Trust Company, trustee, against the city of Indianapolis and another. From a judgment against plaintiff and in favor of defendant, the City Bond Company, on its cross-complaint, plaintiff appeals. Affirmed.

Wilson & Townley, for appellant. S. M. Richcreek and J. M. Milner, for appellees.

COMSTOCK, J. Action by appellant to quiet title against appellees to certain real estate in the city of Indianapolis. Appellees filed separate demurrers for want of facts to appellant's complaint. The court sus-

¹ Rehearing denied. Transfer to Supreme Court denied.

tained these demurrers. Appellee City Bond Company filed a cross-complaint against appellant, seeking to foreclose a sidewalk improvement lien against the property described in appellant's complaint. Appellant filed an answer to this cross-complaint, setting up substantially the facts alleged in its original complaint. To this answer appellee City Bond Company demurred for want of facts, and the court sustained the demurrer. Appellant elected to stand upon its original complaint and upon its answer to the cross-complaint of the City Bond Company, and refused to plead further. The court thereupon rendered judgment against appellant, refusing to quiet appellant's title, as prayed in its original complaint. The court also rendered judgment in favor of appellee City Bond Company upon its cross-complaint, and decreed the foreclosure of the sidewalk improvement lien above referred to.

Appellant assigns as error the action of the court in sustaining the separate demurrers of appellees to its complaint, and in sustaining the demurrer of the City Bond Company to appellant's answer to the cross-complaint of the City Bond Company.

The material facts out of which the controversy arises, and which are alleged in appellant's original complaint and again in appellant's answer to the cross-complaint of the City Bond Company, are as follows: Appellant is the owner in fee simple of certain real estate abutting upon the west side of Central avenue in the city of Indianapolis. In April, 1903, the city, through its board of public works, took steps to improve said Central avenue by constructing cement sidewalk along the west side thereof. After the proper proceedings had been taken, the contract was let, the improvement was made and completed, and the board assessed certain property with the cost of the improvement. The assessment made by the board was limited to the land abutting upon the west side of Central avenue, and the entire cost of the improvement was attempted to be assessed against said land. The west side of the street only was improved, nor was the east side ordered improved, nor had it ever before been improved, nor has it since been improved with any sidewalk whatever. After the making of the above assessment by the board, the contractor properly assigned his interest in the assessment to appellee City Bond Company, which is now the owner of the same. The land of appellant abutting upon the west side of Central avenue was assessed in the amount of \$1,942.95. Before its assessment was payable, appellant tendered to appellees one-half of the above sum, namely, \$971.48, claiming that such tender was sufficient to discharge the lien of the assessment as against its property. This was upon the theory that the board had no power to assess more than one-half of the cost of the improvement against the land abutting upon the west side of the street, and

that, having unlawfully attempted to assess the entire cost thereof against said land, appellant was only legally chargeable with one-half of the assessment which the board attempted to make. Appellees refused to accept the tender made by appellant. Thereupon appellant paid into court said amount of \$971.48 for appellee's use, and prayed this action to quiet title to its land as against the assessment in question.

The controversy in this case grows out of the construction to be given to the amended seventy-fourth section of the Indianapolis charter. 2 Burns' Ann. St. 1901, § 3845; Acts 1897, pp. 80, 81, c. 55. The portion of the said section material to the consideration of the question before us is as follows: "If said board shall finally order such improvement, and shall advertise for bids and let the contract for the same, the cost of any street or alley improvement shall be estimated according to the whole length of the street or alley, or so much thereof to be improved as is uniform in the extent and kind of the proposed improvement per running foot, and the total cost thereof, exclusive of one-half the cost of street and alley intersections, shall be apportioned upon the lands or lots abutting thereon. The remaining one-half of the cost of street and alley intersections shall be apportioned upon the lands or lots abutting on the street or alley intersecting the street or alley under improvement, for a distance to the street line of the first street extending across the said intersecting street or alley in either direction from the street or alley improved: Provided, that in the case of intersections with diagonal streets or avenues the remaining one-half cost of each intersection shall be apportioned on the lots or lands abutting on each of the intersecting streets for a distance to the street line of the first street extending across each of said intersecting streets in each direction from the street improved. Should a street or alley enter into and not across the street or alley under improvement, then the assessment for the cost of one-half of said entering street or alley, measured to the center line of the street or alley under improvement, shall be made on the lots or lands abutting on said entering street or alley, for a distance to the street line of the first street extending across the said intersecting street or alley, and such last-named assessment shall be made, pro rata upon the lots or lands abutting on said street or alley: Provided however, that if it may be deemed necessary by the Board of Public Works to improve only a part, or one side of any street, or sidewalk, or other public place in such city, then one-half of the cost of such improvement shall be assessed against the lands or lots abutting upon and adjacent to such half or side of the street or alley so to be improved, as now provided by law: Provided, also, however, that when the Board of Public Works orders the improvement of any sidewalk, the cost of

the same shall be estimated according to its whole length, including the street and alley intersections, and shall be apportioned upon the lots or lands abutting thereon."

Appellant contends that this case is to be governed by the first proviso of the foregoing statute; appellees contend that the case is to be governed by the second proviso. The question is one of statutory construction. All parts of the statute must be construed together to ascertain its meaning. It need only be stated that municipal corporations have no inherent power to levy special assessments for street improvements. Such power exists only to the extent that it is expressly conferred by the Legislature. Statutes conferring upon municipal corporations the power to levy special assessments for street improvements are to be strictly construed against the municipality and in favor of the abutting property owners. The city of Indianapolis is given express statutory power to improve its streets at the expense of abutting property owners.

Appellant relies upon the literal meaning of the first proviso. It says: "That if it be deemed necessary by the Board of Public Works to improve only a part or one side of any street, sidewalk, or other public place in such city, then one-half of the cost of such improvement shall be assessed against and paid by said city and the remaining one-half of the cost thereof shall be assessed against the lands or lots abutting upon or adjacent to such half or side of the street or alley so to be improved, as now provided by law." Appellant insists that the improvement on the west side of Central avenue was the improvement of a part or one side of a sidewalk, within the meaning of the above provision. It is argued that a sidewalk improvement generally contemplates the construction of sidewalk upon both sides of the street, and where only one side is improved it is natural to refer to the improved portion as a part or one side of a sidewalk. The two provisos in controversy here became part of the seventy-fourth section of the city charter in 1897. Acts 1897, p. 80, c. 55. Previous to that time the section was substantially as it now stands, except that it did not contain the two provisos in question. Acts 1895, p. 884, c. 165. At that time the act provided generally: "That the cost of any street or alley improvement shall be estimated according to the whole length of the street and alley * * * and the total cost thereof, exclusive of one-half the cost of street intersections, shall be apportioned on the lands or lots abutting thereon." In other words, the statute at that time provided that the cost of any street improvement should be assessed against the land abutting upon the street improvement. *Kilen v. Nugent Gravel Co.* (Ind. App.) 66 N. E. 486; *Id.* (Ind. Sup.) 70 N. E. 801; *Indianapolis, etc., Co. v. Capital Co.*, 24 Ind. App. 114, 54 N. E. 1076; *Drake v. Grout*, 21 Ind. App. 534, 52 N. E. 775.

While the term "street" in ordinary legal signification includes all parts of the way—the roadway, the gutters, and the sidewalk—yet the term "sidewalk" has come to be generally used in this country for the purpose of designating a footway for passengers at the side of a street or road. *Elliott on Roads and Streets*, § 20; *Challiss v. Parker*, 11 Kan. 384. In that sense the Legislature is presumed to have used it.

The second proviso of the section relates only to, and provides for, the improvement of sidewalks. In enacting it the Legislature must have had a purpose. It radically differs from the first proviso as to the assessment of costs of the improvement. Unless it governs the improvement of sidewalks it is meaningless. The first makes provision "to improve only a part or one side of any street or sidewalk or other public place in such city." This does not mean one side of a sidewalk. If "part" qualifies sidewalk, it would not apply to the case at bar, because the sidewalk is complete and entire. We think it plain that "or sidewalk" is by inadvertence or mistake in the statute; otherwise, there appears contradictory and meaningless provisions in the same section. It is significant that the codification commission in reporting the section under consideration as section 108, Acts 1905, p. 288, c. 129, omitted, from said text "sidewalk." This omission was probably for the reason, in the opinion of the commissioners, that the word was without meaning in the connection in which it was used. The demurrer to the complaint was properly sustained.

Judgment affirmed.

(37 Ind. App. 796)

MARION TRUST CO. v. CITY OF INDIANAPOLIS et al. (No. 5411.)¹

(Appellate Court of Indiana, Division No. 2, Oct. 23, 1905.)

Appeal from Superior Court, Marion County; John L. McMaster, Judge.

Action by the Marion Trust Company, trustee against the city of Indianapolis and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Wilson & Townley, for appellant. A. B. Cole, for appellees.

COMSTOCK, J. The questions presented in this case are decided in *Marion Trust Company, Trustee, v. City of Indianapolis* (No. 5410), 75 N. E. 884, and upon the authority of that case the judgment is affirmed.

OLEVENGER v. MATTHEWS et al. (No. 5070.)²

(Appellate Court of Indiana, Division No. 2, Oct. 25, 1905.)

On petition for rehearing. Overruled. For former opinion, see 75 N. E. 23.

¹ Rehearing denied. Transfer to Supreme Court denied.

² Superseded by opinion, 75 N. E. 542.

ROBY, J. The correctness of the conclusion heretofore announced depends primarily upon the right of one holding a claim, which he is unable to file against the decedent's estate, to procure relief in an action independent of the statute. The right so to do under exceptional circumstances is established by the cases cited, to which may be added *Whitern v. Kirk*, 31 Ind. App. 577, 68 N. E. 694. It is not necessary at this time to restate the reasons upon which these decisions are based. They have not been overruled, and are therefore followed, as well as approved.

It remains to inquire whether the facts averred bring this particular case within the principle upon which these decisions depend. This depends on what meaning is ascribed to the word "impossible." It is defined in the *Standard Dictionary* as "impracticable in the nature of the case." The phrase "practically impossible" expresses only that meaning which would be ascribed to the word "impossible" standing alone, and does it with exactness and aptitude. This is illustrated by reference to the facts upon which some of the cases referred to were decided. The surety on a guardian's bond is not compelled to permit the estate of a deceased co-surety to be settled before liability upon such bond is determined. A timely application by him could never fail to result in keeping such administration from being closed until such liability has been expeditiously determined. The power to hasten the maturity of the claim is as absolute in such case as that of appellant could be; but the failure to take the initiative is not a bar to an action brought for contribution, because of a payment thereafter made. *Voris v. State*, 47 Ind. 345; *Stevens v. Tucker*, 87 Ind. 109. It may have been an accident and without design that Henderson did not ask payment from any one until the Matthews estate was settled and the statutory period for reopening it had elapsed; but a nearer approach to justice will be made in considering the evidence than in ruling upon a demurrer.

Appellees' counsel have supported the petition by an argument of signal ability; but the petition will be, and is, overruled.

(36 Ind. App. 467)

CAPITAL NAT. BANK v. WILKERSON.
(No. 4,994.)

(Appellate Court of Indiana, Division No. 2
Nov. 3, 1905.)

1. BANKRUPTCY—PREFERENCES—RECOVERY—LIABILITY OF CREDITOR.

Under the express provisions of Bankr. Act July 1, 1898, c. 541, § 60, subd. "b," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], no recovery of preferences can be had of a preferred creditor unless he had reasonable cause to believe that he was a participant in the bankrupt's unlawful act in attempting to prefer him.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 256, 257.]

* See 76 N. E. 258.

2. SAME—ACTIONS—DEMAND.

Bankr. Act July 1, 1898, c. 541, § 60, subd. "b," 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], provides that if a bankrupt shall have given a preference within four months, and the person receiving it or to be benefited thereby shall have reasonable cause to believe that it was intended thereby to give a preference, the trustee may recover the same. *Held* that, as a recoverable preference constituted an unlawful act on behalf of both the bankrupt and the creditor, no demand or notice was necessary to entitle the bankrupt's trustee to maintain an action for the recovery thereof.

3. SAME—INSOLVENCY—EVIDENCE.

Where a bankrupt's indebtedness at the time an alleged preferential payment was made was \$11,308.12, exclusive of a large sum which he owed to a bank, the exact amount of which was unknown, and his aggregate assets amounted to only \$1,481.73, such fact sufficiently showed that he was insolvent, within the meaning of the Bankrupt act, at the time the preferences were given.

4. SAME—LIABILITY OF CREDITOR—BELIEF AS TO PREFERENCE—EVIDENCE.

In a suit by a bankrupt's trustee to recover an alleged preference, evidence *held* to require a finding that the creditor had reasonable cause to believe at the time the payments were made that a preference was intended and was being obtained.

5. SAME—AMOUNT OF RECOVERY.

In an action by a bankrupt's trustee to recover an alleged preference, plaintiff, if entitled to recover, may recover interest from the commencement of the action.

Roby, J., dissenting.

On Rehearing.

For former opinion, see 72 N. E. 247. Affirmed.

WILEY, C. J. Appellee sued appellant to recover an alleged preference, under subdivision "b," § 60, of the national bankrupt law of July 1, 1898, 30 Stat. 562, c. 541 [U. S. Comp. St. 1901, p. 3445]. The complaint was in a single paragraph, to which an answer in denial was filed. Trial by the court, and finding and judgment for appellee. Appellant's motion for a new trial was overruled. The errors assigned are (1) that the complaint does not state facts sufficient to constitute a cause of action; and (2) that the court erred in overruling the motion for a new trial.

The only objection urged to the complaint is that it does not show a legal demand for the return of the unlawful preference. The complaint proceeds upon the theory that the demand was necessary, and that such demand was duly made. Counsel for appellant assert the proposition, also, that it is necessary in an action of this character to allege a demand by the trustee in bankruptcy against the creditor for the return of the property, or its value if return cannot be had, and a refusal on the part of the creditor; and until such demand and refusal the holding of the creditor is legal and valid. It will thus be observed that both parties to this appeal affirm that a demand is necessary. In this position it is our opinion they are in error.

This court, in the case of *Goldberg et al. v. Harlan, Trustee*, 33 Ind. App. 465, 67 N. E.

707, held that no demand was necessary before the commencement of an action by a trustee in bankruptcy to enforce his rights as such trustee to property unlawfully transferred by the bankrupt. The decision in that case was put upon the proposition that the whole transaction under the bankrupt act was unlawful, and in such case a demand is unnecessary. The Supreme Court has approved the rule there declared by overruling appellant's petition to transfer. Subdivision "b," § 60, of the Bankrupt Law of 1898 (Vol. I, Fed. Statute), is as follows: "If a bankrupt shall have given a preference within four months of the filing of the petition, or after the filing of the petition, or before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person." Under the bankrupt act of 1867, a preference to a creditor was declared to be void, while in the act of 1898 it is declared to be voidable. It seems to us that the word "void" in the act of 1867 must be held to be used in the sense of voidable and not void. A preference under the act of 1867 was good, not only between the parties, but as to all the world, unless judicial proceedings were brought by the assignee under that act to avoid it. If no suit was brought, the preference in the hands of the party preferred could not be assailed by the creditors of the bankrupt, or by any other person. Where a suit is brought by a creditors' bill against an alleged fraudulent grantee, no demand is necessary; and this is put upon the ground that such grantee is consciously attempting to defeat the legal rights of the creditors. As a general rule, a person who knowingly wrongs another is not entitled, in any sort of suit, to a previous demand to make restitution. Under the existing bankruptcy law, the trustee cannot maintain a suit against the party alleged to have received an undue preference unless it is made to appear that such person had reasonable cause to believe that it was intended thereby to give a preference. It will be seen, therefore, by the very words and spirit of the statute, that, before the action can be successfully maintained against a person alleged to have received an undue preference, it must be shown that he received it believing that he was a participant in an unlawful act, or, in other words, that he was receiving the property or other thing of value in violation of the statute, and therefore, as to other creditors, was a wrongdoer. We cannot perceive of any reason why a man or a corporation who is a participant in an attempted violation of the law, having reason to believe that he was guilty of such participation, should be entitled to notice before suit was brought against him. Under the express provision of the

statute, unless he has reasonable cause to believe that he was such participant in an attempted unlawful act, the action could not be maintained against him; and why should a party who has reasonable cause to believe that he is a wrongdoer have notice before suit is brought?

It should be observed that the remedy which appellee seeks here to enforce is to recover a preference which is purely of statutory creation. The trustee in such case must bring himself within the provisions of the law which defines what shall constitute a preference, and creates the right in him to recover it. Subdivision "a," § 60, of the act defines what a preference shall be, to wit: "A person shall have been deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class." Subdivision "b," § 60, provides the constituent elements necessary to enable the trustee to recover the preference. These constituent elements are to be construed with subdivision "a," supra, and are: (1) The debtor must have been insolvent at the time. (2) He must have procured or suffered a judgment or made a transfer. (3) The result of either of which must be to give one creditor a greater percentage of his claim than others. (4) Such creditor must have had reasonable cause to believe this result was intended. (5) It must have been within four months before the filing of the petition, or between the filing and adjudication. *Brandenburg on Bankruptcy* (2d Ed.) p. 563. While the statute does not declare in words that a preference under the conditions named therein is unlawful, yet, in effect, that is what is meant by the statute. The question is simply this: In receiving a preference under the conditions named in the statute, is a creditor in the wrong? To hold, under the provision cited, that a trustee should make a demand before filing his suit to recover would require reading into the statute a provision which the Congress did not see fit to put therein, either by express provision or necessary implication, and would, in fact, be a violation of the terms of the statute, which confers upon the trustee the right to recover upon the simple terms therein declared. We therefore hold that it was not necessary for the trustee to allege in his complaint a demand before the bringing of his action. This being true, the objection urged to the complaint is not well grounded.

This brings us to the consideration of the questions presented by the overruling of appellant's motion for a new trial. Counsel contend that the decision of the trial court is contrary to law and not sustained by suffi-

cient evidence. The two propositions may properly be considered together, as they rest upon the evidence.

In the bankruptcy act of 1898, Congress defines insolvency as follows: "The person shall be deemed insolvent, within the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed, or permitted to be concealed or removed with intent to defraud, hinder or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts." Bankr. Act July 1, 1898, c. 541, § 1 (15), 30 Stat. 544 [U. S. Comp. St. 1901, p. 8419].

It is earnestly contended by counsel for appellant that upon the question of demand the evidence was wholly insufficient. It is useless for us to dwell upon this branch of the case longer, in view of the fact that we have held that no demand was necessary.

The evidence fairly establishes the fact that, when the two payments were made to appellant, exclusive of them the bankrupt's property was of the aggregate value of \$1,431.73, and that his indebtedness was \$11,308.12, exclusive of a large sum which he owed to the American Trust & Savings Bank, the exact amount of which was unknown. It is true that the examination made by appellee as to the assets and liabilities of the bankrupt was made on August 5th, being 10 and 13 days, respectively, after the two payments to appellant. Yet it is shown that the only change in his financial condition between those dates was the transfer of the furniture and fixtures of his bank to appellant. The value of these was fixed at \$1,000, and included in the schedule of assets, shown to aggregate \$1,431.73. The evidence fully establishes the insolvency of the debtor, within the meaning of the statute, at the time of the payments to appellant.

Before a recovery can be had in a cause of this character, it is incumbent upon the trustee to prove that the party to whom payment is made had reasonable cause to believe that a preference was being obtained. *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Stucky v. Bank*, 108 U. S. 74, 27 L. Ed. 640; *Browning, Assignee, v. Hurdle* (C. C.) 18 Fed. 164; *Otis v. Hadley*, 112 Mass. 100; *Brown v. Gichard*, 7 Am. Bankr. R. 515, 74 N. Y. Supp. 735; *In re Eggert* (D. C.) 98 Fed. 843. Upon this proposition counsel for appellant earnestly insist and ably argue that the evidence fails to establish the fact that appellant had reasonable cause to believe that it was obtaining a preference. It is not necessary for the trustee to prove that the creditor had actual knowledge, but both the spirit and letter of the statute are satisfied if the evidence is sufficient to show that he had reasonable cause to believe that the debtor was insolvent, and that he was thus obtaining a preference. *Coburn v. Proctor*, 15 Gray 38; *Wager v. Hall*, 16 Wall. 584,

21 L. Ed. 504. The rule is that, if the facts and circumstances with respect to the debtor's financial condition are brought home to the creditor, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. *In re Eggert*, 102 Fed. 735, 43 O. C. A. 1; *Boudinot v. Hamann*, 117 Iowa, 22, 90 N. W. 497; *Brandenburg on Bankruptcy*, vol. 1, p. 567; *National Exchange Bank v. Pepperdine*, 2 Nat. Bankr. N. 676; *Buchanan v. Smith*, 16 Wall. 277, 21 L. Ed. 280; *Wager v. Hall*, 16 Wall. 584, 21 L. Ed. 504; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Bank v. Cook*, 95 U. S. 343, 24 L. Ed. 412. It is not necessary to prove that the debtor intended a preference. *Benedict v. Deshel et al.* (N. Y.) 68 N. E. 999; *Pirie v. Chicago Title & Fund Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171.

The principal argument of appellant's counsel is addressed to the proposition that the evidence does not establish the fact that appellant had reasonable cause to believe that it was obtaining a preference when the two payments were made to it. On the contrary, they urge there is a total failure of proof upon that question. It clearly appears from the evidence that James M. Key was engaged in the banking business in Andrews under the name and style of the Commercial Bank of Andrews; that appellant was his correspondent in Indianapolis; that he carried an account with it; and that on October 9, 1900, his account was overdrawn \$350.84. At that time appellant carried on its books a large number of correspondents, banks and bankers, and only two of which, besides Key's bank, had overdrawn their accounts. The overdrafts on these two banks were only for a period of about 30 days, while Key's overdraft at the time of his payments to appellant had existed for about 9½ months. Key's overdrafts varied from October 9, 1900, to the date of the last payment to appellant, and on July 25, 1901, it amounted to \$2,725.78. During this period he would occasionally execute a note to appellant in payment of his overdraft, and, if such note exceeded the overdraft, appellant would give him credit upon its books for the balance. His account on appellant's books on July 25, 1901, stood as follows: Overdraft, \$2,725.78; amounts due upon notes, \$3,000. This made his indebtedness to the bank on that day \$5,725.78. To cover this indebtedness collateral notes had been turned over by Key to appellant, aggregating \$7,800. On the day the \$500 payment in controversy was made, Key also turned over to appellant an additional collateral note for \$300. The evidence shows that all the notes turned over to appellant as collateral, except the last \$300 note mentioned, were forgeries; but appellant had no actual knowledge of that fact. Of the \$7,800 of collateral notes, there were two of \$2,500 each, executed

by one Nichols, and appellant did not rely upon them as being good, for Mr. Packard, its representative, testified: "We never regarded that as of any particular value. We never took that into account." Appellant knew that the collateral notes held by it, purporting to have been signed by S. J. & John Leedy, H. C. Morgan, Pinkerton & Kelsey, Needham & Cale, and L. T. Mills, aggregating a large amount, were past due from three to eight months, and hence knew they were dishonored paper. Appellant had made no effort to collect them. On July 26th, while Key's account was overdrawn in the sum of \$2,725.78, and while appellant held the collateral notes above indicated, it sent its representative, Mr. Packard, to Andrews, where Key lived and conducted his banking business, to see him. When asked why he went to Andrews, Mr. Packard said it was to see Key; that he had never seen him; that he thought he would go and spend a part of the day with him at his place of business. Packard further testified that Key was at that time indebted to appellant upon three notes in the sum of \$3,000, and had an overdraft against him of about \$2,300. He spoke to Key about the overdraft, and told him he had better give him exchange to "square it up," as it did not look well upon the books. That thereupon Key gave him exchange for \$500 in the American Trust Company of Chicago, and promised to send him \$1,000 the next day, which he did. On September 3d Packard again went to Andrews, representing appellant, and took an assignment to it of all of Key's bank furniture, and after such assignment was made he stated, in answer to a question as to whether he had any suspicion that Key was insolvent, "No; I had arrived at no condition of mind of that kind positively." Key testified that about July 21, 1901, he told Packard that he could not meet his overdrafts; that he would have to have an extension of time, and that, if the bank refused to extend him further credit, it would cause his failure. He further testified that when he gave Packard the exchange for \$500, and agreed to send him \$1,000 the next day, Packard agreed that upon the receipt of the \$1,000 he would return him \$500 in currency, which he afterward refused to do. Key had at that time other business interests at Avilla and Cromwell, and testified that he told Packard that his partner had made some bad investments, and, in order to prevent failures there, he had been compelled to assist him. Key advised appellant at different times that he had loaned too much money for his deposits, and he was sending notes to it for discount. In the trial of a cause in the Wabash circuit court, in an action brought by appellant upon the Leedy note, Packard testified that, when he got the \$500 draft of Key on July 26th, he was afraid that it might not be paid, but that "it went through all right."

We have set out the substance of the facts

pertinent to the issue as to whether appellant had reasonable ground to believe that it was obtaining a preference in the two payments made to it by Key. The knowledge of Packard, who represented appellant in these transactions with Key, was its knowledge. As to some of the facts, also, they were communicated directly to the president of the bank. Hence appellant was chargeable with knowledge of the fact that Key was indebted to it upon overdrafts and upon notes in a sum aggregating \$5,725.78. It knew, also, that it held collaterals aggregating something over \$7,000, of which amount it knew \$5,000 was worthless; or, to state it in the language of Mr. Packard himself: "We never regarded that as of any particular value. We never took that into account." To secure payments on these overdrafts, etc., appellant sent its representative to Key's place of business upon different occasions, and when he got the draft for \$500 he was so unfavorably impressed with the financial condition of Key, he was afraid it would not be paid. Following soon upon the two payments, Packard went to Andrews, and took an assignment of all of Key's bank furniture, and aside from this the balance of Key's assets were less than \$500. If appellant in good faith had in its possession over \$7,000 of collaterals to secure an indebtedness of something over \$5,000, in view of the fact that it made repeated attempts to secure payments in cash or exchange to apply on the indebtedness, and possessing, as it did, the knowledge that Key had "overloaned," and was pressed for ready money, and being confronted with the damaging statement that, if appellant would not extend him further credit, he would fail, we would have to declare that courts and juries cannot make reasonable deductions and inferences from established facts, so as to arrive at a correct conclusion as to issuable facts. These facts, in our judgment, are sufficient to put appellant upon inquiry. The fact was brought to appellant's knowledge that Key was in financial straits, and it knew it was receiving payments from him when he was in that condition. While this fact, of itself, may not have been sufficient to charge it with knowledge that it had reasonable ground to believe it was obtaining a preference, it was a fact which the trial court was authorized to consider.

With all the facts to which we have adverted before us, we do not see how the trial court could have reached a different conclusion than it did. The test, as defined by the statute, is not what the creditor believed, but as to whether it had reasonable cause to believe that it was obtaining a preference. The facts recited demonstrate the wisdom of the rule declared by the act of Congress. From a careful consideration of the evidence upon the question as to whether appellant had reasonable ground to believe that it was obtaining a preference, our conclusion is that

the record contains ample evidence upon which the trial court could reasonably find, and must have found, that fact to exist.

Counsel for appellant put much stress upon the fact that, when the two payments were made to it, it held collateral notes largely in excess of the amount due from Key to it. They say: "We are utterly unable to understand how a creditor who has security, apparently valid, for 50 per cent. more than his debt, could believe that, by getting a payment from his debtor of 30 per cent. of the debt, he was getting a preference." We cannot see how appellant is entitled to any relief upon the ground of its having held collaterals largely exceeding in amount the indebtedness which Key owed to it. Counsel have not cited us to any authority which throws any light upon this proposition, but our search has led us to two cases which are squarely against them in this contention, to wit: *Bartholow v. Bean*, 18 Wall. 635, 21 L. Ed. 866, and *Harris v. Bank (Tenn.)* 75 S. W. 1053. In the first case just cited, Mr. Justice Miller, delivering the opinion of the court, said: "Does the fact that Wilcox, the indorser, was solvent and was liable change the rule as to payment as a preference? The statute in express terms forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is therefore very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee. If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him; or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered; or if the money or other property had been placed in his hands to meet the note or to secure him, instead of paying it to the bankers, he would have been liable. He would not, therefore, have been placed in any worse position than he already occupied if the holders of the note had refused to receive the money of the bankrupt. It is very obvious that the statute intended, in pursuit of its policy of equal distribution, to exclude both the holder of the note and the surety or indorser from the right to receive payment from the insolvent bankrupt. It is forbidden. It is called a fraud upon the statute in one place, and an evasion of it in another. It is made by the statute equally the duty of the holder of the note and of the indorser to refuse to receive such a payment. Under these circumstances, whatever might have been the

right of the indorser, in the absence of the bankrupt law, to set up a tender by the debtor and a refusal of the note holder to receive payment as a defense to a suit against him as indorser, no court of law or equity could sustain such a defense while that law furnishes the paramount rule of conduct for all the parties to the transaction, and when in obeying the mandates of that law the indorser is placed in no worse position than he was before, while by receiving the money the holder of the note makes himself liable to a judgment for the amount in favor of the bankrupt's assignee, and loses his right to recover either of the indorser or of the bankrupt's estate. We are of opinion, therefore, notwithstanding the hardship of the case, which is more apparent than real, that the payment must be held to be a preference within the bankrupt law, and that the judgment of the court below that the assignee should recover it must be affirmed." In the Tennessee case the facts exhibited show that one Rosa B. Prewitt conducted a mercantile business under the firm name of J. J. Prewitt & Co., and that she transacted her banking business with the appellee, and became indebted to it by note in the sum of \$3,500, upon which there were three securities. Mrs. Prewitt was allowed by the bank to overcheck her account to the amount of \$500, and at the date of these transactions she was indebted to the bank, over and above the note, for \$3,500 upon an overcheck of \$800, and also upon a note for \$795, indorsed by one of the securities on the former note. During the summer of 1900, a payment of \$1,000 was made on the \$3,500 note. In July or August of the same year, she made application to the bank to increase her line of overcheck to \$800, which was granted, but very soon thereafter this concession was withdrawn, and again limited to the overcheck of \$500. At this time it was shown that Mrs. Prewitt was largely indebted, and, being pressed by creditors, was anxious to obtain an additional line of overcheck. But this was declined. Soon thereafter, upon consultation with the cashier of the bank, she sold her entire stock of merchandise, which comprised all of her assets, to one McKinney for the sum of \$3,100, and this amount she turned over to the bank in payment of her overcheck of \$600 and the balance due on the \$3,500 note. A few days thereafter her creditors forced her into involuntary bankruptcy, and she was duly adjudged a bankrupt. The trustee appointed under the proceedings instituted an action to recover from the bank the \$3,100 paid to it as an unlawful preference. It was shown that the securities on the \$3,500 note were solvent, and, following the case of *Bartholow v. Bean*, supra, it was held that the payment to the bank, under the facts exhibited, constituted an unlawful preference.

We can see no difference in principle between a creditor who holds collaterals to

secure the payment of his debtor's debt and a creditor whose debt is secured by the indorsement of solvent sureties. In either event, it amounts simply to a security. If the principal upon the secured note pays the debt, the sureties are released, and, if the debtor whose obligation is secured by collateral pays his debt, the collaterals are released, and must be surrendered to the pledgor. Contract of a surety upon a promissory note is a direct undertaking, and he is primarily liable. A creditor who holds collaterals to secure the debt of his debtor has only a special interest in such collaterals, while the legal title remains in the debtor. 22 Am. & Eng. Ency. of Law (2d Ed.) 864, and authorities there cited. If the latter fails to pay his debt, the pledgee has two remedies: (1) He may proceed personally against the debtor, or (2) he may convert the collaterals into cash, apply the proceeds to the satisfaction of his debt, and account to the pledgor for the residue. 22 Am. & Eng. Ency. of Law (2d Ed.) pp. 897-904, and authorities there cited. It follows, therefore, that the payment made by an insolvent debtor to his creditor, who holds collaterals as security for the debt, is as much an unlawful preference, within the meaning of the bankrupt law, as it is where such payment is made under like circumstances upon the note of the insolvent debtor which is secured by solvent indorsers.

That case is also very strongly in point on the proposition as to whether or not the bank had reasonable cause to believe that Mrs. Prewitt was insolvent, and that it was obtaining a preference. The court said: "It is insisted on behalf of the bank that there is no evidence in the record showing that the bank or any of its officers knew, or had reasonable cause to believe, that Prewitt & Co. were insolvent at the time the note and overcheck were made. We are constrained to believe from the proof that the cashier at the time he received the payment was aware of the insolvency of this debtor, and that the money received from the sale of the stock of merchandise constituted the entire assets belonging to the bankrupt. The record shows that the cashier had been consulted by Prewitt with reference to obtaining an extension of time from the creditors of Prewitt & Co. living in St. Louis and Louisville. The cashier was also aware that Mrs. Prewitt had asked an extension of time and additional line of overcheck with the Second National Bank, which the bank, on instruction of the finance committee, had declined to grant. The proof also shows that after Mrs. Prewitt had failed to get an additional line of credit from the bank, she offered to sell the stock of goods to the bank, but that it declined to buy; and the cashier admits that, when the bank declined to make a further ad-

vance, he said to Mr. Prewitt: 'I believe it would be best to make a general assignment, and get matters settled up.' " The facts exhibited in that case, as just disclosed, are certainly no stronger than those in the case at bar, which brought knowledge to appellant, through its authorized representative, Mr. Packard, of the financial condition of Key; and yet the court in that case upon those facts said: "Surely, in view of these facts, the bank had, in the language of the bankrupt act, reasonable cause to believe a preference was intended." In the case of *Bank v. Cook*, supra, it was held that knowledge of such facts is not necessary, nor even belief, but simply a reasonable cause to believe. We must therefore hold that the evidence disclosed by the record, and upon which the trial court passed, is of such a character as to warrant the conclusion reached, and we cannot disturb the finding on that ground without constituting ourselves triers of facts.

Appellant also predicates error upon the admission of certain evidence, upon overruling its motion to strike out certain evidence, and in rejecting evidence offered by it. Appellee was permitted to testify as to the aggregate indebtedness of the bankrupt, and the evidence was objected to, on the ground that it related to his indebtedness at a subsequent time. The evidence of appellee upon this point was so closely connected with the time of the payments to appellant that it was competent as tending to prove insolvency. The investigations of the appellee, as trustee, upon which his evidence was based, were made within a few days after such payments, and, as above shown, no substantial change had taken place as to the debtor's financial condition. *Tenn., etc., Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215. It was competent for the additional reason that it tended to show that other creditors of the same class would not receive a percentage of their claims equal to that received by appellant.

Mr. A. M. Packard was called as a witness on behalf of appellant. Upon his examination in chief, he was asked a question to which an objection was made and sustained. No offer to prove the fact or facts which the question elicited was made. In such case, to save any question, the party producing the witness must state what he proposed to prove by him in answer to the question. *Elliott, App. Procedure*, § 743. The rule as stated has been enforced in a vast number of cases. We refer to note 1, p. 698, *Elliott, App. Proc.*, where the authorities are collected and cited. For the same reason there was no error in sustaining an objection to a question asked of M. B. Wilson, a witness for appellant, in his examination in chief.

One of the grounds assigned by appellant

for a new trial was that the amount of the recovery was erroneous, being too large. The complaint avers that the bankrupt, being insolvent, made two payments to appellant upon a pre-existing indebtedness, aggregating \$1,513.17. The judgment was rendered for \$1,623.95, the excess over \$1,513.17 being for interest. Appellant was entitled to recover interest, and the interest from the date of the commencement of the action would amount, at 6 per cent., to \$110.78. This added to the principal makes the judgment mathematically correct.

We have considered every question discussed by counsel, and have reached the conclusion that the trial court arrived at the correct result.

Judgment affirmed.

COMSTOCK, BLACK, MYERS, and ROB-INSON, JJ., concur.

ROBY, J. (dissenting). It was held by this court in *Goldberg v. Harlan*, 33 Ind. App. 465, 67 N. E. 707, that no demand was necessary before action by a trustee in bankruptcy to recover an unlawful preference. That decision is controlling here. In determining the quality of appellant's action, both the jury and this court are limited to a consideration of the facts known by it or with knowledge of which it was chargeable at the time of the transaction. These facts were that Key had overdrawn his account with appellant \$5,725.78, and had deposited collateral notes to the amount of \$7,800 to secure such overdraft; that some of said notes were overdue when the pay-

ment in question was made; that no steps had been taken to collect them; that appellant's officer, testifying with reference to a portion of them, said "that we never regarded them as of any particular value" and that under this state of affairs it accepted certain payments from Key. It is stated in the main opinion that all the notes held as collateral except one were forgeries, and that appellant knew that \$5,000 thereof were worthless. I do not believe that appellant knowingly loaned money upon forged collaterals, and I do not find any evidence justifying the statement that it knew \$5,000 of such collaterals were worthless.

The case is reduced to the single proposition, which may be illustrated as follows: One holding \$7 of collateral notes as security for payment of \$5 due obtains an unlawful preference by accepting payment of \$5 although he thus releases and renders available to other creditors \$7 worth of assets. It is stated in the main opinion: "It follows therefore, that the payment made by an insolvent debtor to his creditor, who holds collaterals as security for the debt, is as much an unlawful preference, within the meaning of the bankrupt law, as it is where such payment is made under like circumstances upon the note of the insolvent debtor which is secured by solvent indorsers." Unfortunately the cases cited in support of this conclusion do not sustain it.

The verdict cannot be sustained, except by the legal proposition thus stated in the main opinion; and, it being erroneous, the cause should be reversed.

68 Ind. App. 184)

MCCASLIN et al. v. STATE. (No. 5,440)*
(Appellate Court of Indiana, Division No. 1,
Oct. 31, 1905.)

1. APPEAL—WAIVER OF ERRORS.

Errors not discussed on appeal are waived.
[Ed. Note.—For cases in point, see vol. 3,
Cent. Dig. Appeal and Error, §§ 4256-4261.]

2. LIMITATION OF ACTIONS—ACTION AGAINST STATE—PLEADING.

A complaint filed in 1903, which alleges that the plaintiff has for the last 38 years or more been in the open and exclusive possession of real estate, does not show, by reason of the 20-year limitation statute, a bar as against the state; for Rev. St. 1852, § 224, making limitation of actions applicable to the state, only remained in force until 1881, since which time the common-law rule exempting the state has prevailed.

3. ADVERSE POSSESSION—PLEADING.

A complaint which alleges that plaintiff entered into the open, notorious, and exclusive possession of real estate in 1860 is insufficient to show, by reason of the 20-year limitation statute, a bar as against the state, because it fails to state that the possession was continuous for 20 years, while Rev. St. 1852, § 224, remained in force.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, § 641.]

4. TRIAL—VERDICT—MOTION FOR VENIRE DE NOVO.

A motion for a venire de novo, in order to be effective, must be made before final judgment.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 804.]

5. STATES—ACTIONS—STATE LANDS—RECOVERY OF STATE LANDS.

Burns' Ann. St. 1901, § 7164, making it the duty of the Auditor of State to direct the sheriff to take possession of state lands unlawfully held by any person, when construed with the whole of Acts 1883, p. 170, c. 124, of which it is a part, which provides for the sale of lands belonging to the state, prescribing the duties of the state and county auditors and the manner of putting the purchaser in possession, does not prohibit the state from recovering land belonging to it by action for possession and for quieting title thereto.

6. NEW TRIAL—DEFECTIVE VERDICT.

A motion for a new trial does not reach a defective verdict.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 121.]

Appeal from Circuit Court, Boone County;
Samuel R. Artman, Judge.

Action by the state against William McCaslin and another. From a judgment for plaintiff, defendants appeal. Affirmed.

P. W. Bartholomew, for appellants. C. W. Miller, Atty. Gen., C. C. Hadley, L. G. Rothschild, and W. O. Geake, for the State.

MYERS, P. J. Appellee began this action against appellants in the Marion superior court by filing a complaint in three paragraphs. Thereafter the venue was changed to the Boone circuit court, where the case was tried before a jury, verdict returned, and judgment rendered in favor of appellee. The first and second paragraphs of complaint are in the ordinary form; the first demanding

possession of, and the second that appellee's title be quieted to, 100 acres of land in Marion county, Ind. The third paragraph is to quiet title, and avers the facts in detail upon which judgment is sought. A great number of pleadings were filed in the case, but we shall only notice those upon which a question is presented for our consideration.

1. It has been held a number of times by the Supreme and this court that only such questions as are discussed by the parties asserting error on appeal will be considered. All other questions will be deemed to have been waived. *Hoover v. State*, 161 Ind. 350, 68 N. E. 591; *Smith v. Borden*, 160 Ind. 223, 66 N. E. 681; *Clear Creek Coal Co. v. Dearmin*, 160 Ind. 162, 66 N. E. 609; *Franklin v. Lee*, 30 Ind. App. 31, 62 N. E. 78; *City of Greenfield v. Johnson*, 30 Ind. App. 127, 63 N. E. 542.

2. Appellant William McCaslin insists that the court erred in sustaining appellee's demurrer to the second and third paragraphs of his cross-complaint. Omitting the formal parts of this paragraph, William McCaslin avers "that he has been the owner, in open, notorious, unequivocal, continuous, and exclusive possession of the real estate described as follows, to wit: [describes the real estate by metes and bounds] containing 100 acres, for the last thirty-eight years or more, and that the plaintiff in this cause is claiming some interest therein, and this cross-complainant prays that his title in and to said above-described real estate be quieted, and for any and all proper relief herein." The material allegations of the third paragraph are as follows: That "William McCaslin states that on or about 1860 he entered into the open, notorious, unequivocal, and exclusive possession of the following described real estate, to wit: [describing the lands by metes and bounds] containing 100 acres, and as such owner his title is under a cloud, for the reason that the plaintiff herein claims to own the same as against this defendant, and he prays that his title to the same be quieted, and for all proper relief in the premises." It is apparent that in both of these paragraphs William McCaslin bases his title and right to the real estate as against appellee upon the doctrine of title by prescription or adverse possession. Section 224, Rev. St. 1852, pt. 28, c. 1, provides that limitation of actions applies to the state as well as other persons. This limitation continued in force until September 19, 1881, and since that time the common-law rule has prevailed, except as to sureties. Section 305, Burns' Ann. St. 1901; *State v. Halter*, 149 Ind. 292, 47 N. E. 665.

While appellant William McCaslin avers in the second paragraph of his cross-complaint that he had the continuous possession of said real estate for 38 years, it does not appear that he had such possession for 20 years prior to September 19, 1881, and, if

the rights of the state were not barred at that time, whatever rights it had then continued unaffected by appellants' possession. This paragraph was filed April 23, 1903, and under its averments we think it insufficient to show a bar, as against the rights of the state, by reason of the 20-year limitation statute. By the averments in paragraph 3, it appears that on or about the year 1860 he took exclusive possession of said real estate, but for what time, or how long he continued in such possession, does not appear. In *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779, it is said that, in order to constitute adverse possession, five indispensable elements must appear: "(1) It must be hostile, and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; (5) it must be continuous." In support of this rule the court cites numerous authorities. In *Peterson v. McCullough*, 50 Ind. 35, the court said: "To acquire a right by prescription, there must be an actual enjoyment. Prescription acquires for the party precisely what he has possessed, and nothing more, and in proving a prescription the user of the right is the only evidence of the extent to which it has been acquired. The use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the estate, in, over, or out of which the easement prescribed for is claimed, and while such owner was able in law to assert and enforce his rights, and to resist such adverse claim if not well founded."

Applying the cases from which we have just quoted to the facts as they appear from the allegations of the second and third paragraphs of William McCaslin's cross-complaint, we are of the opinion that neither of these paragraphs are sufficient to withstand a demurrer for want of facts, and therefore we find no error in the ruling of the trial court.

3. Appellants contend that their motion for a *venire de novo* should have been sustained. Upon an examination of the record, we find that on the 10th day of May, 1904, this cause was regularly submitted to a jury for trial, and on the same day the following verdict was returned: "We, the jury, find for the plaintiff." On May 11, 1904, final judgment on the verdict in favor of appellee was rendered. On May 18th appellants filed a motion for a *venire de novo*, which was by the court overruled. There was no error in this ruling. As has been held a number of times by the Supreme Court of this state and by this court as well, a motion for a *venire de novo*, to be effective, must be made before final judgment, and, when not so made, no question is presented. *Bennett v. Simon*, 152 Ind. 490, 53 N. E. 649; *Potter v. McCormack*, 127 Ind. 489, 26 N. E. 883; *Shaw*

v. Merchants' National Bank, 60 Ind. 83; *Cannon v. Castleman*, 24 Ind. App. 188, 55 N. E. 111; *Sloan v. Lick Creek, etc., Co.*, 6 Ind. App. 584, 33 N. E. 997.

4. Upon completion of the issues in this cause, and before the same were submitted to the jury for trial, appellants filed their joint motion for judgment upon the pleadings which motion was by the court overruled, and this ruling is here assigned as error. In support of this motion, appellants contend that section 7164, Burns' Ann. St. 1901, provides the remedy the state shall pursue to secure possession of any of its lands unlawfully held or in the possession of any one, and controls and governs the state in its procedure in this case. This section of the statute must be construed in connection with the whole act of which it is a part. This statute was enacted by the General Assembly in 1883 (Acts 1883, p. 170, c. 124), and provides for the sale and conveyance of certain lands belonging to the state, prescribing the duties of the Auditor of State and county auditors in that regard, and the manner of putting the purchaser of such land in possession of the same. This statute has reference to possession of the state's lands, and is not applicable where the question of title is involved.

It cannot be said that the General Assembly, by summary proceedings, as provided by section 7164, supra, intended that any of its citizens, in the possession of property or lands to which he has title, shall be thus summarily ejected without due process of law, and yet such would be the effect if appellants' contention should prevail. The authority of the Auditor of State over the state's lands and to deal therewith is purely statutory, and the statute must be strictly followed. He is given no authority to adjudicate the question of title as between the state and one of its citizens. Such rights are to be settled by the judicial department, and for this purpose the courts of the state are open alike to the state and its citizens.

5. Appellants' motion for a new trial was overruled by the trial court, and this ruling is assigned as error. The evidence and instructions given the jury are not in the record, and the only causes for a new trial here insisted upon are: (1) That the verdict of the jury is defective, in that it does not cover the issues in the case. (2) Because the jury was discharged by the court without having returned a verdict upon which judgment could be rendered. It does not appear from the record that any motion was made or any steps taken in the court below to correct or modify the judgment, or that any objection was made or reason assigned why the court should not render judgment on the verdict until after its rendition, and then only by a motion *venire de novo*. The rule is well established in this state that a motion for a new trial does not reach a defective verdict. *Bohr v. Neuenschwander*,

120 Ind. 449, 22 N. E. 416, and cases cited. In *Cottrel v. Shadley*, 77 Ind. 348, the court said: "Where a verdict is imperfect by finding less than the whole matter in issue, the proper remedy is a *venire de novo*." Under the authorities last cited, we are of the opinion that the court did not err in overruling appellants' motion for a new trial.

Finding no error in the record, the judgment of the trial court is affirmed.

(36 Ind. App. 373)

STATE ex rel. RICHESON v. RICHESON.
(No. 5,626.)

(Appellate Court of Indiana, Division No. 2.
Oct. 23, 1905.)

1. NEW TRIAL—GROUNDS—STATUTORY ENUMERATION.

The causes for which a new trial may be granted are specifically defined by Burns' Ann. St. 1901, § 568, and the aggrieved party, to be entitled to the remedy, must bring himself within the provisions of the statute.

2. SAME—ASSIGNMENT OF REASONS—VERDICT AGAINST EVIDENCE.

Under Burns' Ann. St. 1901, § 568, subd. 6, authorizing a new trial on the ground that the verdict or decision is not sustained by sufficient evidence or is contrary to law, an assignment that "the decision of the court is contrary to the evidence" presents no question for review.

3. SAME—DECISION AGAINST LAW.

An assignment that the "decision of the court is contrary to law" presents a statutory ground for a new trial, and a clause appended thereto, reading, "in this, that the amount of recovery is too small," may be regarded as surplusage.

4. SAME—QUESTIONS RAISED.

An assignment that the "decision of the court is contrary to law" does not raise the question of amount of recovery.

5. SAME—APPLICABILITY OF STATUTES.

Burns' Ann. St. 1901, § 568, subd. 5, authorizing a new trial on account of error in the assessment of the amount of recovery, when the action is on contract or for injury to or detention of property, has no application to an action under Burns' Ann. St. 1901, § 7298a, to recover a penalty for a fraudulent marriage.

6. SAME—ASSIGNMENTS NOT PROVIDED BY STATUTE.

Assignments as grounds for new trial that the "decision of the court in fixing the amount of damages is too small," and that "the court abused its discretion in its decision in this, to wit, in making the amount of recovery assessed too small," must be disregarded, as not within Burns' Ann. St. 1901, § 568, specifying the reasons for which a new trial may be granted.

7. HUSBAND AND WIFE—ABANDONMENT—ACTIONS FOR PENALTY.

Burns' Ann. St. 1901, § 7298a, prescribes a penalty for fraudulent marriages contracted to avoid seduction or bastardy proceedings, where the man contracting the marriage abandons or fails to provide for his wife. Section 7298b provides that the action for the penalty shall be instituted in the name of the state, on the relation of the wife. Section 7298d provides that the action "shall be governed by the laws now in force governing prosecutions for bastardy." Section 1004 authorizes the court in bastardy proceedings to fix the amount to be paid by defendant and to prescribe the terms of payment. *Held* that, in actions to recover the penalty prescribed for a fraudulent mar-

riage, it is within the sole province of the trial court to fix the amount of the penalty, although the trial is had by a jury.

8. NEW TRIAL—GROUNDS—MATTERS SUBSEQUENT TO TRIAL—ASSESSMENT OF PENALTY.

The action of the court fixing the amount of recovery, under Burns' Ann. St. 1901, § 7298a, prescribing a penalty for fraudulent marriage and abandonment of wife, is not a matter occurring at the trial, but a part of the judgment; and the question as to the amount of the penalty assessed cannot be raised or presented for review by a motion for new trial.

9. APPEAL—REVERSAL—DIRECTING JUDGMENT IN LOWER COURT.

Where the court finds for plaintiff in one sum, but enters judgment for a smaller sum, the judgment will be reversed, with directions to enter judgment in conformity to the finding.

Appeal from Circuit Court, Greene County; Orion B. Harris, Judge.

Action by the state, on the relation of Frances E. Richeson, against Logan Richeson. From the judgment rendered, plaintiff appeals. Reversed.

J. W. Lindley, Pros. Atty., and Slinkard & Slinkard, for appellant. W. L. Cavins and C. E. Henderson, for appellee.

WILEY, C. J. This cause was advanced. This was an action to recover the penalty provided for a fraudulent marriage under the act of 1895. Acts 1895, p. 167, c. 78; section 7298a, Burns' Ann. St. 1901. This section reads as follows: "That any male person, who being at the time under or liable to a prosecution, either civil or criminal, for seduction or bastardy, fraudulently enters into a marriage with the female who has been seduced, or who is the mother of the bastard child, with the intention thereby to escape or avoid such prosecution or the consequences thereof, and who within two years after such marriage, without just cause, shall abandon his wife, or who shall within said time, cruelly and inhumanly treat such wife, or fail and neglect to make reasonable provision for her support, shall be liable for an action for the recovery of a penalty, which shall in no case be less than \$200." Section 2 of that act, being section 7298b, Burns' Ann. St. 1901, provides that such action shall be instituted in the name of the state, on the relation of the wife. By section 4 of the act, being section 7298d, Burns' Ann. St. 1901, it is provided that the action may be commenced either before a justice of the peace or in the circuit court, and that the practice in such cases as to the execution of the bond, commitment upon failure to give bond, trial, judgment, etc., "and as to all other matters, shall be governed by the laws now in force governing prosecutions for bastardy." Prior to the enactment of the statute under consideration, as now, if a putative father of an illegitimate child should marry its mother, it absolved him from liability in a prosecution for bastardy. If after such marriage he abandoned her, there was no remedy, but a double wrong without redress. In such case

the marriage and subsequent abandonment did not right the original wrong, but added injury to disgrace, and the unfortunate woman was left remediless. It was to remedy this evil and create a new liability that prompted the enactment of this statute. Now a man who has seduced an innocent woman, and begotten her with an illegitimate child, while he may avoid a prosecution for bastardy or for criminal seduction by marrying his victim, yet if he does this, and then abandons her without cause within the statutory limit, the law steps in, and says he must respond in damages, which shall accrue to the use and benefit of the wronged woman and unfortunate offspring of his lust. Thus, in such cases, the Legislature has said in legal contemplation that the man who is guilty of these wrongs cannot avoid Scylla without falling into Charybdis.

Here the relatrix at the time of her seduction was but 14 years of age—a mere child. She was begotten with an illegitimate child, and the appellee turned his back upon her. She appealed to the law for the only remedy she had, and in the name of the state prosecuted him for bastardy. Pending this prosecution, he sought escape from its consequences by asking her to marry him. When she expressed doubt as to whether he would live with her and take care of her and her child, he assured her that he would. She yielded to his entreaties, and they were married. He lived with her for two weeks, and then, without cause, abandoned her and her child, has never lived with them since, and has in no manner provided to their support.

It is clearly manifest from all the facts and circumstances surrounding this case that he fraudulently induced her to marry him to avoid the prosecution for bastardy, and that he did not intend to live with her and support her and her child. The facts present a deplorable condition of moral obliquity on the part of the appellee. For all this wrong which he has committed against her there can be no adequate atonement in dollars and cents. There is no legal measure by which the extent of her wrongs can be determined. The scales of justice cannot weigh her heartaches and sufferings, and there is no panacea that can alleviate her shame. As far as the law has gone is to provide an indemnity for the benefit of the wronged mother and wife and the unfortunate child.

The only question which counsel for appellant have discussed is that the award of damages as fixed by the court was erroneous in that it was too small. If the judgment is reviewable on appeal on account of the smallness of the amount of recovery, it must be because the question is properly presented by the motion for a new trial. The causes for which a new trial may be granted are specifically defined by statute, and unless the party aggrieved brings himself within the statute,

he is without remedy. The statute specifies eight reasons for which a new trial may be granted, upon proper application, by the party applying therefor. Section 568, Burns' Ann. St. 1901. The fifth subdivision of that section provides that a new trial may be granted on account of "error in the assessment of the amount of recovery whether too large or too small, when the action is upon contract or for the injury or detention of property." Under the sixth subdivision of that section, a new trial may be awarded on the ground that the verdict or decision is not sustained by sufficient evidence, or is contrary to law. Of the eight reasons for which a new trial may be granted under the statute, the two just specified are the only ones which have any application here.

In appellant's motion for a new trial six reasons are assigned: "(1) The decision of the court is contrary to the evidence in this, that the amount of recovery is too small. (2) The decision of the court is contrary to law in this, that the amount of recovery is too small. (3) The decision of the court is erroneous, and there is an error in the assessment of the amount of recovery, in this, that the amount of recovery assessed is too small. (4) The decision is contrary to the evidence in this, that the amount assessed is too small. (5) That the decision of the court in fixing the amount of damages is too small. (6) The court abused its discretion in its decision in this, to wit, in making the amount of recovery assessed too small." To assign as a reason in a motion for a new trial that "the decision of the court is contrary to the evidence" is not recognized by the statute, and hence presents no question for review. *Louisville, etc., Ry. Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Allen v. Indianapolis Oil Co.*, 27 Ind. App. 158, 60 N. E. 1003; *Hubbs v. State ex rel.*, 20 Ind. App. 181, 50 N. E. 402.

In the second reason for a new trial appellant has stated a statutory ground therefor, in that the "decision of the court is contrary to law." The latter clause, "in this, that the amount of recovery is too small," may be regarded as surplusage. This reason, however, does not raise the question of the amount of recovery. It is not contended that the decision was improperly affected by errors of law occurring at the trial.

The third reason assigned for a new trial, which appears above, comes within the fifth clause of section 568, *supra*; but that clause only applies where the action is upon a contract, or for the injury or detention of property. This is not such an action, and hence the reason assigned does not bring before us the amount of the recovery.

The fourth, fifth, and sixth reasons assigned for a new trial are unknown to the statute, and must be disregarded.

The statute under which this proceeding is prosecuted, as we have previously seen, pro-

vides that the practice in actions thereunder as to certain specified things, and generally, in regard to all other matters, shall be governed by the laws governing prosecutions for bastardy. By section 1004, Burns' Ann. St. 1901, the right to fix the amount which a defendant in a bastardy prosecution ought to pay is lodged with the court, and not with the jury. This provision, so far as practicable, must control in prosecutions under the statute involved, and it is the duty of the court to fix the amount of the recovery, though the trial is had by jury. *Latslaw v. State ex rel.*, 156 Ind. 194, 59 N. E. 471. The statute in a proceeding of this character does not specify how or by whom the amount of the recovery shall be determined, but, under the authority just cited, that becomes the sole province of the trial court.

In the case of *McIlvain v. State ex rel.*, 80 Ind. 74, a bastardy proceeding, one of the causes assigned for a new trial was that the amount which the court required the appellant to pay the relatrix for the support and maintenance of her child was excessive. In discussing the question the court said: "In the first place, no exception was taken to the decision of the court fixing the amount to be paid by the appellant to the relatrix, and hence no question was reserved upon that decision. In the next place, the fixing of the amount to be so paid was not a matter occurring at the trial, but a part of the proceedings and judgment of the court after the trial had been concluded. * * * However excessive, therefore, the decision fixing the amount afforded no cause for a new trial." To the same effect are the following cases: *Scott v. State ex rel.*, 102 Ind. 277, 1 N. E. 691; *Hamilton v. State ex rel.*, 117 Ind. 348, 20 N. E. 252. In the latter case it was held that the action of the court fixing the amount to be paid by the defendant in a bastardy prosecution is not a matter occurring at the trial, but a part of the judg-

ment and proceedings of the court after the trial has been concluded, and the question as to the damages being excessive cannot be raised by a motion for a new trial. By the same reasoning, it must be held that in such case the question of the smallness of damages assessed cannot be raised by a motion for a new trial. In this case trial was had and a finding for appellant made December 10, 1904. On the 22d of December following, judgment was entered fixing the amount to be paid by appellee, and directing that it should be paid in installments, and fixing the time of such payments. No exception was taken to the judgment, and no motion made to modify it. Under the authorities cited, we are reluctantly driven to the conclusion that the question as to the amount of the recovery is not properly presented for review. This condition of the record is to our minds regrettable, for under the facts and surrounding circumstances presented here, as disclosed by the record, the amount of the recovery as fixed by the trial court is wholly inadequate. The relatrix is in the early bloom of young womanhood. Her life has been clouded by the double wrong and perfidy of the appellee. She is in destitute circumstances, and is burdened by the unfortunate offspring of appellee's lust. If it was within our power, considering the condition of the record, we would remand the cause, and direct the trial court to enter a judgment in such sum as would, as far as possible, provide for the support and maintenance of the relatrix and her child; but this we cannot do.

Although the point is not made, we discover by the record that the court found for the appellee in the sum of \$250, but entered a judgment for only \$200. There is such a discrepancy between the finding and judgment that the latter ought not to stand.

The judgment is therefore reversed, and the trial court is directed to enter judgment for \$250, to conform to the finding.

OHIO FARMERS' INS. CO. v. VOGEL.*
(No. 5,100.)

(Appellate Court of Indiana. Nov. 17, 1905.)

Petition for rehearing. Overruled.

For former opinion, see 73 N. E. 612.

WILEY, C. J. Appellee has filed a petition in this cause for a rehearing, and has assigned 13 reasons why it should be granted. The first reason is that "the principal opinion * * * disregards the law, and contravenes the ruling precedent of the Supreme Court * * * as declared in the following cases"—citing several cases. Counsel for appellee have not furnished us with any brief or argument in support of the petition, and after a careful examination of the authorities cited in support of the first reason, we are led to the conclusion that they are not in point, and the proposition is not applicable to any question arising under the petition.

The only controverted question that is attempted to be raised by any of the reasons assigned in the petition is the one arising on the overruling of appellant's demurrer to the second paragraph of the appellee's reply to the fifth paragraph of appellant's answer. The sum and substance of the fifth paragraph of that answer alleges vacancy of the insured property at the time of the fire, and relies upon that part of the contract of insurance to the effect that should the property become vacant during the term of the insurance, the policy for that reason should be void, and not enforceable. The second paragraph of reply admits the fact of vacancy, but seeks to avoid that clause of the contract, on the ground that the premises were occupied by a tenant; that such vacancy was in contemplation of the parties at the time the contract was made; that the appellant would have consented to the vacancy if it had been requested so to do; that at the time of the issuing of said policy, it was the custom of the appellant and other insurance companies in that community to issue assents and permits for insured buildings to be and remain temporarily vacant and unoccupied during changes of tenants and to indorse such permits on such policies upon request therefor by the insured, and that the contract of insurance was entered into with the full knowledge by the parties of such custom, and with reference thereto. The reply also avers that the insured was, and is by law and by such custom, entitled to a reasonable time in which to obtain such permit. It was further averred that the property became vacant by the tenant moving out about 5 o'clock p. m. of the day preceding the night upon which it was destroyed by fire, and that the appellee did not know of such vacancy. It is unnecessary to cite additional authorities to those in the original opinion to the effect that the clause in the policy provid-

ing that it shall be void in case the premises should become vacant and unoccupied, for this rule of law is firmly established by all of the authorities. Insurance companies have a right to insert in their policies such a provision, and there is nothing in the law prohibiting the making of such contracts. It is clearly shown by the averments of the answer, to which this second paragraph of reply is addressed, that the parties did enter into such a contract. Under the facts thus pleaded, it becomes a question of law for the court to determine, as to whether or not the premises were vacant or unoccupied at the time of the fire, within the meaning of that clause of the contract.

Appellee accepted the policy in suit with the condition in it, exempting appellant from liability, in case the property insured should become "vacant or unoccupied." These words "vacant" and "unoccupied" have a definite and fixed meaning and that is, "that if the house insured should cease to be used as a place of human habitation, or for living purposes, it would then become vacant and unoccupied." The extent of the time of vacancy is not the essence of the contract. Vacancy of insured property is universally recognized in insurance circles as an increased risk, and in contemplation of law there is as much violation of such a provision in a contract by a vacancy for a brief period as there would be for a more extended period. The law cannot measure and determine the question of duration in such cases. Special stress is given to the fact, by appellee, that the insured property was occupied by a tenant and that this fact excused the subsequent vacancy. We are unable to see how such fact can be held to relieve the insured from a compliance with the provisions of the contract into which he entered. If the appellee desired his contract to remain in force, so that the appellant would become liable under any and all of its provisions in case of loss by fire, he was bound to see that the building remained in the condition that it was when the contract was entered into, for an unwarranted breach of any such conditions might void the policy.

The case of *Liverpool, etc., Ins. Co. v. Gunther*, 116 U. S. 113, 6 Sup. Ct. 306, 29 L. Ed. 575, is instructive upon this proposition. One of the conditions of the policy in that case was that if the assured should keep or use any of the prohibited articles specified therein, without written permission, the policy should be void, and it was also provided that such prohibited articles should not be stored, used, kept, or allowed on the premises, temporarily or permanently, for sale, or otherwise, unless with written permission indorsed upon the policy. In deciding the case, the court, by Justice Matthews, said: "A violation of these prohibitions by any one permitted by the assured to occupy the premises is a violation by the assured himself. The company stipulates that it will

not assume the risk arising from the presence of the articles prohibited, and if they are not brought upon the premises in violation of the policy by one in whose possession and control, the latter have been placed by the insured, he assumes the risk which the company has refused to accept. In our opinion, the defendant in error was chargeable with the acts of Walker, if he brought upon the insured premises and stored in the oilroom any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife, he was in the lawful occupancy of the premises, and with the implied assent of the assured, at least, was intrusted with the control and management of them, and, under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequences of Walker's acts in doing that for which, if done, the company had stipulated they would not be liable. The insured engaged that the prohibited thing should not be done, and when he committed the control of the insured premises to another, the latter became his representative for whom he must answer as for himself. This consideration of such a condition is wholly supported by authority. *Kelly v. Worcester Mutual Fire Ins. Co.*, 97 Mass. 284, 287. In this case it was held that 'a policy of insurance obtained upon a building by the owner, and containing a proviso that it shall be void if the building shall be occupied or used for unlawful purposes, even without the owner's consent.' In distinguishing the case from those cited by counsel adversely, the court said: 'In some of the cases cited for the plaintiff the prohibited use was not so constant or habitual, or of such a nature as to fall within the terms of the provision, and, in the others, the knowledge or assent of the assured was expressly required in order to avoid the policy.' In New York, it has been the law since the case of *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488, 22 Am. Dec. 539. In *Mead v. N. W. Ins. Co.*, 7 N. Y. 530, 533, it was said: 'It is equally unimportant that the respondent was ignorant that such business was carried on. The question whether the warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach.' *Matson v. Farm Building Ins. Co.*, 78 N. Y. 310, 29 Am. Rep. 149. In *Fire Ass'n v. Williams*, 26 Pa. 193, 198, the Supreme Court of Pennsylvania said: 'Neither is it material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect. *Diehl v. Adams Co. Mutual Ins. Co.*, 58 Pa. 443, 98 Am. Dec. 302; *Howell v. Baltimore Equitable, etc.*, 16 Md. 377.' See,

also, in this connection, the case of *Thuringia Ins. Co. v. Norwayns*, 104 Ill. App. 390.

In the original opinion, it was held that, although the policy provided against the occupancy of the premises by a tenant, appellant could not shelter itself behind that provision, because at the time the policy was issued it knew that it was occupied, and would continue to be occupied by a tenant. Appellant therefore waived that condition. It was further held, however, and we think correctly, that other separate and distinct conditions which, if broken, should work a forfeiture, were not thereby waived. We are clear that because appellant waived the condition against occupancy by a tenant, it did not waive the inhibition against vacancy. To uphold appellee's contention in this regard would be equivalent to the court making a new contract between the parties. Courts construe, but do not make contracts by judicial decisions. The contract of insurance must be construed to contemplate a knowledge of the fact, both by the insured and the insurer, that a tenant occupying the premises could vacate it at any time, even without notice, and it cannot be said that the mere fact that appellant in this case knew that the property was to be so occupied by a tenant was a permit for vacating it. Appellee thus assumed the risk of the property becoming vacant at any time by his tenant moving out. The legal status of the parties would not be changed, even had the tenant moved out without the knowledge of appellee, and the fire had occurred 5, 10, or 30 days thereafter, both appellee and appellant remaining in ignorance of that fact. The vacancy of the premises breached the contract, and the parties are bound thereby.

We think this view of the law is well settled in this and other states, and while there is some conflict in the authorities, we hold to the views expressed in the original opinion, and the petition for a rehearing is overruled.

(37 Ind. App. 390)

HEIGERT v. STATE.¹

(Appellate Court of Indiana, Division No. 2
Oct. 28, 1905.)

1. SUNDAY—OFFENSES—BASEBALL PLAYING—QUESTIONS FOR JURY.

In a prosecution for playing baseball on Sunday, in a game where a fee was charged, in violation of Burns' Ann. St. 1901, § 2087, whether an admission fee was charged, within the meaning of the statute, held, under the evidence, which showed that seats were sold for the grand stand and bleachers, but that a number of persons stood up at other points in the grounds, and saw the game for nothing, properly submitted to the jury.

2. SAME—EVIDENCE.

Under Burns' Ann. St. 1901, § 2087, declaring it unlawful for a person to play baseball on Sunday, in a game where an admission fee is charged, evidence of the payment of a fee to see the game by one or more persons is competent proof that a fee was charged, although other persons saw the game for nothing.

¹ Rehearing denied. Digitized by Google

Appeal from Circuit Court, Hancock County; E. W. Felt, Judge.

James Helgert was convicted of playing baseball on Sunday, and appeals. Affirmed.

Binford & Walker, for appellant. Charles L. Tindall, Pros. Atty., O. W. Miller, Atty. Gen., W. C. Geake, C. C. Hadley, L. G. Rothchild, and A. C. Van Duyn, for the State.

ROBY, J. Appellant was charged by indictment and found guilty upon trial of having unlawfully engaged in playing a game of baseball, where an admission fee was charged and paid by the spectators, upon Sunday. Section 2087, Burns' Ann. St. 1901; State v. Hogreiver, 152 Ind. 652, 53 N. E. 921. The evidence was to the effect that on the 11th day of September, 1904, said day being the first day of the week, commonly called Sunday, the defendant, James Helgert, engaged in playing a game of baseball on the ball ground located at or near a park called "Spring Lake Park," in Hancock county, state of Indiana; that said ground had been leased by Mrs. Jennie Colestock to a Mr. Matthews; that said ground was bounded on the north by the Spring Lake Park land, which was owned by Mr. Matthews; that said ground was bounded on the east, west, and south by the lands of the said Jennie Colestock; that said ground where said game was played had been scraped or leveled, and a baseball diamond made thereon, and that at the northwest corner of the ground so prepared an amphitheater stood fronting easterly on the ball ground; that said amphitheater was provided with seats, and there was a roof over said seats to protect the occupants thereof from the sun and rain; that said amphitheater was entered from the north end thereof by means of steps; that a short distance east of said amphitheater, and on the north side of said ground, seats had been constructed of boards without any covering over them, said seats being characterized as "bleachers"; that said seats fronted south on the ball ground; that a tight board fence extended east from the north end of said amphitheater, along the north side of said ground, to a point within about 40 feet of the east line of said ground; that said fence thence veered in a southeasterly direction a very short distance, stopping before it reached the east line of said ground; that said fence was of such height that people on the north side thereof could not see the players in the game of ball on the south side thereof; that there was a gate in said fence a little east of the amphitheater, and near said board seats or "bleachers"; that at the east end of said fence people could pass around and onto the ball ground, and view the ball ground and the game of ball while it was being played by passing over the other lands, there being no fence on the east side of said ground; that there was no fence on the south side of said ground, and the view

from the west end of said ground was unobstructed, except the part along which the amphitheater fronted; that a building used as a ticket office stood a little to the north of the amphitheater, and that while said game of ball was being played tickets were sold at 15 cents each, entitling the purchasers to occupy seats in the amphitheater, and tickets were also sold at 10 cents each, entitling the purchasers to occupy seats on the "bleachers," east of the amphitheater; that about 479 tickets were sold for the amphitheater seats and about 120 tickets for the "bleacher" seats; that the tickets sold for seats in the amphitheater were taken up at the entrance thereof as the purchasers passed in, and the tickets for the "bleachers" were taken up as the purchasers passed through the gate leading to said seats; that said seats so sold were occupied by the purchasers while the game of ball was being played; that during the entire time that said game was being played the view on the east and south side of said grounds was unobstructed, and the view was unobstructed on the west side of said grounds, except the points along which the amphitheater extended, and that persons desiring to see said game could do so at said points without paying any fee therefor; that no attempt was made by the defendant or any person connected with the game to prohibit persons from seeing said game at said points, and that no tickets were sold nor fee charged, except the tickets sold for the seats in the amphitheater and for the seats on the "bleachers"; that a great many people did witness said game of baseball from the east and south side of said grounds and from points on the west side of said ground, and that said persons did not pay any fee for seeing said game, and that no attempt was made by the defendant, or any one connected with said game of ball, to prevent them from seeing said game of ball.

Appellant's propositions for reversal, raised by exceptions to instructions given and to the refusal to give instructions requested by him, are that the question of an admission fee being charged should not have been submitted to the jury. It is claimed that evidence showing the sale of seats is not supportive to the charge made, and that the offense does not exist if the game can be seen by spectators without being compelled to pay for so doing.

The eleventh instruction given was as follows: "In determining whether the fee paid, if any, was such as makes the defendant liable, you must determine from the evidence whether the fee so paid was paid that the spectators might see the game of baseball, or simply for the purpose of having a seat, without any relation whatever to the game of baseball which was played, if any was so played. If the playing of the game of baseball was the inducement which led to the payment of the fee by spectators, if any

did so pay, then any one engaged in playing a game of baseball on Sunday, as alleged in the indictment, is guilty under the statute." The law concerns itself with substance rather than form. It does not tolerate subterfuges or evasions, and the evidence justified the court in submitting the question of fact to the jury, as was done.

The thirteenth instruction was as follows: "The fact that some may have seen the game in question without paying any fee, or that all could have seen the game without any fee whatever, will not relieve the defendant from liability in this case if you believe from the evidence, beyond a reasonable doubt, that the defendant played in the game, as alleged, on Sunday, and that some of the spectators paid a fee, which was charged by the managers of the game in connection with the game of baseball so played." It was sufficient to show that the exhibition was not free, and evidence of the payment of a fee by one or more persons is competent proof of that fact; nor is it necessarily given a different character by the fact that some persons saw the game without paying therefor. *State v. Hogreiver, supra.*

Judgment affirmed.

(20 Ind. App. 636)

INLAND STEEL CO. v. SMITH.
(No. 5,239.)¹

(Appellate Court of Indiana, Division No. 1.
Oct. 31, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—WARNING AS TO DANGER.

Where a servant was properly engaged at his employment in a place which was apparently safe, and the master by pursuing other work of the establishment caused the place of the servant's employment to become dangerous by reason of a traveling crane, the approach of which could not be discovered by the servant while so employed, it was the duty of the master to provide proper means of warning, and he was liable for injuries resulting from his failure to do so.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 811.]

2. SAME—DELEGATION OF DUTY.

The master's duty to his servants of keeping the place of employment safe cannot be delegated so as to relieve him from liability.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 175.]

3. TRIAL—VERDICT—INTERROGATORIES.

It is not necessary that the answers of the jury to the interrogatories framed by defendant should affirmatively establish plaintiff's cause of action.

4. SAME—INCONSISTENCY IN ANSWERS.

Inconsistency in the answers to interrogatories, if they do not conflict with the general verdict, cannot affect such verdict.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 856.]

5. SAME—INSTRUCTIONS—EXCEPTIONS TO MODIFICATION.

Acts 1903, p. 338, c. 193, § 1, providing that, if the court shall modify any instruction requested, the instruction as modified shall be written out at full length and given as one of the instructions of the court on its own motion, and the instruction requested shall be refused,

and that exceptions to the giving or refusing of instructions may be taken, does not contemplate the taking of an exception to the modification of instruction asked, and such an exception is not properly taken.

6. SAME—DATING EXCEPTIONS.

Under Acts 1903, p. 338, c. 193, § 1, providing that the party excepting to the giving or refusing of instructions shall enter a memorandum, "which shall be dated and signed," an exception not dated is not properly taken.

7. SAME—DESIGNATION OF INSTRUCTIONS EXCEPTED TO.

Under Acts 1903, p. 338, c. 193, § 1, providing that the party excepting to the giving or refusing of instructions shall set forth "in substance that such party excepts to the giving or refusing, as the case may be, of each of the above instructions, designated by its number," an exception is not properly taken where the memorandum states that "defendant excepts to all of" eight certain instructions.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Trial, §§ 688, 689.]

8. SAME—MEMORANDUM OF REQUESTED INSTRUCTIONS.

Under Acts 1903, p. 338, c. 193, § 1, providing that the court shall indicate by memorandum the numbers of requested instructions given and of those refused, and that such memorandum shall be signed by the judge, a written memorandum signed by counsel does not sufficiently establish the fact of refusal.

9. APPEAL—BRIEFS—REFERENCE TO RECORD.

Where appellant makes objection to the action of the court in admitting evidence, he must point out in his brief so much of the record as presents the alleged error, and indicate the places in the record where such matter may be found by reference to pages and lines of the transcript, as required by rule 22 of the Appellate Court (55 N. E. v.).

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3095.]

10. SAME—HARMLESS ERROR—INSUFFICIENCY OF EVIDENCE.

Assignments that the answers of the jury to certain interrogatories were not sustained by the evidence will not be reviewed, where the different answers supposable would not have produced such material conflict with the general verdict as to require a different judgment.

Appeal from Superior Court, La Porte County; H. B. Tuthill, Judge.

Action by Fred Smith against the Inland Steel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. L. Agnew, H. E. Outler, B. F. Ibach, and A. S. Toner, for appellant. Crumpacker & Moran, for appellee.

BLACK, J. The appellee recovered judgment against the appellant for a personal injury. In the appellee's complaint it was shown that the appellant owned and operated a large steel manufacturing plant at Indiana Harbor; that on the morning of June 12, 1902, the appellee was employed by the appellant; that through its officers and agents the appellant directed the appellee to engage in the work of fastening certain cleats for the hanging of electric wires to a certain tall pillar in appellant's mill, which direction was a reasonable one, and the appellee obeyed it, as it was his duty to do; that the cleats were put on by passing a bolt through the iron of said pillar and screwing a nut down on the

¹ Appealed to Supreme Court, 80 N. E. 523.

bolt, so as to hold the cleat firmly in place; that in order to do the work the appellee was directed by the appellant to climb up on a certain horizontal beam and to stand on the flange thereof and on the angle iron attached to the pillar, which was a reasonable direction, and the appellee obeyed it; that in order to retain his foothold, which was very slight and precarious, to do the work which he was required to do, it was necessary that he put his arm around the upper portion of the pillar at some distance above the horizontal beam, and he did so; that he used his left arm to put around the pillar in order to hold himself in the position in which it was necessary for him to be to do the work; that at that time, and for some days prior thereto, the appellant used and operated and had charge of a certain large traveling crane, which was operated and moved over the horizontal beam so attached to the pillar, which crane was a part of the equipment of the building and plant; that when he was in this position, with his arm around the pillar, in discharge of his duty, the appellant knew, or ought to have known, the position in which he was and the danger in which he was placed; that he was in full view of the agents and representatives of the appellant operating the crane; that it was necessary for him to work with his back to the crane, and he did so work, and in this position he could not see the crane moving or approaching him; that his work necessarily engrossed his entire attention, and he could not see and did not know the crane was being operated over the beam by the pillar about which he had his left arm, and he had no reason to suspect the crane was being operated or would be operated while he was in this position, without warning or notice to him, so that he might protect himself from injury, which he could and would have done if warned or notified; that the appellant did not give him any notice or warning that the crane was being used, and he did not know of that fact or of the danger therefrom; that while he was in the position described, in obedience to said orders, and in the careful performance of his duties and wholly without fault on his part, the appellant negligently, without warning or notice to him, ran the traveling crane noiselessly and quietly down and against and upon him; that the appellant negligently failed to equip the crane with a bell or other means for the purpose of warning persons that might be injured by it when it was put in motion, and negligently constructed the crane so that in passing the pillar on the horizontal beam it passed very close to it; that appellee did not know the crane was being operated on the horizontal beam, and did not know of the danger of his position, and did not know that the crane would not clear the beam in such manner that his arm would not be caught by it as hereinafter stated; that at the time of his injury and the time of running the crane down upon him the Indiana

Bridge Company, by its officers, agents, and employes, was engaged in placing certain large iron or steel plates in the floor of the building and riveting them to the beams thereof; that this work made a great deal of noise and clatter, so that it was impossible for the appellee to hear the slight noise made by the moving of the crane; that the crane was negligently run against and upon the appellee by the appellant, and thereby and by reason of said negligence of the appellant he was crushed, mangled, mutilated, bruised, and lacerated, etc.—describing his injuries and stating his damages, etc.

The appellant does not suggest any defect in the complaint, but in its brief it is said that it may be sufficient to show a cause of action, and we are asked to consider it in connection with the evidence and the special findings of the jury returned with the general verdict. By these special findings in answer to interrogatories, the history of the injury is related, and much of what is thus found specially is substantially in agreement with the averments of facts in the complaint. The crane was owned by the appellant and being operated by one John Nelles, an employe of the appellant, and it was traveling from east to west. Nelles was in a cage suspended below the crane at the north end thereof within a few feet of the north rail, on which the crane traveled, and he was required to look southward while operating the crane. There was no evidence, it was found, that the crane had moved that morning, prior to the time of the injury. The appellee, on that morning before his injury, had punched or bored four or five holes in the columns, above the track on which the crane traveled, and he had been thus engaged about 30 minutes. At the time of his injury he was engaged in fastening a cleat upon one of the columns which supported the girder on which rested the rail which supported the truck of the crane. There was nothing to prevent the appellee, had he looked, from seeing the crane while walking in the department in which it was situated. He could not have seen the crane while he was boring the holes, and could not have seen it, it was found, just prior to the time he was injured, from the point where he was injured, had he looked, because he was too busy with his work. He did not see and observe the rail and track on which the crane traveled, while he was fastening on the cleat and before his injury, though there was nothing to prevent him from seeing the rail, or track, had he looked. He did not, while he was in the building, look for the crane at any time prior to his injury. He was not sufficiently familiar with such cranes as this one to know its purpose and manner of operation. Interrogatory 44: "Did the plaintiff look for said crane or use any precaution whatever to protect himself from injury from said crane, at any time while he was in said open-hearth department on the 12th of June, 1902, and

prior to his injury?" Answer: "Did not know of crane being there, and no precaution necessary." If he had looked he could not have seen the crane approaching in time to have escaped the injury, from the point where the injury occurred, because he was too busy with his work. If he had listened at the time of his injury, he could not have heard and felt the vibrations of the crane upon the track at and prior to the time of his injury, because there was too much noise. His injury was caused by his arm being caught between the upright column and the end of the girder of the crane. He was not injured because he changed his position and placed his left arm around the column after the first beam of the girder had passed him. He was an able-bodied man, in the possession of all his faculties, and 23 years of age. He had worked seven years in a steel mill similar in construction to the one in which he was injured. He was upon the column where he was injured from three to five minutes before the injury occurred. He was standing upon the flange (about 2½ inches wide) of the girder upon which the crane was operated, and he had his left arm around the column. It was sufficiently light where he was working, so that he could see over the building without the aid of artificial light, and there was no artificial light in that part of the plant. There was sufficient light in the building so that the crane could be seen in any part thereof where he was working. McGrath, Stoneburner, and Nelles, employes of the appellant, were present at the time of the injury. The appellee was working with Stoneburner, who was directing the work upon which he and the appellee were engaged. Stoneburner had no authority to employ or to discharge or to pay the appellee or to do anything more than to instruct him in the work. Stoneburner and the appellee were engaged in fastening cleats upon the column which supported the girder and T-rail upon which the north truck of the crane traveled, for the purpose of supporting electric light wires, which were to be used in lighting the building, when put in operation; the appellee being engaged in bolting cleats upon the column where he was injured, and Stoneburner being engaged in doing the same work upon another column. Stoneburner and the appellee went to this place with the cleats and tools for fastening them upon the columns, and they both did the same kind of work and in the same manner, except that Stoneburner instructed the appellee how to do the work. Stoneburner and the appellee were both under the charge and control of one McCullom, superintendent of the electrical department of the appellant. There was no evidence, it was found, that McCullom was in the building at the time of the injury. Nelles, who operated the crane, was engaged in moving material for the construction of the building from one place to another in the building by means of the operation of the crane. His

whole duty consisted in so doing at the request and upon the order of any one who desired such material to be used. Nelles did not have any charge or control over the movements of the appellee, and did not have any connection with the appellee in the service of the appellant other than being engaged in the construction of the building. McGrath, an employe of the appellant, was about 25 or 30 feet from the appellee at the time of the injury, engaged in the construction of the building, as superintendent of the open-hearth department. McGrath was not connected in any wise with the appellee or concerned in his work. There was no evidence, it was found, that the crane was in any way defective. Interrogatory 94: "Did the plaintiff's injury result from the negligence of any person in the employ of the defendant on the 12th of June, 1902?" Answer: Yes." Interrogatory 95: "If you answer the foregoing interrogatory in the affirmative, please state the name of such employe and what he was doing." Answer: "McCullom, the superintendent of the electrical department of the Inland Steel Company. No evidence as to what he was doing." Interrogatory 96: "If you answer the last preceding interrogatory but one in the affirmative, please state in what such negligence consisted." Answer: "In not giving the needed instructions to the plaintiff." It was further found that the appellee's injury was directly due to the failure of McCullom to give the appellee notice of the approach of the crane at the time of his injury; that warning or notice could have been given the appellee that was not given, by placing a man to warn all of approaching danger; that appellee's injury was not due to his own failure to look for the approach of the crane; that he did not see and know of its approach before it reached him; that he was not assisting in the construction of the building, but was putting up electrical appliances. Interrogatory 105: "Was not said building at said time in an uncompleted state, and were not all the workmen in said building at said time engaged in construction of said building?" Answer: "No. Some were, some were not." The appellee, prior to his injury, knew that the building was incomplete and in process of construction, but he took no part in the construction thereof. No person in the employ of the appellant saw the appellee at the time he was injured. No person in the employment of the appellant at the time of the injury saw the appellee and the crane in time to have warned him or to have prevented such injury. He had been in the employ of the appellant about 2½ months prior to his injury. Interrogatory 113: "If the jury find that any person in the employment of the defendant at the time of the plaintiff's injury failed to warn the plaintiff of the approach of the crane, whose duty it was to do so, state who such employe was." Answer: "McCullom."

The legal principles pertaining to the re-

lation of employer and employé, with reference to the safety of the place in which the latter performs the duties of his employment and to the giving of warning or notice of dangers to which the employé is exposed, are so well settled and have been so often stated in the decisions of the Supreme Court and of this court that there does not seem to be need for any discussion of them here. While the appellee was properly engaged at his employment in a place which was apparently safe, the appellant, pursuing other proper and necessary work of the establishment, caused the place of the appellee's employment to become dangerous and brought about his injury by failing to provide any warning of the approach of the crane. There does not appear to have been any breach of duty on the part of the employé who operated the crane, the performance of whose duty required him to look in a direction away from the appellee. The use of the crane was not unusual or negligently performed; but it inevitably was dangerous to a person situated as the appellee rightfully and without negligence on his part was situated in the performance of his duty, unless he were by some means warned of the approach of the crane in time to avoid it. That there was need of such warning when the crane was being so operated is manifest. The want of it put the appellee in danger and caused his injury. That it was the master's duty, in order to maintain the safety of the appellee's place of employment, to provide proper means of warning him of the approach of the crane, there is no doubt. The absence of warning made the place become unsafe and the duty of keeping it safe was one which the master could not escape by delegating it to another employé, who failed in the performance of the obligation. It, of course, was not necessary that the answers of the jury to the interrogatories (which were framed by the appellant) should affirmatively establish the appellee's cause of action, nor could any mere inconsistency in the answers themselves affect the general verdict. Evidence would not be inconsistent with these special findings which tended to prove that the employment of the appellee in the service of the appellant for 2½ months had been in an entirely different kind of service in an entirely separate part of the establishment, and that he had never seen the crane at work, and had never been in the part of the building where it was until the morning when he was injured, and that his work on that morning, without fault on his part, had wholly occupied his attention. It cannot be presumed, upon the facts specially found, that he knew or ought to have known of the danger of his position in the accomplishment of his task, or that he had a duty to inspect the premises, which he neglected to perform. The danger cannot be said to have been within the ordinary risks assumed by him,

but arose from the negligence of the master. It does not appear from the findings that he was chargeable with contributory negligence, which, with the question as to the assumption of the risk, was, upon the facts found, a question for the decision of the jury, and it was found in his favor in the general verdict. There was not such conflict between the special findings and the general verdict as to require the setting aside of the latter. See *Indiana Car Co. v. Parker*, 100 Ind. 181; *Salem Stone, etc., Co. v. Griffin*, 139 Ind. 141, 38 N. E. 411; *Cincinnati, etc., R. Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Louisville, etc., R. Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584, 7 Am. St. Rep. 432; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364, 59 N. E. 1044; *Taylor v. Evansville, etc., R. Co.*, 121 Ind. 124, 22 N. E. 876, 6 L. R. A. 584, 16 Am. St. Rep. 372; *Louisville, etc., R. Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187, 31 Am. St. Rep. 443; *City of Ft. Wayne v. Patterson*, 25 Ind. App. 547, 58 N. E. 747; *Gould Steel Co. v. Richards*, 30 Ind. App. 348, 66 N. E. 68; *Michael v. Roanoke Machine Works*, 90 Va. 492, 19 S. E. 261, 44 Am. St. Rep. 927.

The appellant's motion for a new trial was overruled. The trial was held in December, 1903, and it was sought to make the instructions given to the jury and those requested, but refused, parts of the record, and to take and to save exceptions to the action of the court in the giving and in the refusing to give instructions, pursuant to the provisions of section 1 of the statute of 1903 (Acts 1903, p. 338, c. 193). The court gave written instructions numbered from 1 to 29, inclusive. Between instructions 23 and 24 of this series is inserted an exception as follows: "Defendant excepts to the modification of instructions Nos. 14, 16, 18, 19, 21, and 23, instructions tendered and modified by the court before giving to the jury"—signed by the defendant's attorney. After instruction No. 29 is the signature of the special judge who presided at the trial. Next is the following, signed by the attorneys for the appellant: "The defendant excepts to the giving of each and every one of the foregoing instructions Nos. 1 to 29, inclusive, separately and severally and as a whole." There is then an exception signed by attorneys for the appellee, which need not be set out. Then follows a statement, dated and signed by the judge, to the effect that the appellee excepted to certain of the instructions given by the court. Then follows a statement, not signed or dated, which so far as it relates to exceptions taken by the appellant is as follows: "And the defendant excepts to all of said instructions numbered 12, 13, 15, 16, 17, 18, 20, and 22." The appellant requested a separate instruction directing verdict in its favor, which need not be further noticed. The appellant also requested the giving of a series of instructions numbered from 1 to 10, inclusive,

signed by attorneys for the appellant. Then follows an exception signed by the attorneys for the appellant, dated December 8, 1903 (the date of the verdict); the exception being as follows: "The said defendant, the Inland Steel Company, excepts to the refusal of the court to give to the jury the foregoing instructions numbered from 1 to 10, inclusive, and the refusal to give each of said instructions. Said instructions were tendered by the defendant prior to the beginning of the argument, and this exception is taken before the close of the term at which said cause was tried." In the motion for a new trial the appellant assigned as reasons therefor, amongst others, "that the court erred in giving instructions from 1 to 29, inclusive, and in giving each of said instructions separately and severally," and that the court erred in refusing to give instructions numbered from 1 to 10, inclusive, asked for by the appellant, and in refusing to give each of said instructions separately and severally. The statute above mentioned provides: "That all instructions requested shall be plainly written and numbered consecutively and signed by the party or his counsel. The court shall indicate, before instructing the jury, and by a memorandum in writing at the close of the instructions so requested, the numbers of those given and of those refused, and such memorandum shall be signed by the judge. All instructions given by the court of its own motion shall be in writing and shall be numbered consecutively and signed by the judge. If the court shall modify any instruction requested, the instruction as modified shall be written out at full length and shall be given as one of the instructions given by the court of its own motion, and the instruction as requested shall be refused. All instructions requested, whether given or refused, and all instructions given by the court of its own motion, shall be filed with the clerk of the court at the close of the instruction of the jury. Exceptions to the giving or refusing of instructions may be taken at any time during the term, and the same may be taken orally and entered upon the record or minutes of the court, or in writing at the close of the instructions requested, or given by the court of its own motion, in which case the party excepting or his counsel shall enter at the close of such instructions a memorandum, which shall be dated and signed, setting forth in substance that such party excepts to the giving or to the refusing, as the case may be, of each of the above instructions, designated by its number. All instructions requested as herein provided, whether given or refused, and all instructions given by the court of its own motion, together with all exceptions taken to the giving or refusing of instructions as herein prescribed, and all entries upon the minutes or records of the

court in respect to such instructions and exceptions, shall be a part of the record without any bill of exceptions and as such may be included in the transcript on appeal." Other provisions of the section in part above quoted relate to oral instructions.

Concerning the instructions given, it is to be observed of the exceptions taken in writing that the statute does not contemplate the taking of an exception to the modification of an instruction asked, but the instruction as modified and given is to be regarded as if given by the court of its own motion, and the instruction as requested is to be refused and is to be treated, in the taking of exceptions, as an instruction asked and refused. The exception which it was sought to take by memorandum in writing at the close of the instructions given by the court of its own motion was not dated. The statute provides that it "shall" be dated, as well as signed. If the statement in the record, not signed or dated, above mentioned, may properly be regarded as an exception taken orally and entered upon the record, it is to be observed that it purports to show that "the defendant excepts to all of" eight certain instructions, jointly. The motion for a new trial assigned that the court erred in giving the 29 instructions, "1 to 29, inclusive," and in giving each of said instructions. There was no exception properly taken to the giving of each of the instructions given, or to the giving of any separate instruction, and there was no exception properly taken to the giving of instructions 1 to 29, inclusive. So, the motion did not assign any cause, properly saved by exception, relating to the giving of instructions. Besides, the appellant in the "points" in its brief does not assail all the instructions given or any of those mentioned in the statement of its exception not signed or dated, above mentioned. With reference to instructions requested, the statute, as we have seen, provides that the court shall indicate, by memorandum in writing at their close, the numbers of those given and of those refused, and that such memorandum shall be signed by the judge. By such method the court itself, without a bill of exceptions, makes the record show which of the instructions requested were given and which were refused. The court may have given some of the instructions as asked, without modification, and may have refused others, so far as is shown by the method required by the statute. The written memorandum signed by counsel, stating that the appellant excepted to the refusal to give the instructions, does not sufficiently establish the fact of refusal, which must be authenticated by the signature of the judge.

We have read carefully the appellant's statement of the evidence, upon which it is claimed that the verdict was not supported

by sufficient evidence, and that the damages (\$10,000) were excessive, and we do not find any occasion for disturbing the judgment on such grounds. The evidence was such that the questions as to whether there was negligence of the appellant, and as to whether there was contributory negligence on the part of the appellee, and as to whether he assumed the risk, and as to the amount of damages, were properly within the province of the jury; and it does not seem that any useful purpose would be subserved by taking the considerable space which would be necessary to set out here the substance of the evidence.

In the appellant's brief some objections are made to the action of the court in the admission of evidence; but while the motion for a new trial, in which such alleged errors are assigned as causes for a new trial, is set out in the brief, there is not in the brief for the appellant, as is pointed out by the appellee, any statement otherwise of so much of the record as presents such alleged errors, or any indication of the places in the record where such action of the court may be found by reference to pages and lines of the transcript, as required by rule 22 of this court (55 N. E. v). See Perry, etc., Co. v. Wilson, 160 Ind. 435, 67 N. E. 183; Franklin Ins. Co. v. Wolff, 80 Ind. App. 534, 66 N. E. 756; Harrold v. Fuenfstueck, 31 Ind. App. 275, 67 N. E. 699.

In the motion for a new trial it was assigned that the answers of the jury to certain interrogatories were severally not sustained by sufficient evidence, and there were a number of assignments, each of which was directed to the answer to a particular interrogatory questioning it for like reason. Comparing those portions of the evidence recited in the brief of appellant in presenting these questions with the interrogatories and answers in question, if, taking into consideration the forms of the several interrogatories, it can be said that there was evidence upon which any of the answers given by the jury might or should have been different from those returned, the different answers supposable would not necessarily have produced such a material conflict with the general verdict as to require a different judgment. As to such assignments in a motion for a new trial made by the party against whom the general verdict is returned, we need not render any decision in this case, for, if different answers would not have changed the result, there could be no available error; but relative to such practice see Ohio, etc., R. Co. v. Selby, 47 Ind. 471, 497, 17 Am. Rep. 719; Staser v. Hogan, 120 Ind. 207, 227, 21 N. E. 911, 22 N. E. 990; Burkhardt v. Gladish, 123 Ind. 337, 344, 24 N. E. 118; Chicago, etc., R. Co. v. Kennington, 123 Ind. 409, 24 N. E. 137; Pittsburg, etc., R. Co. v. Ives, 12 Ind. App. 602, 40 N. E. 923.

Judgment affirmed.

(37 Ind. App. 617)

OLEVELAND, C. C. & ST. L. RY. CO. v. PATTERSON. (No. 5,452.)

(Appellate Court of Indiana, Division No. 2. Oct. 31, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—PROXIMATE CAUSE.

If the negligent conduct of a railroad company in furnishing an engine of which the cab windows had been broken or taken out and replaced with boards, so that they could not be used, caused the engineer to turn from his seat toward the center of the cab when receiving signals from the conductor, thereby bringing his face in close proximity to the water gauge, and such engineer was injured by the bursting of the gauge, the company's negligence was the proximate cause of the injury, although there was no negligence with regard to the water gauge.

2. APPEAL—REVIEW—EVIDENCE.

Where, in an action by a servant against his master for injuries received, there was evidence to support a verdict which found that plaintiff was in a place of danger, and that his presence there was caused by defendant's negligent act in furnishing him with a defective engine, the windows in the cab having been boarded up, conjectures as to what he might have been doing had the windows been in the proper condition cannot affect the finding of fact as to what he was doing, and the conditions leading to the action taken.

3. SAME—CONTRIBUTORY NEGLIGENCE—DUTIES OF LOCOMOTIVE ENGINEER.

Although the fireman on a locomotive was charged with the duty of receiving signals from the conductor and communicating them to the engineer, such duty cannot be regarded as exclusive; and where an engineer, while keeping a vigilant outlook for signals, was injured because of the negligence of the railroad company in furnishing an engine which required him to assume a dangerous position while so doing, his act did not prevent a recovery for the injury.

4. NEGLIGENCE—FINDING AS TO PROXIMATE CAUSE OF INJURY—APPEAL.

A general verdict for plaintiff in an action for negligence carries a finding that the negligence complained of was the proximate cause of the injury suffered, and such finding cannot be disturbed on appeal without good reason.

5. MASTER AND SERVANT—RISKS ASSUMED BY SERVANT—SERVANT'S KNOWLEDGE OF DANGER.

The doctrine that the servant who remains in the employment after knowledge of the danger thereby assumes the risk depends on an implied contract deduced from the facts, and, where it is shown that there was an express contract whereby the master assumed responsibility for the condition of an engine which the servant was required to use, the doctrine as to risks assumed by the servant does not apply.

Appeal from Circuit Court, Decatur County; Francis T. Hord, Judge.

Action by Samuel N. Patterson against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. J. Hackney, for appellant. George Bruce, for appellee.

ROBY, J. Appellee had judgment in an action for personal injuries. Cause was tried upon a single paragraph of complaint. Errors assigned are that the court erred in overruling appellant's demurrer to the complaint and in overruling its motion for a new trial.

It is averred in the complaint: That appellant was operating a railroad, and appellee was in its employment on February 3, 1903, in the capacity of an extra engineer, and on said day it ordered him to take its engine, No. 723, and pull a freight train from Cincinnati to Indianapolis. That said engine had been negligently permitted to become and be out of repair and unfit for use, and that the glass had been broken, or taken out of the cab windows, and said windows covered and closed with boards, so that they could not be used. That as originally constructed, said cab had glass windows on the side and front for the use of engineer and fireman, and that they were made to open, so that the engineer could look back, see his train, and receive signals from the conductor and brakeman relative to its management; and by reason of the windows being boarded up, it became necessary for appellee, in order to receive signals relative thereto, to turn from his seat toward the center of the cab, thereby bringing his face in proximity to the water gauge and valve thereon. That the water gauge was partly composed of glass, was in the form of a tube 12 inches long, and that there were valves and cocks in the cab which appellant had negligently suffered to be and remain out of repair, and that they were leaking and making a noise, rendering it difficult for appellee to hear. That said water gauge was liable to explode at any time and to injure appellee, of which appellants had knowledge and appellee none. It is also averred: That appellee was in the line of promotion in said service, and that he was induced to take out and operate said engine by appellant's roundhouse foreman, who had charge of and full power in its behalf, over its engineers at the Cincinnati terminal, and to whose orders he was bound to conform. That said foreman assured him that the engine was perfectly safe for use, and threatened to discharge him if he did not take the same out. That while operating said engine, and in endeavoring to get signals from the brakeman for the placing of the engine in such position that the locomotive and tank might be uncoupled, said water gauge exploded, the steam and broken glass striking him in the face, destroying one eye, damaging the other, and inflicting additional injury. "That said injuries were caused by defendant's negligence as herein set forth and alleged." It is the unquestioned duty of the master to use reasonable care in furnishing safe tools and appliances for the servant's use. This duty is shown by the allegations of the pleading in question to have been disregarded by appellant. No suggestion is made to the effect that the engine was in a reasonably safe and fit condition for use; but, in support of the assignment, based upon the overruling of the demurrer, it is argued that the negligent boarding up of the windows was not the proximate cause of the injury, but that said proximate cause

was the bursting of the water gauge, not averred to have been caused by appellant's negligence.

It is averred that appellant did not exercise reasonable care in furnishing a safe engine, and, because of its negligence in that behalf, its employé was injured. A number of particulars are specified in regard to which the defects are explicitly pointed out, one of which was the liability of the water gauge to explode and injure appellee, of which fact he is averred to have been ignorant and appellant to have had knowledge. The general denial put in issue, among other things, whether or not the engine was defective as averred, and whether such defects caused the injury complained of, and each issue was one of fact. *Chicago, etc., v. Martin*, 31 Ind. App. 308, 65 N. E. 591. The averment that the injury was caused by the defective tool is sufficient, it not being overcome by specific facts exhibited. If it were true, as assumed, that no charge of negligence with regard to the water gauge is made, it would by no means follow that appellant would be relieved from liability. If its conduct in furnishing an engine which was defective, as alleged, caused appellee to be in a place of danger, thereby leading to his injury, such negligence is a proximate cause thereof, and the fact that other causes contributed thereto affords no defense. *Cincinnati, etc., v. Worthington*, 30 Ind. App. 663, 670, 65 N. E. 557, 66 N. E. 478, 96 Am. St. Rep. 355; *Lake Shore, etc., v. McIntosh*, 140 Ind. 261, 272, 38 N. E. 476; *Board of Commissioners, etc., v. Mutchler*, 137 Ind. 141, 36 N. E. 534.

It is averred at length that, had the windows of the cab been in condition to use, appellee would, in the work he was doing when injured, have been taken away from danger, while because of their defective condition, he was compelled to occupy a portion of the cab, whereby he was exposed thereto, and his injury thereby caused. The demurrer admits these allegations to be true, and there was therefore no error in overruling it. *Indianapolis Union Railway Co. v. Houlihan*, 157 Ind. 494, 504, 60 N. E. 943, 54 L. R. A. 787.

In support of the ground stated for a new trial that the evidence is insufficient to sustain the verdict, it is argued that whether appellee would, had the windows been in proper condition, have been turned away from the point of danger at the instant of explosion, is purely conjectural. This contention may readily be granted, but there was evidence from which the jury might find, as the general verdict does, that he was in the place of danger while receiving signals and obtaining information relative to the movement of the engine, and that his presence there was caused by the windows in the cab being boarded up. Conjectures as to what he might have been doing in contingencies which did not exist do not affect the

finding of fact as to what he was doing and the conditions leading to the action taken. There was evidence tending to sustain appellee's theory relative to the cause of the injury complained of. Appellant requested a number of instructions embodying its theory upon this subject. They were not given, and, in view of what has been said, will not be adverted to. It may be that the fireman was charged with the duty of receiving signals and communicating them to his engineer, as asserted, but such duty cannot be regarded as exclusive. The obligation which rests upon the engineer in the performance of his responsible task calls for constant vigilance upon his part, and we decline to hold that keeping a vigilant outlook was not within the line of his duty.

A considerable number of cases, in which questions of proximate cause have been considered, are cited in appellant's brief. The facts considered in them differ from those presented in this case. Whether an injury is caused by the acts or omissions of the defendant, which are attacked as negligence, is primarily a question of fact to be determined by sensible men, in the light of circumstances and conditions existing. *Chicago, etc., v. Martin*, 31 Ind. App. 308, 315, 65 N. E. 591; *Southern Ry. Co. v. Webb (Ga.)* 42 S. E. 395, 59 L. R. A. 109; *Great Northern Ry. Co. v. Bruyere*, 114 Fed. 543, 51 C. C. A. 574; *Patten v. Chicago & Northwestern Ry. Co.*, 32 Wis. 524, 535; *Landgraf v. Kuh*, 188 Ill. 501, 59 N. E. 501; *Felton v. Harbeson*, 104 Fed. 740, 44 C. C. A. 188; *Chicago Great Western Ry. Co. v. Price*, 97 Fed. 423, 38 C. C. A. 239. In *New York, etc., Ry. Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976, and *McGahan v. Indianapolis Natural Gas Co.*, 140 Ind. 335, 37 N. E. 601, 29 L. R. A. 355, 49 Am. St. Rep. 199, verdicts were set aside, upon the ground of a responsible intervening agent, but the court, notwithstanding the evident care with which the opinions were prepared, overlooked the fact that, where the intervening agency is one whose intervention might reasonably have been foreseen by the wrongdoer, it does not operate to relieve him from liability. *Terre Haute & Indianapolis Ry. Co. v. Buck*, Adm'r, 96 Ind. 346, 49 Am. Rep. 168; *Louisville, etc., Co. v. Lucas*, 119 Ind. 583, 590, 21 N. E. 968, 6 L. R. A. 193; *City of Crawfordsville v. Smith*, 79 Ind. 308, 41 Am. Rep. 612; *Billman v. Indianapolis etc., R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Binford v. Johnson*, 82 Ind. 428, 42 Am. Rep. 508; *Cincinnati, etc., Ry. Co. v. Eaton*, 94 Ind. 474, 479, 48 Am. Rep. 179; *Alexander v. Town of New Castle*, 115 Ind. 51, 17 N. E. 200; *Clore v. McIntyre*, 120 Ind. 262, 265, 22 N. E. 128; *Milwaukee, etc., Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860, 27 Am. St. Rep. 753; *Southern Ry. Co. v. Webb*, supra; 1 Thompson's Negligence, § 54. The general verdict carries a finding that the negligence complained of was the

proximate cause of the injury suffered, and there is no good reason for setting it aside.

The doctrine that the servant, who remains in employment after knowledge of the danger, thereby assumes the risk, depends upon an implied contract deduced from such facts. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 615, 62 N. E. 492, 92 Am. St. Rep. 319. Where there is an expressed contract there can be no implied one. *Long, Ex'r, v. Strauss*, 107 Ind. 94, 99, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; 15 Am. & Eng. Ency. 1078. The appellee testified that on the 3d day of February, 1902, he was in the employ of the appellant as an extra engineer, taking regular engineers' places when they were absent; that he was subject to call in case there was a vacancy; that he was working in Wood street yards; for some four or five months prior, he had been running extra switch engines at said Wood street and Mill Creek yards, Cincinnati, Ohio. On said day he was ordered by appellant's superintendent to report to the Riverside roundhouse for through freight service. In obedience to said order, he reported to the foreman at the Riverside roundhouse, James Keegan. About 3:30 o'clock he was called by direction of said foreman for an extra west. In obedience to said call he went to the roundhouse, and saw that he was marked for engine No. 723 west, to leave at 4 o'clock. He then went out to said engine and walked around her, and met the foreman, Mr. Keegan, and said: "Mr. Keegan, I don't want to run that engine the way she is; she is boarded up, and I can't see the right of way." And Mr. Keegan said: "That engine is all right; we don't want to have any bulling out of you around here; we want you to get out of here; this engine is all right, and safe for service." To which remark the appellee replied: "If I get on this engine, you will be responsible for anything that happens along the road." And Mr. Keegan replied: "We are responsible for all things; that engine is O. K.; you get on her and go." "You get on her and go, or you will never run any more engines for this company." And appellee then took charge of said engine. The witness Charles Sands testified that there was some kind of an argument; "Nick" (the appellee) did not want to go out on the engine the condition she was in, and Mr. Keegan told him to go on, and go out on it, or he wouldn't make any more trips on any other engine on that road; and Nick said he did not like to take the engine out in that kind of shape, and Mr. Keegan told him to take the engine, and go out; that she was all right, to go out; that she was all right to go, and if he did not take that engine or locomotive out, that he would not take any other out for the company; and that it was all right and ready to go.

There is no reason why the master may not contract to assume all risk arising from defective appliances furnished by him. The

author of a recent text-book says: "It may be collected from the most unanimous current of judicial authority that, if the servant complains of or directs attention to a defect or danger in the place where he is required to work, or in the tools, machinery, or appliances with which he is required to work, and thereupon the master or his representative, assures him that he can proceed without danger, and requests or commands him to continue his work, the servant will not, as a matter of law, be put in the position of having accepted the risk, or of having been guilty of contributory negligence, because of relying upon the presumed superior knowledge of his master or his master's representative, and continuing the work. The servant will not be imputable with wrong for thus acting upon the advice or assurance of the master or his vice principal, nor will it lie in the mouth of the master to impute blame to the servant for so doing." Thompson, Neg. § 4664. The conclusion stated accords with our own cases. Phillips v. Michael, 11 Ind. App. 672, 39 N. E. 669; Bradbury et al. v. Goodwin, 108 Ind. 286, 9 N. E. 302. It does not follow that one who works with a defective appliance or machine is necessarily guilty of contributory negligence because of so doing. American Car & Foundry Co. v. Clark, 32 Ind. App. 644, 648, 649, 70 N. E. 828.

Appellee does not appear to have been, at the time of his injury, doing anything unusual or unnecessary to the operation of the engine in its then condition.

Judgment affirmed.

(36 Ind. App. 385)

REMSTER et al. v. SULLIVAN et al.
(No. 5,928.)

(Appellate Court of Indiana, Division No. 2.
Oct. 31, 1905.)

1. ELECTIONS—SCHOOL COMMISSIONERS—NOMINATION—PETITIONS.

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the election of school commissioners in certain cities, and declares that each candidate shall be proposed in writing by not fewer than 300 householders of the city, and that no more than one candidate may be named in any one petition and no person may sign more than one petition for any one election. *Held* that, where five school commissioners were to be elected for different terms, petitions of nomination failing to designate the term of office for which the candidates were nominated were void for uncertainty.

2. SAME—BOARD OF ELECTIONS—PREPARATION OF BALLOTS—MINISTERIAL DUTY.

The duty of the board of election commissioners of a city to prepare ballots to be used at an election of school commissioners required by Acts 1903, pp. 5, 6, c. 3, § 1, and to have the same printed and distributed, is wholly ministerial.

3. SAME—POWERS OF BOARD.

Under Acts 1903, pp. 5, 6, c. 3, § 1, providing for the nomination of candidates for the office of school commissioners in certain cities, and requiring the board of election commissioners to prepare ballots containing the names of all candidates nominated in the manner prescribed by such section, where commissioners were to be elected for different terms and peti-

tions of nomination did not specify any term, such election commissioners had no authority to designate the term or terms for which such candidates were nominated.

4. SAME—NOMINATIONS—PUBLICATION.

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the nomination of candidates for the office of school commissioners in cities by petitions to be filed with the comptroller, and requires that after 5 days, the last of which shall not be less than 30 days before the election, such comptroller shall publish the names proposed in two daily newspapers in the city. *Held*, that such provision requires publication of both the names of the candidates and the office or offices for which they have been nominated.

5. SAME—PETITIONS—AMENDMENT.

Acts 1903, pp. 5, 6, c. 3, § 1, provides for the nomination of school commissioners in certain cities by petition, and requires that such petitions shall be filed not later than 40 days before the election in the office of the comptroller, where they shall remain in the public files for 5 days, the last of which shall not be less than 30 days before the election, when he shall publish the names proposed and at the time required by law certify such nomination to the board of election commissioners for the preparation of ballots. *Held* that, where nominating petitions were fatally defective for failure to specify the term for which the candidate was nominated, they could not be amended 40 days prior to the election, so as to cure the defect, but on the expiration of the 40 days became functus officio.

6. APPEAL—REVIEW—SCOPE—MOOT QUESTIONS.

Where complainants sued to prevent the placing of 13 names on a ballot as candidates for school commissioners of a certain city, and yielded to a decree declaring that 7 of the names objected to be placed on the ballot, and that the remaining 6 should not be so placed, the Supreme Court, on affirming the decree, on defendant's appeal, in which complainants filed no cross-errors, would not review questions with reference to the right of the others to have their names on the ballot.

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Bill by Patrick Sullivan and others against Charles Remster and others. From a decree in favor of complainants, defendants appeal. Affirmed.

Jameson, Joss & Hay, for appellants. J. T. Markey and Hanna & Daily, for appellees.

WILEY, C. J. The record in this cause was filed on October 25, 1905, and on the joint petition of the parties it was advanced. In the court below a demurrer to appellees' complaint was overruled. Appellants answered in two paragraphs, to each of which a demurrer for want of facts, was addressed and sustained. All of these rulings are assigned as errors.

In their complaint appellees aver that they are male citizens of the United States and for more than five years last past have been legal residents of the city of Indianapolis and are legal householders therein; that the appellants are the election commissioners for the city of Indianapolis for the municipal election to be held November 7, 1905; that the appellee Sullivan and more than 300 other householders of Indianapolis, no one of whom has signed the petition of any other

candidate for school commissioner to be elected at such election, signed and acknowledged before a notary public, and delivered to Jacob P. Dunn, comptroller of said city, more than 40 days before November 7, 1905, a petition in writing, presenting the name, as a candidate for election as a member of the board of school commissioners of said city, of John H. Emrich, who is more than 25 years of age, a resident of the city of Indianapolis, and has been such for more than three years last past, and whom such petition named as a candidate for the term of office of school commissioner commencing January 1, 1906. It is further averred that the appellee Deem and more than 300 other householders of Indianapolis, no one of whom had signed a petition for any other candidate for school commissioner, signed and presented a petition to the comptroller, duly acknowledged, etc., similar in all respects to that above indicated, naming William M. Taylor as a candidate for said office, and averring facts showing his eligibility therefor, for the term commencing January 1, 1906. It is further averred that more than 40 days before November 7, 1905, similar petitions were filed, signed, and acknowledged before a notary public by more than 300 householders of said city, who had signed no petition for other candidates, and delivered the same to said comptroller, presenting the names of Charles W. Moores, Henry C. Sickels, and Andrew M. Sweeney as candidates for said office, designating said three persons as candidates for the term commencing January 1, 1906. It is again averred that more than 40 days before the date of the election petitions were filed by more than 300 householders of said city, no one of whom had signed any other petition, presenting the names of Matthew H. Camden and William H. Leedy as candidates for said office for the term commencing January 1, 1906. It is also charged that additional petitions were filed 40 days before the election by more than 300 householders, none of whom had signed similar petitions, presenting the names for said office of Amelia Keller Buehler, Julius A. Haag, Joseph H. Keller, Charles O. Lowry, Clarence L. Marlatt, and Frank Morrison, but that no petition in behalf of any of said persons last named "indicates any term for which such persons so named are candidates." It is then alleged that appellees are informed and believe, and charge the fact to be, that all the persons in whose behalf petitions have been filed as candidates for school commissioners are eligible to said office; that no petition for the nomination of any candidate has been or is acknowledged before any notary public, or other officer authorized to take acknowledgments, saving and excepting only the petitions in behalf of John H. Emrich, William M. Taylor, Charles W. Moores, Henry C. Sickels, and Andrew M. Sweeney; and that no petition saving and excepting those of the five last named can-

didates and Matthew H. Camden and William H. Leedy designate the term for which the candidate named shall be voted for at said election. It is further charged that appellants, as election commissioners, are proposing and threatening to place upon the official ballot to be printed by them and to be voted at such election the names of all of said candidates for whom petitions have been filed, notwithstanding the fact that but five of said candidates have been presented by petitions properly acknowledged; that appellants are proposing to, and "unless restrained, will, print the official ballot, containing simply the names of such candidates as have been nominated for school commissioners, without designating upon such official ballots the terms for which such candidates have been respectively nominated"; that if such election commissioners should proceed it would involve the election and the election officers and board of canvassers in doubt and confusion and render it difficult to tell what candidates, if any, have been properly elected at such election, and would be productive of litigation, and might deprive the parties of the rights which they possess not only to nominate candidates for such office to be assured that all other candidates for such office had been nominated in conformity with the provisions of the law. It is then averred that the two candidates whose petitions appellees have signed, to wit, Emrich and Taylor, have no opposition at such election, and if the names of all candidates for school commissioners should be printed together upon the official ballot, without indication as to the terms for which said candidates have been nominated, in the event any other candidate should receive more votes than said Emrich and Taylor, it is "probable that the board of canvassers of the city of Indianapolis would certify such other candidates as elected to the place for which said Emrich and Taylor were candidates, and that thereby lasting and irreparable damage would be done to the plaintiffs, and that plaintiffs have no adequate remedy at law for the redress of the grievances herein complained of, and that it is impossible to fix accurately in dollars and cents the damage plaintiffs are likely to sustain by reason of the wrongful and unlawful acts of the defendants herein, if suffered to continue; that no penalties whatever are provided by the law for the unlawful and wrongful acts of the defendants; and that injunctive relief is necessary to restrain the continued wrongful acts of the defendants, and unless the same is given it would be necessary to resort to a multiplicity of suits in the future to determine the rights of the various candidates." The prayer of the complaint is that the appellants, constituting the board of election commissioners, be perpetually enjoined from printing upon the official ballots for school commissioners the names of any other candidates than the five persons, petitions for

whose names were duly acknowledged, namely, Emrich, Taylor, Moores, Sickels, and Sweeney, and that appellants be perpetually enjoined from printing upon said ballots the names of any candidates for school commissioners without designating upon the official ballot the term for which said candidate is named, whether it be for the term commencing January 1, 1906, or January 1, 1908.

The first paragraph of appellants' answer admits that petitions designating all of the 13 names mentioned in the complaint were filed as alleged therein, but denies that appellees intend to and will, unless restrained, print an official ballot containing simply the names of such candidates as have been named for school commissioners, without designating upon such official ballots the terms for which said candidates have been respectively nominated; but, on the contrary, appellees aver and allege the fact to be that they intend to and will, if permitted, designate and have printed on the official ballot "the office and term of office for which each of said candidates will be voted for, and that said defendants intend to and will, unless restrained and enjoined from so doing, designate on said ballot and print thereon the name of Amella Keller Buehler, Julius C. Haag, Joseph H. Keller, Charles O. Lowry, Clarence R. Marlatt, and Frank Morrison as candidates to be voted for for school commissioners for the term commencing January 1, 1906. In their second paragraph of answer appellants admit that the petitions of all of the 13 persons named in the complaint, designating them, were filed as alleged in the complaint, but they deny that they intend to and will, unless restrained, print the official ballot containing simply the names of such candidates without designating the terms for which said candidates have been respectively named; but, on the contrary, allege that since the filing of said petitions the candidates Buehler, Haag, Keller, Lowry, Marlatt, and Morrison, by, and with the consent of each and all the petitioners, have elected and designated in writing, duly acknowledged, the term of office for which they intend, and intended at the time the petition was filed, to be candidates; and that appellees intend to and will, if not restrained, designate and print on the official ballot the office and the particular term of office for which each of said candidates will be voted for, to wit, Buehler, Haag, Keller, Lowry, Marlatt, and Morrison, for the term commencing January 1, 1906, "according to the choice so expressed by said candidates and their respective petitioners."

Upon the action of the court in sustaining the demurrer to the first and second paragraphs of their answer, appellants declined to plead further, and the cause was submitted to the court upon the complaint. Such proceedings were had that the court entered a decree perpetually enjoining the board of election commissioners from printing upon

the official ballots for school commissioners any other names than those of Emrich, Taylor, Moores, Sickels, Sweeney, Camden, and Leedy, and that "said defendants and each of them and their agents and employees be, and they are hereby, perpetually enjoined from printing upon said ballots the names of any candidate for school commissioner, without designating upon the official ballot, in connection with the name of such candidate, the term for which said candidate is named, and whether it be for the term commencing January 1, 1906, or for the term commencing January 1, 1908." The antagonistic positions upon which the contending parties base their rights are clearly manifest by the facts averred both in the complaint and answer.

The two basic propositions, upon which all others must depend, are: (1) That of appellees, to wit, that the board of election commissioners have no authority to print upon the official ballots the name or names of any candidate or candidates, whose petitions designating them as such do not specify the term for which they are to be elected, and where the petitioners have not acknowledged the execution of the petitions before some officer authorized to take acknowledgments. (2) That of appellants, to wit, that where the petitions show that the candidates are eligible to the office and are signed by the requisite number of legal petitioners, even though the petition does not designate the term for which the nominations are made, it is the duty of the board to place such name or names on the official ballot, and also to designate thereon the term for which such candidates are to be voted. From the decree entered by the trial court, it is likewise evident that it did not adopt the view in whole of either party, for it held that the only names of candidates that should go upon the official ballots were those whose petitions designated the term for which they would be elected, notwithstanding the petition of two of the candidates, to wit, Camden and Leedy, were not acknowledged by the nominators. The trial court, therefore, in terms held that the acknowledgment by the petitioners was not requisite to the validity of the petition, but that to make the petition valid it was requisite that it should designate the term for which the candidate was to be voted.

The office of school commissioner, created by the act approved March 4, 1899 (Acts 1899, p. 434, c. 200), and the amendatory act approved January 29, 1903 (Acts 1903, p. 5, c. 3), is the only elective office under the laws of this state which is not subject to the control of political parties, and candidates for which cannot be nominated by political organizations. The act creating the office and providing the manner in which candidates therefor might be placed upon the official ballot has therefore wisely divorced the management and control of public schools in

cities that come within the act from the intrigues and manipulations of all political parties. The only manner in which an elector can become a candidate for such office is by the petition of not less than 300 householders of the municipality. When the act of 1899 and the amendatory act of 1903 were passed, the law provided for biennial elections in the city of Indianapolis, and such elections were not held in connection with the general elections for state and county offices. The apparent confusion which presents itself in this case upon the facts disclosed by the record has arisen by reason of the provisions of the act approved March 6, 1905, that elections for city and state offices in cities of the class of Indianapolis shall be held on the first Tuesday after the first Monday in November in the year 1905, and on the same day every four years thereafter. Acts 1905, pp. 239, 240, c. 129, § 43. Under section 4 of the act of 1899 (Acts 1899, p. 436, c. 200), the term of three of the present school commissioners of the city of Indianapolis will expire on the 31st of December, 1905, while the term of the other two members will not expire until two years thereafter. By reason of the provisions of the act of 1905, supra, postponing the city election until the first Tuesday after the first Monday in November, 1905, and providing for elections every four years thereafter, it becomes necessary to elect at the election of 1905 five school commissioners, instead of three. Seven of the petitions nominating candidates for this office have specified the terms for which such nominations have been made, while six of them do not specify any term. It is very earnestly contended by appellants that, notwithstanding the omission in the six respective petitions to designate the term for which the candidates are to be voted for, it is within the power of the election commissioners of the city to designate upon the ballots such terms, and which they aver in their answer they intended to do, and will do unless enjoined.

To determine the merits of the controversy it becomes important at the threshold of the case to look to the statutes which make provision for such nomination and elections. Section 1 of the amendatory act of 1903 (Acts 1903, pp. 5, 6, c. 8) is as follows: "The said board of school commissioners shall be elected, except as specified in section 4 of this act, on the general ticket for a term of four years, by the voters of such city qualified to vote at its city elections. The members of such board shall be elected at the regular city election of such civil city, and shall be taken from the city at large without reference to districts, and such election shall be held under the provisions of the general laws governing such city elections, so far as they are not inconsistent with the provisions of this act. * * * Not later than forty days before any election for members of the board of school commissioners, provided for in this

act, householders of said city may present names of candidates for election as members of said board of school commissioners by filing the nominations in the office of the comptroller of said city in the following manner: Each candidate shall be proposed in writing by not fewer than 300 householders of said city. No more than one candidate may be named in any one petition and no person may sign more than one petition for any one election. Upon the filing of such petitions in the office of the comptroller, as aforesaid, the comptroller shall place the same in the public files of his office, and for five days, the last of which shall not be less than thirty days before the election, he shall publish the names proposed in two daily newspapers of the city, and at the time required by law shall certify such nominations to the regular board of election commissioners for said city election. * * * The election commissioners shall prepare ballots the color and quality of whose paper shall be the same as that of the regular city ballots. The ballots so prepared shall contain the names of all such candidates arranged in alphabetical order in columns according to the following method: The names of candidates for each term shall be printed in a separate column. Those for the regular term in the first column, and those to fill vacancies in the second column, and such names shall be printed upon the ballots in rotation in such manner, as nearly as possible, that the name of each candidate shall appear at the head of the column for his term, whether the regular or the vacancy term, as often as that of any other such candidate shall so appear, and in the second place a like number of times, and so on. In printing the ballots the positions of the several names shall be changed as many times as there are candidates to be voted for. In changing the names the printer shall take the name at the head of the column and put it at the foot, raising the remainder of the column, so that the name that was second before the change shall be first after the change." It is further provided "that there shall be nothing on the fact of said ballots, except as otherwise provided herein and except the names of the candidates and the respective terms for which they are candidates, together with the square in front of each name, and a statement at the head of each column of the number of candidates for that term for which the elector may vote, and that the elector shall indicate his choice by marking a cross in the square opposite the name of each candidate for whom he votes and not elsewhere." It becomes the duty, under the statute, for the comptroller to certify to such nominations to the regular board of election commissioners for the city.

If it were not for the fact that five school commissioners are to be elected in the November election, 1905, instead of three, no confusion could arise on account of the peti-

tions for nominations not designating the term or terms for which the candidates were to stand. It is conceded by both parties that if there were only three candidates to be elected, the terms of which would commence January 1, 1908, the petitions would not be void for a failure to designate the term. Section 1 of the act of 1903, *supra*, provides that the election of school commissioners "shall be held under the provisions of the general laws governing such city elections so far as they are not inconsistent with the provisions of such act." Section 12 of the act approved March 4, 1905 (Acts 1905, p. 193, c. 113), entitled "An act concerning elections," provides that: "No name upon any ballot for nomination shall be considered by the city or county board of election commissioners unless the same be signed by the petitioner in person, or by his mark duly attested; and no petition for nomination shall be effectual to authorize the name petitioned for to appear upon the official ballot unless the signatures of such petitioner to the number required by law shall be duly acknowledged before some officer authorized to take acknowledgments." Statutes that affect the franchise rights of the electors should receive a reasonable and liberal construction to the end that such rights should not be abridged, but it is important, also, that all such statutory provisions should be substantially complied with that the rights of the public as well as the rights of the individual elector should be preserved. It is the rule that an act regulating elections should not be extended by construction beyond the letter thereof, so as to deprive an elector of his right to suffrage, but courts should restrict the exceptions which exclude the ballot, where the spirit and intention of the law are not thereby violated. 10 Am. & Eng. Ency. Law, 589; *Kirk v. Rhoads*, 46 Cal. 399; *Kellogg v. Hickman*, 12 Colo. 256, 21 Pac. 325; *Drulliner v. State*, 29 Ind. 308; *Stanley v. Manly*, 35 Ind. 275; *State v. Phillips*, 63 Tex. 393, 51 Am. Rep. 646. It is the universally accepted doctrine in a republican form of government that an elector has a right to cast a free ballot and to cast it for the candidate of his choice, provided the name of such candidate legally appears upon the official ballot. Here the only mode, as we have seen, of nominating candidates for the office of school commissioner, is by petition, signed by not less than 300 householders, and by filing such petitions of nominations in the office of the comptroller of the city not less than 40 days before the date of the election. As appears by the record, at least 3,600 householders indicated their choice of candidates by filing 13 separate petitions, naming 13 candidates for whom they desired to vote. If they have shown a substantial compliance with the provisions of the statute in mak-

ing such nominations, they should not be denied the right to cast their votes for such candidates.

The nomination of any candidate for an office, whether it be by convention, petition, or otherwise, necessarily implies the naming of such candidate and the particular office for which he is nominated. This suggestion brings us to the consideration of the first question presented by the assignment of error, to wit, the sufficiency of the complaint. Among other things, it is averred that appellants, constituting the board of election commissioners, "unless restrained, will print on the official ballot containing simply the names of such candidates as having been named for school commissioners, without designating upon such official ballots the terms for which such candidates have been respectively named." If for no other reason this averment is sufficient to entitle appellees to injunctive relief, and makes the complaint good. Six of the petitions do not designate the term of office for which the respective candidates are nominated, and, as school commissioners are to be elected at the November city election for two separate and distinct terms, such petitions are void for uncertainty. True, these petitions name certain candidates and state that they are to be candidates for the office of school commissioner; yet they fail to specify the terms for which they are to serve, and unless it is within the power of the board of election commissioners to supply this essential requirement, and to designate for the petitioners and candidates the respective term or terms for which they are to be elected, the failure to designate such terms in the petition is fatal.

This brings us to the consideration of the sufficiency of the answers. The board of election commissioners of the city of Indianapolis is a creature of legislative enactment, and such board derives its power and authority from the statute. The city clerk is *ex officio* a member of such board, and he appoints the other two members upon the recommendation or nomination of the chairman of the two political parties casting the greatest number of votes. It is the duty of such board to prepare and have printed and distributed the ballots to be used in the election. Their duties are wholly ministerial. The statute confers upon the board some latitude in certain matters. Sections 6215-6220b, Burns' Ann. St. 1901. But as the latitude therein given to the board has no application to the question involved we omit to set out the statute or to comment thereon. It is urged upon behalf of appellants that the spirit and letter of the law is that the board can make such changes, subject to restrictions, in preparing and printing the ballot as to make it a legal ballot, and that, as six of the petitions fail to designate the term or terms for which

the candidates were nominated, the board is clothed with power to so designate and place their names upon the ballots accordingly. It is also claimed that, as the statute does not require that the petition of nomination should designate the term, the candidates have the right, if exercised within a reasonable time, in any other effective way, and that the board would have the right to act upon such election by the candidates, and print the ballots accordingly.

The material substance of the first paragraph of answer is that appellants propose to, and will, unless restrained, place upon the ballots the names of the six candidates, whose petitions for nominations do not specify any term, for the term commencing January 1, 1906. The second paragraph is to the effect that, since the filing of the petitions, the six candidates therein named, by and with the consent of the petitioners, "have elected and designated in writing, duly acknowledged, the term and the office for which they intend, and intended at the time the petition was filed, to be candidates," and that such board will, unless restrained, place their names upon the official ballot for the term beginning January 1, 1906. It should be noted by these averments of answer that the six candidates elected to stand for the term commencing January 1, 1906, and that they did so with the consent of the petitioners. Under the first paragraph of answer it clearly appears that appellants intend to arbitrarily determine for themselves the term of office for which the six candidates should stand for election, without regard to the wishes of the candidates or the petitioners. If they have a right to do this, they have an equal right to arbitrarily say that three of the candidates shall stand for election for the term commencing January 1, 1906, and that the other three shall be elected for the term beginning January 1, 1908. We are clearly of the opinion that they possess no such authority, and hence the demurrer to that paragraph was properly sustained.

As above stated, the statute requires that such petitions must be filed not later than 40 days before the election. The second paragraph of answer does not aver that the election of the six candidates to stand for the term to begin January 1, 1906, was made within the 40 days before the election. A pleading will always be construed most strongly against the pleader, and, as no direct averment is made that the election of the candidates was within the 40 days, it will be presumed that it was not so made. We have no doubt but what a petition of this character could be withdrawn, after it had been filed, for amendment; if it was done within the statutory period; but, being void in the first instance for uncertainty, it could not be legalized and be made effective by such amendment after the expiration of the

statutory period. We think that the election of the six candidates named in the petitions to stand for the term beginning January 1, 1906, as indicated by the answer, must be regarded as a material and essential amendment to the petitions. After the expiration of the statutory period neither the petitioners nor the candidates could exercise any control or authority over the petitions thus filed. They became public documents, and were in the custody and control of an authorized statutory officer. In fixing and designating the time for which such petitions have to be filed, the Legislature, no doubt, had in mind some useful purpose in the interest of the public. The comptroller, who is made the custodian of the petitions, and with whom they must be filed, is required to place "the same in the public files of his office and after five days, the last of which shall not be less than thirty days before the election, he shall publish the names proposed in two daily newspapers of the city," etc. This provision of the statute implies that in such publication he shall state, not only the names of the candidates, but the office or offices for which they have been nominated. It is evident, therefore, that the purpose of the Legislature in requiring these several specific things to be done was to give the electors of the city timely notice of the candidates for whom they might desire to vote and the specific office for which such candidates were to be elected. The mere naming of a candidate for the office of school commissioner, without designating the term for which he was to be elected, where members of the board are to be elected for two separate and distinct terms at the same election, would not be naming such candidates for any specific office.

In our judgment there is no more warrant in law for doing what appellants are proposing to do, as indicated in their answer, than there would be in allowing and recognizing the right of any person who desires to be a candidate for a public office to file his petition of nomination after the expiration of the statutory period, and the election commissioners then placing his name upon the official ballot as a candidate. In such case all would agree that such person would have no legal standing as a candidate and acquired no right to be voted for. If the election commissioners can do what they propose in this case, it would be equivalent to an assumption of power on their part to place the name of a candidate upon the ballot who had not been designated as such in any mode known to the law. The law provides for the election of three members of the board of commissioners for each county in the state. Suppose a political party, at a regularly called convention, should nominate three candidates for commissioners without designating the districts they were to represent and so certify such nominations as required by law. The board of election commissioners, when they come to prepare and print the

ballots, would in such case have no authority to do what the convention omitted to do, and amend the nominations by designating the districts. After the expiration of the statutory period of 40 days, the petitions for nominations, so far as the petitioners are concerned, become *functus officio*, for they have then discharged their functions and can not be amended.

It has been held that where a statute requires a certificate of nomination to designate the particular office for which the person named in the certificate was nominated, and it fails to do so, the officer with whom it is to be filed must reject it. *State ex rel. v. Falley*, 9 N. D. 464, 83 N. W. 913. It was also held in that case that where the certificate was required to be filed 30 days before the election, and it was filed within that time, and had been withdrawn for correction and again filed 29 days before the election, the officer had no authority to certify it. The court said: "The designation of the office is matter of substance, and not a mere formal matter. * * * Unless the office be named the Secretary [Secretary of State] cannot certify the name of the county auditor, because its place upon the ticket could not be fixed." Quoting from *Lucas v. Ringsrud*, 3 S. D. 355, 53 N. W. 426, it was further said: "The first certificate of the nominations made by the Prohibition Party, as shown by the exhibit, is clearly insufficient, because it fails to give the residence or business address of any of the officers purported to be nominated; and it also fails to state the place of residence, the business, and business addresses of the presiding officer and secretary of the convention or primary meeting at which said nominations were made, and they were therefore properly rejected. What the certificate of nomination shall contain is briefly stated in the statute, and any one who wishes to avail himself of the benefits of this law must substantially comply with its requirements. Until this is done, the Secretary of State is justified in refusing to place such a document on file." In *State ex rel. v. Falley*, *supra*, the court, continuing, said: "Under this decision, as well as under the expressed words of our statute, the certificate, when first presented, was clearly insufficient, and the Secretary could not receive or file the same. When the amended certificate was presented, granting that it was in law presented when placed in the registered mail, * * * it was too late." The statute in North Dakota provides that certificates of nominations must be filed with the Secretary of State not less than 30 days before the date fixed by law for the "election of the persons in nomination," and in the case from which we last quoted it was said: "This time limit has been held mandatory by every court that has ever passed upon a similar statute, as far as we can ascertain." Citing *Lucas v. Ringsrud*, *supra*; *State v. Piper* (Neb.) 69 N. W. 383; *Hallon v. Center*

(Ky.) 43 S. W. 174; *In re Cuddeback* (Sup.) 39 N. Y. Supp. 388. In *Howes et al. v. Turner et al.*, *Law Reports Common Pleas Division*, vol. 1 (English) 670, it was held, where a nomination paper was filed within the time allowed by law, and then taken away, without any intention of withdrawing it, to make an unnecessary amendment by getting one of the signors to write his Christian name in full, instead of the abbreviation, as it appeared upon the petition when filed, and then returning it to the files the day after the expiration of the time, would not invalidate it, but that by the filing of such petition after the expiration of the time the certificate became a nullity.

Where there is more than one office to be filled, or different terms of the same office at the same election, a failure to designate for which office or term of office the vote is intended will invalidate the ballot. 10 Am. & Eng. Enc. Law (2d Ed.) 7256; *Page v. Kuykendall*, 161 Ill. 319, 43 N. E. 1114, 32 L. R. A. 656; *State v. Griffey*, 5 Neb. 165; *Milligan's Appeal*, 96 Pa. 222; *Chamberlain et al. v. Hartley et al.*, 152 Pa. 544, 25 Atl. 572; *State v. Goldwaite*, 16 Wis. 146. It may be said, we think, as a general proposition, that under the Australian ballot system a legal ballot can only be prepared and printed when it is done in substantial compliance with a certificate or petition of nomination and the requirements of the statute governing such proceedings; and when the certificate or petition is defective in not designating the office to be filled or the term of office, where different terms of the same office are to be filled at the same election, a candidate thus named and placed thereon is not entitled to be voted for and a ballot cast for him is a nullity. This being true, there cannot be in such case any legally designated candidate. These considerations lead us to the conclusion that the six persons named in the petition, where the terms for which they were to be voted were not designated therein, are not entitled to have their names appear upon the official ballot. We reach this conclusion without considering the question of the acknowledgment of the petitions by the petitioners.

We have thus disposed of every matter in dispute between the parties, except the one, asserted by appellees, that it was an essential requirement to acknowledge, before some officer authorized to take acknowledgments, the execution of the petitions. We have held these 6 petitions invalid upon other grounds, and that appellants in their official capacity are not authorized to place the names of the persons therein specified as candidates upon the ballots. This holding is favorable to appellees, but against the contention of appellants, who assert that all of the 13 names designated in the petitions are entitled to be placed upon the ballots. Appellants are asking a reversal because they say that the trial court erred in holding that these 6

persons were not entitled to have their names appear on the ballots as candidates. We have clearly indicated in this opinion that we are in accord with the conclusion of the trial court upon that proposition. The decree below commanded the appellants to place and print upon the ballots the remaining 7 names of the candidates petitioned for. To this command appellees yield obedience and are content, for they have not assigned cross-errors, and close their brief with the statement that: "The action of the lower court should in all things be sustained." It logically and necessarily follows that, if it was a prerequisite to the validity of the petitions that the petitioners should have acknowledged the execution of the same, that question has ceased to become a matter of controversy, and is therefore eliminated from the case. The rights of the respective parties are adjudicated by what we have already said in this opinion. Courts of appeal will not give time to the examination or determination of questions which will serve no useful purpose, nor will they adjudicate questions unnecessary to the decision of the case. *State v. Board, etc.*, 153 Ind. 302, 54 N. E. 809; *Carmel, etc., Co. v. Small*, 150 Ind. 425, 47 N. E. 11, 50 N. E. 476. We therefore decline to express an opinion as to the necessity of the acknowledgment of such petitions.

The judgment is affirmed, and the clerk of this court is hereby directed to certify this opinion to the court below forthwith.

(35 Ind. App. 422)

CHICAGO, I. & L. RY. CO. v. HARE.
(No. 5,385.)

(Appellate Court of Indiana, Division No. 2,
Nov. 1, 1905.)

1. CARRIERS—CONTRACT OF SHIPMENT—LIMITATION OF LIABILITY—CONSIDERATION.

A contract limiting the liability of a carrier must be supported by a consideration other than the delivery of the goods and the agreement to transport.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 643.]

2. SAME—CONSTRUCTION.

A clause in a contract of shipment, "Tariff rate on this shipment is thirty per cent. higher than the rates herein named if shipment is not made under this contract," was prima facie evidence of consideration for stipulations limiting the carrier's liability.

3. SAME—ACTIONS—BURDEN OF PROOF.

Acts 1905, p. 58, provides that, in actions against common carriers for failure to safely transport and deliver shipments, it shall be sufficient for the shipper or person entitled to maintain such action to allege and prove, in the first instance, the delivery to and receipt by the carrier, together with its failure to transport or deliver. *Held*, that such statute governs the procedure in cases not founded on breach of the special contract, and arising after the taking effect of the statute.

4. SAME—CONTRACT OF SHIPMENT—INTERSTATE COMMERCE ACT—CHOICE OF RATES.

A contract of shipment containing a clause, "Tariff rate on this shipment is thirty per cent. higher than the rates herein named if shipment is not made under this contract," did not show

on the face of the contract that it was inhibited by the interstate commerce act, as not offering the shipper a choice of rates.

Appeal from Superior Court, Marion County; James M. Leathers, Judge.

Action by Marcus L. Hare against the Chicago, Indianapolis & Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Taylor & Woods, H. R. Kurrle, L. B. Ewbank, and E. C. Field, for appellant. Jameson & Joss and H. J. Brandon, for appellee.

ROBY, J. This is a suit to enforce the common-law liability of a common carrier on account of damages suffered by live stock while being transported from Indianapolis to Chicago by appellant for appellee. The complaint was in one paragraph, and the answer was a general denial.

Appellant offered in evidence an instrument purporting to be a special contract of carriage between the parties, limiting the liability of the carrier in various respects. Upon appellee's objection the court excluded the offered evidence; the objection made being that the contract is invalid on its face, under an act of Congress known as the "Interstate Commerce Act," and for the reason that appellee was not offered a choice as of rates. The instrument contains a clause in terms as follows: "Tariff rate on this shipment from Indianapolis to Chicago is thirty per cent. higher than the rates herein named if shipment is not made under this live stock contract." A contract limiting the liability of a common carrier must be supported by a consideration other than the delivery of the goods and the agreement to transport, such consideration being usually found in a rate reduction. That clause of the instrument in question above quoted tends to show the existence of such consideration. Its recitals are not conclusive, but they are prima facie; and, in the absence of other evidence upon the subject, would entitle appellant to a finding in its favor. *United States Express Co. v. Joyce*, 69 N. E. 1015, 35 Ind. App. —; *L. E. & W. Ry. Co. v. Holland*, 162 Ind. 406, 412, 69 N. E. 138, 63 L. R. A. 948. This statement, in the nature of an admission, would be competent against the party making it however evidenced. The practice declared in *L. E. & W. Ry. Co. v. Holland*, supra, requires one who has signed a contract which he claims is invalid because of the want of consideration to aver and prove facts from which the invalidity arises. *Evansville & T. H. Ry. Co. v. McKinney* (Ind. App.) 73 N. E. 148. This procedure places the burden upon the shipper, but the incongruity therein is not of general importance; the procedure in cases not founded on breach of the special contract, and arising since the act of February 27, 1905, being governed by it. Acts 1905, p. 58.

The instrument offered in evidence con-

tains the statement of a consideration rendered by appellant. If there was in fact no consideration, it must be determined from all the evidence relevant; and, no matter how well founded the claim may be, it did not justify the exclusion of the contract. It does not appear upon the face of the contract that it is one inhibited by the "Interstate Commerce Act," and, in the absence of extrinsic facts, the court declines to consider the question argued.

Inasmuch as the judgment will have to be reversed for the error indicated, other questions not likely to arise upon a retrial do not need to be taken up.

Judgment is reversed, and cause remanded, with instructions to the court to sustain appellant's motion for a new trial, and to permit appellee to amend his complaint if he shall so desire.

(36 Ind. App. 441)

BARNETT v. THOMAS et al. (No. 5,417.)
(Appellate Court of Indiana, Division No. 2.
Nov. 2, 1905.)

1. APPEAL—FINAL ORDER—PARTITION.

An order for the sale of lands in partition, after it has been ascertained that the lands cannot be partitioned in kind without injury, is a final disposition of the cause, from which an appeal will lie.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 357, 450.]

2. PARTITION — RENTS AND PROFITS — ACCOUNTING.

Where in partition it appeared that certain of the co-tenants had been in exclusive possession of the common property, and had received the entire rents and profits thereof to the exclusion of another co-tenant, the court in such suit had power to decree an accounting of such rents and profits.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 247, 247½.]

3. ADMINISTRATORS—SALES TO PAY DEBTS—SURPLUS PROCEEDS.

A debt due an estate from the heir may be retained out of his distributive share of the surplus proceeds of real estate sold to pay debts.

4. PARTITION—INTEREST OF HEIRS—INDEBTEDNESS.

Where one of several heirs to whom certain real property descended was indebted to the deceased owner and others were not so indebted, such indebtedness should be considered in a partition proceeding in which the property was sold, and the proceeds directed to be distributed between the co-tenants.

5. DESCENT AND DISTRIBUTION—ADVANCEMENTS—EQUALIZATION—PERSONAL ESTATE.

Under Burns' Ann. St. 1901, § 2563, providing that decedent's personal estate is the primary source from which advancements shall be equalized, where advancements have been made to certain heirs who are tenants in common of real estate sought to be partitioned, and they converted decedent's personal estate to their own use without administration to the value of \$3,000, the purchaser of the interest of one of the heirs in such real estate is entitled to have such advancements equalized out of such personal property in such partition proceeding in order to free the real estate therefrom.

Appeal from Circuit Court, Hendricks County; Thomas J. Cofer, Judge.

Suit for partition by Mary E. Thomas and others against Levi A. Barnett and another. From a judgment in favor of plaintiffs, defendant Barnett appeals. Reversed.

Thad. S. Adams and L. A. Barnett, for appellant. Brill & Harvey, for appellees.

WILEY, C. J. Appellees were plaintiffs below, and appellant and the appellee Edward D. Thomas were defendants. In their complaint appellees averred that they and appellant were owners in fee simple, as tenants in common, of certain real estate, which is specifically described; that appellees derived their title as heirs of one Erasmus D. Thomas, deceased, who died seised of certain real estate; that said Edward was a son and heir of decedent, and that his interest in the real estate had been divested by a judicial sale, and appellant had acquired such interest by deed from the sheriff; that decedent had made certain advancements to his children, specifying the amount made to each, and that said advancements to Edward aggregated \$556. It was further averred that the real estate was not susceptible of division in kind without injury, and asked that it be sold, that an accounting be taken of the several advancements, and that the proceeds be divided according to the interests of all the parties. Appellee Edward D. Thomas filed an answer, in which he admitted all of the averments of the complaint. Appellant answered in four paragraphs, to the second, third, and fourth of which a demurrer for want of facts was sustained. The trial was had upon the issues joined by the general denial of appellant and the answer of the appellee Edward, and upon request of the parties the court made a special finding of facts and stated its conclusions of law thereon. By the special finding of facts and the conclusions of law the interests of the respective parties were found and determined. The court found that the real estate was not susceptible of division in kind, and that the same should be sold, and the proceeds divided according to the interests of the parties, as determined in the finding and judgment. A commissioner was appointed to make the sale. Appellant's motion for a new trial, for cause and as of right, was overruled. All the rulings above referred to which were adverse to appellant are assigned as errors.

Other questions are presented by the record, but from the conclusion we have reached upon the action of the court in sustaining the demurrer to the second, third, and fourth paragraphs of answer, all subsequent rulings of which appellant complains need not be considered.

Appellees contend that the appeal is premature for the reason that the order to sell the real estate is not a final judgment, and as there can be no appeal except from a final judgment it is insisted that this appeal

should be dismissed. An appeal will lie from an ordinary partition proceeding after the commissioners have reported partitioning the real estate, and such report has been confirmed by the court. *Kern v. Maginniss*, 41 Ind. 398. An order or decree in a proceeding for partition for the sale of lands, after it has been ascertained that such lands cannot be partitioned in kind without injury, is as much a final disposition of the cause as a confirmation of the report of commissioners making partition of the property. *Fleener v. Driskill*, 97 Ind. 27. In such case every question raised by the issues is finally determined and adjudicated when the report of partition is confirmed, or the property ordered sold where partition is impracticable. Where the property is ordered sold, and the question of distribution determined, no other question can arise, except that of properly carrying out the terms of the decree. *Freeman on Judgments*, 36. Under the authorities, this appeal is not prematurely prosecuted, but is properly before us.

If the facts stated in the affirmative paragraphs of answer present questions which appellant had a right to have litigated and determined in the partition proceedings, and such questions were pertinent to and affected the rights of the respective parties, it necessarily follows that it was error to sustain the demurrer thereto. Such error might have been obviated had the court in its special findings found and embodied the facts charged in the answers, but this it did not do. The special findings state, and the decree so ordered, that appellant was the owner, as tenant in common with appellees, of the undivided $\frac{2}{48}$ of the real estate. From the time appellant acquired the interest in the real estate formerly owned by Edward, he became a tenant in common with all the other joint owners, and was entitled to share in the rents and profits thereof according to his interest therein.

In his second paragraph of answer appellant avers that he had been the owner by purchase of the undivided $\frac{2}{48}$ of said real estate for more than six years, and that the rental value of all of said real estate, over and above the taxes and other expenses incident to keeping up the repairs, was of the value of \$600 per annum, and that he was entitled to $\frac{2}{48}$ thereof; that appellees during all of said time had the exclusive possession of said real estate, and received and converted to their own use all of said rents and profits, and that during said time they had cut, sold, and removed therefrom timber of the value of \$500, and converted the proceeds thereof to their own use. The prayer of this paragraph is that an accounting be had as to the said rents and timbers sold, and that the same be taken into account, and the distribution of the proceeds of the sale of said lands be distributed accordingly, etc.

In the third paragraph of answer it is charged that at the time of the death of the

decendent certain of the heirs, appellees herein, were indebted to the decendent for moneys loaned to them, specifying the persons and amounts each were indebted, respectively. It is further charged that no administration of the estate of the decendent was had, and that said several amounts are due and owing said estate. The prayer of this paragraph is that the several amounts so owing by appellees should be taken into account, and that the proceeds of sale of the real estate be distributed accordingly.

In the fourth paragraph of answer it is charged that the decendent left a personal estate of the value of \$3,000 over all indebtedness; that no administration of his estate was had; that appellees took possession thereof, and converted the same to their own use; that appellant acquired the interest of Edward D. in said real estate more than six years ago; and that he is entitled to have an accounting of the personal estate of decendent, and have the proceeds thereof taken into consideration in making the distribution of the funds arising from the sale of the real estate. The prayer of this paragraph is that the appellees be required to account for all of such personal estate, and that it be taken into account in making the distribution, etc.

The demurrer admits the facts averred in the several paragraphs of answer to be true. It is therefore admitted that for six years prior to the filing of the petition for partition appellees had exclusive control and possession of the real estate; that the annual rental value thereof was \$600; and that they cut, sold, and removed from the real estate timber of the value of \$500. These items aggregate \$4,100. Appellant owned an undivided $\frac{2}{48}$ interest in the real estate, and he was entitled to $\frac{2}{48}$ of the rental value thereof, which would be \$182.22, and a like proportion of the \$500. It is the rule both in this country and in England that in a proceeding for partition a court of equity will, in a proper case, require one co-tenant, who has been in the exclusive possession of the common property, or of more than his portion thereof, or has received rents and profits therefrom, to account for the share of which his co-tenants are entitled. *Am. & Eng. Ency. of Law* (2d Ed.) p. 1171, and authorities there cited. The case of *Peden v. Cavins et al.*, 184 Ind. 494, 84 N. E. 7, 39 Am. St. Rep. 276, is in point, and squarely decides the question. Also, *Freeman on Co-Tenancy & Partition*, § 512. "Where equity has jurisdiction for partition, no obstacle exists to its proceeding to complete justice by compelling an accounting for all rents received, and nothing better than expenses and delay can result for requiring one suit at law for mesne profits and another in equity for partition." *Freeman on Co-Tenancy & Partition*, supra. The law regards with much favor the early adjustment of legal and equitable controversies, and the rule prevails that all matters

which might have been litigated and determined under the issues will be conclusively presumed to have been litigated. *Beaver v. Irwin*, 6 Ind. App. 286, 33 N. E. 462. As appellant had a legal right to his share of the rents and profits of the real estate, which appellees while in exclusive possession appropriated to their own use, he was entitled to have such right determined in the equitable proceedings for partition.

In the third paragraph it is sought by affirmative averments to show that certain of the heirs (appellees) of the decedent were indebted to him at the time of his death, that said sums are still due the estate, and that they should be taken into account in the distribution of the proceeds of the sale of real estate, etc. It is the policy of the law, and in accord with strict principles of justice and equity, that in the distribution of estates heirs should share equally in proportion to their respective interests. The same rule applies in the partition of real estate. Where the real estate is partitioned in kind, or sold under order of the court, and the proceeds distributed to the parties in interest, it would be unfair and inequitable for one heir or one co-tenant to receive a greater portion than his share. This would be unfair and unjust to their co-tenants. A debt due a decedent becomes a part of the assets of his estate, and if such debt is due and owing from an heir who is entitled to share in his real estate or the distribution of his personal estate, equity demands that an account be taken of it, to the end that an equal distribution may be made. It has been held that a debt due an estate from an heir may be retained out of his distributive share of the surplus proceeds of real estate which has been sold to pay debts. *Fiscus' Adm'r v. Moore*, 121 Ind. 547, 23 N. E. 362, 7 L. R. A. 235. The right of the executor or administrator in such case to retain any such sum depends upon the principle that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid. *Fiscus' Adm'r v. Moore*, *supra*. We cannot perceive any good reason why this rule should not apply where real estate has been ordered sold in a partition proceeding, the respective interests of the parties determined, and an order made for distribution. If one heir should be indebted to the deceased owner of the real estate, while another was not so indebted, and these facts should not be taken into account in the division, then the heir who is indebted would receive a larger share of the estate, and this would result in an unequal distribution of the estate, which neither law nor equity will tolerate.

The fourth paragraph avers that Erasmus W. Thomas died, and left a personal estate of the value of \$3,000 over and above all indebtedness, etc.; that there was no administration of his estate; that appellees took possession

of the same, and converted it to their own use; that by purchase appellees has been the owner of all the interest of Edward D. for more than six years; and that by reason of which he is entitled to have an accounting of the decedent's personal estate, and have the proceeds thereof taken into consideration in making the distribution of the proceeds of the real estate.

Appellees in their complaint for partition aver advances to certain of the appellees, and proceed upon the theory that they have a right to have such advancements taken into consideration, to the end that there be an equal distribution of the proceeds of the sale of real estate. The rule is that, in proceedings between heirs of a decedent for partition of his real estate, the court may and should take into account the advancements made by the decedent to some of the heirs, by requiring that such advancements be brought into hotchpot and adjusted, so that all the shares will be equal. 21 Am. & Eng. Enc. Law (2d Ed.) p. 1173. The primary source from which advancements should be equalized is the personal estate, and is so declared by statute. Section 2563, Burns' Ann. St. 1901. It has often been held that advancements should be taken into consideration in decreeing partition. *Kepler v. Kepler*, 2 Ind. 363; *New v. New*, 127 Ind. 576, 27 N. E. 154; *Scott v. Harris*, 127 Ind. 520, 27 N. E. 150; *Purner v. Koontz*, 138 Ind. 252, 36 N. E. 1094. The purchaser of real estate from an heir stands in the same relation to the estate as did the heir, and receives whatever interest the heir has in the estate. If the heir from whom he has purchased has been advanced, that fact may be shown to reduce the interest of the heir, and likewise reduce the interest received by the purchaser. *Duncan et al. v. Henny*, 125 Ind. 10, 24 N. E. 506. The several advancements alleged to have been made by the decedent to certain of his children aggregate \$2,552, being \$448 less than the value of the personal estate of the decedent, as charged in the fourth paragraph, over and above all indebtedness. Under the admitted facts of this paragraph, appellant was entitled to have the court require appellees to account for the personal estate which they took possession of and appropriated to their own use. Such personal estate, of itself, was sufficient to equalize the advancements, and this would have left the real estate unburdened. Equality is equity among heirs, and the doctrine of advancement has for its object the furtherance of this thing. *Miller's Appeal*, 31 Pa. 334. Both by the letter and spirit of the statute cited, advancements to heirs should be equalized, if possible, out of the personal estate of the common ancestor, and appellant had a right to invoke this rule of law. As appellant stands in the place and acquired the rights of Edward D. Thomas in the real estate, he has a right to have his interest therein, or the proceeds thereof, come to him unburdened by the advancements to his grant-

or, if he can establish the facts he has pleaded.

Our conclusion is that none of the three paragraphs of answer were vulnerable to the attack of the demurrer.

The judgment is reversed, and the trial court is directed to overrule the demurrer on the second, third, and fourth paragraphs of answer, and for further proceedings not inconsistent with this opinion.

(165 Ind. 486)

WHIRLEDGE et al. v. SHOUP et al.
(No. 20,647.)

(Supreme Court of Indiana. Nov. 17, 1905.)

1. DRAINS—REPORT OF VIEWERS.

Under Burns' Ann. St. 1901, § 5677 (Rev. St. 1881, § 4308; Horner's Ann. St. 1901, § 4308), relating to the construction of a ditch in two or more counties, requiring the board of commissioners of each of the counties to appoint three viewers to act jointly, and providing that the joint viewers shall perform the duties required of viewers in a ditch in one county, and Burns' Ann. St. 1901, § 240 (Rev. St. 1881, § 240; Horner's Ann. St. 1901, § 240), providing that words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared, where there are six viewers in a proceeding to construct a ditch in two counties, the report, in favor of the proposed work, must be signed by at least four of the viewers.

2. SAME—NOTICE OF HEARING.

Under Burns' Ann. St. 1901, § 5663 (Horner's Ann. St. 1901, § 4293; Acts 1893, p. 331, c. 148), authorizing notice of the hearing in a proceeding for the construction of a ditch only when the viewers' report is in favor of the proposed work, a notice given by the auditor is without authority, where the report is not signed by a majority of the viewers.

3. SAME—DISMISSAL OF PETITION.

Where three viewers are appointed from each of two counties to meet and act jointly in a proceeding for constructing a drain, reports of three viewers for the proposed ditch and three against must be treated as a report against the construction of the proposed ditch, under Burns' Ann. St. 1901, § 5664 (Rev. St. 1881, § 4294; Horner's Ann. St. 1901, § 4294), and the petition must be dismissed.

Appeal from Circuit Court, Elkhart County; Wm. J. Davis, Special Judge.

Proceedings by Noah Whirledge and others against J. Q. Shoup and others to establish a drain. From a judgment dismissing the petition, the petitioners appeal. Affirmed.

E. A. Dousman and L. L. Burris, for appellants. Miller, Drake & Hubbell, and Drake & Drake, for appellees.

MONKS, C. J. This proceeding was commenced in May, 1903, by appellants under the act of April 21, 1881 (Acts 1881, p. 410, c. 44), and the acts amendatory thereof and supplemental thereto (section 5655 et seq., Burns' Ann. St. 1901) to establish and construct a ditch having its head or source in Elkhart county, and its outlet in La Grange county. The board of commissioners of each of said counties appointed three viewers "to meet and act conjointly," as required by section 5677, Burns' Ann. St. 1901 (section 4308, Rev.

St. 1881; section 4308, Horner's Ann. St. 1901). On October 26, 1903, the viewers appointed by the board of commissioners of Elkhart county reported in favor of, and those appointed by the board of commissioners of La Grange county against the proposed work. These reports were filed with the auditor of Elkhart county, who gave notice that said reports were filed, and of the time when the petition and said reports would be heard, as required by section 5677, Burns' Ann. St. 1901 (section 4308, Rev. St. 1881; section 4308, Horner's Ann. St. 1901). Before the time set for hearing, a remonstrance was filed against said ditch, setting forth grounds therefor together with a bond, as required by section 5665, Burns' Ann. St. 1901 (section 4295, Rev. St. 1881; section 4295, Horner's Ann. St. 1901). Two of said grounds were: "(3) That three of the six viewers appointed to view said proposed ditch reported adversely and against the establishment of the same. * * * (5) That a majority of the viewers appointed herein have not reported in favor of said ditch." Afterwards a motion was filed to dismiss said proceeding, assigning as cause the third and fifth grounds of remonstrance above set out. The cause was submitted to the board of commissioners of Elkhart county, and said board found "for the remonstrators, that said petition ought to be dismissed," and rendered judgment dismissing said petition. The petitioners appealed to the court below, where the proceedings were dismissed.

Section 5677, Burns' Ann. St. 1901 (section 4308, Rev. St. 1881; section 4308, Horner's Ann. St. 1901), provides that the joint viewers shall have the same powers and perform the same duties as provided in said act for viewers in a ditch in one county. This requires that when there are six viewers, as in this case, the report if in favor of the proposed work must be signed by at least four of said viewers to be sufficient. Clause 2, § 240, Burns' Ann. St. 1901 (section 240, Rev. St. 1881; section 240, Horner's Ann. St. 1901), provides that "words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority." Section 5663, Burns' Ann. St. 1901 (section 4293, Horner's Ann. St. 1901; Acts 1893, p. 331, c. 148), only authorizes a notice when the report filed by the viewers is in favor of the proposed work. As the report in favor of the proposed work was not signed by a majority of the viewers, the notice of the hearing, given by the auditor, was without authority. The reports of the viewers, three for and three against the proposed work, must be treated as a report against the same, and under section 5664, Burns' Ann. St. 1901 (section 4294, Rev. St. 1881; section 4294, Horner's Ann. St. 1901), it was the duty of the board to dismiss the petition.

Appellants insist, however, that as this

court has held that under section 5678a, Burns' Ann. St. 1901 (Acts 1897, p. 231, c. 152), the whole jurisdiction or power is in the board of commissioners where the proceeding was commenced, and the proceedings in the other counties into which the ditch extends are of an administrative character, that the same rule must apply to the viewers. Section 5678a, supra, expressly provides "that each board of commissioners required to act in the establishment and construction of a joint ditch shall act by itself, sitting alone in its own county; all rendering like judgments conforming to the one rendered in the county having original jurisdiction." Section 5677, Burns' Ann. St. 1901 (section 4308, Rev. St. 1881; section 4308, Horner's Ann. St. 1901), requires the proceeding to be commenced in the county containing the head or source of the ditch; and this court has held under section 5678a, supra, that the board of commissioners of the other county may be compelled by mandate to perform their duties which are purely ministerial. *Strayer v. Taylor*, 163 Ind. 230, 233, 234, 69 N. E. 145. Section 5677 (4308), supra, in regard to the viewers, however, requires that the viewers appointed by the different counties act together as one body. It follows that the court below did not err in dismissing the proceeding.

Judgment affirmed.

(165 Ind. 377)

IRELAND v. STATE ex rel. BARNHART et al. (No. 20,488.)

(Supreme Court of Indiana. Oct. 25, 1905.)

1. SCHOOLS AND SCHOOL DISTRICTS—CHILDREN—TRANSFER FOR SCHOOL PURPOSES—VOTERS.

Under Burns' Ann. St. 1901, §§ 5950a-5950e, providing for the transfer of children of school age from one corporation to another, but not authorizing transfer either of their parents or guardians, nor their property for school taxation, the parent, guardian, or custodian of a pupil so transferred is not a legal voter of the school district to which the pupil is attached.

2. SAME—EXTENT OF DISTRICT.

A school district has no fixed boundaries, but is composed of the persons residing in the township who have been enumerated and attached thereto for school purposes, as provided by Burns' Ann. St. 1901, § 5958.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Schools and School Districts, § 50.]

3. SAME—ABOLITION OF DISTRICT—CONSENT—VOTERS.

Burns' Ann. St. 1901, § 5920f, provides that no township trustee shall abandon any district school in his township until he shall have first procured the written consent thereof of a majority of the legal voters who are entitled to vote for township trustee in such district, etc. Section 5958 declares that all taxpayers, male and female, residing in the township, except married women and minors, who have been listed as parents, guardians, or heads of families, and attached to a school district, are legal voters of such school district at all school meetings of the district. *Held*, that since persons may be legal voters of the school district, and yet not be entitled to vote for township trustee in the district, an allegation that a township trustee abandoned a school district without the written consent of a majority of the legal voters in the school district was not

an allegation that he did not have the written consent of a majority of those legal voters entitled to vote for township trustee in the district.

Appeal from Circuit Court, Wabash County; H. B. Shively, Special Judge.

Mandamus by the state, on the relation of Frederick M. Barnhart and others, against Frank Ireland, trustee of Pleasant school township. From an order directing the issuance of a peremptory writ, the latter appeals. Reversed.

Warren G. Sayre and Nelson G. Hunter, for appellant. Milliner & Milliner, for appellee.

MONKS, C. J. The relator brought this action to compel appellant by writ of mandate to employ a teacher and maintain a school in School District No. 16 of said township for the school year 1903-04. A trial of said cause by the court resulted in a finding and judgment in favor of the relator for a peremptory writ of mandate that appellant employ a teacher and maintain said school.

Prior to the adoption of the act approved March 7, 1901 (Acts 1901, p. 159, c. 97; section 5920f, Burns' Ann. St. 1901), the trustee of the school township had the power to abolish a school district, when in his judgment the public interest required it, subject to the right to appeal to the county superintendent. Such discretion, if exercised in good faith, could not be reviewed by the courts. *State ex rel. v. Seely*, 163 Ind. 244, 70 N. E. 805, and cases cited; *State ex rel. v. Wilson*, 149 Ind. 253, 254, 48 N. E. 1030, and cases cited; *Braden v. McNutt*, 114 Ind. 214, 215, 16 N. E. 170, and cases cited; *Carnahan v. State*, 153 Ind. 156, 157, 57 N. E. 717, and cases cited.

Said act of 1901 (Acts 1901, p. 159, c. 97; section 5920f, Burns' Ann. St. 1901) provides: "That no township trustee shall abandon any district school in his township until he shall have first procured the written consent thereof, signed by a majority of those legal voters who are entitled to vote for township trustee in such district: Provided this act shall not apply to schools which have a daily attendance of twelve (12) pupils or fewer." It is alleged in the amended petition for the writ of mandate that when appellant, as trustee of said school township, "abandoned said school, he did not have the written consent of a majority of the legal voters in said school district." Does it appear from the allegation that appellant did not have the written consent required by said act to authorize him to abandon said school district? We think not. Before the taking effect of the act of 1901 (Acts 1901, p. 448, c. 204; section 5950a-5950e, Burns' Ann. St. 1901), the parents, guardians, and those having charge of children entitled to school privileges were transferred, under section 5950, Burns' Ann. St. 1901 (section 4473, Rev. St. 1881; section 4473, Horner's Ann. St. 1901), from the school corporation in which they resided to another for school purposes,

and their property, real and personal, situate in the township in which they reside was transferred with them to the school corporation to which they were transferred, and was taxable there for school purposes the same as if located therein, and they became legal voters of the school district to which they were attached at all school meetings of said district. *Johns, Auditor, v. State ex rel.*, 130 Ind. 522, 30 N. E. 640. But a radical change was made as to transfers from one school corporation to another by said act of 1901 (Acts 1901, p. 448, c. 204; section 5959a-5959e, Burns' Ann. St. 1901). Under the last-named act, the child of school age, and not the parent, guardian, or custodian, is transferred from one school corporation to another for educational purposes (*Weir v. State ex rel.*, 161 Ind. 435, 439, 68 N. E. 1023), and no property, real or personal, is thereby transferred for the purposes of taxation to the school corporation to which such transfer is made; but the tuition of the pupil so transferred is paid by the school corporation in which said pupil resides to the school corporation to which the transfer is made. Under this law, it is clear that the parent, guardian, or custodian of the pupil so transferred is not a legal voter of the school district to which said pupil is attached.

A school district has no fixed boundaries, but is composed of the persons residing in the township who have been enumerated and attached thereto, under section 5958, Burns' Ann. St. 1901 (Acts 1895, p. 127, c. 54). All the taxpayers, male and female, residing in the township, except married women and minors who have been listed as parents, guardians, or heads of families, and attached to a school district under said section 5958, supra, are legal voters of said school district at all school meetings of said district. The legal voters, therefore, of School District No. 16 were those taxpayers, male and female, except married women and minors, residing in Pleasant township who were enumerated and attached thereto under the enumeration made in April, 1906, by the trustee of said school township.

It is evident that many persons may be legal voters of a school district, and yet not be "entitled to vote for township trustee in said district." For aught that appears in said amended petition for the writ, appellant may have had the written consent for the abandonment of said school district, "signed by a majority of those legal voters who are entitled to vote for township trustee in said district." This is all that said act of 1901 (Acts 1901, p. 159, c. 97; section 5920f, Burns' Ann. St. 1901) requires to authorize a township trustee to abandon a school district coming within the provision of said act. It follows that the court erred in overruling appellant's demurrer for want of facts to said amended petition.

Judgment reversed, with instructions to sustain said demurrer, and for further proceedings not inconsistent with this opinion.

(165 Ind. 397)

BRADLEY v. STATE. (No. 20,650.)

(Supreme Court of Indiana. Oct. 26, 1905.)

1. LARCENY—EVIDENCE—INTENT.

Where defendant hired a horse by false representations and immediately disposed of the same, and thereafter kept in hiding for a considerable period, and there was nothing to show an absence of felonious intent to wholly deprive the owner of the horse at the time defendant obtained possession of the horse, he was guilty of larceny.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 84, 35, 41.]

2. CRIMINAL LAW—APPEAL—VARIANCE—OBJECTIONS.

Where accused made no objection at the trial on the ground of an alleged variance, and did not assign any adverse ruling thereon as a reason for a new trial, the objection was unavailable on appeal.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2842.]

Appeal from Circuit Court, Jackson County; John M. Lewis, Judge.

Edward Bradley was convicted of larceny, and he appeals. Affirmed.

D. A. Kochenour, for appellant. C. W. Miller, Atty. Gen., C. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

JORDAN, J. Appellant was charged in the lower court with the crime of grand larceny committed at Jackson county, Ind., on February 28, 1905, by then and there feloniously stealing a certain mare, of the value of \$50, of the personal goods of one William E. Grigsby. Upon his plea of not guilty he was tried by the court and found guilty of the offense as charged, and over his motion for a new trial, assigning only the statutory grounds, judgment was rendered sentencing him to be fined, disfranchised, and imprisoned in the State Prison under the indeterminate sentence law. From this judgment he appeals to this court, and has assigned that the trial court erred in denying his motion for a new trial.

Appellant's counsel contend that the evidence is wholly insufficient to sustain the conviction. No evidence was offered by appellant in his own behalf. That which was introduced by the state goes to establish that appellant on February 28, 1905, came to the home of Grigsby, the prosecuting witness, a colored man and a farmer residing near the town of Crothersville, and stated to Grigsby that he wanted to hire a horse. Grigsby was unacquainted with appellant, who appears at that time to have been a resident of Jennings county, Ind. Previous to his coming to see Grigsby he went to see Dr. W. H. Warner, a druggist of Crothersville, and informed him that he was very much in need of a horse to use for a few days or a week in driving about the vicinity of Seymour in said county, for the purpose of collecting bills for a Mr. Russell, a retail groceryman. He stated to the doctor that he could not secure a horse in his own neighborhood, and Dr. Warner refer-

red him to Grigsby, the owner of the horse in question. Appellant said he would give a mortgage on a buggy which he represented that he owned, and which at the time he said was at Seymour. He claimed to Dr. Warner that the buggy belonged to him, and that he would execute a mortgage thereon to secure the money for the hire of the horse and the return thereof. It appears that before going to see Grigsby he executed a chattel mortgage on the buggy in question to Grigsby to secure a note for \$7.50, which represented the hire of the horse for 15 days; that being the amount which it appears Dr. Warner told him Grigsby would charge him for the use of the horse for that length of time. He then went to see Grigsby, taking the mortgage and note with him, and represented to Grigsby that he was in need of a horse to drive around the country to sell certain medicine for the cure of consumption. He presented the note and mortgage in question to Grigsby, which was to secure the money for the hire of the horse, and by this means obtained the possession of the horse from Grigsby to be used by him for a period of 15 days for the purpose which he represented, and within that period he was to return the horse to Grigsby. As a part of arrangement with Grigsby in regard to hiring the horse he agreed to report to Grigsby once every week. He took the horse away with him, made no report whatever, and Grigsby thereafter never saw the horse or heard anything in regard to the animal. There is evidence to show that appellant, upon securing the mare, subsequently disposed of her and absolutely converted her to his own use. She was of the value of \$50, and her possession was secured by appellant from her owner, as hereinbefore shown, at Jackson county, Ind. Grigsby testified at the trial that he did not part with her, nor had he any intention of parting with the title to the mare, and had no knowledge whatever as to her whereabouts or what had become of her. The evidence shows that appellant misrepresented the fact that he was the owner of the buggy upon which he placed the mortgage in question. He was not the owner thereof, and his representation that he had been employed by Russell to collect bills was false, and the evidence shows he did not intend to use the horse for that purpose. Dr. Warner upon the trial testified that in the conversation which he had with appellant he was in no manner representing Grigsby, the owner of the mare, nor was he acting as his agent. He appears to have drafted the mortgage and note in controversy, which appellant, as it appears, delivered to Grigsby to secure the hire of the mare. In doing so the doctor testified he was merely accommodating appellant. After the latter obtained the possession of the mare, as herein shown, he did not return to

Crothersville, and appears to have gone to Remington, a town in the northern part of this state, at which place, about five weeks after the time he came into possession of the mare, he was arrested on the charge in controversy by one Harry Rodenburg, an officer. He voluntarily admitted to this officer after his arrest that he did not have possession of the mare very long, and in the same conversation he said he could not tell where she was, or what had been done with her, but that "other parties" had the animal. On being questioned by the officer in respect to these "other parties" appellant would not state who they were. He claimed, however, that the mare had been taken from him in "broad daylight," and that when he became conscious that she had been taken he left the road upon which he was traveling, kept out of the way of all persons until night, and then walked all night. The officer said to him that he at least might tell where he had left the animal. In response to this request he said that to tell might not do him any good. After going to Remington he admitted that he went under the name of Wilson, instead of his true name, for the reason, which he gave, that he did not want any person to know where he was, because if his whereabouts became known he would be called upon to give an account about the mare. He further stated to the officer in question that it was his purpose "to keep out of the way long enough" until he could make sufficient money to pay for the mare, and he then intended to return, as he supposed everything would be all right.

There are no explanatory circumstances or reasons in this case tending to show an absence of felonious intent on the part of appellant to wholly deprive the owner of the property in controversy at the time he obtained the possession thereof as a bailee for hire; but, upon the contrary, the evidence in the case certainly justifies the inference that at that time he entertained the felonious intent not to return the property, but to wholly appropriate or convert it to his own use, which, as there is evidence to show, he subsequently did without the consent or knowledge of the owner. This, under the authorities, constituted the crime of larceny as completely as though the property in dispute had been taken without the knowledge or consent of its owner. It is apparent under all of the circumstances that the transaction of hiring the mare on the part of appellant was merely resorted to with the felonious intent of obtaining the possession of her, in order that he might thereby wholly appropriate her to his own use and absolutely deprive her owner of his property. *Grunson v. State*, 89 Ind. 533, 46 Am. Rep. 178; *Fleming v. State*, 136 Ind. 149, 36 N. E. 154; *March v. State*, 117 Ind. 547, 20 N. E. 444.

That the evidence in the case affords this court no grounds for disturbing the judgment of the trial court is fully affirmed and settled by the decision of this court in *Lee v. State*, 156 Ind. 541, 60 N. E. 299. Appellant's counsel insists that *Stillwell v. State*, 155 Ind. 552, 58 N. E. 709, is on a parallel with the case at bar. In this insistence counsel is mistaken, for the facts in that appeal may be said to be virtually the reverse of those in this case.

It is lastly insisted that there is a fatal variance between the evidence and the description of the stolen property, as alleged in the pleading. The subject of the larceny is described in the affidavit as "one brown mare with white face and feet." It is claimed that, although this description is unnecessarily specific, nevertheless, under the authorities, it must be proved as alleged, citing *Morgan v. State*, 61 Ind. 447. It is argued that there is no evidence to prove that the mare in question had a white face, or that her feet were white. Conceding that this insistence is true, nevertheless the question of variance which appellant seeks to raise cannot properly be considered in this appeal, as, for aught appearing in the record to the contrary, it is presented for the first time in this court. If appellant believed there was a fatal variance between the averments of the affidavit and the proof in the case, he ought to have seasonably interposed his objections in this respect during the trial in the lower court, and in the event of an adverse ruling have assigned it as a reason for a new trial. *Graves v. State*, 121 Ind. 357, 23 N. E. 155; *Taylor v. State*, 130 Ind. 68, 29 N. E. 415; *Kruger v. State*, 135 Ind. 573, 35 N. E. 1019.

There is no available error in the record, and the judgment is therefore affirmed.

MONTGOMERY, J., did not participate in the decision.

(166 Ind. 472)

WILLIAMS v. STATE. (No. 20,587.)

(Supreme Court of Indiana. Nov. 15, 1905.)

1. CRIMINAL LAW—CONVICTION—CONFLICTING EVIDENCE—REVIEW.

The Supreme Court will not reverse a conviction on the weight of the evidence, where the evidence is conflicting.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, §§ 3075, 3076.]

2. FINDING LOST GOODS—TITLE OF FINDER.

The finder of money lost becomes the owner thereof as against all persons except the true owner.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Finding Lost Goods, §§ 4, 5, 9.]

3. LARCENY—INTENT—EVIDENCE.

The finder of a purse containing money told defendant's wife thereof, and she stated that the purse looked like her husband's and contained about the same amount of money he should have. She took the purse and told the finder that, if it did not belong to her husband, she would return it to her. Defendant was

thereupon called, and, after examining the purse, claimed it as his own, when in fact it belonged to another. *Held*, that at the time defendant claimed the purse both the title and legal possession, as against him, was in the finder, and that defendant's claim thereto constituted larceny.

Appeal from Circuit Court, Spencer County; Elbert M. Swan, Judge.

Jonah Williams was convicted of larceny, and he appeals. Affirmed.

Logsdon, Chappell & Veneman and Emory L. Boyd, for appellant. C. W. Miller, Atty. Gen., B. F. Huffman, Pros. Atty., W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

MONKS, C. J. Appellant was indicted, tried, and convicted of the crime of grand larceny, in feloniously stealing \$115 in money of the personal property of William Raibley. Over a motion for a new trial, judgment was rendered on the verdict.

The only error properly assigned and not waived calls in question the action of the court in overruling appellant's motion for a new trial. It is claimed by appellant that the verdict of the jury is contrary to the law and evidence. There was a sharp conflict in the evidence, and appellant's brief seems to proceed upon the theory that this court will weigh the evidence. It is well settled that this court cannot reverse a case upon the weight of the evidence, nor for the reason that there is a conflict, nor for the reason that all persons might not draw the same inferences from the facts proved. This rule was fully considered by this court, and the reasons therefor stated, in *Deal v. State*, 140 Ind. 354, 39 N. E. 930; *Lee v. State*, 156 Ind. 541, 546, 60 N. E. 299; *Lake Erie, etc., R. Co. v. Stick*, 143 Ind. 449, 453, 41 N. E. 365; *Hire v. State*, 144 Ind. 360, 361, 43 N. E. 312; *Lankford v. State*, 144 Ind. 428, 434, 43 N. E. 444; *Robb v. State*, 144 Ind. 569, 570, 43 N. E. 642; *Hinshaw v. State*, 147 Ind. 334, 349, 47 N. E. 157.

Appellant further insists that, even if all the evidence against appellant is true, it does not prove the crime of larceny, because the essential element of felonious intent at the time of the taking was not established. To determine this question we are required to look alone to that part of the evidence which tends to establish the felonious intent charged in the indictment. It appears from evidence that on Sunday, November 8, 1903, as one Alice Schisler was going from church to her home she found a lead-colored purse on the public highway about one foot outside the wagon track. The place where she found the purse was between the bridge on the highway and a cornfield belonging to William and Jacob Raibley. The purse contained five \$20 bills, one \$10 bill and one \$5 bill. Nothing else was in the purse. The bills were folded together in a small wad, about as small as it could be. The purse had two

sides, and the money was all on one side. After she found the money, and she and three other girls had examined and counted it, she walked over the bridge toward her home and met appellant, who lived about 100 steps from the bridge. He was driving a horse attached to a buggy going from his home toward the bridge. Appellant did not speak to her. After she passed appellant's house, appellant's wife came out and she said to appellant's wife: "I found a pocketbook with \$125 in it, if anybody inquires for one." Appellant's wife asked to see the pocketbook, and when she saw it said, "That looks like his," meaning appellant, and she said that "\$125 was about the amount." At this time appellant had crossed the bridge, and his wife called to him that she (the girl, Alice Schisler) had found a pocketbook, and said, "Did you lose yours?" or "Have you got yours?" Appellant turned around and started back. Before he came to where his wife and the Schisler girl were, his wife said to the girl that if the money was not theirs it would be given back to her, and because of this statement the girl left the purse containing the money with appellant's wife and went on home. When the money was so left by the Schisler girl, neither appellant nor his wife had claimed the money to be theirs. When appellant came back his wife gave him the purse and money, and they went into the house and counted it. Immediately after the Schisler girl got home appellant came and told her that it was his money, and that he was very thankful that she gave it back to him, and offered her a new dress or a dollar. The next Thursday he gave her a dollar. Appellant refused to return or surrender said money, but converted it to his own use. Appellant claimed that he lost said purse and money on Sunday, November 8, 1908; that the same were his property; that there were two \$20 bills, one \$10 bill, and fifteen \$5 bills—in all, \$125 in the purse. At the trial he produced a purse which he testified contained the money found by said Alice Schisler. Alice Schisler and other witnesses testified that it was not the same purse found by her and left with appellant's wife. There was evidence which authorized the jury to find, as they did, that the purse and money, five \$20 bills, one \$10, and one \$5 bill, \$115, found by Alice Schisler and converted by appellant to his own use, were the property of William Raibley, and that the same had been lost the day before they were found by her, and that appellant knew that the same did not belong to him, but were owned by some one else, and that, so far as he was concerned, the finder, Alice Schisler, was the owner of said purse and money, and he fraudulently converted the same to his own use.

Appellant insists that larceny was not committed, because there is no evidence that appellant had such felonious intent when said Alice Schisler parted with the possession of said property. As against William Raibley,

the real owner of said money as found by the jury, Alice Schisler acquired no title; but as against appellant and all other persons she became the substantial owner of said purse and money. 19 Am. & Eng. Ency. of Law, 580; Bowen v. Sullivan, 62 Ind. 281, 288, 30 Am. Rep. 172. It is true, as a general proposition, that where the owner voluntarily parts with the title to his property, although his consent is obtained by fraud, there is no larceny; and if by a delivery of goods not only the possession, but the right of property, also passes, no subsequent conversion by the person in whom the right of property has thus vested can be construed into larceny. Gillett's Criminal Law (2d Ed.) § 540; Perkins v. State, 65 Ind. 317. If the defendant, with a design to steal the property, obtains possession of it by fraud, the taking is larceny, for the reason that, as the fraud vitiated the transaction and left the title in the original owner, he still retained a constructive possession of the goods, and the conversion of them by the defendant is such a trespass to that possession as makes it larceny. To bring a case within this rule there must exist at the time an *animus furandi*, an essential element of larceny. Gillett's Criminal Law (2d Ed.) § 540; Crum v. State, 148 Ind. 401, 407, 47 N. E. 833; Grunson v. State, 89 Ind. 533, 46 Am. Rep. 178, and cases cited; Fleming v. State, 136 Ind. 149, 151, 152, 36 N. E. 154; March v. State, 117 Ind. 547, 548, 549, 20 N. E. 444; 88 Am. St. Rep. pp. 569-571, note. When, however, one has the bare charge or custody of the goods of another, the legal possession remains in the owner, and the party having such bare charge or custody may be guilty of larceny by fraudulently converting the same to his own use, although he had no fraudulent intent when he received them in custody. 3 Chitty, Criminal Law (Perkins' Ed.) pp. 917a, 917b; 1 Wharton, Crim. Law (10th Ed.) §§ 756, 957, 975; 2 Clark & Marshall on Law of Crimes, pp. 698, 707-722; 87 Am. St. Rep. pp. 31-35, note; 88 Am. St. Rep. 575, note; Crim. Law Mag. 559; 35 Cent. Law J. 66-68; Colip v. State, 153 Ind. 584, 587, 588, 55 N. E. 739, 74 Am. St. Rep. 322, 324, 325; Currier v. State, 157 Ind. 114, 118, 119, 60 N. E. 1023, and authorities cited; Holbrook v. State, 107 Ala. 154, 156, 18 South. 109, 54 Am. St. Rep. 65, 66, and authorities cited; Dignowitty v. State, 17 Tex. 521, 67 Am. Dec. 670, 671-673; Justices, etc., v. People, 90 N. Y. 12, 43 Am. Rep. 135, and cases cited, and note pages 137, 138, 43 Am. Rep.; People v. Call, 1 Denio, 120, 43 Am. Dec. 655, and cases cited; Brown v. People, 20 Colo. 161, 165, 166, 36 Pac. 1040; People v. Martin, 116 Mich. 448, 74 N. W. 653, 46 Cent. Law J. 450, and note page 452; State v. Anderson, 25 Minn. 66, 33 Am. Rep. 455; 18 Am. & Eng. Enc. of Law (2d Ed.) 473-476. In People v. McDonald, 43 N. Y. 81, it was said: "If money or property is delivered by the owner to a person for mere custody or for some specified purpose, the

legal possession remains in the owner, and the criminal conversion of it by the custodian is larceny." In *Smith v. People*, 53 N. Y. 111, 13 Am. Rep. 474, it was held that: "When the delivery of goods is made for a single and specific purpose, the possession is still supposed to reside, not parted with, in the first proprietor." It is said in *Bishop's New Criminal Law*, § 824: "Where any person, whether servant or not, has the bare charge or care of another's effects, 'Legal possession,' observes East, 'remains in the owner, and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use.'"

It is evident that, when Alice Schisler delivered the purse and money to Mrs. Williams, appellant's wife, she did not intend to part with her title to said property as finder, but merely left the same with Mrs. Williams for her husband to examine, under the agreement that, if it was not the property of her husband, it was to be returned to Alice Schisler. Under this arrangement appellant's wife had the mere charge or custody of said property; the legal possession remaining in Alice Schisler. When appellant received the money from his wife and counted it and retained it under a claim that he was the true owner thereof, when in fact it was not his property, as the jury found, the title of the finder, which was good as against appellant, and the legal possession, still remained in Alice Schisler. When, therefore, appellant fraudulently converted said property to his own use, the offense, under the above well-recognized rules, was larceny, and not that of obtaining money under false pretenses. The fact that the owner intends to part with the title to the property, and not merely the possession, marks the distinction between larceny and false pretense. 88 Am. St. Rep. 572, note; *Zink v. People*, 77 N. Y. 114, 83 Am. Rep. 589; *Loomis v. People*, 67 N. Y. 329, 23 Am. Rep. 123. That the evidence upon the subject of felonious intent, as well as the evidence in support of all the other essential elements of the crime charged, is conflicting affords the court no ground for disturbing the judgment of the trial court, is settled by the decisions of this court. *Lee v. State*, 156 Ind. 541, 60 N. E. 299; *Bradley v. State* (this term) 75 N. E. 873.

Judgment affirmed.

(165 Ind. 421)

KARGES FURNITURE CO. v. AMALGAMATED WOODWORKERS' LOCAL UNION NO. 131 et al. (No. 20,583.)

(Supreme Court of Indiana. Oct. 31, 1905.)

1. TRADE UNIONS—UNINCORPORATED ASSOCIATIONS—ACTIONS.

A trade union, consisting of an unincorporated association of artisans, cannot be sued in its company name, in the absence of statute authorizing it, but must be sued in the name of all the individual members thereof.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Associations, §§ 36, 37, 40.]

2. CONSPIRACY—DEFINITION.

A conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a purpose not in itself criminal or unlawful by criminal or unlawful means.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 1-5, 32.]

3. SAME — STRIKES — SOLICITATION OF EMPLOYEES.

Where a trade union voted for a strike, and acted in concert, all the members quitting work from the factory of complainant and others, and agreed by peaceable means to induce employes in such factories, not members of the union, to become such and strike, in order to assist the strikers, but it was expressly voted that under no circumstances should any striker endeavor, by any violence or intimidation, to influence the acts of any employe for complainant or others, the combination of such employes to strike did not constitute a conspiracy.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 9.]

4. TRADE UNIONS — RIGHTS OF EMPLOYEES — STRIKES.

Members of a trade union, consisting of employes under no contractual restraint, may lawfully combine and by prearrangement quit their employment in a body, to secure from their employers an advance in wages, shorter hours, or any other legitimate benefit, though they know at the time that such action will be attended with injury to their employers' business, provided the strike is carried on in a lawful manner, and free from force, intimidation, and false representation.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 9.]

5. INJUNCTION—STRIKE—ACTION OF UNION.

Where a labor union, consisting of 600 members, voted to strike, and expressly voted that under no circumstances should any striker endeavor, by any form of violence, threats, or intimidation, to influence the acts of any one engaged or about to engage at work in the various factories affected, including complainant's, the fact that 14 members of the union were guilty of acts of intimidation and violence during the strike, while lounging in the street and not while serving as pickets, did not entitle complainants to an injunction against the union.

6. TRADE UNIONS—PICKETING.

A trade union during a strike may appoint pickets or a committee to visit the vicinity of factories to take note of the persons employed, and secure by lawful means their names and places of residence, for the purpose of peaceful visitation and solicitation by means other than threats, intimidation, etc.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, § 9.]

7. APPEAL—WEIGHING EVIDENCE.

Where, in a suit to restrain picketing pending a strike, etc., many witnesses were examined, and about 600 printed pages of oral testimony taken, which was conflicting, the Supreme Court on appeal would not weigh the evidence, though authorized to do so by Acts 1903, p. 341, c. 183.

Appeal from Superior Court, Vanderburgh County; John H. Foster, Judge.

Suit by the Karges Furniture Company against the Amalgamated Woodworkers' Local Union No. 131 and others. From a decree in favor of plaintiff for less than the relief demanded, it appeals. Case transferred from Appellate Court, under Burns' Ann. St. § 1837u. Affirmed.

J. E. Williamson and George A. Cunningham, for appellant. A. W. Funkhouser, F. M. Hostetter, and A. F. Funkhouser, for appellees.

HADLEY, J. Appellant brought this action against the appellees the Amalgamated Woodworkers' Union No. 131 of Evansville, an unincorporated labor organization, and members thereof, to enjoin appellees, the members being on strike, from picketing, intimidating, and otherwise interfering with the plaintiff's employes and business. The complaint, in two paragraphs, was answered by a general denial. There was a trial, a special finding, and injunction awarded against 14 of the appellees, and finding and judgment in favor of the remaining appellees, including said Amalgamated Woodworkers' Union.

The real question presented by the record is the refusal of the court to enjoin the defendant union and all its members from picketing, and otherwise intermeddling with appellant's business.

1. The first question to be considered is, can an action be maintained against an unincorporated society or association? "A private corporation," says Field, J., in *Mining Co. v. Pennsylvania*, 125 U. S. 189, 8 Sup. Ct. 741, 31 L. Ed. 650, "is merely an association of individuals united for a special purpose, and permitted to do business under a particular name and have a succession of members without dissolution." In England corporations exist only by virtue of letters patent, issued by permission of the Crown, and in this state corporations can be created only by special permission of the state, expressed in legislative enactment. Corporations may in their corporate name sue and be sued and hold title to property. The interest of its several members is represented by shares, which may be sold and transferred to a stranger without affecting a dissolution or the status of the corporate body. A fundamental purpose for the creation of corporations is to subserve public welfare and convenience by bestowing the character of individuality upon a combination of capital and individuals, for the accomplishment of such things as may not be so well or readily achieved by a single person, and that may not be ended by death or the withdrawal of a part of their members; and such body, being created by authority of a statute, and endowed with certain rights and obligations, is recognized by the law as an artificial person, possessed of the right to sue and be sued. On the other hand, in the absence of an enabling statute defining the rights and liabilities of the members, societies, associations, partnerships, and other bodies, combined under their own rule, for their own private benefit, and without any express sanction of law, are not, in the collective capacity and name, recognized at common law as having any legal existence

distinct from their members. Hence no power to sue or be sued in the company name. Such unincorporated associations, so far as their rights and liabilities are concerned, are rated as partnerships, and to enforce a right either for or against them, as in partnerships, the name of all the individual members must be set forth, either as plaintiffs or defendants. *Hays v. Lanier*, 3 Blackf. 322; *Hughes v. Walker*, 4 Blackf. 51; *Holland v. Butler*, 5 Blackf. 255; *Livingston v. Harvey*, 10 Ind. 218; *Adams Ex. Co. v. Hill*, 43 Ind. 157; *Pollock v. Dunning*, 54 Ind. 115; 22 Ency. Pl. & Pr. pp. 230, 242, and cases colated. We have no statute abrogating the rule at common law. Hence it must be held that this rule is still in force in this state, and, regardless of the evidence, the court committed no error in denying an injunction against the appellee the Amalgamated Woodworkers' Union.

2. Does the finding show a conspiracy to injure the plaintiff? A conspiracy is defined to be "a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means." *Commonwealth v. Hunt*, 4 Metc. 111-123, 38 Am. Dec. 346; *Spies v. People*, 122 Ill. 213, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; 3 *Greenleaf's Ev.* § 89. It is disclosed by the special finding that the Woodworkers' Union of Evansville had about 600 members, all employed in some one of the ten furniture factories in said city, and of the appellees nine were nonmembers and the others were members of the union. On March 17, 1903, at a meeting of the union it was resolved by a free vote of the members, 380 to 17, that all members should, on April 1, 1903, as a body, discontinue their work at their several places of employment, unless meanwhile the employers, including the plaintiff, should agree to an advance in wages, to a shorter work day, and to furnish a scale of prices to be paid piece workers. Appellees all, except the nonmembers, either voted for the resolution or subsequently ratified it. By order of the union, notice of the demands, signed by the president and secretary, was on March 21st delivered to the plaintiff. On April 1st, the demands upon the employers not having been complied with, all the plaintiff's employes, but about 20 nonmembers of the union, each one acting voluntarily in concert with others, and in pursuance of the agreement and vote, quit their employment and left the plaintiff's factory. Soon after the strike was inaugurated, the union, with the participation or subsequent ratification of the appellees, organized a picket system, whereby pickets were regularly and daily maintained in the vicinity of all the factories affected by the strike. Each morning a meeting of the union was held to distribute food supplies, to appoint picket committees, composed of from two to eight

men, to receive reports therefrom, and to consider such means as might be necessary to compel the plaintiff to grant its demands. The pickets thus chosen, to avoid recognition by employers, were assigned so that no one would picket the factory where he had been employed. The pickets were uniformly instructed by the president and other officers of the union before going on duty to take note of those entering and leaving the factory, to ascertain their names and places of residence, and, as far as they could, by fair and peaceful means to influence those remaining at work to quit, and prevent new men from entering to take the places of those on strike. It was often declared by the president, and always unanimously indorsed by the members present, that the policy of the union was: First. That the members of the union should endeavor by peaceable persuasion, and not otherwise, to induce such woodworkers as were not members of said union, and who remained in the employ of the plaintiff and other employers, to join the union and co-operate in the strike. Second. That they should seek the acquaintance of such working nonunion men, visit them at their homes, and there, and at all other suitable places, discuss with them the mutual benefits of the union, and the importance of their quitting work, and by fair argument and peaceable measures try to induce them both to cease working and attach themselves to the union. Third. That under no circumstances should any striker endeavor, by any form of violence, threats, or intimidations, to influence the acts and conduct of any one engaged or about to engage at work in said factories, including the plaintiff's. The peaceable policy adopted by the union, and given as instructions to the pickets, was adopted and given in good faith, and the defendants individually and collectively, as members of the union, at all times intended to effectuate the purposes of the strike by lawful means, and not by violence, threats, or intimidation.

The plaintiff's factory is so situate that many miners, moulders, and other workmen reside in the neighborhood, and pass and repass the plaintiff's factory in going to and from their work, and occasionally groups or crowds of men generally composed in small part of strikers, would assemble in the alley and streets about the plaintiff's factory, and sometimes accost the plaintiff's workmen as they entered or left the factory, by calling them scabs and other opprobrious names. On the 7th and 8th of April, and on subsequent days, certain of the employees of the plaintiff, on their way home from work, were stopped and followed by groups of men, including in some one or more of the groups the defendants John Gebhardt, Harry Thomas, John Kramer, John Mandel, John Slemers, Robert Fisher, Charles Lipking, Frank Barnes, Henry Pit-

tieler, Frank Gebhardt, John Stock, Fred Wilhelm, and Leander Cook, who in one instance assaulted said employees, and in all called said employees offensive names, and cursed and threatened them with violence if they did not quit work in plaintiff's factory. On many occasions other of the defendants stopped and visited the plaintiff's employees, and argued with them the propriety of quitting work; but such argument and conversations were held in a fair and friendly spirit, and devoid of any form of intimidation or offense. The withdrawal of the plaintiff's workmen and its inability to secure others to take their places so seriously impaired the productive capacity of the factory that the plaintiff was unable to fill the orders it had accepted, and it was thereby damaged, and had reasonable grounds to expect further and continuing damages. The employees who remained at work in plaintiff's factory, except a few who afterwards quit on account of the strike and its consequences, are still employed therein. At the time of the strike part of the plaintiff's workmen were employed without any contract as to duration of service, and the others were employed by the piece. It was not shown in evidence that the violence and intimidation mentioned above was ever reported to the union, or that the union had knowledge of any such proceedings.

The court stated as conclusions of law, first, that the plaintiff is entitled to an injunction, as prayed, against the defendants last above named; and, second, is not entitled to an injunction against the defendant Amalgamated Woodworkers' Union No. 131, nor against any of the defendants whose names are set out in the findings.

All combinations are not conspiracies. It is fundamental under our form of government that all citizens in the race of life have a free and equal chance; that one may pursue the path he chooses and do whatever he deems best for himself, so long as he does not infringe upon the rights of another exercising a like and equal freedom. Every absolute right has its limits, and to the extent of those limits it is the correlative duty of every other person to respect and refrain from obstructing by force, fraud, intimidation, or any other artificial means. It is the invasion of another's rights that constitutes a legal wrong and gives a basis for damages. A tradesman, singly or in combination with others, may lawfully advertise his goods, undersell, solicit, and win the customers of his rival, knowing that he is thereby ruining the latter's business. This is competition, and is what the law commends as "the life of trade." In such case one loses his property by the acts of his neighbor, but it is *damnum absque injuria*. But the contest must be a fair and honest one. If the same tradesman, singly or with others, advertises his goods, undersells, solicits, and wins away the customers of his rival by false represen-

tation, intimidation or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong. Eddy on Comb. § 262, and note. *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588. Another principle: Whatever one man may do, all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is conducted in a lawful manner. *Curren v. Galen* (1897) 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; *Macaulay v. Tierney*, 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770; Eddy on Comb. § 523; *Clemmitt v. Watson*, 14 Ind. App. 33, 42 N. E. 367. It is illegal under all circumstances for either the employed or employer to violate a contract, and, in the absence of existing contracts, employes have the same right to strike or cease working in a body that the employer has to dismiss them in a body. It may therefore be said that employes under no contractual restraint may lawfully combine, and by prearrangement quit their employment in a body, for the purpose of securing from their employers an advance in wages, shorter hours, or any other legitimate benefit, even though they know at the time that such action will be attended with injury and damage to the business of their employer, provided that the strike is carried on in a lawful manner; that is, in a manner free from force, intimidation, and false representation. Eddy on Comb. §§ 521-523; *Gray v. Building, etc., Council*, 91 Minn. 171, 179, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477; *Wabash R. Co. v. Hannahan* (C. C. 1903) 121 Fed. 563, 568; *State v. Stockford* (Conn. 1904) 58 Atl. 769; *National Protective Ass'n of Steam Fitters & Helpers v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *Longshore, etc., Co. v. Howell*, 26 Or. 527, 38 Pac. 547, 28 L. R. A. 464, 472, 46 Am. St. Rep. 640; *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414; *Ames v. U. P. Ry. Co.* (C. C.) 62 Fed. 7; *Thomas v. Railway Co.* (C. C.) 62 Fed. 803; *Erdman v. Mitchell*, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783; 3 Current Law, p. 726; *Ray on Con. Lim.* 838, 378; *Greenhood on Public Policy*, p. 650; *Wood, Master & Servant*, § 241; *Beach on Monopolies & Industrial Trusts*, § 102.

The finding of the court is that 14 members of the union, whose names are set out, were guilty of various acts of intimidation and violence, not while serving as pickets, but while lounging in the street, and as against these the application for injunction was sustained; but as against the other defendants and members of the union the court finds that they, as individuals, and collectively as members of the union, at all times intended to effectuate the objects of the strike by peaceful means, and without violence, threats, intimidation, or other unlawful methods,

and, so far as the findings show, they continued to carry out their peaceful policy. These facts, under the authorities above cited, characterize the combination and concert of the defendants in striking as lawful, and not amenable to injunction. That 14 of the 600 members of the union did disregard the express instructions and declared policy of the union to conduct the strike peacefully, and of their own initiative indulged in acts of disorder calculated to, and did in fact, intimidate the plaintiff's employes, is not of itself sufficient to condemn the union as a body. The strike being properly conceived and conducted by the great majority of members, its purposes will not be defeated by the unlawful conduct of a few rowdies and lawbreakers that may be found among them. "Where a combination or association is innocent in its inception," says a recent author, "but is afterward perverted to unlawful ends, only those participating in the perversion are held to be conspirators." Eddy on Comb. § 368; *Carew v. Rutherford*, 106 Mass. 10, 8 Am. Rep. 287; *Commonwealth v. Hunt*, 4 Metc. (Mass.) 111, 38 Am. Dec. 346, 355; *Railroad Co. v. Ruef* (C. C.) 120 Fed. 102.

3. But it is argued that the maintenance of pickets at the plaintiff's factory was an unlawful interference with its business, and that the appointment, instruction, and the receiving of daily reports from such pickets constituted all participating members of the union civil conspirators. Whether picketing is lawful or unlawful depends in each particular case upon the conduct of the pickets themselves. The fact that they are serving under appointment and instructions from their union adds nothing to their rights and privileges as affecting third persons. Under no circumstances have pickets the right to employ force, menaces, or intimidation of any kind in their efforts to induce non-striking workmen to quit, or to prevent those about to take the strikers' places to refrain from doing so; neither have they the right, as pickets or otherwise, to assemble about the working place in such numbers or in such manner as to impress workmen employed, or contemplating employment, with fear and intimidation. *Beaton v. Tarrant*, 102 Ill. App. 124; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Murdock v. Walker*, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678. It is, however, generally conceded in this country and in England that workmen, when free from contract obligations, may not only themselves, singly and in combination, cease to work for any employer, but may also, as a means of accomplishing a legitimate purpose, use all lawful and peaceful means to induce others to quit or refuse employment. The law, having granted workmen the right to strike to secure better conditions from their employers, grants them also the use of those means and agencies, not inconsistent with the rights of others, that are necessary to make the

strike effective. This embraces the right to support their contest by argument, persuasion, and such favors and accommodations as they have within their control. The law will not deprive endeavor and energy of their just reward, when exercised for a legitimate purpose and in a legitimate manner. So, in a contest between capital and labor on the one hand to secure higher wages, and on the other to resist it, argument and persuasion to win support and co-operation from others are proper to either side, provided they are of a character to leave the persons solicited feeling at liberty to comply or not, as they please. Likewise a union may appoint pickets or a committee to visit the vicinity of factories for purpose of taking note of the persons employed, and to secure, if it can be done by lawful means, their names and places of residence for the purpose of peaceful visitation. *Eddy on Comb.* § 537; *Perkins v. Rogg* (1892) 28 Wkly. Law Bul. 32.

The decided cases are not in harmony with respect to the right to persuade, but the clear weight of authority is to the effect that so long as a moving party does not exceed his absolute legal rights, and so does not invade the absolute rights of another, he may do as he pleases, and may persuade others to do like him. To illustrate: A. resides in a populous, residential part of the city. B. has established a saloon in the same square. Keeping a saloon there is lawful business. Many of the neighbors patronize the saloon, and the business prospers. A. disapproves of the business in that place, and withholds his patronage. He has the absolute right to withhold it. The other neighbors have the absolute right to bestow theirs. B. has no absolute right to the patronage of either, and without patronage will fail in business. Here it is plain that A. has the absolute right to stand on the street corner and note all his neighbors who enter and leave the saloon, hail them on the street, or visit them at their respective homes, and by argument and persuasion (they being willing to listen) endeavor to induce them to cease their patronage. A's object is to make B's business unprofitable and losing, and thus compel him to move away, and improve the place and attractiveness of A's neighborhood. Now if A. converts all of his neighbors to his course of conduct by argument, reason, entreaty, and other fair and proper means, and thereby effects the suppression of the saloon and financial ruin of B., it is *damnum absque injuria*. A. has done nothing but what the law protects him in doing. *Eddy on Comb.* §§ 537, 539; *Beach on Mon. & Ind. Trusts*, § 107; *Union P. Ry. Co. v. Ruef* (C. C.) 120 Fed. 102; *Foster v. Retail Clk., etc., Ass'n*, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; *Rogers v. Evarts* (Sup.) 17 N. Y. Supp. 264; *Perkins v. Rogg*, 28 Wkly. Law Bul. 32; *Reg v. Druitt*, 10 Cox, Cr. R. 592; *Reg v. Hilbert*, 13 Cox, Cr. R. 82. According to the finding, the pickets, after being chosen and before going out, were "invariably" instructed by the presiding of-

ficer of the union to observe only peaceable means, and under no circumstances resort to force, menaces, threats, or intimidation of any kind. There is no finding of any departure from these instructions by any picket, and we must therefore presume, as against the plaintiff, that there was none, and consequently hold that the maintaining of the pickets at the plaintiff's factory under the facts proved was not unlawful.

The court did not err in its second and fourth conclusions of law.

4. As a reason for a new trial, and as an independent assignment, appellant challenges the sufficiency of the evidence to sustain the finding. He concedes in his brief that the facts found in all material respects have support from the evidence, but he requests the court, under the act of 1908 (Acts 1908, p. 341, c. 193), to consider and weigh the evidence. There are many witnesses and about 600 printed pages of oral testimony, and, there being a conflict in the evidence, we cannot undertake to weigh it, for reasons stated at length in the following recent cases from this court: *Parkison v. Thompson* (February, 1905) 73 N. E. 109; *Hudleston v. Hudleston* (May, 1905) 74 N. E. 504; *Ray v. Baker* (June, 1905) 74 N. E. 619.

Judgment affirmed.

(166 Ind. 433)

GIPE v. STATE. (No. 20,575.)

(Supreme Court of Indiana. Nov. 1, 1905.)

1. HOMICIDE—DYING DECLARATIONS—REVIEW.

The question as to the competency of a dying declaration was one which the trial court was called on to decide before admitting the testimony, and its conclusion that the declaration was admissible is one which should not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion.

2. SAME—SENSE OF IMPENDING DEATH.

Where it appears that in the afternoon deceased expressed a belief that she would not get well, that she gradually grew worse until the physician had abandoned hope of her recovery, and that at midnight, when the declarations were made, she was very weak and unable to speak more than a few words, and that she died early the following morning, the trial court was justified in holding that the declarations were made under a sense of impending death, without a hope of recovery.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 430-437.]

3. SAME—INSTRUCTIONS.

Where an indictment charged that accused "did then and there unlawfully * * * kill and murder" deceased "by then and there * * * unlawfully striking and wounding and forcibly throwing the said" deceased "in a well," an instruction was unwarranted which authorized a verdict of guilty, if the jury found that defendant broke and entered the house of deceased under certain circumstances, and that by reason of said acts the deceased was put in great fear and agitation, to such an extent that she lost her reason, and that by reason thereof she left the house and jumped into the well, and death resulted.

4. SAME—HARMLESS ERROR.

Where an indictment charged that the killing was accomplished by physical violence, an erroneous instruction authorizing a conviction

of murder in the first degree, if the jury found that by reason of the acts of defendant the deceased was put in great fear and agitation, to such an extent that she lost her reason and jumped into a well, which caused her death, cannot be considered harmless, although the jury did not find the accused guilty of murder, but of involuntary manslaughter.

Appeal from Circuit Court, Henry County; John M. Morris, Judge.

Ollie Gipe was convicted of the crime of involuntary manslaughter, on which judgment was pronounced, and he appeals. Reversed.

F. O. Gause and W. A. Brown, for appellant. C. W. Miller, Atty. Gen., C. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

GILLET, J. Appellant was charged by indictment with the murder of one Mollie Starbuck and her infant child. There was a verdict of involuntary manslaughter, on which judgment was pronounced.

The first question which this appeal presents is whether the trial court erred in admitting as dying declarations certain statements of said Mollie Starbuck. On a Saturday night, between the hours of 9 and 10, said decedent was found, in a frenzied condition, with said infant, in a shallow well, situate about 1,000 feet to the rear of her house. She and the child were the only members of her family who were at home during the evening, and there was evidence tending to show that the house was broken into that night, at some hour previous to the time that they were found in the well. Said declarant died about 4 a. m. the next Monday. One of the attending physicians testified that the cause of death was acute pulmonary congestion, while another physician, in testifying, ascribed her death to shock, fright, and exhaustion. The evidence warranted the conclusion that her condition and death were due to her experience of the preceding Saturday night. She continued very ill from the time she was found. She was in a highly nervous condition, and was suffering from pulmonary hemorrhage. She was better Sunday morning, but during that time, and up to her death, her breathing was heavy and labored. Between 2 and 3 p. m. of said day she asked one of the attending physicians whether he thought she could get well. He told her he had hopes of her recovery, that she had improved nicely, and he saw no reason why she should not get well. She replied that she did not believe she would. Between that time and midnight Sunday, when the declarations were made, there was a gradual decline in her condition, and said physician testified that at the latter hour he had no hope of her recovery. The declarations in question, and the circumstances in which they were made, are thus stated by said witness: "At one of her waking spells I said to her: 'Mollie,' I says, 'do you know me?' And she made no answer,

and she looked at me, and I said: 'If you cannot answer me, Mollie' (she was getting weak), 'raise your hand if you know me,' and she raised her hand or finger. And I said: 'There are some things we want to know, and very badly, and, if you can possibly let us know any way whatever, do so.' I said: 'Was it some bad man carried you off?' And she summoned a great effort and said, 'Yes.' The nurse asked her then: 'Did they come in at the window?' And she said, 'Yes,' and looked toward the window where the screen had been torn away. And then the nurse asked her if there were more than one, and she said, 'I don't know.' And then I asked her if she recognized any one, and she made some answer, but we could not understand her—she was getting very weak."

With this statement of the facts, we proceed to the discussion of the admissibility of said declarations. In John's Case, as reported in 1 East, Pleas of the Crown, 357, 358, from the MSS. of Buller, J., it appears that it was the unanimous opinion of the judges that "if a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence." That the character of the wound may of itself warrant the inference that the declarant was under a sense of certain and speedy death is settled upon the authorities. Woodcock's Case, 2 Leach, 563; Anthony v. State, 19 Tenn. 265, 33 Am. Dec. 143; McLean v. State, 16 Ala. 672; Hill's Case, 2 Gratt. 594, 608; 3 Russell on Crimes (9th American from 4th London Ed.) page 250; and see Green v. State, 154 Ind. 655, 57 N. E. 637. The question as to the competency of the declarations was one which the trial court was called on to decide before admitting the testimony. 1 East, Pleas of the Crown, 358; John's Case, Id. 357; Donnelly v. State, 26 N. J. Law, 463; Starkey v. People, 17 Ill. 17; 1 Roscoe, Cr. Ev. *37; 1 Bishop, New Cr. Pro. § 1212; 1 Elliott, Ev. § 355. Its conclusion that the declarations were admissible is one which will not be disturbed on appeal, unless it is manifest that the facts did not warrant the conclusion. Swisher v. Com., 26 Gratt. 963, 21 Am. Dec. 330. Professor Wigmore, who discusses the propositions above laid down, says: "In ascertaining this consciousness of approaching death, recourse should naturally be had to the attending circumstances. It has been contended that only the statements of the declarant could be considered for this purpose, or, less broadly, that the nature of the injury alone could not be sufficient; i. e., in effect, that the declarant must have shown in some way by conduct or language that he knew he was going to die. This, however, is without good reason. We may avail ourselves of any means of inferring the existence of such knowledge; and, if in a given case the nature of the wound is such that the declarant must have

realized his situation, our object is sufficiently attained. Such is the settled judicial attitude. * * * No rule can here be laid down. The circumstances of each case will show whether the requisite consciousness existed, and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances." 2 Ev. § 1442. In this case it appears that on Sunday afternoon said decedent expressed the belief that she would not get well. Assuming that to have been her opinion then, and considering that she gradually grew worse until the physician had abandoned hope of her recovery, and bearing in mind her extreme weakness, as evidenced by the physician's testimony as to the circumstances in which her statements were made, we can but regard the deduction of the trial court as authorized that the declarations were made under a sense of impending death, without hope of recovery. The remarks of Eyre, C. B., in *Woodcock's Case*, 2 Leach, 563, seem quite apropos in this connection, but we need not pause to quote them.

The indictment charged that appellant "did then and there unlawfully, feloniously, purposely, and with premeditated malice kill and murder Mollie Starbuck and Beulah Starbuck, by then and there feloniously, purposely, and with premeditated malice unlawfully striking and wounding and forcibly throwing the said Mollie Starbuck and Beulah May Starbuck in a well, then and there being." It is contended by appellant that, in view of the charge in the indictment as to the means by which the deaths alleged were caused, the court erred in giving to the jury instruction No. 3. By that instruction, the court, after calling the attention of the jury to the provisions of statute relative to the killing of a human being in the perpetration of, or attempt to perpetrate, the crime of robbery or burglary, charged that if the jury found that appellant, either by himself or with others confederating with him, broke and entered the Starbuck house under certain circumstances set forth in the instruction (amounting in law to a burglary), and that by reason of said acts the said Mollie Starbuck was put in great fear and agitation, to such an extent that she lost her reason and became insane, and that by reason thereof, while in such state of insanity, she left the house and jumped into the well, carrying with her the infant child, and that by reason of her exposure therein and her extreme fright and agitation, brought upon her by the facts aforesaid, she afterward died, appellant would be guilty of murder in the first degree. In this case, as will be observed, the charge was a killing by "striking and wounding and forcibly throwing" said Mollie Starbuck and Beulah May Starbuck into a well. This clearly means that the killing was accomplished by physical violence. In an English *nisi prius* case, involving a state of facts somewhat similar

to that involved in the hypothesis embodied in said instruction, we find that the facts as to the manner in which death occurred were pleaded. *R. v. Pitts*, 1 Oar. & M. 284. It is settled in this jurisdiction that the charge that the killing was by ways and means unknown to the grand jury is sufficient; and then it is a question whether the proof supports the averment. *Waggoner v. State*, 153 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 287; *Donahue v. State* (at this term) 74 N. E. 996. We have here, however, a case in which it is alleged that the killing was accomplished by an act of physical violence. The averment is descriptive of the crime charged, and it was therefore necessary to prove the allegation substantially as laid. *Taylor v. State*, 130 Ind. 68, 29 N. E. 415. As respects the allegation and proof as to the manner of death, it is sufficient if the proof agree with the allegation in its substance and generic character, precise conformity is not required; but, to quote from one of the older writers, "if a person be indicted or appealed for one species of killing, as by poisoning, he cannot be convicted of a totally different species of death, as by shooting, starving, or strangling." 1 East, Pleas of the Crown, 341. See, also, *Mackalley's Case*, 9 Coke, 67; *R. v. Waters*, 7 C. & P. 597; *State v. Dane*, 11 N. H. 271, 35 Am. Dec. 495; *State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *State v. Fox*, 25 N. J. Law, 566; *State v. Hoyt*, 13 Minn. 132, 142 (Gil. 125, 127); *State v. Jenkins*, 14 Rich. Law, 215, 94 Am. Dec. 132; 10 Ency. Pl. & Pr. 128.

It is contended that the above instruction is shown to have been harmless, because the jury did not find appellant guilty of murder, but of involuntary manslaughter. There is no merit in this contention. The instruction, in view of the evidence, was strongly calculated to be influential, because of its indication to the jury that there might be a conviction for the homicide, if such it was, although the conclusion of the jury as to the manner of killing might be that death was caused by a means totally different from that which was alleged. It must not be forgotten that a charge of murder in the first degree comprehends every grade of felonious homicide, and that a finding of involuntary manslaughter cannot be disturbed on appeal because the evidence shows that the defendant was guilty of murder. *Hasenfuss v. State*, 156 Ind. 246, 59 N. E. 463. It has been declared, and properly so, that if an "error is in itself radical and affects substantial rights in a material degree, or may probably so affect such rights, then the error cannot be regarded as unimportant unless the record, with decisive clearness and strength, affirmatively shows that it did not influence the final decision in the case to the prejudice of the party who complains." *Elliott, Appellate Procedure*, § 643, note.

After a careful consideration of the question which the giving of said instruction pre-

sents, viewed, not in the abstract, but in the concrete, as applied to the testimony in the record, it is our conclusion that it does not clearly appear that appellant was not prejudiced. A reversal must therefore follow.

Judgment reversed, and a new trial ordered. The clerk will issue the proper notice for the return of the prisoner.

(165 Ind. 443)

TERRELL v. STATE. (No. 20,474.)

(Supreme Court of Indiana. Nov. 2, 1905.)

1. INDICTMENT—ALLEGATION OF DATE.

Where an indictment found September 12, 1903, charged that defendant on "July 12, 18903," at, etc., then and there unlawfully and feloniously did kill and murder W. by shooting etc., the indictment was fatally defective, as alleging the date of the offense subsequent to the finding of the indictment.

2. SAME—STATUTES—APPLICATION.

Burns' Ann. St. 1901, § 1825, provides that no indictment or information shall be deemed invalid because it omits to state the time at which the offense was committed in any case in which time is not the essence of the offense, nor for stating the time imperfectly unless time is of the essence of the offense. *Held* that, where an indictment stated that the offense was committed on a date long after the finding and return of such indictment, it could not be sustained under such section.

Appeal from Circuit Court, Wells County; John M. Smith, Special Judge.

John W. Terrell was convicted of murder, and he appeals. Reversed.

A. L. Sharpe, C. E. Sturgis, R. W. Stine, C. H. De Lacour, R. S. Gregory, and Robt. Landfair, for appellant. C. W. Miller, Atty. Gen., John Burns, Pros. Atty., C. C. Hadley, W. C. Geake, and L. G. Rothschild, for the State.

JORDAN, J. On the 12th day of September, 1903, a grand jury of the Wells circuit court returned an indictment against appellant, John W. Terrell, charging him with the crime of murder in the first degree. He unsuccessfully moved the lower court to quash the indictment, and then entered a plea of not guilty, and also filed a special answer, wherein he averred that at the time the alleged offense was committed he was a person of unsound mind. The state's reply to the special answer was a general denial. The case, upon issues joined, was tried by a jury, and a verdict returned convicting him of murder in the first degree, and assessing his punishment at imprisonment in the State's Prison during life. Upon this verdict the court, over appellant's motion for a new trial, pronounced judgment.

The errors assigned and relied upon for a reversal are: (1) Overruling the motion of appellant to quash the indictment; (2) denying his motion in arrest of judgment; (3) overruling the motion for a new trial; (4) error of the trial court in pronouncing judgment on the verdict, for the reason that at the time of the rendition of the judgment

appellant was a person of unsound mind, incapable of understanding and comprehending what was being done; and (5) error of the court in refusing to permit appellant to file a supplemental motion for a new trial.

The indictment in this case consists of one count, and it is therein alleged that John W. Terrell, on the 12th day of July, in the year 18903, at the county of Wells and state of Indiana, then and there unlawfully, feloniously, etc., did kill and murder Melvin Wolfe by shooting, etc. Appellant's counsel contend that the court erred in overruling the motion to quash, for the reason that it is apparent on the face of the pleading that the commission of the alleged offense was on an impossible date, or, in other words, for the reason that it is disclosed upon the face of the indictment that the crime was committed after the return of the indictment, and therefore the latter is fatally defective on a motion to quash. The general rule applicable to criminal procedure is that the time of the alleged commission of an offense, as stated in the indictment or information, must not be shown on the face of such pleading to be subsequent to the return of the indictment or the filing of the information, but must appear to be anterior or prior thereto. If the time of the commission of the crime is disclosed to antecede the return of the indictment, then the time stated must not appear to be so long prior to the return as to bring the case beyond the statute of limitations, provided it is one to which the latter statute applies. The general rule above asserted is one well settled by our own decisions and other authorities, except so far as it can be said to have been abrogated by statute. See *State v. Noland*, 29 Ind. 212; *State v. Windell*, 60 Ind. 800; *Hutchinson v. State*, 62 Ind. 556; *Murphy v. State*, 106 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722; *Trout v. State*, 107 Ind. 578, 8 N. E. 618; *Gillett's Criminal Law*, § 131. See, also, *Commonwealth v. Doyle*, 110 Mass. 108; *State v. Sexton*, 10 N. C. 184, 14 Am. Dec. 584; *State v. O'Donnell*, 81 Me. 271, 17 Atl. 66; *Markley v. State*, 10 Mo. 291; *State v. Smith*, 88 Iowa, 178, 55 N. W. 198; *McJunkins v. State*, 37 Tex. Cr. R. 117, 38 S. W. 994; *Dickson v. State*, 20 Fla. 800; *Serpentine v. State*, 1 How. (Miss.) 256; *Wharton, Crim. Law*, § 274; *Wharton on Homicide*, § 788; *Chitty, Crim. Law*, *p. 225.

The Attorney General, in his answer to the contention of appellant's counsel in respect to the insufficiency of the indictment in controversy, says: "(1) The court will observe that the copy of the indictment in the record shows the figures 8 and 9 without any space between them. To get at the real cause of this alleged error, it is necessary to examine the original indictment, where the trouble concerning the statement of the date will readily be observed. (2) It may be said that the statement of time is so far imperfect as to fall within the provisions of section 1825, Burns' Ann. St. 1901, which pro-

vides that 'no indictment or information shall be deemed invalid, nor shall the same be set aside or quashed * * * for any of the following defects: * * * Eighth. For omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense; nor for stating the time imperfectly unless time is of the essence of the offense.' It must be remembered that the copy of indictment as it appears in the record imports absolute verity, and we cannot resort to anything de hors the record for the purpose of contradicting it. In *Buckner v. State*, 56 Ind. 210, the record stated that the grand jury had returned into court an "indictment burned." This court in that case, in considering the question in respect to the truth of the record, said: "The record of this cause filed in this court imports to us 'absolute verity,' and from this record we are bound to conclude that at the time of the trial of this case nothing but ashes remained of the indictment against the appellant in the court below."

It is a well-settled rule of appellate procedure that all questions presented in the appeal must be tried and determined by the record as certified to the appellate tribunal. This rule is one universally affirmed and enforced by our decisions. Whether the statement of the time in question is a mistake which occurred in drafting the indictment, or was made by transcribing it, is, under the circumstances, not a material factor, so far as it can be said to exert any influence over the point as presented upon the face of the indictment. If the copy of the indictment in the record did not correspond to the original, the state should have secured a correction through the means of a certiorari.

An examination and quotation from some of the authorities above cited will fully serve to sustain the conclusion at which we have arrived upon the question involved. In *State v. Noland*, 29 Ind. 212, the offense was charged to have been committed some nine months after the indictment was found. The court held that under the circumstances the indictment was bad. Judge Frazer, in a separate opinion in that case, said: "I was first inclined to hold that this was merely a repugnant allegation, and therefore not affecting the sufficiency of the pleading, but on reflection I am not able to adopt that conclusion. No other time is alleged elsewhere, and this cannot therefore be rejected. It follows that the indictment charges what is impossible, and cannot therefore legally be regarded as charging anything whatever." *State v. Windell*, 60 Ind. 300, was an accusation for betting on the result of an election. The indictment alleged that the defendant on the 14th day of September, 1876, did unlawfully win \$5 of and from the person named by unlawfully betting on the result of an election then and there held on the 7th day of November, 1876. The court held the indictment bad because it disclosed that the money was won

on September 14, 1876, by betting on the result of an election which did not actually take place until nearly two months thereafter. The court in its opinion affirmed that, under the circumstances, "where the time laid in an indictment is an impossible time, or is beyond the statute of limitations, or at a time when the offense was not punishable by statute, the indictment is bad." In *Murphy v. State*, 103 Ind. 96, 5 N. E. 767, 55 Am. Rep. 722, the indictment charged that the defendant, an unlicensed retailer of intoxicating liquors, at the county of Owen, state of Indiana, "on the 16th day of August, 18184, did then and there unlawfully, etc., sell one gill of whisky." The contention in that appeal was that the trial court erred in overruling the motion to quash, for the reason that the indictment was fatally defective in alleging that the offense was committed at a time subsequent to the return. In this contention the court concurred. The state in that case insisted that, inasmuch as section 1576, Rev. St. 1881, the same being section 1825, Burns' Ann. St. 1901, provides that no indictment shall be quashed or set aside for omitting to state the time at which the alleged offense was committed, or for stating the time imperfectly, therefore the fixing of an impossible date is no longer a cause for quashing an indictment; citing *State v. Sammons*, 95 Ind. 22. This contention the court denied, affirming, in the course of its opinion, that there was nothing in *State v. Sammons*, supra, either changing or intimating a change in the rule which declares that the fixing of an impossible date vitiates an indictment. The court further affirmed that the above section of the Criminal Code of 1881 did not work any change in the rule in controversy. The court also declared that in *State v. Sammons*, supra, it was inferable "that an indictment is bad which either states an impossible date or fixes the date at a time beyond that limited by the statute of limitations. * * * As has been seen, section 1756, Rev. St. 1881 (the only section bearing directly on the subject), only renders immaterial the omission to state any time, or to imperfectly state the time, and hence only to that extent changes the common-law rule." *Murphy v. State*, supra, is certainly influential and controlling upon the question as presented in the case at bar. That decision was followed and adhered to in *Same v. State*, 107 Ind. 598, 600, 8 N. E. 158, 176. In *Trout v. State*, 107 Ind. 578, 8 N. E. 618, the prosecution was based on affidavit and information. The latter pleading was filed on the 16th day of January, 1886, and alleged that the offense in question was committed on the 21st day of October, 1886. The court in that case said: "If appellant had moved the court to quash the information in this case, it would have been, under our decisions, error to have overruled such motion"; citing *Murphy v. State*, supra, and

Dyer v. State, 85 Ind. 525. In this latter case the prosecution was also by affidavit and information. The affidavit charged that the crime of which the defendant was convicted was committed on December 24, 1881, while the information alleged that it was committed on January 24, 1881. The court held that the motion to quash should have been sustained. Elliott, J., speaking for the court in that appeal, said: "Informations must be supported by an affidavit, and must charge the same offense as that described in the affidavit. An information charging a distinct and different offense from that stated in the affidavit cannot be upheld. It is difficult, if not impossible, to discover any ground upon which it can be held that an offense committed in January is the same as one committed in the following December. It would be a wide stretch of construction which would declare a misdemeanor perpetrated in December to be the same as one committed in the preceding January. The offense described in the information was committed, taking as true (as it is our duty to do), the statements of the information, 11 months prior to the one described in the affidavit. We are unable to perceive any reason which will justify us in treating the two offenses as one. The question is not, however, barren of authority"; citing authorities. In *State v. Patterson*, 116 Ind. 45, 10 N. E. 280, 18 N. E. 270, the decision in the *Murphy* Case was cited in support of the point that an impossible date is fatal to an indictment. In *Commonwealth v. Doyle*, 110 Mass. 103, the court held that a complaint which charges a crime to have been committed on a future day alleges no offense and is properly quashed. In *State v. Smith*, 88 Iowa, 178, 55 N. W. 198, the defendant was charged with obtaining money by means of false pretenses. The indictment was found in February, 1891, and alleged that the crime in question was committed on the 17th day of December, 1891. The accused was put upon trial on this indictment before a jury. At the close of the state's evidence he unsuccessfully moved for an acquittal, on the ground that the indictment charged the offense to have been committed at an impossible date; it being apparent, however, upon the face of the indictment that the commission of the alleged offense was fixed at a date subsequent to the return of the indictment. The court, on its own motion, discharged the jury, and resubmitted the cause to another grand jury, which on March 3, 1891, found an indictment against the defendant for the same offense, alleging the commission thereof on the 17th day of December, 1890. To this latter indictment the accused pleaded once in jeopardy on the same charge and former acquittal thereof. A demurrer to his plea was sustained, and upon the issue of not guilty he was convicted, and judgment rendered against him. This judgment on appeal was affirmed. The court held that

the indictment in the former case was not sufficient, because it laid the commission of the offense on a future day. The court further held that, the indictment being insufficient, the defendant, in contemplation of law, had not been placed in jeopardy at the trial had thereon. The court in its opinion affirmed that, where an indictment "states an impossible time, it fails to charge an offense."

The proposition with which we have to deal in this appeal is one relating to pleading. Hence we cannot indulge in presumptions where there is nothing in the pleading to legitimately sustain them. The indictment in the case at bar fixes a specific date—one not anterior to, but subsequent to, its return. Certainly, under the circumstances, the court would not be warranted to presume that the commission of the offense was at some time prior to the finding of the indictment. A precise time upon which the crime in question was committed is stated. No other is alleged or given. A motion to quash an indictment is recognized as the proper procedure to raise an issue of law on material facts therein alleged. On appellant's motion to quash, it is for the purpose of the motion conceded or admitted by both parties to the cause that the time at which the offense is charged to have been committed is correctly stated. *Murphy v. State*, supra; *Gillett's Crim. Law*, §§ 131, 767.

It would be a great stretch of construction to hold, upon the face of the indictment in this case, on the motion to quash, that the offense in controversy must be treated or considered as though it was one charged to have been committed at a time anterior or antecedent to the finding of the indictment against appellant.

The interpretation placed upon section 1825, Burns' Ann. St. 1901, by this court in *Murphy v. State*, supra, is sufficient to show that the second contention of counsel for the state, to the effect that the statement of the time of the commission of the offense is so imperfect as to bring the indictment within the scope of the above section, is not tenable. We may assume that, had the Legislature intended to cure a statement of an impossible time in an indictment or information, it would have declared its purpose in this respect in express and positive language. In considering the meaning of this section of our Criminal Code, the author of *Gillett's Criminal Law*, in section 131, says: "It is evident that it does not have any application, except where no time is stated, or where the statement of time is so imperfect as not to amount to any statement at all. As a consequence, if a time is laid beyond the period of limitation, the indictment is vulnerable on a motion to quash; for the court, in looking at the indictment to determine its sufficiency, will in all cases assume the time stated therein

to be the true time." Accepting, as we must, under the authorities cited herein, the time upon which the offense in question is alleged to have been committed as the true or correct time, therefore the only reasonable inference to be deducted is that the offense was not committed, and the indictment should have been quashed under the second clause of section 1828, Burns' Ann. St. 1901, on the ground that the facts as therein stated do not constitute a public offense.

We do not consider the alleged error of the court in rendering judgment against appellant at a time when, as it is asserted, he was a person of unsound mind, because, as the judgment must be reversed, that proposition has become a moot question by reason of the statute of 1905, which provides what the procedure shall be under such circumstances. See Acts 1905, p. 174, c. 103.

It follows, for the reason stated, that the court erred in overruling appellant's motion to quash the indictment. The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to quash the indictment.

(165 Ind. 489)

TONGRET et al. v. CARLIN et al.
(No. 20,611.)

(Supreme Court of Indiana. Nov. 17, 1905.)

APPEAL—BRIEFS—SPECIFICATION OF ERRORS.

Where appellant assigns as the only error the overruling of a motion for new trial, and does not set out the motion in its brief or the evidence, or an attempt to comply with Sup. Ct. Rule 22, subd. 5 (55 N. E. vi), no question is presented, and the judgment will be affirmed.

Appeal from Circuit Court, Rush County; Douglas Morris, Judge.

Action between Stuart T. Tongret and others and Frank J. Carlin and others. From the judgment, said Tongret and others appeal. Transferred to the Supreme Court under section 1337u, Burns' Ann. St. 1901. Affirmed.

W. M. Sparks and Gates Sexton, for appellants. Gavin & Davis and Innis & Morgan, for appellee.

HADLEY, J. From the appellants' brief it is impossible to ascertain any question involved in this appeal. Appellants assign as the only error the overruling of their motion for a new trial. That motion, neither in terms nor substance, is set out in the brief. There is no suggestion in the brief of a single ground of the motion. There is no recital of the evidence in narrative or any other form. In short, appellant, in his brief, has made no attempt to comply with the fifth subdivision of rule 22 (55 N. E. vi), and for this reason we are constrained to hold, following other previous decisions of the court, that no question is presented for our consideration. Henderson v. Henderson (this term) 75 N. E. 269, and cases cited.

Judgment affirmed.

(113 Ill. 209)

GLOS et al. v. SHEDD.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. APPEAL—ABSTRACTS—SUFFICIENCY.

An abstract of record, which has condensed in less than 4 pages 39 pages of evidence, none of the exhibits being abstracted, but only being referred to as in the record, is not sufficient to authorize a review of the question of the sufficiency of the evidence to support the decree.

2. COSTS—TAXATION AGAINST DEFENDANT—OBSTRUCTION OF PROCEEDINGS.

Where defendant in an equity case has disclaimed all interest and may procure a dismissal on his own motion, but still insists upon remaining a party and making costs in order to hinder and delay the proceedings, he is properly chargeable with costs.

3. EQUITY—DECREE PRO CONFESSO—WHEN BINDING.

Where a party appears by attorney without making any effort to vacate a decree pro confesso, the court, on rendering a final decree, is justified in treating the decree pro confesso as binding.

4. APPEAL—DECREE PRO CONFESSO—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE.

Under a decree pro confesso, a defendant cannot on error allege the insufficiency or amount of evidence that may have been heard by the court entering the decree.

5. TAXATION—VOID SALES—VACATION—REIMBURSEMENT OF PURCHASER.

A sale for taxes of land the taxes on which have been in fact paid by the owner in possession is void ab initio, and the purchaser need not be reimbursed for the amount paid out by him in order that the sale may be set aside.

Error to Circuit Court, Cook County; F. A. Smith, Judge.

Bill in chancery by John G. Shedd against Henry L. Glos and others. There was a decree for complainant, and defendants bring error. Affirmed.

Rehearing denied December 12, 1905.

Defendant in error, John G. Shedd, filed a bill in chancery October 1, 1901, in the circuit court of Cook county against plaintiff in error Henry L. Glos to set aside a tax deed issued to him by the county clerk May 5, 1899. A summons was issued and on October 2, 1901, served upon Glos. A quitclaim deed, purporting to have been executed August 30, 1901, by Glos and wife, conveying to R. S. Barber land described in complainant's bill, was placed on record November 1, 1901, at 3:00 p. m. Plaintiff in error Glos entered his appearance October 22, 1901, by Enoch J. Price, his solicitor, and, without disclaiming, filed on November 11, 1901, a general demurrer to the bill. On May 26, 1902, Glos filed his answer, in which he denied that the defendant in error was the owner in fee simple or otherwise of the lot described in the bill of complaint; denied that the defendant in error was in the actual or exclusive possession of the same or any part thereof; alleged that on the 12th day of November, 1896, the premises were sold for taxes for the year 1895 and purchased by him, and that on the 5th day of May, 1899, a tax deed was made to him by the

county clerk of Cook county, and that said tax deed was recorded June 29, 1899, in the office of the recorder of Cook county, and that said tax deed conveyed to him a good fee-simple title to said real estate, etc.; denied that said tax deed was null and void or a cloud upon the title of defendant in error; alleged that on August 30, 1901, he and his wife executed and delivered a quitclaim deed to said R. S. Barber for said land, and that on the 1st day of October, 1901, said quitclaim deed had been filed for record in the office of the recorder of Cook county, and disclaimed any right, title, or interest in said property whatsoever; and concluded with the usual prayer that the bill be dismissed.

After the disclosures in the answer filed by Glos, the defendant in error on June 26, 1902, by leave of the court, filed an amendment to his bill, making R. S. Barber a party defendant, and praying process of summons against him. He alleged in the amended bill that on March 7, 1901, he became the owner in fee simple of the property in question, and that he held title to the same by a deed from George R. Elliott of that date; that said Elliott purchased and became seized of the premises in fee simple on April 21, 1891, by a deed of conveyance from one Norman and wife; that said Elliott, ever since April 21, 1891, down to March 7, 1901, was in the actual possession of said premises as the owner in fee thereof, and had paid all the taxes and assessments thereon, as the same became payable, down to the date of conveyance to defendant in error, and that ever since the conveyance to him he has been, and is now, in the actual possession of said premises, and has paid all taxes assessed thereon as they became due and payable; that the taxes assessed in the year 1895 were paid by said Elliott, then in possession of said premises; that the premises were sold on the 12th day of November, 1896, for the taxes assessed upon the same for the year of 1895, by virtue of the judgment rendered at the July term, 1896, to plaintiff in error Glos, and a tax deed was made May 5, 1899, by the county clerk to said purchaser and filed for record June 29, 1899, in the office of the recorder; that said deed was issued upon affidavits and notices and duplications of notices which were fraudulent and void, and that no notice of the sale or purchase, or of the right or time of redemption therefrom, was ever given or caused to be given to the said Elliott, the owner of said premises and the person occupying the same, and that for the foregoing reasons the tax deed is fraudulent and void, and a cloud upon complainant's title to said premises, etc., and he asked that the same be set aside and be declared to be null and void; that, notwithstanding the sale and proceedings of the county court thereon of said

premises was void, and that, notwithstanding said tax sale is fraudulent and void, complainant on the 30th day of September, 1901, offered to pay to said Glos the amount of said sale, taxes, interest, and costs accrued and accruing down to September 30, 1901, and was ready and willing to pay the same; that the said Glos appeared at the time to be the only person of record to whom said amount of sale and interest and costs were properly payable and tenderable, and that said Glos declared that he had conveyed the interest acquired by him in said premises and was no longer the owner thereof at the time of said tender, notwithstanding he appeared of record as such owner; that said Glos for the first time on June 5, 1902, wrongfully and fraudulently gave out that he had conveyed and quitclaimed said premises on August 30, 1901, to one R. S. Barber, and that said deed was recorded October 1, 1901, and that it appears that said deed was filed at 3:00 p. m. on said date. The complainant charges that said deed was fictitious and fraudulent, and was made without any consideration and for the fraudulent purpose of hindering and delaying the complainant in obtaining the relief in and by said bill, etc.; alleges that he made diligent effort to ascertain the residence of said R. S. Barber, so that process could be served upon him, and was unable, upon diligent inquiry, to ascertain the same; and charges that R. S. Barber is a fictitious and not a real person, etc. The bill, as amended, concluded with the usual prayer. On June 28, 1902, the amended bill was demurred to and the demurrer overruled, and upon motion it was ordered that the answer to the original bill stand as the answer to the bill as amended. The cause was referred to the master in chancery to take proofs of the material allegations in the bill contained, and report the same, together with his conclusions on the law and the evidence, to the court. Default was entered as to defendant Barber on November 29, 1902, before the reference was made to the master. The default of Barber was entered upon a publication of notice which was defective, but no motion was made by counsel for Barber at any time to set aside the default. On April 6, 1903, E. J. Price, counsel for Glos, entered the appearance of R. S. Barber and his own appearance as solicitor for Barber. Barber was not, at any time during the proceedings, personally present. No application was made by Barber to the court to set aside the default or for leave to answer in the cause.

The testimony, having been taken before Master Cooper, was on April 16, 1903, filed by him in the circuit court, together with his report, findings, conclusions, and recommendations. Attached to the report of the master in chancery appear objections in behalf of R. S. Barber to the report, which are

signed by E. J. Price, solicitor for Barber, and were overruled by the master April 10, 1903. On April 20, 1903, E. J. Price, solicitor for Glos and Barber, filed exceptions to the master's report in the circuit court in pursuance of leave granted by the court April 16, 1903. At the May term, 1903, of the circuit court, the cause came on for hearing June 2, 1903, and a decree was entered in favor of complainant thereto upon answer of the defendant Glos, and the replication of the complainant to said answer, "and the default of the defendant R. S. Barber to said original and amended bill," and the master's report of the testimony taken and reported and filed April 16, 1903, and the documentary evidence filed therewith, and the exceptions to said report filed by defendants Glos and Barber, by E. J. Price, their solicitor. The court overruled all of the exceptions, approved the report of the master, and found that the court had jurisdiction of the complainant and each of the defendants and of the subject-matter of the suit, and that on March 7, 1901, complainant, Shedd, became the owner in fee simple of lot 11, block 4, etc.; that he derived title to the same by a deed duly executed and acknowledged by George R. Elliott, for a good and valuable consideration on March 7, 1901, recorded March 12, 1901, in the office of the recorder of Cook county; that ever since that date complainant has been, and is now, in the actual possession of all said premises, and has paid all the taxes assessed thereon from said time; that Elliott became seized in fee simple of said real estate April 21, 1891, by a deed from Norman and wife, recorded June 2, 1891, in the office of the recorder of Cook county; that said Elliott remained in the actual possession of said premises from April 21, 1891, and paid all taxes and assessments thereon, of every kind and character, down to March 7, 1901; that the sale of said premises on November 12, 1896, for taxes assessed thereon in 1895, was illegal and void, and the deed issued to defendant Glos on May 5, 1899, by the county clerk, and recorded in the office of the recorder, was and is void and a cloud upon the title of the complainant to said premises; that the notices required to be served, and the affidavits to be made of the sale and expiration of redemption, were not made and served upon the owner and occupant, as required by the Constitution and statutes, and that said Elliott, the owner of the premises at the time, had no notice of the sale or the expiration of redemption, as required by the statute; that the tax deed depreciates the value of the premises and is a cloud upon the same, and should be declared null and void, etc.; that on September 30, 1901, defendant Glos appeared of record as the owner of the tax title appearing on said premises, and on said day complainant caused to be tendered to said Glos the amount of the tax sale and lawful interest thereon down to September 30, 1901, believing that he was the person to whom

said tender should be made, and that said Glos thereupon declared that he had conveyed the interest acquired by said tax deed, and was no longer the owner thereof; that afterward complainant filed his original bill; that defendant Glos appeared in court by E. J. Price, his solicitor, and filed a demurrer to the bill, which was on May 26, 1902, overruled by the court; that said Glos afterwards, on June 5, 1902, filed his answer in the cause, "in which he disclaimed ownership of said premises, and answered that he had conveyed all his interest in said premises August 30, 1901, to one R. S. Barber, and that said deed was recorded in the office of the recorder of Cook county, Ill., October 1, 1901." The court found, also, said deed was filed for record October 1, 1901, at 3:00 p. m.; that on the same day, at 1:00 p. m., the bill of complaint in this suit was filed, and summons issued on said bill and placed in the hands of the sheriff for service at 2:06 p. m. October 2, 1901, and served upon the defendant Glos on October 2, 1901; that the act of defendant Glos in placing the deed on record October 1, 1901, after the tender to him on September 30, 1901, and his defense to this suit interposed by demurrer and answers, were wrongful, vexatious, and fraudulent, and hindered and prevented the complainant from speedily prosecuting his suit and obtaining the speedy relief to which he was in equity entitled. The court further found that said Glos, by his solicitor, appeared before the master in chancery, interposed objections to the proof offered by the complainant, cross-examined witnesses, and obtained divers postponements of the examination of witnesses, filed objections to the report of the master, and obstructed and hindered the complainant unnecessarily, wrongfully, and fraudulently in obtaining the relief sought by his suit and the prosecution and maintenance of the same, contrary to equity, and occasioned and necessitated the incurrence by complainant, and the expenditure in his behalf, of witness' fees, master's fees, and divers costs and sums of money; that the said Glos is, and ought to be estopped from insisting upon or claiming any right or interest in law or equity to any sums of money paid by him under said tax sale in purchasing said premises or in procuring the tax deed issued thereon or the interest accrued thereon under the statute, and is not entitled in equity to have or claim the same, or any part thereof, and that the equities of this case are with the complainant. The court further found that said Barber was duly notified of the suit, and the pendency thereof, and the proceedings therein; that he neglected to appear in court in person or by solicitor, and suffered a default to be entered against him, confessing the allegations of the original bill and the amended bill, and particularly that the sale of said real estate for taxes November 12, 1896, for the year 1895, was void for the reason that said taxes for said year had been paid before the sale by George R.

Elliott, then the owner in possession of said premises; that the tax deed issued on May 5, 1899, was null and void, and that the deed purporting to have been executed by Glos on August 30, 1901, conveying said premises to Barber, and filed for record October 1, 1901, at 3:00 p. m., was fictitious and fraudulent, and was made without any consideration, for the sole and fraudulent purpose of hindering and delaying the complainant in obtaining the relief prayed in and by his said bill, and that said deed was put on record by said Glos after he learned complainant intended to file his said bill for the purposes set forth in said bill; that said deed is fraudulent and void and of no effect, and is a cloud upon the title of the complainant on said premises, and ought to be removed therefrom; that said Barber is not entitled to and has not made any claim in this proceeding to any taxes, legal costs, or interest paid in procuring said tax deed, and has not claimed or proved in this proceeding the payment of any taxes or legal costs in procuring any such deed or any right or title thereto, and is concluded therefrom by the default heretofore entered.

The court decreed that the sale of the premises for taxes in pursuance of a judgment in the county court, and the tax deed contained therein to Glos and recorded June 29, 1899, and the deed by Glos and wife on August 30, 1901, to Barber, and recorded October 1, 1901, were each null and void and of no effect, and that Glos and Barber, and their heirs and assigns, be forever enjoined from insisting upon, asserting, claiming, or maintaining any right, title, interest, or claim in and to said premises, or any part thereof, by reason of said judgment, tax sale, and tax deed issued thereon, and deed from Glos and wife to Barber. The court further adjudged and decreed that neither Glos nor Barber recover any costs in the proceedings, and found that the fees and compensation charged and reported by the master for his services under the order of reference were lawful and proper, "and that said fees and charges were necessary, and vexatiously occasioned by the defendant Henry L. Glos, and the complainant, in equity, is entitled to be reimbursed as to said amount of fees and costs." The court adjudged and decreed that said fees of said master be allowed and ordered taxed as costs in the case, and that complainant have and recover of and from defendant Glos such amount of fees and costs, and ordered the defendant Glos to pay complainant the same within 10 days, and in default ordered that the complainant have execution therefor.

Enoch J. Price, for plaintiffs in error.
James R. Ward and Wm. G. Forrest, for defendant in error.

RICKS, J. (after stating the facts). Separate errors are assigned upon the record by Glos and Barber, by their attorney, Enoch

J. Price, but all the errors are argued under one head. It is insisted that the record disregards all established practice, giving defendant in error a decree wiping out the tax title without reimbursement, and assessing all costs against the tax buyer, Glos. It is also insisted that various allegations of the bill were found to be true by the decree, when there was no evidence to support them; that Barber is not in default; and that it was error to take the bill pro confesso as to him. It is further insisted that, if the default is held proper, it should be reversed, with directions to reimburse Barber for money paid for taxes and interest and his costs in the court below, and that as to Glos the decree should be reversed, with directions to dismiss him with his costs.

The abstract filed in this court by plaintiffs in error is so meagre that it is impossible to determine whether or not the evidence was sufficient in all respects to sustain all the findings in the decree. Upon the margin of the pages in the abstract referring to the record, it is shown that 39 pages of evidence were taken by the defendant in error, complainant below, and abstracted in less than four pages, without any exhibits being abstracted, but the references to the record are simply as to such exhibits. This is not a compliance with the rules of this court in abstracting a case, and, as was said in *Illinois Nat. Bank v. Trustees of Schools*, 211 Ill. 506, 71 N. E. 1070, 1072, "in the absence of such showing, we must presume that the chancellor heard sufficient evidence upon which to base his findings and decree."

As to the plaintiff in error Glos, we think the court was justified in decreeing the costs against him. There can be but little doubt, from a review of this record, that Glos' whole scheme was to delay and hinder the proceedings in this case. After answering and, as he contends, disclaiming any interest whatever, he insisted upon going before the master and introducing evidence; and before filing the disclaimer he filed a demurrer, both to the original and amended bills, and interposed before the master in chancery objections and made defenses which he had no right to interpose. Under these conditions a court of equity is justified in taxing the costs to the party who insists upon making the costs and remaining a party to the proceeding, when he could have been dismissed from the cause upon his own motion. A court of equity is justified in going to extremes to mete out justice, when such practices are resorted to as are shown by this record to delay and hinder its proceedings. No one can read this record without becoming convinced that the transfer quitclaim to Barber, if there was in fact such a person as Barber, was but a scheme to annoy the complainant. We think the decree is equitable in all respects in its findings in reference to Glos.

As to the objections interposed by the plaintiff in error Barber, no effort was made to

obtain a vacation of the decree pro confesso, and after his appearance by attorney the court was justified in treating the decree pro confesso as binding and conclusive against him at the time it entered the final decree. *Staunton Coal Co. v. Menk*, 197 Ill. 369, 64 N. E. 278; *Andrews v. Campbell*, 94 Ill. 577; *Ryder v. Twiss*, 3 Scam. 4. He never appeared in person to testify before the master or object to the decree defaulting him. No answer was set up by him claiming any interest in the premises under the deed from Glos to him or the tax deed to Glos, nor was any money claimed or reimbursement asked for taxes paid, etc. So far as Barber is concerned, the decree is in accord with the averments in the bill, as will be seen from the allegations of the bill and the findings of the decree as set forth, and as was said in *Dunfee v. Mutual Building Ass'n*, 206 Ill. 133, 68 N. E. 1052: "Under a decree pro confesso, a defendant cannot, on error, allege the want or insufficiency of the testimony, or the insufficiency or amount of the evidence that may have been heard by the court entering the decree: Where the defendants are persons not under disability, and a default is entered, a decree pro confesso follows as a matter of course. Such decree, if warranted by the averments of the bill, is unassailable"—citing *Monarch Brewing Co. v. Wolford*, 179 Ill. 252, 53 N. E. 583, and *Roby v. Chicago Title & Trust Co.*, 194 Ill. 228, 62 N. E. 544.

The decree finds that the taxes for the year 1895, and for which the sale was made upon which the Glos deed is predicated, were in fact paid by Elliott, the then owner of the land, and who was at that time in possession of the same. If this finding in the decree be true, as we must assume it is under the state of this record, the sale was illegal and void ab initio. *Perkins v. Bulkley*, 166 Ill. 229, 46 N. E. 733. It was not in contemplation of the statute or the requirements of equity that defendant in error, in order to remove the cloud of such void sale, should reimburse any person for the taxes which had already been paid by the owner, and for which the land was illegally sold. The statute is that the holder of the tax deed should be reimbursed for all taxes, legal costs, and penalties as shall have been properly paid. *Hurd's Rev. St.* 1903, c. 120, § 224. If the taxes were paid by the owner before the sale, then there was no delinquency, and the alleged purchaser, Glos, did not properly pay any taxes within the contemplation of the statute, and was not entitled to be reimbursed for any payment so made. *Wilmerton v. Phillips*, 103 Ill. 78; *Langlois v. Cameron*, 201 Ill. 301, 66 N. E. 332.

We are unable to find any error that would justify a reversal of the decree as entered by the chancellor. The decree is equitable in all respects under the conditions appearing from this record, and it is accordingly affirmed.

Decree affirmed.

(218 Ill. 323)

WISTRAND v. PEOPLE.

(Supreme Court of Illinois. June 23, 1905.)

1. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—CONFESSIONS.

In a prosecution for rape on a girl 13 years old, a written confession was admitted, in which defendant admitted having had intercourse with prosecutrix and with another girl; the statements with respect to the two girls being so connected that it was practically impossible to exclude part of the confession without excluding it all. The court instructed the jury to disregard all evidence of other offenses, and only consider that which was applicable to the charge in the indictment. *Held*, that it was not error to admit that portion of the confession which related to defendant's intercourse with the other girl.

2. SAME—PROOF OF VENUE.

In a prosecution for rape upon a girl 13 years old, the prosecuting attorney stated that he expected to prove by several girls under 14 that they had been over and over again to see the defendant at his house, and that this proof would be offered for the purpose of proving that the premises were in the county wherein the venue was laid. The girls referred to gave evidence that they had been at defendant's house on several occasions, and that the house was in the county mentioned; but there was nothing in the testimony tending to prove that defendant had improper relations with any of the girls. *Held* that, while this method of proving the venue was improper, defendant was not injured.

3. RAPE—EVIDENCE—DEFENDANT'S REPUTATION FOR PEACE AND QUIET.

In a prosecution for rape, evidence of defendant's general reputation as a peaceable and quiet citizen is irrelevant.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 841; vol. 42, Cent. Dig. Rape, § 61.]

4. CRIMINAL LAW—HARMLESS ERROR.

Where, in a prosecution for crime, the undisputed evidence shows defendant to be guilty, and no other verdict could properly be rendered, the Supreme Court will not reverse a conviction for errors which did not bring about the result.

Error to Criminal Court, Cook County; George Kersten, Judge.

Charles Wistrand was convicted of rape, and brings error. Affirmed.

Rehearing denied December 13, 1905.

Charles P. R. Macaulay and Edwin A. & Oscar D. Olson, for plaintiff in error. W. H. Stead, Atty. Gen., John J. Healy, State's Atty., and James J. Barbour, Asst. State's Atty., for the People.

WILKIN, J. The plaintiff in error was convicted in the criminal court of Cook county of the crime of rape upon one Annie Kaplan, a girl 13 years of age, and his punishment was fixed at imprisonment in the penitentiary for the term of 1½ years. To reverse that judgment this writ of error has been sued out.

The only errors assigned are that the court erred in denying the motions for a new trial and in arrest of judgment and in pronouncing sentence. Many grounds of reversal are called to our attention, but under these general assignments of error, and the indefinite manner in which the points are

urged, it is impossible to consider each of them separately. The substantial grounds of reversal are the improper admission of testimony and the giving of erroneous instructions. The evidence is to the effect that the offense was committed in the room of plaintiff in error in the second flat of a residence building which he owned in the city of Chicago. He used the basement of the building for a carpenter shop. The first floor was rented for residence purposes, and the second was occupied by himself; he being a bachelor without family. A young girl by the name of Eva Goldstein testified she was in the adjoining room at the time the crime was committed, and she corroborated the prosecuting witness, Annie Kaplan. After his arrest, and while at the police station, the defendant made a written statement, in which he acknowledged having had sexual intercourse, on various occasions, with both the Kaplan girl and the Goldstein girl. It is not claimed that this statement was not freely and voluntarily made, but it is contended that so much of it as relates to the Goldstein girl should have been excluded. The statement was, as shown above, in writing, and it would have been impossible to separate the part of it objected to from that which referred to the crime charged. To refuse to admit a part of the confession would have been practically to exclude it all. The court, by an instruction, told the jury to disregard all evidence of other offenses, and only consider that which was applicable to the charge in the indictment. There was no error in admitting the confession.

It is said that in his opening statement to the jury the prosecuting attorney told the jury that he expected to prove by several little girls under 14 years of age that they had been, over and over again, to see the defendant at his house, and that this proof would be offered for the purpose of proving that the premises were situated in Cook county. Several young girls were introduced as witnesses, and testified, over the objection of the defendant, that they were under 14 years of age, that they had been at defendant's house on several occasions, and that the house was in Cook county. It is argued that the statement to the jury and the testimony of these girls constituted prejudicial error to the defendant, as tending to impress the jury with the belief that he had been guilty of improper conduct with those witnesses. The method resorted to to prove the venue was improper. There was nothing in the testimony of the girls, however, which tended in any way to prove that which counsel contend the jury might have inferred. It did not prove, nor did counsel attempt to prove by either of them, that the defendant had been guilty of any improper conduct with them or other children, or that he had been guilty of other

offenses than the one charged in the indictment.

The defendant sought to introduce evidence of his general reputation as a peaceable and quiet citizen, but the evidence was objected to and the objection sustained. He was not entitled to prove his reputation for an entirely irrelevant trait of character. He was allowed to prove his general reputation for chastity, and that was the only fact which he offered to prove tending in any way to disprove his guilt of the crime charged.

It is further urged that the court erred in giving and refusing instructions to the jury, but no specific objection in this regard is pointed out. We have examined the instructions given and refused, and are of the opinion there was no material or substantial error in the ruling of the court therein. If, however, it should be conceded that the court below committed error in each of the matters complained of, except the admission of the confession, still the judgment should not be reversed. The undisputed evidence in this record is that the defendant is guilty of the crime for which he was indicted. His confession of guilt is in no way explained nor the offense in any way mitigated. There is nothing here shown to indicate that he did not have a fair and impartial trial. The verdict of the jury could not properly have been other than guilty.

It cannot be seriously urged that the punishment is excessive. Under such circumstances this court will not reverse a judgment of conviction, although errors may have been committed upon the trial which cannot be said to have brought about the result. *Jennings v. People*, 189 Ill. 320, 59 N. E. 515; *Johnson v. People*, 202 Ill. 53, 66 N. E. 877, and cases cited; *Barber v. People*, 203 Ill. 543, 68 N. E. 93; *Glover v. People*, 204 Ill. 170, 68 N. E. 464.

The judgment of the criminal court is affirmed.

Judgment affirmed.

(218 Ill. 286)

PITTSBURGH, FT. W. & C. RY. CO. v. SANITARY DIST. OF CHICAGO.

(Supreme Court of Illinois. Oct. 14, 1905.)

1. EMINENT DOMAIN—PLEADING—DEMURRER.

Where a petition for the condemnation of land is defective in not stating the purpose of the taking or the manner in which the land is to be used, the proper method of taking advantage of the defect is by demurrer.

2. SAME—EXERCISE OF POWER—SCOPE OF JUDICIAL INQUIRY.

In a proceeding to condemn land for public use the court may rightfully determine whether the petitioner has power to exercise the right of eminent domain, whether the property is subject to that right and is being taken for a public use, and whether the power is being used for taking an excessive amount of property, but cannot deny the right to condemn

on the ground that the exercise of the power is unnecessary or inexpedient.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 165-167.]

8. SAME—PROPERTY SUBJECT TO CONDEMNATION.

Under Laws 1889, p. 129, § 8, giving to a sanitary district the right to acquire by condemnation any and all real property which it may require for its corporate purposes, a sanitary district has power to condemn land which is used by a railroad company as a freight terminal.

Appeal from Circuit Court, Cook County; R. W. Clifford, Judge.

Condemnation proceedings by the Sanitary District of Chicago against the Pittsburgh, Ft. Wayne & Chicago Railway Company. From the judgment, defendant appeals. Affirmed.

Rehearing denied December 12, 1905.

Loesch Bros. & Howell, Herrick, Allen, Boyeson & Martin, and Wilson, Moore & McIlvaine, for appellant. James Todd and Eddy, Haley & Whetten (P. C. Haley, and Dolph, Buell & Abbey, of counsel), for appellee.

HAND, J. This was a petition filed in the circuit court of Cook county by the Sanitary District of Chicago to condemn a narrow strip of land situated upon the west bank of the South Branch of the Chicago river, between the south line of Madison and the north line of Van Buren streets, in the city of Chicago, the east line of said strip being the center line of said river, to enable it to deepen, widen, and improve said river from Lake to Robey street, and thereby increase the flow of water from Lake Michigan through said river into its main artificial channel, which connects with the said South Branch at Robey street and extends to Lockport, without increasing the current in said river to a greater velocity than that provided for by the Secretary of War in the permit issued to said sanitary district by him, permitting it to divert a portion of the waters of Lake Michigan through said South Branch into its main channel. The appellants filed a motion to dismiss the petition on the ground of want of jurisdiction in the court to hear and determine the cause. The motion was overruled by the court, and a jury was impaneled to assess the appellants' compensation. The jury returned into court their verdict fixing the amount of appellants' compensation at \$1,389,940, upon which verdict a judgment was rendered; and the appellants having preserved, by proper exceptions, their objections to the ruling of the court in denying their motion to dismiss the petition for want of jurisdiction, an appeal has been prosecuted by them to this court to review the action of the trial court in holding that the sanitary district had the right to condemn, for the purposes aforesaid, said strip of land.

It is first contended the petition is insufficient in averment to give the court jurisdiction. The petition averred that the Sanitary

District of Chicago was duly organized under "An act to create sanitary districts and to remove obstructions in the Desplaines and Illinois rivers" (Laws 1889, p. 125), approved May 29, 1889, and in force July 1, 1889, and set out the powers conferred upon it as a sanitary district by virtue of the statute under which it was organized, and averred that it had power to condemn land to carry into effect the purpose for which it was organized. It also averred that in order to carry out the purpose of its organization and make effective the main channel by it constructed, it was necessary that it deepen, widen and improve the Chicago river, in order that it might comply with the statute of the state of Illinois and obtain a minimum flow through its channel of 300,000 cubic feet of water per minute, and such additional quantities of water as from time to time the population of the sanitary district might require, in order that the sewage of said district might be diluted in the manner and degree required by law. It also averred that its board of trustees, on June 19, 1901, had adopted a plan for the deepening and widening of the Chicago river between Lake street and Robey street, in the city of Chicago, and that said trustees, on the 20th day of May, 1903, passed an ordinance by the terms of which the said district had laid out and established its right for the deepening, widening and improving of said river between the south line of Madison and the north line of Van Buren streets in said city, and that in order to accomplish such purpose and make such improvement it was necessary that the petitioner acquire the strip of land sought to be condemned, which strip was described by metes and bounds. It was also averred that the sanitary district had obtained the permission of the Secretary of War to make the modifications, changes, and alterations in the Chicago river contemplated and provided for in the plan and ordinance referred to in the petition. The petition named a large number of persons and corporations, including the appellants, who it was averred had, or claimed to have, some interest in the premises sought to be condemned, and that the petitioner had been unable to agree with said persons and corporations as to the compensation to be paid them by it for said property. The persons and corporations who were named in the petition as interested in said premises, with the exception of the state of Illinois, were made defendants thereto, and the petition prayed that process might issue against said defendants, and that a jury might be impaneled to determine the just compensation to be paid the several defendants, occasioned by the taking of said strip of land, and for general relief. The sanitary drainage act provides, in express terms, that where it is necessary for a district organized under such act to acquire property by condemnation the proceeding shall be carried on under the eminent domain act; and section 2 of the

eminent domain act requires the petition to state (1) the authority of the petitioner to exercise the right of eminent domain, (2) the purpose for which the property is sought to be taken, (3) a description of the property sought to be taken, and (4) the names of all parties interested in the property, as owners or otherwise, if known, if not known the fact should be stated, and to conclude with a prayer that the compensation to be paid the owner or owners be assessed. We are unable to see wherein the petition, upon its face, fails to comply with the statute and why it was not sufficient to give the court jurisdiction of the case. In *Suver v. Chicago, Santa Fé & California Railway Co.*, 123 Ill. 293, 14 N. E. 12, it was held that it is not necessary to state in the petition the particular manner in which the land is to be used, as that may be shown by the plans and specifications of the petitioner. The court did not err in declining to dismiss the proceeding for want of a sufficient petition.

It is next contended the petition should have been dismissed because, as urged by the appellants, it was not necessary for the petitioner to take the land sought to be taken, as the object of its organization could be effected without the taking of said strip of land; and the appellants sought to show, upon a motion to dismiss, by affidavits which the court refused to consider but struck from the files, that the petitioner could obtain the flow of water required to effect the object of its organization by taking a strip of land from the river bank opposite the land of the appellants, or by deepening, instead of widening, the river at the point where appellants' land was situated, or by constructing by-passes beneath the surface of appellants' land sought to be taken, to accommodate the flow of water required by the petitioner to effect the object of its organization. The question of whether it was necessary that the petitioner acquire title to the strip of land sought to be taken in order that the object of its organization might be effected was a legislative and not a judicial question, and was one to be determined by the trustees of the sanitary district and not by the court in which the condemnation proceeding was pending. The court in which such a petition is pending may rightfully determine whether the petitioner has the power to exercise the right of eminent domain, whether the property is subject to the right of eminent domain and is being taken for a public use, whether the power is being abused by the taking of an excessive amount of property, and other kindred questions which do not involve a determination of the necessity or the expediency of the taking of the lands sought to be condemned; but where the right to condemn exists, and the property is subject to the exercise of the right of eminent domain and is being condemned for a public use, and the right to

condemn is not being abused, the court can not deny the right to condemn on the ground that the exercise of the power is unnecessary or inexpedient, as the determination of that question devolves upon the legislative branch of the government, and is a question which the judicial branch of the government cannot determine. *Smith v. Chicago & Western Indiana Railroad Co.*, 105 Ill. 511; *Chicago & Eastern Illinois Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill. 155, 48 N. E. 485. In the *Smith Case*, 105 Ill., on page 519, it was said: "It certainly was never contemplated by the Legislature that, where the petitioner has brought itself within the provisions of the statute, the right of condemnation can be defeated by simply showing, in the opinions of witnesses who may have no interest in or connection with the objects of the proceeding, that the land sought to be condemned is not necessary for the purpose stated. * * * On the other hand, the law having authorized such companies to take private property for public use, when one, by a proper petition, has brought itself strictly within the provisions of the statute, and the court can see, from the facts stated, the land sought to be condemned is not manifestly in excess of what would be reasonably necessary for the purpose stated in the petition, the court will not be authorized to interpose on the ground suggested." Also in the *Wiltse Case*, 116 Ill., on page 454, 6 N. E. 49: "The question of the necessity for the exercise of the right of eminent domain, and in what cases it will be exercised, within the constitutional restrictions, is legislative, and not judicial. And where the power has been delegated to an incorporation by the Legislature, the exercise of that power by the incorporation, within the scope and for the uses and purposes named in the legislative grant, will not be a proper subject for judicial interference or control, unless to prevent a clear abuse of the power." Also in *Illinois Central Railroad Co. v. City of Chicago*, 141 Ill., on page 599, 30 N. E. 1047, 17 L. R. A. 530: "The municipal authorities have exercised the option or discretionary authority conferred upon them by the Legislature, and have provided for crossings in one, only, of the methods indicated in the statute, and have instituted condemnation proceedings in pursuance of the ordinances so passed by them. Their action in this regard is political or legislative in its character, and cannot be controlled by the courts. Appellant, in these cases, is asking a court of chancery to substitute its judgment for the judgment of the city council upon a question which belongs exclusively to the legislative branch of the government. They are asking a court of chancery

to require the city council to repeal its ordinances for grade crossings and in the place thereof to adopt ordinances for viaduct crossings. Such relief as this cannot be granted under the facts disclosed in these records. * * * 'When the use is public, the judiciary cannot inquire into the necessity or propriety of exercising the right of eminent domain. That right is political in its nature, and not judicial. It belongs exclusively to the legislative branch of the government, and under our constitution the judiciary have nothing to do with it.' And in *Chicago & Alton Railroad Co. v. City of Pontiac*, 169 Ill., on page 165, 48 N. E. 487: "Where the power to exercise the right of eminent domain has been delegated to an incorporation by the Legislature, the exercise of that power by the incorporation within the scope and for the uses and purposes named in the legislative grant will not be a proper subject for judicial interference or control unless to prevent a clear abuse of the power."

It is next said that the property sought to be taken at the time the petition was filed was devoted to railroad purposes, and it is urged for that reason it is not subject to be condemned. The strip sought to be taken is a part of a tract of land belonging to the appellants, bounded on the west by South Canal street, on the north by Madison street, on the east by the South Branch of the Chicago river and on the south by Van Buren street, and it is intersected by Adams and Jackson streets, which run east and west. The west 135 feet thereof is occupied by the Union Passenger Station, and the portion lying east of said 135 feet and west of said strip is occupied by the freight terminal of the appellants, and said strip is occupied by teamways and three short stub tracks which furnish means of access to the freight buildings of appellants located between said strip and the Union Passenger Station grounds. While no main tracks are located upon said strip, we think, for the purposes of this case, it may be admitted it is used by the appellants in connection with their freight terminal and devoted to railroad purposes. The law is well settled that where land is devoted to a public use it cannot be taken by condemnation for another public use unless the Legislature in express terms or by necessary implication has authorized it to be taken. The question here presented, therefore, is whether or not the statute under which the petitioner is organized in express terms or by necessary implication confers authority upon the petitioner, in order to effect the object for which it is organized, to condemn property which is in use by a railroad company as a freight terminal and similarly situated to the strip of land here in question. In *People v. Nelson*, 133 Ill. 565, 27 N. E. 217, when construing the statute under which

the petitioner was organized, the court held that while said statute was general in its terms, it was a well known historical fact, and a fact abundantly shown by the terms of the act itself, that the general sanitary scheme provided for by the act was formulated mainly, if not exclusively, with reference to the sanitary conditions and needs of the city of Chicago and its environs, and that the act and its several provisions could not be properly construed without taking into account the peculiar situation of the territory which the proposed Sanitary District of Chicago was intended to embrace. And in *Lussem v. Sanitary District of Chicago*, 192 Ill. 404, 61 N. E. 544, where was involved the validity of certain bonds issued by the Sanitary District of Chicago, the proceeds from the sale of which were proposed to be used, in part, by the district in paying for deepening and widening the Chicago river, in compensating the owners of property situated along the banks of said river where the same was acquired for the purpose of widening the river, and in constructing bridges across the river where bridges were made necessary in consequence of changes made in the river by the work done therein by the sanitary district, it was held that the district had the power to take possession of the river, subject to the right of navigation and with the consent of the Secretary of War, for the purpose of widening and deepening the same, and that it might condemn such land situated upon the banks of the river as it might need to enable it to obtain the necessary flow in volume of water to comply with the statute under which it was organized, without increasing the velocity of the flow of the water beyond the velocity of flow provided in the permit of the Secretary of War permitting it to connect its main channel with the South Branch of the Chicago river; that is, to enable it to comply with the law under which it was organized and the permit of the Secretary of War. By section 17 of the sanitary drainage act the petitioner is authorized to enter upon, use, widen, deepen, and improve any navigable waterway necessary to affect the object of its organization. This provision undoubtedly was intended to apply, and does apply, to the Chicago river. By section 8 of said act it is provided that such sanitary district may acquire, by purchase, condemnation or otherwise, any and all real property that may be required for its corporate purposes. By virtue of the provisions of said section 8 the sanitary district in express terms is given power to acquire, by condemnation, any and all real property which it may require for its corporate purposes. This language is broad and comprehensive, and is ample to authorize the petitioner to acquire, by condemnation, the title to the strip in question, if in the judgment of the trustees

of the sanitary district its acquisition was necessary for the corporate purposes of the district.

It is however, contended by the appellants that the right to condemn property held for public use is not conferred upon sanitary districts by section 8, but by section 17 of said act, and it is said section 17 only authorizes the condemnation of a joint use of such property. We do not agree with this contention, but are of the opinion that section 8 authorized the petitioner to condemn any and all real property, which includes property held for a public use; and, while section 17 apparently covers the same subject, we find nothing therein which limits the power conferred by section 8, or which deprives the petitioner of the power, under that section, to acquire property held for a public use. Especially must this be true when it is remembered that the Sanitary District of Chicago is not a corporation for pecuniary profit, but a municipal corporation organized for the purpose of furnishing an outlet to the sewage of a great city and thereby protecting the health of its inhabitants, and that the act under which it was organized was passed especially with reference to the conditions which were known to exist in the territory which was to be embraced within said district when organized. The statute requires the sanitary district to provide a minimum flow of 300,000 cubic feet of water per minute, and the velocity of the flow was limited to 3 miles per hour, which was afterwards limited by the Secretary of War to $1\frac{1}{4}$ miles per hour. No water could be obtained except from Lake Michigan through the river, with its narrow, winding, and obstructed channel, which was lined with docks, railroads, and other improvements, and when the statute authorized the sanitary district to enter upon, use, widen, deepen, and improve the Chicago river, and gave it power to condemn any and all real property required for its corporate purposes, it manifestly intended to and did confer upon said sanitary district the power to condemn any and all property, whether devoted to the public use or not, located upon the banks of said river, which was necessary for it to possess and control in order that it might successfully widen, deepen, and improve said river, which clearly includes the property of appellants.

From a consideration of this record we have reached the conclusion that the petition filed by the petitioner was sufficient, that the question of whether it was necessary that the Sanitary District of Chicago should acquire the strip of property in question for a corporate purpose was a question the decision of which rested with the trustees of said district, and that section 8 of the sanitary drainage act is broad enough in its terms to authorize said district to acquire title to said strip by condemnation. We are therefore of the opinion that the circuit court had power, under said petition, to hear and

determine said cause, and that that court did not err in declining to dismiss the petition for want of jurisdiction.

The judgment of the circuit court, declining to dismiss said petition, will therefore be affirmed.

Judgment affirmed.

(118 ILL. 313)

PEOPLE ex rel. HEALY v. HOOPER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. ATTORNEY—DISBARMENT—GROUNDS.

Where an attorney for plaintiff dismissed the suit before a justice, and induced defendant to believe it had been dropped, and afterwards took an appeal and obtained a judgment by default, and caused execution to be levied on real estate without notice to defendant, with intent to get title to the real estate, it is ground for disbarment.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, §§ 55, 56.]

2. SAME—DECEIVING COURT.

Where an attorney knows that there is on file and in his possession a motion by defendant under special appearance to quash the service of summons, accompanied by an affidavit denying that the person served was the agent for the defendant, and deceives the court into entering judgment by default, it is ground for disbarment.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 54.]

3. SAME.

An attorney who abstracts papers from the files to conceal his fraudulent acts should be disbarred.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 53.]

4. SAME.

Where an attorney procures the clerk of court to sign and certify a transcript of the record, in which the attorney has fraudulently incorporated a certified copy of a decree and other documents as having been offered in evidence and excluded by the master, when they were not so offered, he should be disbarred.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 53.]

5. SAME—LIMITATIONS.

The court will not establish a limitation of a proceeding to disbar an attorney by analogy to the statute, unless the circumstances render it unjust to require the attorney to answer.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attorney and Client, § 71.]

Application by the people, on the relation of John J. Healy, for disbarment of James H. Hooper. Rule made absolute.

Rehearing denied December 14, 1905.

John J. Healy (C. El. More and John L. Fogle, of counsel), for relator. James H. Hooper, pro se.

BOGGS, J. This is an original proceeding in this court, being a petition for the disbarment of the respondent, James H. Hooper, who was enrolled as an attorney in this state on the 22d day of October, 1894.

On the 29th day of April, 1897, the respondent, as the attorney for one Elgin B. Hodgkins, instituted a suit before a justice of the peace of Cook county against R. McMillen,

J. Edward Hope, and Henry J. Thayer to recover the sum of \$200. Summons was issued and served on Thayer, and returned not found as to the other defendants. The cause was continued several times, and on July 1, 1897, was dismissed. We find from the evidence that the respondent said to the justice of the peace, in the presence of Thayer and his attorney, that his client was not in the state, and that he had not been able to get him into court, and that he would not put the defendant to any further trouble, and asked to have the cause dismissed, and thereupon the order of dismissal was entered. Upon the last day allowed for an appeal the respondent filed with the justice what purported to be an appeal bond for the appeal from the judgment of dismissal, to the county court of Cook county. The bond was in the sum of \$10, and purported to bear the signature of the plaintiff, Hodgkins, as principal, and that of the respondent as surety. The respondent signed the name of Hodgkins to the bond without having power of attorney so to do, and without indicating that the signature was by another than Hodgkins. It is clear that Hodgkins did not know that the bond had been signed or was to be executed until several weeks after it had been filed. The cause was removed by the force of the appeal bond to the county court, and there judgment was entered by default against Thayer for the sum of \$163.10. Respondent caused an execution to be issued on the judgment, procured the same to be levied on two city lots in the city of Chicago belonging to Thayer, without demanding payment of Thayer or otherwise notifying him of the issuance of the execution. One of the lots was sold under the execution to W. A. Harris. Thayer, acting in reliance on the statements made by the respondent when the case was dismissed by the justice of the peace, believed the case to have been brought to an end by the judgment of dismissal, and had no knowledge whatever that an appeal had been taken or that judgment had been entered against him in the county court or that the lot had been sold. At the expiration of the period allowed for redemption the respondent produced the certificate of purchase and procured the sheriff to execute a deed purporting to convey the lots to said Harris by virtue of the judgment and sale thereunder. Soon thereafter an action in ejectment was instituted in the name of Harris, against Thayer, to obtain possession of the lot. The service of the summons in the action of ejectment was the first intimation that Thayer had that the suit against him had not been finally disposed of by the order of dismissal in the justice court. He thereupon filed a bill in chancery against Harris and the respondent for a decree canceling the deed made to Harris, on the ground that the same had been fraudulently obtained by Harris and the respondent acting in collusion. Harris and the respondent were personally

served, and answered the bill, and the cause was fully heard and a decree entered vacating and canceling the deed in accordance with the prayer of the bill.

The decree recited that the proofs established that, when the case of Hodgkins v. Thayer was called for trial before the justice of the peace, said Hooper stated to the said justice, in the presence of the said Thayer and his attorney, that the said Hodgkins was absent from the state of Illinois, and suggested or consented that the said suit be dismissed, which was thereupon done; that the said Thayer and his attorney, being thereby led to believe that the said suit was abandoned by the said Hodgkins, paid no further attention to the same; that after the dismissal of the said suit said Hooper, without the knowledge, consent, or acquiescence of the said Hodgkins, signed the name of the said Hodgkins as principal and his own name as surety on an appeal bond in the penal sum of \$10 for an appeal from the dismissal of the said suit to the county court of Cook county aforesaid, and on the 20th day of July, 1897, without the knowledge, consent or acquiescence of the said Hodgkins, filed the same with the said justice and advanced the costs of said appeal with his own money; that if the said Hodgkins had any knowledge of the said appeal before the commencement of this suit he had no knowledge thereof until long after the said appeal had been taken and the time allowed by law for taking the same had elapsed; that the said cause was called for trial in the said county court, and, neither the said Thayer nor his attorney having any knowledge or information of the taking of the said pretended appeal or of the pendency of the said suit in the said county court, the said cause was tried ex parte, and a judgment was rendered therein against the said Thayer for \$163.10 and costs of suit; that as to what took place at said ex parte trial the testimony of the said Hooper and Hodgkins is contradictory, conflicting, and on the part of one or the other, or both, untruthful; that at the time of the rendition of the said judgment the said Thayer was not, and never had been, indebted to the said Hodgkins in any sum whatever; that the said Thayer was at that time, and for many years previously had been, a business man in the city of Chicago, Cook county, aforesaid, as a member of the firm of Thayer & Chandler, engaged in the sale of artists' materials and supplies, his name during all that time being in the city directory of said city of Chicago, and he during all that time being the only person of the name of Henry J. Thayer in the said city of Chicago, so far as shown by the said city directory; that at the time of the rendition of the said judgment the said Hodgkins, according to his own testimony, knew of the whereabouts of the said Thayer, and the said Hooper knew, or by the slightest effort could have ascertained, the whereabouts of the said Thayer; that the

said Thayer was then a man of large means and financially well able to pay the said judgment on demand; that the said Hooper, who had full charge and control of the said matter, made not the slightest effort to obtain a speedy payment of the said judgment by personal demand upon the said Thayer, but, on the contrary, with the intent and design to defraud the said Thayer of valuable real estate exceeding in value the sum of \$7,000, the said Hooper, craftily availing himself of his knowledge of the law and legal procedure, dishonestly, and contrary to his obligations and duty as an attorney and counselor at law, perverted and prostituted legal process and procedure as a means of fraud and oppression, and colluded and conspired with the said defendant W. A. Harris to obtain for one or the other, or both, valuable real estate in satisfaction of the said judgment; that the said Hooper, instead of endeavoring, as a faithful attorney and officer of the court, to realize the amount of the said judgment speedily and expeditiously and without unnecessary cost and expense, colluded and confederated with said Harris to use the execution issued upon the said judgment to obtain the title to valuable real estate and to deprive the said Thayer thereof, without his knowledge, and with that end in view the said Hooper, on November 6, 1899, without the knowledge of said Thayer or his attorney, sued out an execution from said county court upon said judgment, and afterwards, on November 13, 1899, placed the same in the hands of the sheriff of Cook county, with instructions not to make any personal demand upon the same, but to levy the same upon lots 8 and 9, etc.; that contrary to the denials, under oath, of the said Hooper and Harris on the hearing of this cause, it appears that the said Hooper has acted in other cases as the attorney of the said Harris; that in many respects the testimony of the said Harris appears inherently untrue and unreliable, and often appears to have been concocted to fit the requirements of the occasion; that although he denied, under oath, that the said Hooper was his attorney or his adviser, he in eight or nine or more instances bought real estate at sheriff's sale where the said Hooper was the execution creditor's attorney, without any other advice than what information he obtained from the said Hooper, or any advice or information whatever, except such as he obtained from the said Hooper, as to the regularity or validity of the various proceedings wherein the sales were had, or as to the title or ownership of the property sold or the location or value thereof; that from the said Harris' own testimony he at no time bought at any sheriff's or judicial sale where the judgment creditor was represented by an attorney, other than the said Hooper, and that he himself is not an attorney and has never studied law and is not familiar with legal proceedings; that the said Harris did

not pay any part of the amount bid by him for the said lot 8, as aforesaid, but the said Hooper paid said sheriff only the expenses of said sale, amounting to \$7.42, and satisfied the balance of the bid by directing the said sheriff to return the said execution satisfied, which was done by the said sheriff. The decree further found that said lot 8, with the improvements thereon, was of the value of at least \$13,000; that Harris had paid only the sum of \$7.42 on the purchase price, being the costs only; that the respondent, Hooper, wrote the *præcipe* and declaration in the action of ejectment, but signed the same in the name of said Harris *pro se*, and that the *præcipe* and declaration were produced on the trial of the cause, but have since disappeared. This decree was not appealed from, but remains in full force.

It was also proven that, in a number of other cases pending before justices of the peace, the respondent had pursued the practice of causing the cases to be dismissed for the purpose of inducing the defendants therein to believe that the suits had been there finally disposed of, and afterwards filed appeal bonds with the justices, thus bringing the cases into the county, circuit, or superior court without notice to the defendants, taking judgments by default, well knowing that the defendants thereto had been deceived into the belief that the cases had been dismissed and finally disposed of by the plaintiff in the justice courts, and intending that they should be so deceived and misled by the course pursued by him in the justice courts. It was also proven that in some of the other of these cases in which he, by his deceitful and fraudulent practice, had obtained judgments, he sought to further wrong and defraud the defendants therein, as he did Thayer, out of valuable real estate by directing that the sheriff should not seek the defendants to notify them of the issuance of the executions on such judgments or should not seek to find personal property wherewith to satisfy the executions, but should levy upon and sell real estate, the description whereof he gave him, with the purpose and intent upon his part that such real estate should be sold without the knowledge of the owners thereof that judgments had been entered against them, or that the real estate had been levied upon. Harris was also the purchaser in several other of these cases. In these cases the respondent prostituted the remedies and processes of the law, and unlawfully deceived the defendants in the furtherance of his fraudulent scheme to wrongfully procure judgments, without hearing or trial, and to wrong and defraud the defendants out of their property. Such misconduct warrants a judgment of disbarment. 4 Cyc. 909-911.

We think the proof establishes that the respondent was guilty of deceiving and misleading one of the judges of the circuit court of Cook county by taking a judgment by default in the case of *Goldberg v. Metropolitan*

City Express Co. The summons had been returned served by leaving a true copy with Michael Kelly, as the agent of the defendant express company. The respondent represented to the court that the plaintiff was entitled to a default, when at the time, as he well knew, there was on file a motion to quash the service, supported by an affidavit which, if true, established that Kelly was not an agent of the company, and that the service of the summons did not authorize the entry of a default. This judgment was afterwards vacated, on motion, by an order of the court, in which it was recited that it appeared "to the satisfaction of the court that said judgment was procured by fraud, actual or constructive."

The petition also charges that the respondent has been guilty in a number of instances of improperly abstracting and removing from the files or concealing various records of the courts in the cases in which he was interested as an attorney or personally as a party. In the case of *Rehm v. Odell* (a chancery proceeding pending in the superior court) the respondent and one A. G. Dicus had filed objections to the report of the master. They procured consideration of the objections to be postponed or continued on various grounds several different times, and finally on the ground that the master's report could not be found. Subsequently a receipt was found given to the clerk for the master's report, signed by the respondent, and dated the same day that consideration of the objections was postponed because the report could not be found. This receipt was found among the files in another case. The objections to the master's report were finally overruled and a decree entered, and a motion was subsequently entered to vacate and set aside the same. In disposing of the motion, the chancellor entered the following finding of facts: "The court further finds that owing to the peculiar circumstances in this case brought about by the conduct of A. G. Dicus and James H. Hooper, counsel engaged herein, culminating in the abstraction and concealment of the master's report, filed in this cause, the motion of the complainant for a decree of sale was and is an emergency matter," etc.

In the case of *Michaelson v. Creedon*, being one of the cases in which the respondent appeared as counsel for the plaintiff and dismissed the cause before the justice, and afterwards, with the fraudulent and deceitful intent to obtain judgment without the knowledge of the defendants, caused appeal bonds to be filed and judgments to be entered in the higher courts, there was a note on file among the files in the justice court as follows: "Let the case be dismissed, but do not let the record show that the plaintiff asked for the dismissal." This note had disappeared.

In the case of *Goldberg v. Metropolitan City Express Co.*, hereinbefore referred to, the summons was returned served by delivering a copy to Michael Kelly, as agent of the

defendant company, and there was on file when the respondent procured a default to be entered a special appearance, and a motion to quash the return, and an affidavit of said Kelly denying that he was an agent of or in any manner connected with the company. This special appearance, motion, and affidavit disappeared. The evidence tends to show these documents were in the possession of the respondent at the time of the hearing of the motion to set aside the default and vacate the judgment, but since cannot be found nor have the same ever been receipted for to the clerk of the court.

The praecipe and declaration in the ejectment case of *Harris v. Thayer*, purporting to have been drawn by Harris pro se, but shown to have been in the handwriting of the respondent, have disappeared from the files.

The respondent was shown to be guilty of unprofessional conduct in preparing for the clerk of the circuit court of Cook county, and procuring to be signed by the clerk, the transcript of the record in the case of *Norton v. Olivet Baptist Church*, on appeal, by deceitfully incorporating a certified copy of a decree in another case, and of a special commissioner's deed and a certificate of the record of the deed as having been offered in evidence before the master and excluded by the master, when, as a matter of fact, as the respondent well knew, the documents had not been offered or tendered in evidence before the master.

That the respondent is wanting in that high sense of personal or professional integrity which should animate those who appear before the courts in the capacity of attorneys is demonstrated by proof, from which it appears that in order to obtain a letter which he had written to one Schmedtgen, and which was in the possession of one James H. Fitch, an attorney at law, the respondent called upon Fitch, who did not know him, and represented to Fitch that his name was Morris Berkson, and that he was a clerk in the office of Israel Cowan, an attorney at law, and that Mr. Cowan had heard there was something wrong about the matter referred to in the letter, and asked Mr. Fitch to allow him to take the letter to Mr. Cowan. Fitch allowed the respondent, whom he believed to be Berkson and to be acting for Mr. Cowan, to take the letter. The letter was never delivered to Mr. Cowan, nor has Fitch ever been able to secure the possession thereof. The testimony has impressed us with the conviction that the respondent is so wanting in professional and personal fairness and integrity as to render him unworthy of public confidence and unsafe and unfit to be intrusted with the powers and duties of an attorney at law.

The statute of limitations has no application to delinquencies such as have been shown to exist. The court, in such cases, will consider any unexplained, unreasonable delay in presenting the charges, and also whether, by reason of such delay, the accused has been

deprived of a fair opportunity of securing proof to meet the accusation; but the proceeding for the disbarment of an attorney is not barred by the express terms of the statute of limitations, nor will the courts establish a limitation, as to the time in which such proceedings may be instituted by analogy to the statute of limitations, unless, from the nature or circumstances of the particular case, it appears that it would be unjust or unfair to require the attorney to answer as to such occurrences. 4 Cyc. 915.

The rule will be made absolute, and judgment entered striking the name of respondent from the roll of attorneys of this court.

Rule made absolute.

SCOTT, J., took no part in the decision of this cause.

(218 Ill. 327)

MONTGOMERY COAL CO. v. BARRINGER.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—KNOWLEDGE OF DEFECTS.

In order to recover for defect in appliances, the servant must show the defect, that the master had notice of it, and that the servant did not know of the defect and had not equal means of knowledge with master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 243-251.]

2. SAME—KNOWLEDGE OF DANGER.

In order to relieve the master from liability for injury by defects in appliances, proof that the servant knew of the defect must accompany proof of his knowledge of the danger; but, where the danger is such that knowledge of the defect would carry knowledge of the danger to any person of ordinary intelligence, the risk is assumed.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 574-600.]

3. SAME—EVIDENCE.

Where a servant passes under a coal chute with knowledge that there is a hole in the floor of the chute of sufficient size to allow lumps of coal to drop through, and is injured he cannot escape the consequence of his knowledge of the defect by claiming that he had not noticed where the hole was as to persons walking under the chute.

4. TRIAL—INSTRUCTIONS—IGNORING DEFENSE.

In an action against a master for injuries to a servant, an instruction ignoring the question of assumed risk, raised as a defense by the master, and in effect directing a verdict for the plaintiff if the jury believed the facts stated in the instruction to have been established, is fatally defective.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 613, 618.]

Appeal from Appellate Court, Third District.

Action by Corwin E. Barringer against the the Montgomery Coal Company. Judgment for plaintiff was affirmed by the Appellate Court (109 Ill. App. 185), and defendant appeals. Reversed.

Rehearing denied December 13, 1905.

Amos Miller and Lane & Cooper, for appellant. Jett & Kinder, for appellee.

HAND, J. This was an action on the case brought by the appellee against the appellant to recover damages for a personal injury alleged to have been caused by a lump of coal striking him on the head, which fell through a hole in the bottom of a coal chute, beneath which he was passing with a car loaded with slack from the slack pile to the engine room of the appellant. The declaration contained four counts which averred, in various forms, those facts. The general issue was pleaded, and upon a trial a verdict was rendered in favor of the appellee for \$2,500, upon which, after overruling a motion for a new trial, the court rendered judgment, which judgment, upon appeal, was affirmed by the Appellate Court for the Third District, and a further appeal has been prosecuted to this court.

The appellee, who was 27 years of age, had been in the employ of the appellant about eight months immediately preceding the injury, which occurred on November 16, 1901. Prior to the day of the injury, for some weeks, he had been working as a cager at the upper end of the tower or tippie of appellant's mine, which was about 25 feet above the surface of the ground. On the morning of the injury he was directed by his foreman to take the place of one Lyerla, who was sick, and to wheel slack from the slack pile to the engine room, and in so doing it was necessary that he pass under the wagon chute, which ran south from the tower or tippie in a sloping manner to within five or six feet of the ground, and from which coal was loaded from the tower or tippie into wagons placed beneath the lower end of the chute, and beneath which was situated a track from the slack pile to the engine room, along which slack was conveyed in a small car which was propelled by hand. A hole some five or six inches in diameter had been worn through the bottom of the upper end of said coal chute by means of the pit cars, whose contents were dumped into the chute, coming in contact with the bottom of the chute as the cars were dumped. After appellee had been at work wheeling slack for two or three hours, the contents of a pit car were dumped into the chute, and a piece of coal weighing about a pound fell through said hole and struck appellee upon the head as he passed with a car of slack beneath the chute, and fractured his skull. The appellee testified that for some time prior to his injury, and while he was at work upon the tower or tippie, he knew the hole was in the bottom of the chute and that the slack track passed beneath the chute. He said, however, he never observed that the hole was immediately over the track. The testimony of the appellee upon those questions was uncontradicted. At the close of the plaintiff's evidence, and again at the close of all the evidence, the appellant asked the court to direct the jury to return a verdict in its favor. This the court declined to do, and the action

of the court in that regard is assigned as error.

In the case of *Goldie v. Werner*, 151 Ill. 551, 38 N. E. 95, it was held that in an action upon the case by the servant against the master to recover damages for an injury resulting from defective appliances, which is held to include a safe place in which to work (*Hess v. Rosenthal*, 160 Ill. 621, 43 N. E. 743; *Metcalf Co. v. Nystedt*, 203 Ill. 333, 67 N. E. 764), the burden of proof is upon the servant to establish, first, that the appliance or place was defective; second, that the master had notice thereof, or knowledge, or ought to have had; and third, that the servant did not know of the defect, and had not equal means of knowing with the master. The rules there announced have been repeatedly approved and reaffirmed by this court (*Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051; *Chicago & Alton Railroad Co. v. Scanlan*, 170 Ill. 103, 48 N. E. 826; *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724), and are the settled law of this state.

As to the first proposition, it is admitted that the floor of the chute was defective. As to the second proposition, there is evidence that the hole had been in the bottom of the chute for two or three months prior to appellee's injury, and *Lyerla* testified on two occasions prior to the injury of appellee he called the attention of one *Hess*, who occupied the position of "top boss" at the mine, to the defective condition of the bottom of the chute. While the statement of *Lyerla* was denied by *Hess*, the evidence was sufficient to require the court to submit to the jury the question of whether the appellant had notice of the defect in the bottom of the chute, or ought to have had knowledge thereof by reason of the length of time it had existed.

As to the third proposition, from a careful consideration of all the evidence in the case, we are of the opinion the evidence does not tend to show that the appellee did not have notice or knowledge of said defect, but, on the contrary, think the evidence shows he did have knowledge of the defect prior to the time he was injured. It is undisputed he had been at work upon the tower or tippie, dumping coal from loaded pit cars into the chute, for a number of weeks. The cars which he handled were the cars which wore the hole through the bottom of the chute, and upon the trial he admitted he knew, and had known for a number of weeks prior to his injury, that a hole five or six inches in diameter had been worn through, and was in the upper end of the bottom of said chute. It was only 25 feet from the place where he worked upon the tower or tippie to the ground. The chute ran south from the tower or tippie in a slanting manner to within five or six feet of the ground, and the coal from the lower end of the chute ran into wagons which were driven under that end of the

chute, as it was dumped from the pit cars into the chute. The slack pile was located under the lower end of the chute and between the place where the wagons were loaded and the foot of the tower or tippie, and the track over which the car was pushed which contained the slack was located between the slack pile and the foot of the tower or tippie. The appellee knew where the slack pile was located, and its distance from the foot of the tower or tippie. He also knew that the slack track ran under the chute between the slack pile and the foot of the tower or tippie. He was a man of mature years, and average intelligence, had worked upon the tower or tippie at the point where the hole was in the bottom of the chute and immediately over the slack track, and while the slack track was in use, for several weeks prior to his injury, and was chargeable with notice that small lumps of coal dumped into said chute were likely to fall through the hole in the bottom of the chute, and if they did they were likely to strike and injure a person standing or passing beneath said chute while engaged in wheeling slack from the slack pile near the end of the chute to the engine room; and appellee has not brought himself within the terms of the third rule announced in the *Goldie Case*, by the bare statement that prior to his injury he had not observed that the slack track ran immediately below the hole in the chute. The defect in the chute and the location of the track beneath the chute were obvious to any intelligent person, and the appellee could not close his eyes to those facts and then recover damages of the appellant for an injury received by him by reason of his own thoughtlessness or negligence in going beneath the chute at the time coal was being dumped therein.

It is urged, however, that even though the appellee failed to show that he did not have knowledge of the defect, it appears from the evidence he did not appreciate the danger to him arising from the defect in the bottom of the chute at the time he went beneath the chute and was injured, as, when working upon the tower or tippie, he failed to observe the slack track was located immediately beneath the hole in the bottom of the chute, and reliance is placed upon *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, 35 N. E. 162, and *Hartrich v. Hawes*, 202 Ill. 334, 67 N. E. 13. The rule announced in those cases is that the servant must not only have knowledge of the defect in the appliance or place, but must appreciate the danger to him when using the appliance or working in the place, in order to relieve the master from liability when the servant has been furnished a defective appliance, or is directed to perform service in an unsafe place and is injured. This qualification to the third rule above referred to is a wholesome one in many instances, and should be enforced when the danger from the use of the appliance or the performance of work in an unsafe place is not obvious to the serv-

ant from a knowledge of the defect in the appliance or place, but where the defect in the appliance or place is known and the danger is obvious to a man of ordinary intelligence such exception to said rule ought not to be applied. All persons of mature years and ordinary experience, and endowed with their natural faculties, must be held to understand the ordinary laws of nature, such as that water will run down hill, a falling body will strike the ground, etc., and it must be resumed, when such persons have knowledge of obvious defects in appliances or places with or in which they are engaged in performing ordinary labor, and with which they are entirely familiar, they will also comprehend the natural and probable results which will follow from a use of such appliance, or from working in such place. If, however, the danger which follows from the use of a defective appliance or from working in an unsafe place is such that it requires long experience or a knowledge of intricate machinery or the possession of expert or scientific knowledge, in order that the danger may be apparent to the person using the defective appliance, or working in the dangerous place, a man without such experience or knowledge will not be presumed to understand or comprehend such danger from knowledge, alone, of the defect in the appliance or place, and in such case a knowledge of the defective condition of the appliance or unsafe character of the place will not defeat a right of recovery unless the servant, in addition to a knowledge of such defect, comprehends the danger to which he is exposed from the use of the appliance, or from working in the place. When, however, the defect is obvious and danger necessarily follows from the use of an appliance or from working in an unsafe place, such as would follow from a person going beneath a chute which had a hole five or six inches in diameter in the bottom, down which small lumps of coal were being dumped, a knowledge of the danger will necessarily be implied from a knowledge of the defective condition of the chute, and that lumps of coal are passing down the chute, and the servant injured while thus situated cannot recover.

In *Illinois Steel Co. v. Mann*, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370, an action was brought to recover damages for a personal injury sustained by the plaintiff by reason of his slipping upon a smooth floor, of the condition of which he had knowledge, while attempting to remove an iron paddle from a water trough in which it had been placed to cool. The court, on page 207 of 170 Ill., page 419 of 48 N. E. (40 L. R. A. 781, 62 Am. St. Rep. 370), said: "The servant has the right to presume that the materials and appliances which are furnished to him in the performance of his duty are sufficient therefor. This rule, however, is not applicable to all cases, and where the servant has equal knowledge with the master and a full knowledge of all existing defects, and

more especially in the performance of ordinary labor in which no intricate machinery is involved, the rule is not applicable." In *Lake Erie & Western Railroad Co. v. Wilson*, 189 Ill. 89, 59 N. E. 573, the intestate of the plaintiff was killed while attempting to make a coupling as a brakeman upon one of appellant's trains, as it was claimed, by reason of stepping into a hole near the rail, whereby his foot became caught beneath a tie near the rail, which threw him or caused him to fall beneath the wheels, or by reason of his foot becoming entangled in weeds growing upon the railroad company's right of way, whereby he was thrown beneath the car. The brakeman was familiar with the roadbed and other surroundings at the place of the injury, and the claim was made on behalf of the railroad company that by reason of such knowledge he assumed the risk, and a recovery could not be had. This court, in considering an instruction which failed to submit the question of assumed risk to the jury, on page 97 of 189 Ill., page 575 of 59 N. E., said: "It was the duty of the defendant to exercise ordinary care to provide a reasonably safe switch track as a working place for Wilson and to exercise ordinary care to keep the track in a reasonably safe condition. At the same time, Wilson was held to assume the risks from defects which were known to him, where, as in this case, there had been no promise to repair the defect. If defects are obvious and open to the observation of every person of ordinary intelligence, and the evidence shows that the employé has had full opportunities for such observation, it is sufficient to charge him with knowledge." In *Webster Manf. Co. v. Nisbett*, 205 Ill. 273, 68 N. E. 936, the plaintiff sought to recover damages for an injury to his eye, caused by a small particle of steel striking him therein, which flew from a "backing hammer" with which his helper struck a blow, the claim being that the hammer was out of repair, and that the master had, upon complaint, agreed to repair the same prior to the injury. It was held the court erred in failing to withdraw the case from the jury on the ground that the hammer was a common implement, the use of which was well understood by the plaintiff, and that he assumed the risk or being injured while he or his helper was using the same. The court, on page 276 of 205 Ill., page 937 of 68 N. E., said: "Plaintiff was shown to have had a long experience in the handling of hammers of this character in his business as a blacksmith, and must be held to have assumed the ordinary risks incident to the use of the one in question. The theory and contention of his counsel are, that he did not assume any risk arising from the defect complained of, for the reason that the appellant, by its foreman, promised to repair the hammer or provide a new one for his use. On the other hand, it is contended by counsel for appellant that a promise to repair which will excuse the person injured from assuming

the risk incident to his employment does not apply to a simple implement or instrument such as the hammer in question. We think the latter contention is founded upon good reason and authority. The general rule is, that when the master, on being notified by the servant of defects which render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of the promise without being guilty of negligence, and, if any injury results therefrom, he may recover, unless he should continue in the employment when the danger is so imminent that no prudent man would undertake to perform the service. The promise of the master in such case relieves the servant from the charge of negligence by continuing in the service. This doctrine we have often recognized. *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Donley v. Dougherty*, 174 Ill. 582, 51 N. E. 714, and cases cited. But the rule which exempts an employé from assuming the risk where a promise to repair is made is designed for the benefit of those engaged in work where machinery and materials are used of which the employé has little knowledge, but it does not apply to ordinary labor, which only requires the use of implements with which the employé is entirely familiar." And in *Gunning System v. Lapointe*, 212 Ill. 274, 72 N. E. 393, the same doctrine is recognized on page 279 of 212 Ill., page 395 of 72 N. E., where it is said: "The cases where the rule of assumed risk is suspended and the servant exempted from its application, under a promise from the master to repair or cure the defect complained of, are those in which particular skill and experience are necessary to know and appreciate the defect and the danger incident thereto, or where machinery and materials are used, of which the servant can have little knowledge, and not those cases where the servant is engaged in ordinary labor or the tools used are only those of simple construction, with which the servant is as familiar and as fully understands as the master."

The theory upon which those cases proceed is that when the servant has full and complete knowledge of the condition of the implement which he is using or the place in which he is doing work, and no special knowledge is required on his part to apprise him of the danger which he incurs while using such implement or working in such place, he will be presumed to have assumed the risk of being injured from the use of such implement or while working in such place, and that in case of injury the master, by reason of such assumption of risk, is not liable. In the case at bar the defect was obvious, and open to the observation of every

person of ordinary intelligence who would take the pains to observe the conditions which the appellee knew to exist. The appellee had full opportunity for such observation, and, in the language of the *Wilson Case*, this was "sufficient to charge him with knowledge" of the defect and its attendant danger, and he was therefore barred, by reason of such knowledge, from a recovery. The peremptory instruction should have been given.

It is also urged that the court misdirected the jury as to the law of the case on behalf of the appellee. But one instruction given on behalf of the appellee need be considered, which reads as follows: "The court instructs the jury that if you believe, from a preponderance of the evidence, that the plaintiff was an employé of the defendant, then it became and was the duty of the defendant, by its agents, to exercise reasonable care, taking into consideration the nature of its business and instrumentalities employed, to provide and keep in suitable repair and condition the structures, if any, around and under which he was to work; and if you believe, from a preponderance of the evidence, that the plaintiff, while in the exercise of due care, was injured in consequence of neglect on the part of the defendant of its said duty as charged in the plaintiff's declaration, then you should find the defendant guilty." This instruction wholly ignores the question of assumed risk, which was vital to the appellant's defense, and was, in effect, a direction to find in favor of the appellee, as all the facts found in this instruction, upon which the directed verdict was predicated, were substantially conceded to be true by appellant. The giving of the instruction constituted reversible error. *Lake Erie & Western Railroad Co. v. Wilson*, supra. Nor was the error cured by the instructions given on behalf of the appellant. *Illinois Central Railroad Co. v. Smith*, 208 Ill. 608, 70 N. E. 628; *Illinois Terra Cotta Lumber Co. v. Hanley*, 214 Ill. 243, 73 N. E. 373. In *Pardridge v. Cutler*, 168 Ill. 504, 512, 48 N. E. 125, 127, it is said: "The law applicable to different questions may be stated in separate instructions, and the entire law applicable to all the questions involved in a case need not be stated in each. In such case the instructions supplement each other, and if they present the law fairly when viewed as a series, it will be sufficient. But if an instruction directs a verdict for either party, or amounts to such a direction in case the jury shall find certain facts, it must necessarily contain all the facts which will authorize the verdict directed."

The judgments of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court for a new trial.

Reversed and remanded.

(218 Ill. 276)

PEOPLE ex rel. HEALY, State's Atty., v. FRISCH.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. ATTORNEYS—DISBARMENT—EVIDENCE.

Where an attorney instituted a criminal proceeding, in order to extort money from his clients by representing that they would be sent to the penitentiary on a charge which was dismissed for want of prosecution after they had paid him the money, it is ground for disbarment.

2. SAME.

Where an attorney went upon his clients' bonds on a criminal charge in the amount of \$500 each, after they had paid him \$100 to settle the case, and he afterwards advised them not to appear and persuaded one of them to leave the state, it is evidence tending to show that he knew the prosecution was in his control, and that it was instituted in collusion with him or directly by him.

Information by the people, on the relation of John J. Healy, state's attorney, against Morris Frisch, for disbarment. Rule made absolute.

Rehearing denied December 13, 1905.

This is an information filed in this court by John J. Healy, state's attorney of Cook county, praying that the name of Morris Frisch, the respondent, be stricken from the rolls of this court as an attorney and counselor at law. The information alleges that on the 1st day of June, 1903, a suit was commenced in the circuit court of Cook county, Ill., by one Robert J. Frank against one William Delaney and Carrie A. Delaney (then Carrie A. Henry), seeking to recover damages against the defendants for slander of title to real estate in Ohio; that on the 8th day of July they employed the respondent, Morris Frisch, as their attorney to represent them in defense of that suit, and they paid him a retainer of \$50; that at that time there was pending in one of the courts of Ohio a suit brought by the said Carrie A. Henry against E. Roscoe Frank, a brother of Robert J. Frank, by which suit the said Carrie A. Henry sought to establish a common-law marriage with E. Roscoe Frank and to enjoin the transfer of certain real estate which was then standing in the name of Robert J. Frank; that, shortly after the employment of said respondent as aforesaid, depositions were taken in Chicago on behalf of the defendants in the Ohio suit; that Carrie A. Henry thereupon employed Morris Frisch to appear before the commissioner and cross-examine the witnesses produced by the defendants in the Ohio suit in the taking of such depositions; that during his employment as attorney for said Carrie A. Henry and William Delaney the said Morris Frisch, the respondent, learned that it was claimed that the said William Delaney and Carrie A. Delaney were living together in the city of Chicago in an open state of adultery; that the respondent, taking advantage of the knowledge thus gained, and for the unlawful and corrupt purpose of unlawfully extorting money from the said William Delaney and Carrie A. Henry, pro-

cured the issuance of a warrant by Joseph G. Sheldon, a justice of the peace within and for the said Cook county, for the arrest of the said William Delaney and Carrie A. Henry on the charge of adultery; that said warrant was based upon a complaint pretended to be sworn to before said justice of the peace by one Robert Reid, it being alleged and stated in said complaint that on the 18th day of July, 1903, and for three months prior thereto, William Delaney and Carrie A. Henry were living together in an open state of adultery, the said Carrie A. Henry, alias Mrs. William Delaney, being then and there a married woman, contrary to the form of statute in that behalf made and provided; that on the 20th day of July, 1903, Carrie A. Henry informed the respondent by telephone that some one, apparently an officer, had been looking for her on the 18th, and the said respondent then and there, after pretending to learn by telephoning to several justices of the peace, informed the said Carrie A. Henry that a warrant was out for herself and said William Delaney charging them with the crime of adultery, and that they had better come to his office immediately; that the said Carrie A. Henry and William Delaney did on July 20, 1903, immediately go to the office of the respondent, and were then and there informed by the respondent that the charge was a very serious one; that the penitentiary was open before them, and that if he got them clear from the charge they would have to pay him \$200, and that after he had settled with the justice and Robert Reid there would be little coming to him for fees; that said William Delaney then and there informed Frisch that he did not have \$200, but could give him only \$100, and the respondent agreed to wait for the remaining \$100 until a later date; that thereupon the respondent went with Carrie A. Henry and William Delaney to the office of Justice Sheldon, and gave bond in the sum of \$500 each for their appearance before said justice upon the hearing of said charge, which was set for the 25th day of July, 1903, at the hour of 9 o'clock a. m., and that the said respondent became surety on said bonds for their appearance before the justice at the time set for the hearing of said charge; that thereupon the respondent told the said William Delaney and Carrie A. Henry that they need not appear at the time set for the hearing, and said complaint was at the time of the hearing dismissed for want of prosecution; that as a matter of fact no one by the name of Robert Reid appeared and signed said complaint; that the depositions aforesaid were taken on July 23d; that the respondent appeared as attorney for and on behalf of the said Carrie A. Henry and cross-examined the witnesses; that said respondent also advised said Carrie A. Henry to bring suit against Robert J. Frank and E. Roscoe Frank and others for malicious prosecution, and the said Carrie A. Henry paid the respondent the

costs for commencing such a suit and \$25 for services; that the respondent afterwards filed a praecipe in the circuit court of Cook county directing the clerk to issue a summons against the defendants upon a plea of trespass on the case for \$50,000 damages; that said summons was delivered to the respondent by the clerk, but the same was never served, and no declaration has ever been filed in said cause; that at or about said time said Carrie A. Henry employed the respondent to go to Cleveland and to meet said Carrie A. Henry at Cleveland on or about the 27th day of July, 1903, for the purpose of interviewing witnesses whose testimony was to be taken for use in the Ohio case, and paid the respondent the sum of \$35 for his expenses to Cleveland; that at the time of said payment the respondent agreed to meet the said Carrie A. Henry in Cleveland; that he failed to meet the appointment, and afterwards said he never had any intention of keeping the same; that Carrie A. Henry returned to Chicago, and on August 4, 1903, called, with William Delaney, upon the respondent, and charged him with instigating the prosecution of adultery before Justice Sheldon for the purpose of extorting money, and also obtaining money from them for expenses to Cleveland with no intention of going to Cleveland, whereupon the respondent returned the \$35 paid to him for expenses to Cleveland and the \$100 paid him in the criminal prosecution before Justice Sheldon, and requested the said William Delaney and Carrie A. Henry, in consideration of the repayment of said moneys, not to cause him any trouble in the premises.

The answer of the respondent admits all the allegations of the information except the following: (1) The procuring of the issuance of the warrant before Justice Sheldon; (2) the conversation on July 20, 1903, in which it is alleged that he informed the said Carrie A. Henry and William Delaney that the charge was a serious one, that the penitentiary was open before them, and that if he got them clear of the charge they would have to pay him \$200, and that after he had settled with the justice and Robert Reid there would be little coming to him for fees; (3) that he told Carrie A. Henry and William Delaney that they need not appear at the time the complaint was set before the justice; (4) and, as an explanation of his returning the \$135, alleges a secret agreement with William Delaney, who, he alleges, had been a client of his for many years, by which secret arrangement he was to take Delaney's money, apparently for legal services, with the hope of getting the said Carrie A. Henry to leave the said William Delaney of her own accord, and that the money was by that agreement to be returned to Delaney.

The cause was referred to a master in chancery to take and report the testimony,

and the proofs have been taken and reported to this court.

John J. Healy, State's Atty. (John L. Fogle, of counsel), for relator. Rosenthal, Kurz & Hirschl, for respondent.

BOGGS, J. (after stating the facts). The testimony tends very strongly to show that the respondent procured the warrant to be issued by Justice Sheldon for the arrest of his clients, Delaney and Carrie A. Henry. The information on which the warrant was issued was signed by Robert Reid. No such person seems to be known to any of the parties, to any witnesses herein, or to the justice who issued the warrant. The respondent denied that he signed the complaint. The justice of the peace before whom the complaint was sworn to testified that he did not know the person who signed it, and that he did not then know and so far as he could recollect had never seen the respondent; that he saw the respondent on Monday following the signing of the complaint on Saturday, and that he did not then recognize him as being the person who signed the complaint or as the person who was in company with the person who signed it; and on cross-examination said he had no impression whatever on the question whether the respondent was the person who signed the complaint or was present when it was signed. Two experts in handwriting testified that in their opinion the name of Robert Reid found attached to the complaint was in the handwriting of the respondent. The warrant was issued on Saturday, July 18th, at about the noon hour. Carrie A. Henry testified that between 8 and 9 o'clock on the following Monday she telephoned to the respondent that some one, thought to be an officer, had been at their house looking for her and Delaney on Saturday afternoon, and asked respondent if he knew what the man wanted, and that respondent replied, "Yes," and that they were to come to his office at once; "that a warrant was out for our arrest." Delaney testified he was standing with Carrie Henry at the 'phone, and that the reply came at once from the respondent. The respondent testified that, when Carrie Henry called him over the 'phone, he said, "Why don't you let the gentleman in and ascertain what he wants? If he comes around again find out for yourselves and I will do all I can," and that he at once began calling justices of the peace over the 'phone and inquiring if any complaint had been filed against Delaney and Carrie Henry; that Justice Sheldon, who issued the warrant, was the third justice that he called up; and that he then learned of the complaint, and then telephoned to Delaney and Carrie Henry to come to his office at once, etc. They came to his office, and both testified that he told them they were charged with a serious crime and might be sent to

the penitentiary, and demanded \$200, and said he could not get them out for much less than that sum; that he would have to give Justice Sheldon \$100 and see Robert Reid "and fix it with him," and that by the time he was through he would have to use all of the money; that they agreed to pay him \$100 in cash and \$100 in six months; that he consented, and agreed also to become surety for them on their bonds; that they went to the office of the justice of the peace, and he did sign a bond for each of them for their appearance five days later, being on Saturday, the 25th day of July, and they paid him \$100 in cash.

On the 23d day of July the respondent, as attorney for Carrie A. Henry, was engaged in taking depositions in the Reaper Block, in Chicago, in the case which she had pending in Ohio against E. Roscoe Frank. It was then arranged between her and the respondent that she should go to Cleveland, Ohio, on the 24th day of July, and he would meet her there on the 27th to interrogate certain witnesses whose testimony was desirable, to be used in her behalf in the suit in Ohio, and she paid him \$35 for his services. He testified that the money was paid to him for his expenses and that he agreed to meet her in Cleveland and question her witnesses. Carrie Henry and Delaney both testified that respondent told them that she need not appear at the justice office on Saturday, but could go to Cleveland. Delaney testified that afterwards the respondent told him that he need not appear before the justice; that he (respondent) "would square the whole matter up." Carrie Henry was in Ohio on Saturday, the day on which the criminal charge was set for hearing, and Delaney did not go to the office of the justice. The case was dismissed by the justice on Saturday for want of prosecution. The transcript shows this much, and no more. The justice testified that he had no recollection about what occurred on Saturday. The respondent remained in Chicago, and testified that he did not attend before the justice on Saturday, and knew nothing about what was done on Saturday at the justice's court, except that he heard that the case was dismissed for want of prosecution. He did not go to Cleveland, and when Carrie A. Henry returned to Chicago she was indignant and demanded that he pay back her money, and he repaid to her the \$35 she had paid him to go to Cleveland and also repaid to her and Delaney the \$100 paid him as attorney's fee in the case against them before the justice, and went with them to the justice office and got a certified copy of the record showing that the criminal proceeding had been dismissed. Robert Reid, whose name was used as the person complaining in the criminal proceeding, could not be found, and was and is unknown. There was no actual prosecution of the cause, and clearly it was not intended there should be.

The fact that respondent had become obligated on the bonds of Delaney and Carrie Henry in the sum of \$500 each for their appearance at the office of Justice Sheldon on Saturday, July 25th, and that he directed her to go to Ohio and be there on the day she was to appear before the justice, impresses us with the conviction that the respondent knew he could control the prosecution, and is consistent with the charge that he had procured it to be instituted. The respondent testified: That he was not the attorney for Delaney or Carrie A. Henry in the case in the justice court. That, when Delaney and Carrie Henry came to his office on Monday morning after the warrant had been issued, he called Delaney aside and told him that he (Delaney) had gotten into trouble because of his relations with the Henry woman, and that he would get into more trouble unless he "dropped her." That Delaney said that he "must see her through this trouble, as there was no telling what she would do if he left her in the lurch then," and that he (respondent), in order to assist Delaney, agreed to sign the bond for his appearance, but told Delaney he "would have nothing more to do with his troubles so long as he hung around this woman"—that he "would travel no further with him." That they then went to the office of the justice and he signed the bond for Delaney, and finally, after Delaney had pleaded with him, signed the bond for the appearance of Carrie A. Henry. That he (respondent) "told Mr. Delaney then that he would have to look out for himself. He said, 'What will we do now?' I said, 'You turn over what money you have to me, on the pretense that you are paying a fee to me, and probably, if she knows you haven't any more money, she will quit you anyhow.' I said, 'You give me what you have got, and I will give you a receipt as if you were paying me a fee, and afterwards you can get it back,' which was done. He gave me, I remember, \$100, and I gave him a receipt that he had paid that to me as a fee in this case before the justice." Delaney contradicted the respondent on all of these points. As to the sending of said Carrie A. Henry to Ohio, the respondent testified: "I was not her attorney. There was no occasion for me to go out there to start with, and there was no way I could assist her in this case. My idea in getting her to go was just to get rid of her, and I so explained to Delaney. I said, 'Once she gets out of the state, perhaps she never will come back, and that is the best way to get rid of her,' and Mr. Delaney agreed with me on that proposition." Delaney again contradicted the respondent and denied each of his statements.

If the respondent had not participated in the institution of the criminal proceeding against Delaney and Carrie A. Henry, and did not know that the prosecution thereof was within his control, it is incredible that he should have deliberately arranged for her

to go to Ohio with the hope that she would never return, and fail to appear before the justice of the peace, and suffer default on her bond, on which he was the sole surety, and thus create a liability against him to pay the sum of \$500 because of her failure to appear and answer the charge against her. The respondent, on cross-examination, in the endeavor to relieve himself from this dilemma, testified as follows: "If she went to Cleveland and did not show up in the justice court when this case was set for hearing, her bond would be forfeited, and I was surety on that bond; but Mr. Delaney agreed to take care of it, so far as I was concerned on the bond. Mr. Delaney agreed to take care of the surety so that I would not suffer in any event. I don't know if Mr. Delaney had any money or property, except I had known him and I had considerable friendship for him up to that time. I don't know whether he had any property. I supposed he was pretty well fixed. Although he was a night watchman, and had been since I knew him, I supposed he was well fixed. A night watchman does not work on a salary. He gets so much per store by the week or month, and he is making a pretty good sum at it. He agreed to produce himself in court with Carrie. He agreed to produce Carrie A. Henry. The time I signed her bond, or the bond of Carrie A. Henry, no date had been set for trial. I might have been notified by either Delaney or Carrie what time the case was set for trial. The Delaney bond that I signed fixed the date of the hearing. I don't know that was all to be the same day. I don't know what reason there should be for one hearing one day and the other another day." Delaney denied that any such agreement was made or that any such conversation occurred between himself and the respondent. The transcript of the judgment in the justice court shows the case of both defendants was continued to Saturday, July 25th, and the bonds of both show the same.

Another circumstance conceded by the respondent to be true seems entirely inconsistent with the truthfulness of his explanation. On the 15th day of July, 1903, the respondent accepted employment from Carrie A. Henry to bring an action for malicious prosecution against Frank and others, and she paid him a retainer fee of \$25. The respondent had not begun this action in slander when Carrie A. Henry, at his direction, went to Ohio. He did not repay, or offer to repay, the sum he had received as such retainer. He desires now to claim that while so retaining this money he conspired with Delaney to have her, his client, go to Cleveland, Ohio, hoping and believing she would not return—an explanation which, if true, so seriously affects his character for integrity as to entitle his testimony to but little, if any, credence. After Carrie A. Henry returned from Ohio respondent returned to her and Delaney the \$100 paid him, as they testified and as a receipt given them showed, to defend them in the criminal

case before the justice, and also the \$30 or \$35 paid him to go to Cleveland, but did not return to her the \$25 retainer fee, but on the same day that he returned to them the other sum he filed the præcipe, as attorney for Carrie A. Henry, against Frank and others in the suit for malicious prosecution. Our view is that the evidence warrants the conclusion that the respondent either instituted the prosecution of the criminal charge against Delaney and Carrie A. Henry, or was in collusion with those who did institute it, and that the respondent had full power to control the prosecution of the charge, and that he availed himself of the existence of the prosecution, and of his knowledge thereof and the power he possessed to control the same, to extort money from Delaney and Carrie A. Henry.

Respondent's lack of professional fidelity to his clients and of personal integrity in connection with his conduct as an attorney is also fully manifested by his course and conduct in reference to the slander suit and to the matter of taking testimony for Carrie A. Henry at Cleveland. If his testimony is true, he, while retaining \$25 of her money paid him as a retainer as her attorney in the slander suit, deceitfully colluded with Delaney to have her sent out of the state, permanently, as he hoped, in which event he would render no service for the money which he had received from her as such retainer. He received \$30 or \$35 from her under agreement with her, as her attorney, that he would go to Cleveland, Ohio, and meet her there and interrogate her witnesses in the suit she had pending there, and in which he had been engaged in taking testimony, as her attorney, in the city of Chicago. He testified that he agreed to go to Cleveland and perform this service and received the sum of \$30 or \$35 therefor, but insists that that arrangement was but a part of the scheme he had devised to assist Delaney to rid himself of the woman, and testified that, though he promised her that he would go, he never intended to go there. The respondent seems to have no just appreciation of the relation of trust and confidence that the law intends shall exist between client and attorney, nor of that faithfulness and fidelity to his client which the law exacts of an attorney. Our duty is to order that his name be stricken from the roll of attorneys, and such is the judgment of the court.

Rule made absolute.

(218 Ill. 301)

PEOPLE ex rel. HEALY v. BROWN.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. ATTORNEYS—DISBARMENT—EVIDENCE.

Testimony, in a disbarment proceeding, of a witness, called by the respondent to show that one to whom the respondent claimed to have turned over a check for investigation was in the witness' employment as a detective, that he did

not know any such person, but that respondent had attempted to suborn witness to testify as to his existence, was admissible.

2. SAME—GROUNDS.

It is ground for disbarment that accused attempted to suborn witnesses, purchased property under false representations as to the standing of a client who owed him a large fee, and at once mortgaged the property and manipulated checks so as to defraud a bank.

Information by the people, on the relation of John J. Healy, against William Eugene Brown. Judgment of disbarment.

Rehearing denied December 12, 1905.

John J. Healy (J. Scott Matthews, and John L. Fogle, of counsel), for relator. William Eugene Brown, pro se.

RICKS, J. An information was filed in this court by the state's attorney of Cook county against the respondent, who is a practicing attorney and a member of the bar of this state, charging respondent with certain fraudulent practices, and moving for his disbarment. The respondent answered the information, substantially admitting the acts charged against him, but denying any fraudulent purpose or intent. The cause was referred to a master in chancery in Cook county, and the evidence taken and reported to the court, and at the June term the cause was submitted upon oral and written briefs and arguments.

Respondent is a practicing attorney, the head of a family, and resides in Chicago. He was admitted to the bar in the state of Kansas about the year 1881, and resided there and practiced law until about the year 1891, when he moved to Chicago and was in January of 1892 admitted to practice law in this state. By the record little is known of him from the time he came to this state until 1898. In July, 1898, he opened an account with the American Trust & Savings Bank in the name of Brown & Oakley, by depositing \$2,500, and arranging that the money should be subject to checks drawn by him only. Oakley was never a resident of this state, had no business interests here, and is said by respondent to have been engaged in the grocery and other business in the state of Kansas and to be a brother-in-law of respondent. Respondent's explanation of opening an account in this manner is that Brown & Oakley, under the name of Oakley only, were conducting a business in Kansas which respondent had financed; that the \$2,500 deposit was part of the proceeds of that business, and was placed in the name of Brown & Oakley as a recognition of its firm ownership, although respondent asserts that Oakley and the firm owed respondent much more money than that amount; that Oakley, in fact, had no interest in it, and that it was entirely checked out and used by respondent. He admits that at that time there had been judgments and executions against him, and that, while he kept personal accounts in other banks in his own name, he kept the balance

in his favor down to \$20 or \$40, and carried certificates of deposit in his pocket for thousands of dollars, because it was easier to handle currency than to draw checks. This account with the American Trust & Savings Bank ran in the joint name until May, 1901, when it was closed in consequence of one of the alleged frauds perpetrated by respondent.

On May 4, 1901, respondent deposited in the savings bank, to the account of Brown & Oakley, a check for \$3,850, purporting to be signed by one C. A. Nelson, and drawn on the Commercial National Bank of Chicago. This check was dated May 3, which was Friday. On Friday, the day of the date of this check, respondent gave to A. C. Frost & Co. his check in the name of Brown & Oakley, drawn on the American Trust & Savings Bank, for \$2,475, and received from Frost & Co. two checks—one for \$150 and one for \$300—and stated at the time that he did not need \$2,000 of the money until the following Monday. At that time Brown owed Frost & Co., who were bond brokers and did a small banking business, \$25, and the checks received by him that day and what he owed Frost & Co. would leave a \$2,000 balance coming to him. At the time of the arrangement with Frost & Co., Brown represented that he had a large transaction on hand, which would result in his having several thousand dollars in a few days, and Frost & Co. agreed to receive his check, make the advancement, and pay the balance of \$2,000 on the following Monday, upon the explanations of Brown aforesaid. This check to Frost & Co. was deposited on Saturday, the same day that respondent deposited the \$3,850 check of Nelson. On the same day that respondent deposited the Nelson check he deposited the \$300 check of Frost & Co., a check from another party for \$150 and currency to the amount of \$130. On Monday following he called upon Frost & Co. for the remainder of the check that he had given, and they offered to give him a check for the amount, but he stated that he did not want a check, but wanted the currency, as he did not desire that the check should go through a bank. Frost & Co. gave him the \$2,000 in currency, and he went to the American Trust & Savings Bank and withdrew \$645 in currency. At the time Brown gave Frost & Co. his check for \$2,475 there was only \$30 to the credit of Brown & Oakley in that bank. On Monday morning, at the time he drew the \$640 from the savings bank, he had a credit of \$4,460, the principal part of which was the \$3,850 Nelson check. The Nelson check was not sent to the clearing house until Monday, and when it was sent it did not clear, but was returned with the statement that C. A. Nelson had no account with the Commercial National Bank. The bank claims it was not deposited in time to be cleared on Saturday; that on that day the clearing is done early in the morning, from 9:30 to 10 o'clock, and that this deposit was not made until after the checks and other business had

been sent to the clearing house by the bank. Respondent declares that it was deposited soon after 9 o'clock Saturday morning, and that the bank officials stated that it was in time for clearing, about which matter there is a direct conflict in the evidence. When the savings bank received notice that the Nelson check had not cleared, it notified respondent, and as soon as the check was returned the assistant cashier of the bank took it to respondent, who immediately gave a check of Brown & Oakley to the American Trust & Savings Bank against the Brown & Oakley account for \$3,850, and respondent kept the Nelson check, saying that he would look up Nelson, the trader, and one J. S. Albright, who was the real owner of the fund represented by the check and to whom he claimed to have paid \$2,750 on the faith of the check. When the assistant cashier reported to the bank that he had delivered the Nelson check to respondent he was directed by the bank to call upon respondent to get the same, and testified that within an hour of the time he delivered it to respondent he did call upon him for the check, and respondent claimed to have placed it in the hands of a detective named William H. Barton, with instructions to investigate Nelson and Albright.

The claim of respondent is that respondent, while a member of the Legislature of Kansas, in 1891, became acquainted with Barton, who was a detective, and at the same time with Albright, who was lobbying in the Legislature; that Barton was in Albright's employ to watch and report the movements of other and opposing book concerns, all of whom were seeking favorable legislation; that after respondent came to Chicago, Albright and Barton frequently visited him at his office, and that in the winter of 1900-01 Albright employed respondent to effect the settlement of some business matters existing between him and Nelson, the supposed maker of the check; that Albright told respondent that Nelson was stopping at the Palmer House, and insisted that respondent should go to the Palmer House with Albright to meet Nelson and at once enter upon negotiations for settlement; that respondent insisted that the proper way was for him to notify Nelson by letter that the Albright business matter was in his hands for settlement, but that Albright stated that Nelson was quite as anxious to settle as was Albright to have him, and that formalities were unnecessary; that he did go to the Palmer House and met Nelson, but did not then make a settlement, and that before the settlement was effected, which resulted in the giving of the check, Nelson several times visited the office of respondent; that respondent never wrote to him, or made any arrangements with him when to come, other than that at each meeting a future time of meeting was fixed; that Nelson was reputed to be a general trader and dealer in stock in the Southwestern country; that

after the settlement was made Nelson gave the check and disappeared; that on the day of the date of the check, or the day following, respondent paid Albright \$250, and on Monday, before he learned the check had not cleared, he paid him \$2,500 more, and took his receipt for it, and that Albright was to return in a day or so, and they were to have a settlement, and that Albright also disappeared and was never after seen by him; that very opportunely, just after the Nelson check had been returned from the savings bank to respondent with payment refused, Barton, the detective, came into his office, and that he gave him the check and supplied him with money, and started him in search of Nelson and Albright; that that was the last that was ever seen or heard of Barton.

So far as the evidence shows, Nelson, Albright, and Barton, if they ever had any real part in the transaction, so effectually disappeared that not the slightest trace of them has since been found. Respondent now claims that he was the victim of misplaced confidence, and the bank claims that Nelson was a myth and Albright and Barton were mere mental transferences of individuals known by respondent in Kansas and a fanciful creation of them as actors in this check matter. The savings bank at once employed and set to work leading detective firms, but no satisfactory evidence of the existence of C. A. Nelson was found, and no evidence of the presence of Albright or Barton in Chicago when the check was given or at any other time. Neither of them was ever, so far as the evidence discloses, a guest of any of the hotels in Chicago. Respondent, by his own testimony and that of office boys and clerks, proved that in the winter and spring of 1901 persons whom respondent called Nelson, Albright, and Barton were frequenters of his office, and an oil stock broker testified that, on the day that respondent claims to have paid Albright the proceeds of the collection, Albright came to him to purchase stock of some corporation, but did not purchase and disappeared. Outside of the office force no one seems to have ever seen or heard of Nelson.

There was something, too, peculiar in the series of transactions between Frost & Co. and respondent. Commencing in October, 1900, and extending up to the time of this Nelson check transaction, respondent gave to Frost & Co. a large number of checks. These checks ranged from \$150 to \$900. They seemed to increase in frequency and size as time progressed. At the same time Frost & Co. would give to respondent their check, respondent would give Frost & Co. his check for approximately the same amount. It appears that the checks given by respondent would be deposited first, but by the time they had reached the clearing house respondent would deposit the check

given by Frost & Co. to the credit of the Brown & Oakley account, and thus keep his account good. It also appears that his general balance for a long period of time ran from \$5 to \$65. Respondent claims that these transactions were interchanges of checks at the request of Frost & Co., to enable them to more easily pass their business through the clearing house, while they, on the other hand, claim that all the checks so given by them to respondent were advancements and loans to him, for which he would give his check. Whatever may have been the real transactions between Frost & Co. and respondent, it is quite apparent that the effect of the transactions was to make respondent's bank account appear to be a very active and substantial one, although the final balance would not be great, and that such amount of business would have the tendency to lull the savings bank into a feeling of security as the size of the checks increased and were promptly met.

Respondent did prove by the testimony of three or four witnesses that a party by the name of William H. Barton, or "Billy" Barton, who claimed to be a detective, was known to them, and by some of them who were rooming house keepers that he roomed with them about the time and date of the transaction in question; but the character of these witnesses is such and the attack upon their credibility was so strong that it may well be doubted if they could be believed if there were no other circumstances casting discredit upon their statements. But there was one circumstance that was developed in the proceeding that seemed to stamp the claim of good faith of respondent as untrue. It developed by the testimony of three witnesses that, in the spring of 1905, and after this information had been filed and respondent was facing the hearing, he felt it necessary to establish the existence and presence in Chicago of the alleged detective, William H. Barton, and that he went to Charles T. Haas, of the Haas detective agency, and told Haas, to use the language of respondent, that he had "flim-flammed" the savings bank out of a lot of money; that Barton was a myth, and that it was necessary for his defense to have the identity and existence of Barton established, and that he would pay Haas \$200 if he would produce witnesses meeting the requirement. Haas pretended to accede to his proposition, and notified the relators of it, and the matter progressed until, under the direction of respondent, it was agreed that Haas and two of his clerks should falsely swear that Barton had worked for Haas along about and prior to the time of his disappearance, and that the books of Haas would be, and were, changed so as to show work done by Barton and the time the same was done for Haas; that

each of the parties should give a description of Barton, and that each should claim to have seen Barton on the day that he received the Nelson check from respondent, and should say that a large check was exhibited to him or her by Barton, and they had been told of Barton's employment to search for Albright and Nelson; that each should testify to all those matters, but that they should avoid having too exact correspondence in their statements, so that it would not appear that their evidence was concocted. At the hearing Mr. Haas was called upon the stand by respondent, and, to respondent's surprise, stated that he never did know Barton, and later gave a full detail of the attempt and agreement on the part of respondent to suborn him and his two clerks, and in this he was corroborated by three of the clerks and other circumstances. Respondent insisted that this evidence was incompetent, and asked to have it stricken, and now insists that it should not be considered. In this contention respondent is in error, as it is in the nature of an admission on his part that there was no such person as William H. Barton in any manner really connected with that transaction, and that in order to make his defense it was necessary that it should falsely appear that such party did exist and was concerned in the transaction. *Chicago City Railway Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29; 1 Elliott on Evidence, § 226.

In this last matter respondent again claims that he is the victim of a conspiracy on the part of the lawyers prosecuting the information and of the Haas detective agency, and attacks the reputation of Mr. Haas and his clerks. The relator offered evidence supporting the reputation of Mr. Haas, and we think the evidence clearly establishes the credibility of Mr. Haas and shows that respondent is guilty of attempting subornation of the witnesses, and is also guilty upon the general charge of defrauding the bank.

The other count of the information charged respondent with engaging in a scheme to obtain property by false pretenses and carrying out the scheme. The information charges that under this scheme he obtained two automobiles—one a "Rambler," from Thomas B. Jefferey & Co., of the value of \$1,200, and the other an "Austin," from Mason, Harvey & Co., of the value of \$2,500. The evidence shows that for many years respondent had been greatly indebted, and that there were many judgments against him, both in courts of record and in justices' courts, and that he was being pursued by his creditors. He had a brother-in-law named Norton Hamlin, who was not and had not for many years been a resident of this state, and who was a brakeman and conductor at various times on a railroad. In order to protect his property against creditors he gave to Norton Hamlin a chattel mortgage for several hun-

dred dollars upon his household goods and office furniture and law library. He claims that his indebtedness to Norton Hamlin amounted to \$2,000 or more, and that he paid him on the indebtedness more than \$1,000. Norton Hamlin assigned the mortgage and securities held by him to one Louis F. Hopkins, whose business was loaning money on chattel mortgages and salaries. In March, 1903, respondent claimed to have sold his household effects and office furniture and library to one S. H. Smith, a supposed lawyer from Ohio, subject to the Norton Hamlin mortgage. He testified that soon after the sale he discovered that Smith was attempting to remove the property, and that he stopped him from doing so, and that Smith fled; that, still apprehending that Smith might in some manner get away with the property, although in his own possession, respondent caused a bill to be filed in the name of Hamlin against Smith, setting up the mortgage and the supposed sale, and asking to have a receiver of the goods appointed, and through some arrangement respondent himself was appointed receiver of the goods, and, being in custody of his goods as receiver, he prevented creditors and officers from taking his goods by presenting to them his order of appointment as receiver and challenging them to interfere with the goods at the risk of being proceeded against for contempt. While thus acting as receiver of his own goods he contracted for the "Rambler" automobile on the 30th day of June and for the "Austin" automobile on the 6th day of August, both in the year of 1904. He represented to the dealers that he did not have the money to pay for them, but that he had a client who was worth from \$25,000 to \$50,000, and who owed him \$2,700 or more for legal services, and that she would go his security for the machines. The alleged client was one Katherine Fay. Katherine Fay was unknown to the dealers, and they had to rely upon the representation made by respondent and the references given by him as to her financial responsibility. In each instance he took the machines subject to the investigation to be made by the dealers, resulting in ascertaining that Katherine Fay was financially responsible, and agreed to hold the machines as the property of the dealers until the matter should be ascertained. On the same day that he received the "Rambler," which was on Saturday, July 30, 1904, he made a mortgage on the same to Louis F. Hopkins for \$900. It was acknowledged and recorded the following Monday, and on the same Monday he gave a mortgage to Callaghan & Co. for lawbooks account and one to the Exchange Building trustees for office rent. These two mortgages were not acknowledged or recorded. After obtaining the "Austin" machine, and before the securities could be investigated, he represented to the dealers that it was necessary that he should know the num-

ber of the machine, which did not appear upon it, and that he should have some evidence that he owned it, intimating that it was necessary to have the machine insured, and obtained from the dealers a receipt for the note which he had given for the machine and a bill of sale describing it. On the same day that he received this paper he executed a chattel mortgage on the "Austin" machine to one Seaver for \$400, a second mortgage to his brother-in-law, Norton Hamlin, and also a mortgage to Callaghan & Co. He placed both of the machines in the garage of one Canary, in custody of one Endicott, who was to rent them and drive them and receive one-half of the income from them for his services. He then succeeded in having both the machines put within the receivership. Although the Norton Hamlin claim had been assigned to Hopkins, yet respondent claims that the mortgage to Hamlin was to secure Hamlin that claim, and also claims that the \$400 represented by the Seaver mortgage was cash borrowed by him, and that he paid \$225 of that to Norton Hamlin. It was afterwards ascertained that Katherine Fay was a straw-bond woman and financially irresponsible. The dealers sought to get their machines back, when they were confronted with the chattel mortgages and receivership, and could not do so. When the condition of things was brought to the attention of the court, respondent was removed from the receivership, and upon the hearing in the receivership proceedings the court found that the whole proceeding was fraudulent, and that respondent had intentionally brought about the situation for the purpose of obtaining property through fraud, and had so obtained the two automobiles, and at the same time the court ordered that respondent be not allowed to prosecute causes nor file papers in the court without the court's permission.

Respondent claims that he was imposed upon by Katherine Fay, and believed her to be worth a large amount and as good security as he represented her to be, and that there was no wrongful intent in anything he did in the transactions as to the automobiles, and his being appointed receiver was done at the request of the holders of claims against him. Although he claims to have known Katherine Fay was possessed of a great deal of property, a large portion of which was real estate, he did not in his testimony point out a single piece of property that she ever owned, nor does he disclose what business he transacted with Katherine Fay that resulted in her owing him so much money. It is incredible to believe that a lawyer laboring under the financial difficulties which respondent was would do so much business for any one without actually knowing something about the financial responsibility of his client. Respondent denies that he made any representation as to the financial worth of Mrs. Fay, and denies that

there were any conditions to the sales except in the case of the "Rambler," which he admits he was to hold until Tuesday or Wednesday of the week following his purchase, for the investigation of the dealers. The chancellor before whom the receivership case was tried reached a conclusion adverse to this contention, and while we have not the evidence before us that was before the chancellor, we have the evidence reported to this court upon the matter and are forced to the same conclusion reached by the chancellor. From the evidence it would seem that respondent was reckless in the matter of his expenditures and the manner of his living and indifferent to the condition of his credit. No good purpose can be effected by going into all the details as disclosed by the evidence and the various contentions made.

Our conclusion is that respondent is guilty of the charges preferred against him in the information, and that he is an unfit man to be allowed to further conduct the business and exercise the rights and functions of a lawyer in this state. The rule, therefore, will be made absolute, and the name of the respondent will be stricken from the roll of attorneys and he will be debarred from further practice as such.

Rule made absolute.

(218 Ill. 242)

CITY OF CHICAGO v. DUFFY.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—CONTRACTS—ACTIONS.

Where a public improvement has been completed and accepted, and is in use, and nothing remains to be done under the contract therefor except for the city to pay the amount due thereon, a recovery of such amount may be had under the common counts, though special counts filed with the common counts are insufficient.

2. SAME—NEGLIGENCE OF CITY ENGINEER.

Where the construction of a tunnel for a city was, under the contract therefor, to be under the direction of the city engineer, the expense of back masonry in the tunnel, made necessary by the negligence of the city engineer in running the line of the tunnel, should be borne by the city and not by the contractor.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 892.]

3. SAME—PENALTIES FOR DELAY—ENFORCEMENT.

A city cannot enforce a per diem penalty for delay in constructing a public improvement, where such delay was caused by the suspension of work during litigation, which terminated in favor of the contractor, concerning the proper construction of the contract.

4. ABATEMENT—ANOTHER ACTION PENDING.

The pendency of a suit by a taxpayer to enjoin a city from making payments under a contract for a completed public improvement is not a bar to an action by the contractor to recover from the city the balance due under the contract, where the pendency of such suit is not pleaded, and no injunction was issued, and no cross-bill was filed by the contractor therein.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, § 123.]

Appeal from Appellate Court, First District.

Action by Joseph J. Duffy against the city

of Chicago. From a judgment for plaintiff, defendant appeals. Affirmed.

Rehearing denied December 12, 1905.

Thomas J. Sutherland (Edgar Bronson Tolman, Corp. Counsel, of counsel), for appellant. Sears, Meagher & Whitney and Winston, Payne & Strawn (Nathaniel C. Sears, of counsel), for appellee.

HAND, J. This was an action of assumpsit brought by Joseph J. Duffy, against the city of Chicago, in the circuit court of Cook county, to recover a balance claimed to be due him from the city upon a written contract bearing date September 30, 1895, whereby he agreed to build section 2 of a water tunnel proposed to be constructed by the city. The declaration contained four special and the common counts, and the general issue was filed. A jury was waived and there was a trial before the court, which resulted in a finding and judgment in favor of the plaintiff for \$301,376.08. The city prosecuted an appeal to the Appellate Court for the First District, where the judgment of the circuit court was reversed, and an original judgment was rendered in that court in favor of the plaintiff for \$137,585.28, and the city has prosecuted a further appeal to this court.

The first contention made by the city is, that there can be no recovery under the declaration. The improvement was completed, had been accepted and was in use by the city at the time suit was commenced. There remained, therefore, at that time, nothing for the city to do except to pay the plaintiff the amount due him. The contract was substantially executed, and even though it were admitted the special counts were insufficient, a recovery was properly permitted under the common counts. *Union Elevated Railroad Co. v. Nixon*, 199 Ill. 235, 65 N. E. 314.

It is next contended that a chancery suit commenced by one Ives against the city of Chicago, certain of its officers and the plaintiff, to enjoin the city from making any further payments to the plaintiff under the contract here sued on, upon the ground that the city, under the contract, had a claim against the plaintiff for damages in excess of his claim against the city by reason of his failure to complete the tunnel within the time fixed by the contract, was a bar to this action. The chancery suit was not pleaded in this action, but the question was raised by motion after the general issue was filed. No injunction was issued and Joseph J. Duffy did not file a cross-bill. In the Ives suit Joseph J. Duffy could not have recovered from the city the amount of his claim. We are of the opinion the court did not err in declining to dismiss this suit on the ground the Ives suit was pending and undetermined. To hold otherwise would be to hold that a taxpayer could prevent the collection of a just claim at any time against a city simply by filing a bill against the city and its creditor to enjoin the payment of the claim. Had

an injunction been issued and the Ives suit been properly pleaded, a different question would be presented for decision.

It is next contended that the Appellate Court erred in holding that the plaintiff was entitled to recover, at the rate of \$10 per cubic yard, for 8,871.08 cubic yards of back masonry made necessary by the engineers of the defendant giving improper and erroneous instructions to the servants of the plaintiff while such servants were, under their direction, blasting out said tunnel. The contract provided the work should be carried on under the direction of the city engineer. His subordinates, as the work progressed, directed the servants of plaintiff as to the line upon which the tunnel should be blasted out. When the tunnel was ready for the brick work it was discovered it did not run in a straight line. In bringing the tunnel to a proper line it had to be enlarged, which made necessary said back masonry. The Appellate Court incorporated in its judgment a finding of fact that said extra back masonry was made necessary by reason of the negligence of the defendant's engineers. We think the cost of said extra back masonry should be borne by the city. *Chicago & Great Eastern Railway Co. v. Vosburgh*, 45 Ill. 311; *Sexton v. City of Chicago*, 107 Ill. 823.

It is also contended that the trial and appellate courts erred in declining to allow the defendant \$200 per day as liquidated damages, under the terms of the contract, for delay in completing the tunnel. After the work had progressed for some months a dispute arose between the city and the plaintiff as to the right of plaintiff to receive \$10 per cubic yard for rock excavated in the construction of the tunnel in addition to the price per lineal foot fixed by the contract. Litigation ensued, which, upon the appeal of the city, was finally determined in favor of Duffy by this court. *City of Chicago v. Duffy*, 179 Ill. 447, 53 N. E. 982. Pending the litigation, work upon the tunnel ceased. The plaintiff's contention as to the construction of the contract was sustained by the courts, and we think during the time the city refused to pay the plaintiff for excavating the tunnel according to the terms of the contract, it could not require him to proceed with the work or subject him to a penalty of \$200 per day for delay. So soon as the meaning of the contract was determined by this court, the plaintiff proceeded with the work and completed the tunnel, which was accepted by the city.

It is also contended that the tunnel was not properly constructed, as it is said only two rings of brick were used where the specifications provided for three; and it is also urged the plaintiff charged the city with more material than he used in the construction of the tunnel—that is, lumber permanently left in the tunnel. The Appellate Court overruled both of these contentions,

the first on the ground that the change was made with the engineer's consent, and the second on the ground that it found no support in the evidence. We agree with the conclusion reached by the Appellate Court with reference to both contentions.

The briefs filed in this court cover 691 printed pages, those of the appellant alone covering 524 pages. The original brief filed upon behalf of the city discusses questions of fact settled by the judgment of the Appellate Court adversely to the appellant; also questions decided by that court in its favor, which are not here called in question. Its original brief in those particulars violates the rules of this court. We have, however, read all that has been printed and placed on file with the clerk, and have reached the conclusion that the judgment of the Appellate Court works out substantial justice between the parties, and that the record is free from reversible error.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

(213 Ill. 227)

WEIGEL v. GREEN et al.

(Supreme Court of Illinois. Oct. 24; 1905.)

1. LIFE ESTATES—SALE BY LIFE TENANT—ESTATE OF GRANTEE.

A deed executed by a life tenant conveys an interest for the life of the grantor only, although it purports to convey a fee simple.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Life Estates, § 44.]

2. ESTOPPEL—BY DEED—RIGHT TO INVOKE.

A grantee relies at his peril upon recitals in his deed that the grantor, who is in fact only a life tenant, is the sole heir and legatee of the former owner, and cannot invoke such recitals as an estoppel against persons entitled under the will of the former owner to remainder interests in the land.

3. ADVERSE POSSESSION—PERSONS HOLDING ADVERSELY—GRANTEE OF LIFE TENANT.

The grantee of a life tenant, although he pays taxes and makes improvements, does not hold adversely to remaindermen until the death of the life tenant.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Life Estates, § 26.]

4. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—FACTS PUTTING ON INQUIRY—RECITALS IN DEED.

Where a deed recites that the grantor is the only heir and legatee of a certain person, late of a certain county and state, the grantee is charged with notice of the terms of the will, although the recorded copy of the will does not, because of insufficient authentication, operate as constructive notice.

5. DEEDS—CONSTRUCTION—DESCRIPTION OF GRANTEE.

Where a deed describes the grantor as the only heir and legatee of a certain person, the word "legatee" may be regarded as meaning devisee of land as well as donee of personalty.

Appeal from Circuit Court, Macon County; Wm. C. Johns, Judge.

Action by John M. Green against Henry D. Weigel. From a judgment for plaintiffs, defendant appeals. Affirmed.

Rehearing denied December 12, 1905.

This is an action of ejectment begun on July 28, 1904, in the circuit court of Macon county by the appellees, John M. Green, James F. Green, and Emma D. Green Hulse, all of whom are nonresidents of this state, against the appellant, Henry D. Weigel, to recover 10 acres of land in said county, described as the E. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 16, town 17 N., range 2 E. of the third principal meridian. A plea of the general issue was filed and by agreement a jury was waived, and the cause was submitted for trial before the court without a jury. The court rendered judgment, finding that the appellees were the owners in fee as tenants in common of the premises in question, and that appellant was in possession of the same, and it was therefore considered by the court that appellees recover said premises of the appellant, and appellees were thereby adjudged to be the owners of said premises, and it was further adjudged that a writ of possession issue against the appellant and in favor of appellees, and that appellees recover their costs. The present appeal is prosecuted from such judgment.

The material facts, the most of which were embodied in written stipulations between the parties, are substantially as follows: The land mentioned in the declaration was originally granted by the United States to the state of Illinois for the use of schools in the township where the same is located, and said land was accepted by Illinois. On February 5, 1850, the state of Illinois issued a patent for said land to David Krone. In May, 1856, David Krone conveyed said premises to Katherine Ann Stipp, and the deed to Katherine Ann Stipp was duly recorded in Macon county. Katherine Ann Stipp died testate in Lawrence county, Ind., where she then resided, on or about March 31, 1861. She left a will dated June 19, 1856, the material part of which was as follows: "I, Katherine Ann Stipp, do give and bequeath to my granddaughter, Martha Ann Judah, all my estate, lands, moneys, personal property, with all my effects, to her during her lifetime, and to her children after her death. And if she, Martha Ann Judah, should have no children at her death, I do give and bequeath all my property, lands, effects, money and all my estate to my brothers and sisters, or to their heirs, to be theirs forever to be equally divided between all my brothers and sisters and their heirs." The will was signed by Katherine Ann Stipp by her mark, and there were two witnesses to it, to wit, Isaac Denson and Michael Stipp; the latter signing by his mark. The will in question, with an affidavit by said Isaac Denson subscribed and sworn to on May 29, 1861, before Davis Harrison, clerk, and three certificates attached, each dated July 11, 1904, was recorded in the recorder's office of Ma-

con county on July 14, 1904. The affidavit of May 29, 1861, attached to the will, by Denson, one of the subscribing witnesses, has as its venue the state of Indiana, Lawrence county, and is as follows: "I do solemnly swear that the foregoing will of the testatrix was duly executed by her in my presence and in the presence of Michael Stipp, the other subscribing witness, who, with myself, subscribed our names thereto at the request of the said testatrix, and in her presence, and in the presence of each other, and that the said testatrix was at the time competent to devise her property, and not under coercion." The first certificate, dated July 11, 1904, has the venue aforesaid, and is by Boone Leonard, clerk of the circuit court of Lawrence county of Indiana, in which he certifies, "the foregoing to be a true, perfect and complete copy of the last will and testament of Katherine Ann Stipp, now remaining on file in my office, the same being recorded in my office in Will Record 'A' at page 188; and that said will was duly executed and proved agreeably to the laws and usages of the said State of Indiana," to which is affixed the seal of the court, besides the signature of the clerk. The second certificate, of July 11, 1904, has the same venue, and is by James B. Wilson, judge of the circuit court of Lawrence county, who certifies that said Leonard, "whose name is subscribed to the foregoing certificate of attestation, now is, and was at the time of signing and sealing same, clerk of Lawrence circuit court of Lawrence county aforesaid, and keeper of the records and seal thereof, duly elected and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such in all courts of record, and elsewhere; and that his said attestation is in due form of law and by the proper officer." The third certificate, dated July 11, 1904, is signed by Boone Leonard, clerk of said Lawrence county circuit court, has the same venue, and certifies "that James B. Wilson, whose genuine signature appears to the foregoing certificate, was at the time of signing the same, judge of the Lawrence circuit court of Lawrence county, duly commissioned and qualified; that full faith and credit are, and of right ought to be given to all his official acts as such in all courts of record, and elsewhere."

Appellees on the trial below offered in evidence a copy of said will and of the affidavit of probate by Isaac Denson, as attached thereto, which copies of the will and of said affidavit are above set forth, with the following certificates attached thereto, to wit, one certificate by Davis Harrison, clerk of the court of common pleas of Lawrence county, Ind., per Charles T. Woolfolk, deputy clerk, dated May 29, 1861, witnessing his hand and seal of said court at Bedford, wherein said clerk certified "that the foregoing will of Katherine Ann Stipp, deceased,

has been admitted to probate before said court on this day; that the same was proven by the oath of Isaac Denson one of the subscribing witnesses thereto, and that a complete record of said will and the testimony of said witnesses had been duly recorded in record book in my office, entitled 'Record of Wills A,' page 188"; also, a second certificate by Davis Harrison, clerk of the court of common pleas for the county of Lawrence, Ind., dated July 20, 1861, witnessing his hand and the seal of said court, certifying "that administration with the will annexed of the estate of Katherine Ann Stipp, late of Lawrence county, deceased, who died testate, is granted to Israel Judah, and said Israel Judah, having qualified and given bond as such administrator, he is duly authorized to take upon himself the administration of such estate according to law." The copy of the will last mentioned was filed for record in the recorder's office of Macon county in book 11 on page 318 on January 27, 1863; it being agreed that said book 11 in the possession of the circuit court clerk and ex officio recorder is a book kept and in the possession of the said circuit court clerk, in which are recorded deeds and other instruments relative to the title of lands in Macon county, Ill.

Martha Ann Judah was a granddaughter of the testatrix, Katherine Ann Stipp, and resided in Lawrence county, Ind., at the time of the death of Katherine Ann Stipp. Martha Ann Judah, the granddaughter, was lawfully married to Cornelius Green in Lawrence county, Ind., on or about November 18, 1862, and she and Green lived together as husband and wife until his death. Martha Ann Green (formerly Martha Ann Judah) died at her home in Lawrence county on or about February 19, 1904. She left surviving her, as her only children, John M. Green, James F. Green, and Emma D. Green Hulse, the appellees herein. John M. Green was 40 years old on February 11, 1904, and resides at Pueblo, Colo.; James F. Green was 34 years of age on December 15, 1904, and resides in Lawrence county, Ind.; Emma D. Green Hulse, formerly Emma D. Green, was lawfully married to one Walford R. Hulse on or about November 25, 1884, and now survives her husband, and is 36 years old, and resides in Lawrence county, Ind. On March 28, 1864, Martha Ann Green (formerly Martha Ann Judah) and Cornelius Green, her husband, executed a deed conveying said premises to Daniel Weigel, which deed was recorded in the recorder's office of Macon county May 14, 1864. By the terms of the latter deed, the premises were conveyed to Daniel Weigel and "his heirs and assigns forever, in fee simple as a sure, perfect and absolute estate," and contained a covenant that, at the time of the delivery thereof, the grantors were the lawful owners of the premises and seised thereof in fee simple absolute, and that they would warrant and defend the same

in the quiet and peaceable possession of said Weigel, his heirs and assigns forever. Daniel Weigel entered into possession of the said premises under said deed, and claimed the ownership, and continued in possession thereof, until he died intestate in the year 1885, and, during the time of his possession, paid all the taxes levied or assessed against said land. Daniel Weigel left three sons, Henry D., Martin, and Solomon. The interests of the two sons Martin and Solomon have been conveyed to the third son, the appellant, Henry D. Weigel. About the time of the death of Daniel Weigel Henry and Martin conveyed their interests in said premises to Solomon Weigel, who then entered into possession thereof, and remained in possession until July 28, 1889, and during that time paid all taxes against the land. When Solomon Weigel died on July 28, 1899, he was a bachelor, and died intestate, leaving as his only next of kin and heirs at law his brothers, Henry D. Weigel and Martin Weigel, who entered into possession of said premises, and continued in such possession, until September 15, 1900, and during that time paid all the taxes. On September 15, 1900, Martin Weigel conveyed all his interest in said premises to the appellant, Henry D. Weigel, who has had the possession thereof, and paid all the taxes thereon up to the time of the beginning of this suit.

Walters & Latham, for appellant. Nelson & Whitley and Alexander & Harris, for appellees.

MAGRUDER, J. (after stating the facts). First. The appellant, against whom the present action of ejectment is brought, sets up section 6 of the limitation act as a defense. He claims that, under the deed dated March 28, 1864, executed by Martha Ann Green and her husband, Cornelius Green, to Daniel Weigel, appellant's father, of Macon county, Ill., as color of title, his father and his brothers and himself have been in possession of the premises, and paid all taxes legally assessed thereon, for more than seven years, and are therefore the owners of the premises. It is not denied that, under the terms of the will of Katherine Ann Stipp, who died on March 31, 1861, her granddaughter, Martha Ann Judah, was vested only with a life estate in the property. The appellees, as children of Martha Ann Green (formerly Martha Ann Judah), were remaindermen or reversioners, entitled to the remainder or reversion in the land at the time of the expiration of the life estate of their mother. Martha Ann Green did not die until February 19, 1904, and therefore the life estate did not end until the latter date. This ejectment suit was begun by the appellees, as such remaindermen, on July 28, 1904, and therefore it cannot be said that they have been guilty of any laches in bringing suit for the property since the falling in of the life estate. When the deed of March 28, 1864, was executed by Martha

Ann Green, the owner of the life estate, and her husband Cornelius Green, to Daniel Weigel, the latter became vested only with the interest that Martha Ann Green then owned, and, as that interest was only a life estate, Daniel Weigel only received by his deed an estate in the property for the life of Martha Ann Green. Although the deed on its face purported to convey the fee, it, as matter of fact, only conveyed the life estate of Martha Ann Green.

Appellant, by the death of his father, Daniel Weigel, and by the death of his brother Solomon Weigel and the conveyances mentioned in the statement preceding this opinion, took no other estate in the property, and never had any other estate in the property, than that which his father obtained by the deed of March 28, 1864, to wit, an estate for the life of Martha Ann Green. It follows that the possession of the land by appellant and his father and brothers was merely the possession of tenants for life, and cannot be adverse to appellees, who are the remaindermen or reversioners. This is so, even though the conveyance to Daniel Weigel purported to pass the absolute title to the property. The possession of Daniel Weigel, purchaser from the tenant for life, and that of his son holding under him, was not and could not be, during the continuance of the life estate, adverse to the appellees as remaindermen, so as to set the statute of limitations running against them. It is only since the death of Martha Ann Green on February 19, 1904, when the life estate fell in, that the possession became adverse to the appellees. The possession of the tenant for life or his vendee during the continuance of the life tenancy is, in contemplation of law, the possession of the remainderman or reversioner, and the latter cannot, during the life of the person for whose life the life estate is, bring an action against the person in possession under such life tenant to recover possession of the premises. *Turner v. Hause*, 199 Ill. 464, 65 N. E. 445, and cases therein referred to and quoted from. In *Mettler v. Miller*, 129 Ill. 630, at page 642, 22 N. E. 529 at page 532, it was said: "All statutes of limitation are based on the theory of laches, and no laches can be imputed to one who has no remedy or right of action." Appellees had no remedy or right of action until February 19, 1904, and therefore the bar of the statute could not begin to run against them until that time. This is the express provision of section 3 of the limitation law, which must be construed in connection with section 6 of that act. Section 3 provides that, "when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation." 2 Starr & C. Ann. St. (2d Ed.) 1896, p. 2603, c. 83, par. 3.

It makes no difference that the taxes

were paid by Daniel Weigel and his sons, including the appellant, because "it was the legal duty of the tenant for life to pay the taxes, and by discharging that duty he could acquire no right against" appellees as remaindermen. *Higgins v. Crosby*, 40 Ill. 260; *Prettyman v. Walston*, 34 Ill. 175; *Waldo v. Cummings*, 45 Ill. 421. Nor does it make any difference that certain improvements were made by the appellant upon the property. In *Hagan v. Varney*, 147 Ill. 281, at page 292, 35 N. E. 219 at page 222, we said: "Nor can a life tenant, by placing permanent improvements on the land, however much they may enhance the value of the estate, create any charge for the moneys thus expended against the remaindermen. Such improvements must be deemed to have been made by the life tenant for his own benefit and enjoyment during the pendency of his own estate, and upon the termination of the life tenancy they, being a part of the realty, pass as such to the one in whom the remainder is vested, and he takes them without any liability to recompense the life tenant for his expenditures." In view of the principles thus announced, it follows that appellees were the owners of the property, as found by the trial court, and that the appellant is not in a position to set up the bar of the statute of limitations as a defense.

Second. It is said, however, by counsel for appellant, that neither Daniel Weigel, grantee in the deed of March 28, 1864, nor any of those holding under him, had notice that there was an outstanding life estate in Mrs. Martha Ann Green, or that the appellees were owners of the remainder or reversion after the expiration of such life estate. In support of the position that notice is necessary in such a case, appellant's counsel refer to four cases decided by this court, to wit, *Dugan v. Follett*, 100 Ill. 581; *Safford v. Stubbs*, 117 Ill. 389, 7 N. E. 653; *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; and *Lewis v. Pleasants*, 143 Ill. 271, 30 N. E. 323, 32 N. E. 384. The case of *Safford v. Stubbs*, supra, was explained and distinguished, and shown to be consistent with the views hereinbefore expressed in the case of *Mettler v. Miller*, 129 Ill. 630, 22 N. E. 529. In *Mettler v. Miller*, supra, it was said that the case of *Safford v. Stubbs*, supra, is but the recognition of a rule, which is held in many adjudicated cases, and is thus formulated in *Barrett v. Stradl*, 73 Wis. 385, 41 N. W. 439, 9 Am. St. Rep. 795: "When a person enters under a deed from the person who holds the life estate, which on its face conveys an estate in fee, and when the grantor intends to convey the fee, and the grantee supposes he is getting a conveyance of the fee, the person entering under such deed holds, in fact, adversely to all the world; but he cannot avail himself of the rights of an adverse possession, under the statute, as against the remainderman, during the

life of the owner of the life estate, but immediately upon the death of the person holding the life estate, such possession, if continued, becomes adverse to the remainderman." As to the case of *Burgett v. Tallafiero*, supra, we discover nothing in that case bearing upon the question involved here. In the cases of *Dugan v. Follett*, supra, and *Lewis v. Pleasants*, supra, the attention of the court does not seem to have been called to the phraseology of clauses 2 and 3 of section 3 of the limitation act. 2 Starr & C. Ann. St. 1896 (2d Ed.) p. 2603, c. 83, par. 3. The language of those clauses is positive to the effect that the right of entry of the remainderman will be deemed to accrue only when the precedent estate expires by its own limitation. The provisions of section 3 are not qualified by any statement or intimation that the party in possession shall or shall not have notice of the rights of the remainderman or of the owner of the precedent estate. And it is clear that a right of entry cannot be barred until such right has accrued. The facts in *Dugan v. Follett*, supra, were peculiar, in that the parties, claiming by reason of possession and payment of taxes under color of title, were the owners in fee of one-half of two of the tracts there involved and of an undivided interest in the third tract, and were therefore tenants in common with the remaindermen, and it is there said (page 588): "It follows that appellants and those under whom they claim have, since their respective titles accrued, been, and are now, tenants in common with the appellees. Hence, in determining whether the statute of limitations is a bar to the present proceeding, it is proper to keep this relation of the parties in view. The general rule unquestionably is that the statute does not run as between tenants in common, on the ground, in part, that the possession of one tenant, in contemplation of law, is the possession of the others, and this is especially so where all the parties derive title from the same deed or conveyance." The case of *Lewis v. Pleasants*, supra, was also peculiar in its facts, inasmuch as, in the main opinion in that case, the instrument relied upon as color of title was not a deed from the owner of the life estate, but a tax deed, and in that case it was said as to the title of Mrs. Lewis, who held only a life estate, as follows (page 287 of 143 Ill., page 328 of 30 N. E.): "If the only title or apparent title of Mrs. Lewis to the lands in question at the time of the execution by her of said conveyances had been that derived from the will of her husband, it might perhaps be questionable whether the possession of her grantees would have been adverse to the owners of the reversion, so as to bar the latter under the seven-years statute of limitation." The will of the husband in the latter case had devised his land to his widow and the heirs of her body, and so it was held that, under

section 6 of the statute relating to conveyances, the devise vested in her only a life estate, with remainder in fee to the heirs of her body, leaving the reversion, in case of an entire failure of issue, in the heirs-at-law of the devisor. But, if the cases referred to by counsel do support the position that the party in possession of the property, in such a case as the one at bar, under color of title, can set up the statute of limitations as a defense, if he has no notice of the will or instrument creating the life estate or the estate of remainder or reversion, still we think that, under the facts here, Daniel Weigel and those holding under him must be regarded as having notice of the existence of the life estate and of the rights of the remaindermen.

Third. It may be that the copy of the will of Katherine Ann Stipp, which was filed for record in Macon county on January 27, 1863, and was, therefore, on record when Daniel Weigel received the deed, dated March 28, 1864, may not have been properly authenticated as a foreign will under the act of Congress, so as to operate as constructive notice thereof to Daniel Weigel; the will of Katherine Ann Stipp having been executed and admitted to probate in Lawrence county, Ind. In *Harrison v. Weatherby*, 180 Ill. 418, 54 N. E. 237, it was held that a copy of a foreign will, although recorded will not operate as constructive notice, unless it is authenticated and certified in the manner, required by section 9 of the Illinois act in regard to wills. Starr & C. Ann. St. 1896, p. 4040, c. 148. While, however, such a copy will not operate as constructive notice, yet if Daniel Weigel had had actual notice of the will of Mrs. Stipp, it would make no difference that the copy, of which he had notice, was not properly authenticated as a foreign will. So, if there were circumstances to put Daniel Weigel, or those holding under him, upon inquiry as to the existence of such will, his position is no different from what it would have been if he had had actual notice. The deed, dated March 28, 1864, from Martha Green and her husband, Cornelius Green, to Daniel Weigel, begins as follows: "Know all men by these presents that we, Martha Green [formerly Martha A. Judah, the only heir and legatee of Katherine Stipp, late of Lawrence county in the State of Indiana, deceased], and her husband, Cornelius Green, of the county of Jackson in said state, * * * do hereby grant, bargain, sell" etc. When Daniel Weigel accepted this deed, the title to the property of record was in Katherine Ann Stipp, and there was no conveyance from Katherine Ann Stipp to Martha Ann Green, the grantor of Daniel Weigel. In other words, there was a break in the title, and it was for Daniel Weigel to inquire and ascertain for himself how the title, which was of record in Katherine Ann Stipp, had passed into his grantor, Martha A. Green. The language, above quoted, from the deed, ad-

vised Weigel that Katherine Stipp was dead, because she is spoken of as "late of Lawrence county in the State of Indiana, deceased." He was also thereby advised that her residence was Lawrence county, Ind. He was also therein advised, by the use of the word "legatee," that Katherine Stipp had left a will, because Martha Green, formerly Martha A. Judah, is referred to as the only heir and legatee of Katherine Stipp. The property conveyed by this deed was real estate, and, although "legatee" is generally the word applied in wills to indicate the taker of personal property, yet at sometimes, when used in connection with the description of land, has the meaning of devisee. In 18 Am. & Eng. Ency. of Law (2d Ed.) p. 821, it is said: "The word 'legatee' means in legal acceptance a donee of personal or movable estate, but it may mean a donee of real estate whenever the testator plainly used it in that sense." In Chandler's Appeal, 34 Wis. 512, it was said: "The term 'legatee' is sometimes used by unprofessional persons in a much broader sense than that above stated. It is not infrequently used as synonymous with 'devisee,' and such use is sanctioned by lexicographers. Chattels are bequeathed to a legatee, and real estate is devised to a devisee; yet, according to Webster's Dictionary, the verbs 'bequeath' and 'devise' are synonyms." The term "legatee," as used in a will, may embrace a donee of real property by devise, and there is no reason why the term "legatee," when used in a deed, may not for the same reason embrace a donee of real property by devise. Laing v. Barbour, 119 Mass. 523; Den v. Mitchell, 6 N. C. 228, 5 Am. Dec. 527; Williams v. McComb, 38 N. C. 450; Tucker v. Tucker, 40 N. C. 84. The terms "legatee" and "devisee" are more strictly interpreted as referring, the one to personalty, and the other to realty, in the construction of statutes than in the construction of wills and deeds. 18 Am. & Eng. Ency. of Law (2d Ed.) p. 821, and cases referred to in notes. In Russell v. Russell, 36 N. Y. 582, 93 Am. Dec. 540, a testator by his will gave all his real and personal estate to his wife during her life or widowhood, with remainder to his four children. By a codicil the testator gave power to his wife to sell and dispose of his real estate, or any part thereof, as she should deem most expedient and for the best interests of all his legatees; and it was held that, by the expression "legatees," the testator intended to designate his four children, whom he had named in the body of the will as those to whom he devised and bequeathed the residue of his estate, real and personal, after the death of his wife. 18 Am. & Eng. Ency. of Law (2d Ed.) pp. 821, 822, note 1. In Doyle v. Teas, 4 Scam. 202, in speaking of what circumstances should put a subsequent purchaser upon inquiry, it was said (page 250): "It is sufficient if the channels, which would have led him to the truth, were open

before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. The law will not allow him to shut his eyes when his ignorance is to benefit himself at the expense of another, when he would have had them open and inquiring, had the consequences of his ignorance been detrimental to himself, and advantageous to the other."

A purchaser of land is always chargeable with the knowledge of whatever facts are suggested by the recitals in his title papers. If title papers give notice of facts which would put a reasonably prudent man upon inquiry that would lead to such knowledge, the purchaser is chargeable therewith. Knowles v. Williams, 58 Kan. 221, 48 Pac. 856. In the case at bar the recitals in the deed to Daniel Weigel suggested the existence of Katherine Ann Stipp's will in Lawrence county, Ind. These recitals gave such notice of the existence of such will as would have put a reasonably prudent man upon inquiry, and such inquiry would have led to the knowledge of the contents of that will, either as probated in Lawrence county, Ind., or as recorded in Macon county, Ill. Whatever is sufficient to put a subsequent purchaser upon inquiry as to the rights of others must be considered legal notice to him of those rights. Hatch v. Bigelow, 39 Ill. 546; Babcock v. Lisk, 57 Ill. 327; Shepardson v. Stevens, 71 Ill. 646; Bent v. Coleman, 89 Ill. 364; Citizens' Nat. Bank v. Dayton, 116 Ill. 257, 4 N. E. 492.

Fourth. Counsel for the appellant, however, insist that Daniel Weigel had a right to rely upon the statement in the recitals of the deed to the effect that Martha A. Green (formerly Martha A. Judah) was "the only heir and legatee of Katherine Stipp." He was not justified in relying upon the representation of his grantor that the person named was the only heir and legatee of Katherine Stipp. In Buchanan v. International Bank, 78 Ill. 500, it was said (page 504), in regard to a party who claimed to have been an innocent purchaser, that "he had no right to rely upon the representations of Walker in regard to the title to the premises, and, if he saw proper to do so without consulting the record, which was open to his inspection, it was at his own peril." Inasmuch, therefore, as there was that in the recitals of the deed which was sufficient to put Daniel Weigel on inquiry as to the existence of the will in question, and inasmuch as, under the authorities, that which was sufficient to put him upon inquiry as to the existence of such will must be considered as legal notice to him thereof, it cannot be said that, under the facts shown by this record, he did not have legal notice of the will of Katherine Ann Stipp, and, this being so, of the existence of a life estate in Martha A. Green, and of an estate of remainder or reversion in appellees,

the children of Martha A. Green. In any view which we can take of this case, we are forced to the conclusion that the judgment of the trial court was correct, and that the present appellees were entitled to recover the possession of the property.

Accordingly the judgment of the circuit court of Macon county is affirmed.

Judgment affirmed.

(218 III. 220)

MILLER et al. v. PENNINGTON et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. BASTARDS—LEGITIMACY—MARRIAGE OF PARENTS.

Bastardy Act (Hurd's Rev. St. 1899, p. 205, c. 17) § 15, provides that, if the mother of any bastard child and the reputed father shall at any time after the birth of the child intermarry, the child shall be deemed legitimate. Statute of Descent (Hurd's Rev. St. 1899, p. 653, c. 39) § 3, provides that an illegitimate child whose parents have intermarried and whose father has acknowledged him or her as his child shall be considered legitimate. *Held* that, where there has been a judicial finding as to the paternity of the child, the marriage of the parents renders the child legitimate under the bastardy act without any acknowledgment of paternity; but such acknowledgment is necessary, in order to establish legitimacy under the statute of descents.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, §§ 14-17, 263.]

2. SAME.

The fact that an illegitimate child was the result of adulterous intercourse does not preclude his legitimation under Hurd's Rev. St. 1899, p. 653, c. 39, § 3, providing that an illegitimate child whose parents have intermarried and whose father has acknowledged him or her as his child shall be considered legitimate.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 14.]

3. SAME—ORAL ACKNOWLEDGMENT OF CHILD.

Under Hurd's Rev. St. 1899, p. 653, c. 39, § 3, providing that an illegitimate child whose parents have intermarried and whose father has acknowledged him or her as his child shall be considered legitimate, a parol acknowledgment of paternity and the intermarriage of the parents will legitimize the child and entitle it to inherit, irrespective of the purpose of the acknowledgment or subsequent declarations of the parents.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 263.]

Appeal from Circuit Court, Wayne County; J. R. Creighton, Judge.

Bill by Alexander Miller and others against Uriah Pennington and others. From a decree dismissing the bill as to certain complainants, they appeal. Reversed.

Rehearing denied December 12, 1905.

Organ & Elliott and William T. Bonham, for appellants. J. R. Holt, George W. Johns, and Creighton & Thomas, for appellees.

CARTWRIGHT, C. J. Alexander Miller and Rusaw Miller, the appellants, and their mother, Betsy Pennington, widow of Anthony Pennington, deceased, filed their bill in this case in the circuit court of Wayne county against the appellees, who were children and

grandchildren of said Anthony Pennington, praying for the assignment of dower and homestead to said Betsy Pennington in the lands of which Anthony Pennington died seised, and for partition of said lands among appellants and appellees as heirs-at-law. The adult defendants answered, admitting the death of Anthony Pennington, that he was seised of the lands described in the bill, and that the complainant Betsy Pennington was his widow and entitled to dower and homestead, but denying that her children, Alexander Miller and Rusaw Miller, were children and heirs of Anthony Pennington. The minor defendants, by their guardian ad litem, filed a formal answer, neither admitting nor denying the allegations of the bill, but calling for proof. Replications having been filed, the cause was heard and a decree was entered assigning homestead and dower to Betsy Pennington, but dismissing the bill as to the complainants Alexander Miller and Rusaw Miller. The record has been brought to this court by appeal.

The facts proved at the hearing are as follows: In the year 1864 Anthony Pennington, a farmer and stock dealer, was living with his first wife, Phoebe Pennington, and they had four children. Betsy Miller was an unmarried woman and cousin of Phoebe Pennington. Rusaw Miller and Alexander Miller, who will be hereafter termed the complainants, were born to her,—Rusaw on March 14, 1864, and Alexander on April 24, 1865,—and Anthony Pennington was their natural father. Subsequently four more children were born to Anthony Pennington and his said first wife. Phoebe Pennington, the first wife, having died, Anthony Pennington married Betsy Miller, the mother of the complainants, on April 2, 1902, and he lived with her as his wife until his death, on September 9, 1904. Prior to the death of his first wife he frequently denied the paternity of the children, but when he determined to marry their mother, and after the marriage, from time to time and within a short time before his death, he acknowledged to many different persons that they were his children. He told several persons that he was going to marry Betsy Miller, that they were his children, and he thought he was doing right. When he went to the justice to get the license and procure his attendance at the ceremony, he told the justice he wanted him to come down and marry him, that he thought it was the right thing for him to do, and that the complainants were his children. After the marriage, at different times, he made the same statements as to the parentage of the complainants, with expressions of opinion that he had done right in marrying their mother, saying that after Phoebe died he concluded to marry Betsy, and that he did not think it any more than right that he should marry her. These acknowledgments were made to about 25 disinterested persons who testified in the case. There was also evidence of other witnesses,

not so numerous and several of whom were relatives of his first wife's children, that Anthony Pennington denied to them that he was the father of complainants, and these denials were made both before and after he married their mother. It appears that he was somewhat addicted to the use of intoxicating liquors, and that he was more likely to refer to the subject of the paternity of the children and his marriage to their mother at times when he had been drinking to some extent, which was perhaps natural enough, but it is very clear from the evidence that at such times he was entirely capable of intelligently making the acknowledgment. He made the statements to some witnesses when he had not been drinking and to others when he had, but he was a capable business man of considerable property, a stock buyer and farmer, and the force of his statements and acknowledgment is in nowise affected by the fact that on some occasions he had been drinking.

At the common law, an illegitimate was of kin to no one, and therefore was incapable of being the heir of any person, and the common law was in force in this state until changed by statute. *Blacklaws v. Milne*, 82 Ill. 506, 15 Am. Rep. 339. But this state, like many others, has abrogated the common-law rule by statute. The civil law, which is now recognized as more humane and just than the common law, enabled the father of an illegitimate child to make some reparation by securing to the innocent and unfortunate the rights of inheritance to which it is naturally entitled. There were several methods under the civil law by which an illegitimate child might be made legitimate, one of which was the mere marriage of the father and mother, and in some states their marriage alone, without any acknowledgment of paternity, has this effect. In others, children born out of wedlock become legitimate by the marriage of their parents and the recognition of the children by the parents as their own. In others, the subsequent marriage and recognition by the father, before or after marriage, is sufficient, and, in others, the acknowledgment is required by the statute to be in writing. By our statute two of these methods have been adopted as applied to different conditions. Where there has been a judicial finding of the paternity of the child, the marriage of the parents without any acknowledgment of paternity renders the child legitimate. Section 15 of the bastardy act provides that if the mother of any bastard child and the reputed father shall, at any time after the birth of the child, intermarry, the child shall in all respects be deemed and held legitimate. *Hurd's Rev. St. 1899*, p. 205, c. 17. Other cases of illegitimacy are provided for by the statute of descent. Section 8 of that act is as follows: "An illegitimate child, whose parents have intermarried and whose father has acknowledged him or her as his child, shall be considered legitimate." *Hurd's Rev. St. 1899*, p. 653, c. 39. The rights of the com-

plainants as heirs of Anthony Pennington are to be determined under the latter statute, and it was necessary for them to establish, by the proof, three facts: First, that Anthony Pennington and Betsy Miller were their parents; second, that their said parents intermarried; and, third, that Anthony Pennington acknowledged them as his children. Each of those facts was clearly and indisputably established by the evidence, and, the conditions of the statute having been fully complied with, they are thereby declared to be legitimate. The fact that the children were the result of adulterous connection makes no difference. *Robinson v. Ruprecht*, 191 Ill. 424, 61 N. E. 631. The civil law excluded illegitimates who are the result of adulterous connections, but the provision which existed in the civil law is not contained in our statute, and, where that is the case, all illegitimates are included. *Garland v. Harrison*, 8 Leigh, 368; *Ives v. McNicoll* (Ohio) 53 N. E. 60, 43 L. R. A. 772, 69 Am. St. Rep. 780.

The argument in support of the decree is to the effect that the acknowledgment required by the statute is a general and public one; that the father must show, by his acts, words, and treatment of the child, that he regards, and desires the public to regard, it as his legitimate offspring; and that all his acts and words, taken together, must show that he intends to make the child legitimate and capable of inheriting his estate. Counsel say that, although Anthony Pennington told many persons that the complainants were his children, he told others that they were not, and that, considering the whole evidence, it cannot be said that he intended they should be included among his heirs. At the time of the marriage of their mother they were grown men with families of their own, and, if the argument were sound as applied to children of tender years, there could be no inference from the fact that they were not received into the family as children, but lived by themselves. We do not understand, however, that we are authorized to add anything to the statute or to enlarge or restrict the meaning of its words, and the statute does not contain the conditions contended for by counsel. They cite cases from California and Iowa, and quote from the decision in the case of *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594, where the acknowledgment was held not to be sufficient under the California statute. The statutes of the different states providing for the legitimation of illegitimate children are widely different, and an examination of that case shows that the statute is entirely different from our own. One provision of the California law is that a child born before wedlock shall become legitimate by the subsequent marriage of its parents, and under that provision no acknowledgment is required. Another provision is that an illegitimate child is the heir of any person who, in writing, signed in the presence of a

competent witness, acknowledges himself to be the father of such child. Another section provides for legitimation without the marriage of the parents, and is as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed, for all purposes, legitimate from the time of its birth." That section relates only to minor children. In *re Pico*, 52 Cal. 84. Under those statutes neither an oral admission nor proof of paternity will constitute an illegitimate child an heir, and the section providing for an acknowledgment requires it to be public, and that the child shall be received by the father as his own with the consent of his wife, if he is married, into his family and otherwise be treated as his child. There must be a public acknowledgment and such treatment as a father would naturally give his child. *Blythe v. Ayres*, 98 Cal. 532, 31 Pac. 915, 19 L. R. A. 40. But there is no such provision in our statute and no requirement for a written acknowledgment, so that an oral acknowledgment, when clearly and satisfactorily proved, is sufficient. So, also, the Iowa Code provides that to entitle an illegitimate child to inherit from the father, the recognition of the child by the father must have been general and notorious or in writing. *Watson v. Richardson*, 110 Iowa, 673, 80 N. W. 407. Our statute does not require either, but is similar to the Indiana statute, which provides that if the father shall marry the mother of a bastard child and acknowledge it as his own, the child shall be regarded as legitimate. In construing that statute, the Supreme Court of Indiana has held that an acknowledgment by the father removes from the child the status of illegitimacy, no matter what the purpose of the acknowledgment was or whether the father intended to make the child his heir, and that it fixes the status of the child, which cannot be changed by anything the mother or father might afterward say. The court said: "Having removed the 'bar sinister,' they cannot replace it." *Brock v. State*, 85 Ind. 397; *Binns v. Dazey*, 147 Ind. 536, 44 N. E. 644. That seems to us to be the correct interpretation of our statute, the purpose of which is to fix the status of the child as legitimate. It seems to us that it would be an unjust and unwarranted construction of the law to say that the father of an illegitimate child, who has legitimated it by marrying its mother and acknowledged it to be his, can thereafter change its status by any subsequent declaration. All that the statute requires in respect to the acknowledgment is that the father shall own or admit the child to be his, and the fact that Anthony Pennington very frequently acknowledged these children to be his is beyond dispute or controversy. It follows that the court erred in dismissing

the bill as to the complainants, who asked for a partition of the lands.

The decree is reversed and the cause is remanded to the circuit court, with directions to grant the prayer of the bill and to enter a decree for the partition of the lands therein described in accordance with the views above expressed.

Reversed and remanded, with directions.

(213 Ill. 132)

RAY v. KEITH et al.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. COURTS—APPELLATE JURISDICTION—CASES INVOLVING FREEHOLD.

Where a writ of attachment is levied upon land as belonging to the attachment defendant, and an interplea alleging that such land is the property of the interpleader, and not of the attachment defendant, is filed, a freehold is put in issue within the meaning of the statute governing appeals to the Supreme Court.

2. ATTACHMENT—LIEN—PRIORITY.

An attachment levied without notice of a prior unrecorded deed creates a lien, which, if perfected by judgment, execution, sale, and deed, will ripen into a legal estate as against the grantee in the unrecorded deed.

3. ATTACHMENT—PLEADING—REPLICATION TO INTERPLEA.

A replication to an interplea in attachment which alleges a levy upon property standing in the name of the attachment defendant, without notice of interpleader's alleged ownership of the property, is good against general demurrer, without further setting up particular facts showing the legality of the levy.

4. SAME—TRIAL—NECESSITY OF JURY.

Where the issue under the pleadings in attachment presents only a question of law, the court need not call a jury under section 29 of the attachment act (1 Starr & C. Ann. St. 1896, p. 462, c. 11), requiring the court upon the filing of an interplea to impanel a jury to try the right of property.

5. APPEAL—HARMLESS ERROR—RULING ON PLEADINGS.

Where the original replication to an interplea in attachment denied interpleader's ownership, and an amended replication admitted such ownership, but alleged a want of notice thereof, the action of the court in entering judgment on demurrer to the amended replication without first disposing of an issue raised by demurrer to the original replication was not reversible error.

Error to Superior Court, Cook County; Jesse Holdom, Judge.

Action by Susan Keith and others, as executors of Edson Keith, deceased, against Moses A. Thayer. Susan O. Ray interpleaded. There was a judgment in favor of plaintiff, and interpleader brings error. Affirmed.

Rehearing denied December 12, 1905.

On October 11, 1898, Susan Keith, Edson Keith, Jr., and Walter W. Keith, as executors of the last will and testament of Edson Keith, deceased, began an action of debt against Moses A. Thayer in the superior court of Cook county, and on December 19th following filed their affidavit for an attachment in aid of said suit, upon which a writ of attachment was duly issued

and levied upon certain real estate in Cook county as the property of the said defendant, Thayer. On December 30, 1899, Susan C. Ray filed an interpleader in said attachment proceeding by which she alleged that the realty levied upon by virtue of said writ of attachment was, at the time the same "was so attached and levied, and still is, the property of her, the said Susan C. Ray, and not of the said Moses A. Thayer." On January 3d following a rule was entered upon the plaintiffs in the attachment suit to plead to said interplea within three days, and leave was at the same time given them to reply double within said time. On January 5th they accordingly filed a general replication traversing the allegations of said interplea, alleging "that said realty attached and levied upon by virtue of said writ of attachment was not at the time the same was so attached and levied upon, and is not now, the property of her, the said Susan C. Ray, in manner and form as the interpleader has above in her said interplea alleged, and this the plaintiffs pray may be inquired of by the country," etc. On January 30th they filed an additional replication, by which they averred "that, at the time the said realty was attached and levied upon by virtue of the said writ of attachment, the title to said real estate stood of record in the said county, in fee simple, in the name of said defendant Moses A. Thayer, and that prior to and at the time of the levy of said attachment plaintiffs had no notice of the alleged ownership of said property by said interpleader." To this additional replication Susan C. Ray filed a general demurrer on February 5th, which, so far as the abstract of the record shows, was not disposed of, but on the 10th of the same month plaintiffs filed an amended additional replication, in and by which they alleged that they ought not to be barred from maintaining their writ of attachment against said property, "because they say that at the time the said realty was attached and levied upon by virtue of said writ of attachment the title to said real estate stood of record in said Cook county, in fee simple, in the name of said defendant, Moses A. Thayer, that at the time aforesaid said defendant was indebted to plaintiffs in a large sum of money, to wit, \$7,000, and that, prior to and at the time of the levy of said attachment, plaintiffs, or any or either of them, had no notice of the alleged ownership of said property by said interpleader." On February 13th Susan C. Ray, the interpleader, filed a general demurrer to the said amended additional replication, and on May 14th the following order and judgment were entered: "This cause coming on to be heard upon the demurrer filed herein by the interpleader, Susan C. Ray, to plaintiffs' amended additional replication, filed February 10, 1900, after argument of counsel and due deliberation by the court said demurrer is

overruled and the interpleader excepts, whereupon said interpleader, Susan C. Ray, elects to stand by said demurrer, wherefore the plaintiffs ought to have judgment on their said additional amended replication. Therefore it is considered by the court that at the time of the issuing and levying of said writ of attachment the said realty so attached and levied upon was not, as against said plaintiffs, the property of the said interpleader, whereupon the interpleader, Susan C. Ray, having entered her exceptions herein, prays an appeal from the above order to the Appellate Court in and for the First District of Illinois, which is allowed on filing her appeal bond in the sum of \$200, to be approved by the court within thirty days from this date." On June 28, 1900, the order granting said appeal was vacated, and subsequently this writ of error was sued out. The assignments of error are: First, the superior court erred in entering the order of May 14, 1900, overruling the demurrer filed February 13, 1900, by Susan C. Ray, plaintiff in error, to the amended additional replication of plaintiffs filed February 10, 1900, and in entering judgment for plaintiffs on their said additional amended replication, because the said replication failed to allege or show the recording of a certificate of levy; second, the superior court erred in entering judgment while a material issue remained undisposed of; third, the judgment as entered did not determine the right of property, was not authorized by law, and was illegal and void.

Bolen & Stewart, for plaintiff in error.
Bayley & Webster (Tenney, Coffeen, Harding & Wilkerson, of counsel), for defendants in error.

WILKIN, J. (after stating the facts). It is insisted on behalf of defendants in error that this court is without jurisdiction for the reason that no freehold is involved; the contention being that, because the interplea does not set up by what title the interpleader claimed to be the owner of the property, she may have a mere possessory right which would not amount to a freehold. The attachment writ was levied upon the property as belonging to the defendant in the attachment; i. e., as the absolute owner thereof. The interpleader claims to be the owner of the same property. By her averment that the property "was, at the time the same was so attached and levied upon, and still is, the property of her, the said Susan C. Ray, and not of the said Moses A. Thayer," she claims the title levied upon; that is, the fee-simple title, and a freehold was thereby put in issue. *Monroe v. Van Meter*, 100 Ill. 347; *Frank v. King*, 121 Ill. 250, 12 N. E. 720; *Ducker v. Wear & Boogher Dry Goods Co.*, 145 Ill. 653, 34 N. E. 562; *Alsdurf v. Williams*, 196 Ill. 244, 63 N. E. 686.

We are inclined to think the first error

assigned by plaintiff in error should be overruled. As will be seen, the only ground for that assignment of error is "because said replication failed to allege or show the recording of a certificate of levy." The demurrer to the replication was general. We have uniformly held that an attaching creditor who levies his attachment without notice of a prior deed, either actual or constructive, acquires a lien which, if perfected by judgment, execution, sale, and deed, will hold the legal estate as against the holder under the unrecorded deed. *Thomas v. Burnett*, 128 Ill. 37, and authorities cited on page 42, 21 N. E. 352, 353, 4 L. R. A. 222. The language of the averment of the replication is "that, at the time the said realty was attached and levied upon by virtue of said writ of attachment, the title to said real estate stood of record in said Cook county, in fee simple, in the name of said defendant, Moses A. Thayer, * * * and that, prior to and at the time of the levy of said attachment, plaintiffs, or any or either of them, had no notice of the alleged ownership of said property by said interpleader." This language, under the general demurrer, must be held to mean a legal levy, and while section 9 of the attachment act (1 Starr & C. Ann. St. 1896, p. 453, c. 11) makes it the duty of the officer making the levy to file a certificate of such fact with the recorder of the county where such land is situated, and provides that after the filing of the same such levy shall take effect as to creditors and bona fide purchasers without notice, and not before, it was not necessary, as between these parties, to allege in the replication that the certificate of levy was filed,—in other words, it was not necessary to set out the various acts by the officer in making the levy.

The court did not err in overruling the demurrer to the amended replication. Section 26 of the attachment act (1 Starr & C. Ann. St. 1896, p. 460, c. 11) provides that the practice and pleading in attachment suits, except as otherwise provided in the act, shall conform, as near as may be, to the practice and pleadings in other suits at law. Applying this section to the pleadings and practice under an interpleader provided by section 29, when the claimant demurred to the amended replication, she admitted the facts therein alleged, and upon overruling that demurrer she further elected to abide by the same, and submitted to the court the question of law whether or not the facts so admitted entitled her to a judgment for the property, or whether it was, under those facts, subject to the attachment. While section 29 requires the court, upon the filing of the interpleader, to immediately, unless good cause is shown by either party for a continuance, direct a jury to be impaneled to inquire into the right of property, when the result of the pleadings is to submit to the court, only a question of law a jury is dispensed with. Therefore the court did not

err in rendering judgment as under that replication, if it had presented the only material issue between the parties; and, while the judgment entered was informal, we are of the opinion that, in substance, it is sufficient and settles the right of property between the parties.

It remains to be seen whether the second error is well assigned; that is, that the superior court erred in entering judgment while a material issue remained undisposed of. As will be seen from the foregoing statement, the first general replication, which simply traversed the interpleader denying that the claimant was, at the time the same was attached and levied upon, or is now, the owner of the property attached, has not been tried either upon demurrer or an issue of fact, and, if in view of the amended additional replication a material issue still remained undetermined under this general replication, then undoubtedly it was error for the court to enter final judgment against the claimant without first disposing of that general replication, unless she in some way waived her right to have that issue disposed of. The record fails to show that she made any objection to the final judgment on the ground that a material issue remained undisposed of. We are of the opinion, however, that the issue presented by the general replication became immaterial under the amended additional replication. By the latter, the plaintiffs admitted, in effect, the allegation of the interplea, but sought to avoid the same by alleging new matter. In other words, their amended additional replication was, in effect, a plea of confession and avoidance; i. e., confessed that Susan C. Ray was the owner of the property attached, but placed their right to the attachment upon the ground that the title to the same stood of record in the defendant in the attachment, and that they had no notice of the claimant's ownership or title. If, therefore, a trial had been had upon the first replication, it would have settled nothing not determined under the amended additional replication. We are of the opinion that there was no reversible error in the proceedings below by reason of the failure to dispose of the issue so made.

The judgment of the superior court will be affirmed.

Judgment affirmed.

(218 Ill. 294.)

ROBERTS v. CITY of EVANSTON et al.
(Supreme Court of Illinois. Oct. 24, 1905.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—STREET IMPROVEMENT—PROPERTY ASSESSED.

In order to authorize a special assessment against property to pay for a street pavement, it is sufficient that the property be presently benefited by the improvement, and it is not necessary that it abut on the street to be paved.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Municipal Corporations, §§ 1038-1044.]

2. MUNICIPAL CORPORATIONS—IMPROVEMENT ASSESSMENT—STATUTORY REQUIREMENTS—AFFIDAVIT.

Local Improvement Act June 14, 1897, § 19 (4 Starr & C. Ann. St. Supp. 1902, p. 164), requiring an affidavit of the superintendent of assessments as to the making and filing of an assessment roll, stating that affiant examined the records for the names of owners of property against which benefits were assessed, that the names of such owners were correctly shown, and the residence correctly stated, etc., applies only to assessments for improvements involving the taking or damaging of property.

3. SAME—PROCEEDINGS—FILING OF PLAT.

A plat filed with an assessment roll and petition in paving assessment proceedings is mere surplusage, and the failure of such plat to show the lots of a certain objector does not affect the validity of the judgment of confirmation.

4. SAME—NOTICE—PRESUMPTION.

Under Local Improvement Act June 14, 1897, § 41 (4 Starr & C. Ann. St. Supp. 1902, p. 174), requiring the mailing of a notice to each person paying taxes on the respective parcels during the last preceding year in which taxes were paid, the person to whom notice was given will be presumed to have been the last party to pay taxes.

5. CONSTITUTIONAL LAW—DETERMINATION OF CONSTITUTIONAL QUESTION—PRESENTATION BY PLEADING.

Where a bill charges a designated section of a statute to be unconstitutional on specified grounds, the question of the constitutionality of another section, not specially referred to, to which the objections might have applied, is not presented for consideration, if the designated section is found not subject to the objection urged against it.

Error to Superior Court, Cook County; Willard McEwen, Judge.

Action by Charles H. Roberts against the city of Evanston and others. From a decree of dismissal, complainant appeals. Affirmed.

Rehearing denied December 12, 1905.

Charles H. Roberts, for plaintiff in error.
Edwin L. Harpham, for defendants in error.

PER CURIAM. This is a bill in chancery for an injunction, filed by plaintiff in error on August 17, 1903, in the superior court of Cook county to enjoin the sale of three lots, fronting on West Railroad avenue in the city of Evanston, to wit, lots 4, 5, and 6 in block 16, in North Evanston, in the city of Evanston, Cook county, Ill., under a judgment had in a special assessment proceeding for the paving of Harrison street in Evanston, and, as to said lots alleged to belong to said Roberts, to declare said judgment nugatory and void. Defendants filed a general demurrer to the bill as originally framed and as subsequently amended. The demurrer to the bill was sustained, the temporary injunction dissolved, and the bill dismissed. The present writ of error is prosecuted from such decree of dismissal.

Plaintiff in error claims that the court below erred in holding his lots subject to the special assessment, because they abutted on Railroad avenue, and did not abut on Harrison street, for the paving of which latter street the special assessment was levied. In

other words, it is claimed by plaintiff in error that property cannot be specially assessed for the paving of a street, unless it abuts upon the street so paved. Such is not the law. In *Rich v. City of Chicago*, 152 Ill. 18, 27, 38 N. E. 255, 257, we said: "It is also objected that the assessment is void because it includes lots not abutting on Seventy-third street, in which the sewer is ordered to be laid. In special assessment it is not essential that the property assessed should be contiguous to, or abutting upon, the improvement. It is sufficient that the property be presently specially benefited." *Holdom v. City of Chicago*, 169 Ill. 109, 48 N. E. 164; *Farnelee v. City of Chicago*, 60 Ill. 267; *Fagan v. City of Chicago*, 84 Ill. 227; *Illinois Central Railroad Co. v. City of Kankakee*, 164 Ill. 608, 45 N. E. 971.

It is next insisted by the plaintiff in error that the affidavit, filed by the superintendent of assessments of the city of Evanston as to the making and filing of the assessment roll, as to the contents of the assessment roll, as to the notice given, etc., is insufficient. It is claimed to be insufficient upon the alleged ground that it omits the following statutory requirements, to wit: That the affiant carefully examined the records of the recorder's office for the names of owners of record of the several lots, blocks, etc., against which benefits were assessed in the report; that the names of such owners were correctly shown in the schedule of ownership in the report; that he has diligently inquired as to the residence of the respective owners, specifying the nature of the inquiry made for that purpose; that the residences are correctly stated according to the result of the inquiry; that, where unable to find the residence of the owner, he has examined the collector's warrant for the preceding year. These are the requirements set forth in section 19 of the "Act concerning local improvements," of June 14, 1897 (4 Starr & C. Ann. St. Supp. 1902, p. 164), and counsel in his brief specially refers to said section 19 as the section, whose requirements are omitted from the affidavit. Section 19 is one of the sections of the improvement act which is applicable where the ordinance provides for an improvement that requires the taking or damaging of property. In the case at bar it is not alleged that there was any taking or damaging of property belonging to plaintiff in error, and therefore the requirements of section 19 have no application here, and consequently the affidavit was not insufficient on account of the omission of such requirements. The section, applicable to the case at bar in this respect, is section 41 of the improvement act (4 Starr & C. Ann. St. Supp. 1902, p. 174); but counsel for plaintiff in error in his brief makes no reference to section 41, and charges no defect in the affidavit on account of the omission of any of the requirements of section 41.

Counsel for plaintiff in error also assigns

as error that his lots were not shown on a plat alleged to have been filed in the tax proceedings with the assessment roll. It is said that the petition in the county court was controlled, as a bill in equity, by the plat as an explanatory exhibit. Counsel has not made it appear to us in any way that such a plat is a necessary part of an assessment proceeding. It adds nothing to the force of the petition in such tax proceeding whether it is incorporated in and added thereto, or whether it is omitted therefrom. It is not an essential part of a petition to assess, and hence its addition would be mere surplusage. Section 37 of the improvement act provides that there shall be attached to, or filed with the petition, a copy of the ordinance certified by the clerk under the corporate seal, also a copy of the recommendation of the board of local improvements, and of the estimate of of the cost as approved by the legislative body; but said section also provides that the failure to file any or either of said copies shall not affect the jurisdiction of the court to proceed in said cause, and to act on said petition. 4 Starr & O. Ann. St. Supp. 1902, p. 172. The ground of error thus alleged is without force.

Counsel for plaintiff in error also charges in his bill, as amended, that the assessment was not made by due process of law, and that said act is unconstitutional, and, as to special assessments of nonabutting real estate, invalid, upon the alleged ground that it provides for taking property without notice and without due process of law. Counsel thus charges that the whole act, as we understand his position, in regard to local improvements, is unconstitutional, but states no specific ground upon which the act is claimed to be unconstitutional. He asserts that the court acquired no jurisdiction over him, because he was not served with notice as the owner of the property. Section 41, above referred to, provides for the giving of notice by mail "to each of the said persons, paying the taxes on the respective parcels during the last preceding year, in which taxes were paid." It appears from the allegations of the bill that notice was served upon one Jacob Glos, and the presumption is that he was the last party paying the taxes. So far as is shown upon the face of the judgment, therefore, the statutory requirement as to notice was complied with. The allegations of the bill are not sufficient to raise the question as to the constitutionality of this section 41 upon the ground that it requires notice to the person paying the taxes during the last preceding year upon the property assessed, and not to the owner of the property. Section 19, which is the only section of the act specifically referred to by number in the argument of counsel for plaintiff in error, does provide for notice to the owner, and, as the allegations of the bill are framed in such a way as to appear to attack the constitutionality of that section, and not of section 41, they

must here be regarded as being without force and untenable.

For the reasons above stated, we are of the opinion that the court below committed no error in sustaining the demurrer to the bill and dismissing the same. Accordingly, the decree of the superior court of Cook county is affirmed.

Decree affirmed.

(218 Ill. 189)

FREUND et al. v. FREUND.

(Supreme Court of Illinois. Oct. 24, 1905.)

1. INSURANCE — CHANGE OF BENEFICIARY — STATUTORY PROVISION.

A New York statute (Laws 1892, p. 2015, c. 690, § 211) requiring the consent of the insurance company to a change of beneficiary by insured becomes a part of a New York policy issued while such statute is in force, and is controlling on the subject covered thereby, although the policy is silent concerning the same.

2. SAME—PROVISIONS OF POLICY.

Where an insurance policy provides that no change in beneficiary shall take effect until indorsed on the policy by the company at its home office, a change in the beneficiary cannot be accomplished until the prescribed conditions are fulfilled.

3. SAME—PROVISIONS OF POLICY—WAIVER.

The act of an insurance company in furnishing to the insured at a branch office forms of notice to change the beneficiary does not constitute a waiver of a requirement of the policy that the change of beneficiary be made by the company at its home office.

4. SAME — INCOMPLETE CHANGE OF BENEFICIARY—RIGHTS OF PARTIES.

Under Laws N. Y. 1892, p. 2015, c. 690, § 211, requiring consent of a life insurance company to a change of beneficiary, and under a policy requiring such consent to be indorsed on the policy by the company at its home office, equity will not effect a change of beneficiary attempted to be made by insured, but not completed in accordance with the statute and policy at the time of his death.

5. SAME.

The rights of a beneficiary in a life insurance policy become fixed at the death of insured, and are not affected by a contemplated change of beneficiary, which insured had intended to make, but which had not been perfected in accordance with the statute and terms of the policy at the time of his death.

6. SAME—WAIVER AS AGAINST BENEFICIARY.

An insurance company cannot, after the death of insured and the consequent vesting of the rights of the beneficiary, waive, as against the beneficiary, provisions of the policy relative to change of beneficiary.

7. SAME.

The act of an insurance company in filing a bill of interpleader and paying the proceeds of the policy into court cannot be urged by either of the claimants as against the other as a waiver by the company of noncompliance by insured with provisions of the policy for changing the beneficiary.

Appeal from Appellate Court, First District.

Bill of interpleader by the New York Life Insurance Company against Henry Freund and another and Bertha Freund. From a judgment of the Appellate Court, reversing the decree rendered by the superior court, defendants Henry Freund and another appeal. Reversed.

Rehearing denied December 13, 1905.

This is a bill of interpleader filed on July 17, 1902, in the superior court of Cook county by the New York Life Insurance Company against appellants and appellee, setting forth that on June 10, 1901, the New York Life Insurance Company of the state of New York issued a policy of insurance upon the life of Josef Freund of Chicago in the sum of \$5,000, payable to Bertha Freund, the wife of the insured, or to such other beneficiary as may have been duly designated at the home office of the company in the city of New York, immediately upon receipt and approval of proofs of the death of Josef Freund, the insured, of Chicago, Cook county, Ill.; that on January 10, 1902, by written notice to the company, the insured changed the beneficiary in the policy to Karl Freund, his son; that afterwards, on January 22, 1902, by written notice to the company, the insured changed the beneficiary in said policy to Bertha Freund, his wife, the first beneficiary; that afterwards, on May 16, 1902, by written notice to the company, the insured changed the beneficiary to Karl Freund, his son; that afterwards, on June 16, 1902, the insured presented the policy at the office of the New York Life Insurance Company in Chicago, together with another written statement or order of change, changing the beneficiary in the policy to Bertha Freund, his wife; that on June 17, 1902, Josef Freund died, and the policy ripened into a claim against the company by his death for \$4,891.80, \$108.70 being due to the company for premiums; that the complainant life insurance company is willing to pay said sum to the parties entitled to the same; that appellee, the wife of the deceased, claims the payment of said fund to her as beneficiary, and that the appellants, as legally appointed guardians of the estate of the minor child, Karl Freund, claim said sum as belonging to said minor, and not to Bertha Freund. The bill asks that the sum be brought into court to be applied as the court shall direct, etc. The bill prays that the defendants may interplead, and settle, and adjust their demands between themselves; the complainant agreeing to pay said sum to such of the parties as the court may decree that it rightfully belongs to. The bill was answered by Bertha Freund, claiming the fund in her own right, and by the appellants, as guardians of the minor child, claiming the fund for him. The company paid the money into court. On April 4, 1903, the superior court entered a decree finding that the fund belonged to appellants, as guardians of the estate of the minor, and ordering that the money be paid to them, and that the company, the complainant below, be discharged and released from further liability, and the suit be dismissed as to the appellee for want of equity, and denying all relief prayed. An appeal was taken from the decree of the superior court to the Appellate Court for the First District, where the decree below was reversed, and the Appellate Court

entered a judgment, reversing the decree of the superior court, and remanding the cause to that court, "with directions to that court to enter a decree awarding the fund mentioned in the bill to Bertha Freund individually." The present appeal is prosecuted from the judgment so entered by the Appellate Court.

Max Robinson, for appellants. Castle, Williams & Smith (Arista B. Williams, of counsel), for appellee.

MAGRUDER, J. (after stating the facts). The question in this case is whether the fund in controversy belongs to the appellants, as guardians of the estate of the minor child, Karl Freund, son of the deceased, Josef Freund, the insured party named in the insurance policy, or whether it belongs to the appellee, Bertha Freund, the widow of the deceased, Josef Freund.

The instrument of insurance in this case was a policy of insurance issued by the New York Life Insurance Company, and not a benefit or endowment certificate. The matter to be determined is whether the last change of the beneficiary, attempted to be made by the insured party on June 16, 1902, was valid, and had the effect of making the wife the beneficiary, or whether the son, who was theretofore the beneficiary, still remained so after the death of the insured on June 17, 1902. The laws of New York—the state where the contract of insurance was made—were introduced in evidence, and section 211 in the article on insurance in the Code of New York (Laws 1892, p. 2015, c. 690) is as follows: "Membership in any such corporation, association or society shall give to any member thereof the right at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries."

The policy of insurance upon the life of Josef Freund for \$5,000 contained the following provisions:

"Change of Beneficiary.—The insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company at its home office, accompanied by this policy, such change to take effect on the endorsement of the same upon the policy by the company. If there is no beneficiary living at the death of the insured, the amount then insured by this policy shall be paid to the executors, administrators, or assigns of the insured," etc.

"General Provisions of Policy.—No. 1. Only the president, a vice president, the actuary, or the secretary has power in behalf of the company to make or modify this or any contract of insurance, or to extend the time for paying any premium; and the company shall not be bound by any promise

or representation heretofore or hereafter given by any person other than the above."

Indorsed on the policy, also, was the following: "Each selection, change, or revocation of a selection shall be made by the insured in writing, and shall not take effect until indorsed on this policy by the company at the home office." The first written notice, signed by the insured, Josef Freund, at Chicago on January 10, 1902, and addressed to the insurance company at Broadway, N. Y., recites as follows: "The beneficiary under the accompanying policy, * * * in accordance with the change of beneficiary clause thereof, is hereby changed from Bertha Freund, wife, to Karl Freund, son. The policy is not now assigned." There was a witness to this written notice of change, and it was forwarded from the branch office at Chicago to the home office in New York on January 11, 1902. The next notice, signed by the insured, dated at Chicago, January 22, 1902, and addressed to the insurance company, was of the same tenor and effect, and changed the beneficiary from Karl Freund, son, to Bertha Freund, wife, and was forwarded from the branch office in Chicago to the home office in New York, and received by the latter on January 24, 1902. The third written notice, signed by the insured and dated May 16, 1902, witnessed and addressed to the insurance company, was of like tenor and effect, except that the beneficiary was changed from Bertha Freund, wife, to Karl Freund, son, and was forwarded from the Chicago clearing house of the company to New York, and received in the latter city by the home office on May 19, 1902. The company at its home office in New York, upon receiving the first notice of change dated January 10, 1902, made a written indorsement upon the original policy of that date, signed by its assistant secretary, in the following words: "By written notice to the company the insured has changed the beneficiary of this policy to Karl Freund, his son." After the receipt at its home office in New York of the second notice of change dated January 22, 1902, the company made a written indorsement upon the original policy, signed by its assistant secretary, as follows: "By written notice to the company, the insured has changed the beneficiary of this policy to Bertha Freund, his wife." After the receipt of the third notice of change dated May 16, 1902, by the company at its home office in New York, it made a written indorsement upon the policy, signed by its assistant secretary, in the following words: "By written notice to the company, the insured has changed the beneficiary of this policy to Karl Freund, his son."

It is conceded that by the written notice of May, 16, 1902, and by the written indorsement of that day upon the original policy as above set forth, Karl Freund, the son, was made, under the terms of the policy, the beneficiary then entitled to the fund.

Upon the death of the insured, Josef Freund, Karl Freund was the legal beneficiary and entitled to the fund, unless the next change, sought to be made on June 16, 1902, was effectual in making the appellee, wife of the insured, the real beneficiary. When the deceased Josef Freund, the insured party, took the policy to the local office of the company in Chicago and left there the written notice dated June 16, 1902, signed by himself, for a change of beneficiary from Karl Freund, son, to Bertha Freund, wife, he received the following receipt: "Chicago, Ill., 6/16/1902. 1118 New York Life Building. Received of Joseph Freund the papers listed below for transmission to the New York Life Insurance Company for change of beneficiary. Policy No. 3,157,265. F. A. Jackson, per Hunt, Cashier."

As has been before stated, the assured died on the next day, to wit, June 17, 1902. The policy and the written notice of June 16, 1902, were forwarded from the Chicago clearing house branch office by F. A. Jackson, cashier, on June 19, 1902, two days after the death of the assured, and were received at the home office in New York on June 21, 1902. But no indorsement was made upon the policy, such as was made when the other changes already indicated were requested by the assured. That is to say, no indorsement of the written notice, given by the assured dated June 16, 1902, was ever made by the company at its home office or anywhere else upon the original policy. The position of the appellants is that, under the statute of New York, the assured Josef Freund had no right to change the beneficiary in the policy without the consent of the company; that such consent, under the terms of the policy, could only be indicated by an indorsement on the policy by the company at the home office, and could only take effect when the indorsement of the same upon the policy was made by the company at its home office; and that in this case, as this was not done in the matter of the attempted change of the beneficiary from the son to the wife on June 16, 1902, the latter had no right to claim the fund. On the contrary, the appellee's claim is that, under the terms of the policy, the assured had the right to change the beneficiary, and that inasmuch as he went to the company's office in Chicago on June 16, 1902, and left a written notice of a change of beneficiary from the son to the wife, and at the same time left the original policy there for the purpose of having it transmitted to the home office in New York, he did all that he could do, or was required to do, in order to change the beneficiary, and that, although he died before the company acted upon the last notice of change, yet that equity will decree that to be done which ought to be done, and will act as though the change was complete, and that for this reason the wife, appellee herein, is entitled to the fund in question.

First. It is said by counsel for the appellee that there is nothing in the insurance policy issued to Josef Freund which required the consent of the company to the change of the beneficiary. It is true that in the policy itself, which is the contract between the company and the assured, there are no express words requiring the consent of the company; but the statute of the state of New York provides in substance that the assured shall have "the right at any time with the consent of such corporation, association or society to make a change in his payee or payees, or beneficiary or beneficiaries without requiring the consent of such payee or beneficiaries." This provision of the New York statute, being section 211 of the article on insurance in the New York Code, which is admitted to have been in force in New York when the policy here in question was issued, became a part of the contract, embodied in the policy by implication, with the same effect as if it had been embodied in the policy itself. *Havens v. Fire Ins. Co.*, 123 Mo. 417, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570; *Christian v. Insurance Co.*, 143 Mo. 460, 45 S. W. 268; *Ritchie v. Home Ins. Co.* (Mo. App.) 78 S. W. 342. All stipulations of the policy must yield to the statute. *Havens v. Fire Ins. Co.*, *supra*. Inasmuch, therefore, as the provision of the New York statute thus quoted is by implication a part of the policy or contract, this policy is to be regarded as one which requires the consent of the company to the change, the same as though the provision of the statute was written into the policy itself. In addition to the fact that the consent of the company was thus required, the policy provides that the change of beneficiary shall be made by the insured in writing, "and shall not take effect until indorsed on this policy by the company at the home office." Evidently the policy or contract, in recognition of the requirement of the statute as to consent, provides for an indorsement upon the policy by the company at the home office, as evidence of the company's consent to the change of the beneficiary. This is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid and should not be enforced as made. The proof in this case shows clearly and without dispute that the company never did give its consent to the change of the beneficiary from the son to the wife, as attempted to be made by the writing of June 16, 1902, and that the company never did make the indorsement required by the contract upon the policy at its home office, or at any other place. Therefore the change did not take effect.

It is said, however, that the printed forms, dated as of the respective dates already indicated, upon which the assured directed that the changes be made, were prepared by the company and furnished to the assured by the company, and that these printed forms by their terms indicate that, as soon as the in-

sured signed one of them, the consent of the company to the change was thereby indicated. We cannot concur in this view. The printed forms, signed by the insured, and by which he made known to the company his intention to change the name of the beneficiary, are to be considered in connection with the language of the policy or contract itself between the company and the assured. The policy provides that "the insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company at its home office, accompanied by this policy, such change to take effect on the indorsement of the same upon the policy by the company." The written statement of change of the beneficiary, thus signed by the assured, is designated in the policy or contract as a "written notice to the company at its home office." It being only a notice to the company as to the change desired, it cannot be said that the mere signing of the written notice by the assured at the branch office accomplished the change. This view is further strengthened by the language of the receipt given by the cashier at the Chicago office to the assured on June 16, 1902, when he left the policy and the written notice with the cashier. The language of the receipt is: "Received of Josef Freund the papers listed below for transmission to the New York Life Insurance Company for change of beneficiary." They were to be transmitted that a change might be made thereafter. The mere fact that they were left with the branch office to be forwarded to the home office did not accomplish the change of beneficiary without action by the home office any more than was such change accomplished by the signing of the written notice by the assured. In addition to this, the policy provides that such change was to take effect only upon the indorsement of the same upon the policy by the company. In one clause of the policy this language is used, to wit: "Such change to take effect on the indorsement of the same upon the policy by the company." In another clause of the policy the following language is used: "Each * * * change * * * of a selection shall be made by the insured in writing, and shall not take effect until indorsed on this policy by the company at the home office." As if to enforce the fact that the change is only to take effect by reason of the indorsement, the provision in relation thereto is set forth twice in the policy; once in the affirmative, and a second time in the negative. If it was only to take effect when the indorsement was made by the company upon the policy at its home office, it cannot be said that the change was effected before such indorsement was made by anything done at the branch office by the assured, or by the employé of the company there, whose duty it was to forward the papers for the purpose of having the change made. We are, therefore, of the opinion that

the change of the beneficiary could only be made with the consent of the company and in the manner pointed out by the statute and by the insurance policy. This was not done in the present case.

Second. It is to be noted that this is an insurance policy issued by an insurance company, and is not a benefit or endowment certificate issued by a fraternal society. The right of the assured to change the name of the beneficiary would seem to exist in the case of mutual benefit insurance fraternities, where the contract does not take away the power to change the beneficiary. *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961. But there is a well-recognized distinction between certificates issued by a mutual benefit society and an ordinary life insurance policy. The right of the assured to change the beneficiary does not exist as a general thing in the case of an ordinary life insurance policy. *Delaney v. Delaney*, supra. In the present case, where the policy was issued by a New York company and must be governed by the laws of that state, the right of the assured to change the beneficiary is a qualified right; that is, subject to the consent of the company and to the indorsement upon the policy by the company at its home office. The tendency of the decisions in the state of New York, when carefully examined, is to sustain the rule that a change of beneficiary cannot be accomplished, except by compliance with the provisions of the statute and in the contract for such change, and only by and with the consent of the company. *Thomas v. Thomas*, 181 N. Y. 206, 80 N. E. 61, 27 Am. St. Rep. 582; *Fink v. Fink*, 171 N. Y. 622, 64 N. E. 506; *Hellenberg v. District No. 1 of I. O. of B. B.*, 94 N. Y. 580; *Story v. Williamsburg M. M. B. Ass'n*, 95 N. Y. 476; *Tillman v. John Hancock Mutual Life Ins. Co.*, 27 App. Div. (N. Y.) 892, 50 N. Y. Supp. 470; *Gladding v. Gladding* (Sup.) 8 N. Y. Supp. 880; *Ireland v. Ireland*, 42 Hun. 216. In *Olmstead v. Benefit Society*, 37 Kan. 96, 14 Pac. 451, the court said: "If we assume, as the authorities appear to hold, that a member of a co-operative society retains the power to change the beneficiary, still he cannot exercise his power, except with the consent of the society and in conformity with the rules and regulations of the society." In *Hellenberg v. District No. 1 of I. O. of B. B.*, 94 N. Y. 586, the court held that the death of the insured, however sudden or unexpected, in no manner excused this prior necessity of completing the change of beneficiary prior to his decease. In *Thomas v. Thomas*, supra, the court said: "Undoubtedly the assured in this case acted in good faith and from the best motives. * * * Very likely he believed that he had so far modified his first appointment of a beneficiary as to include his wife therein, and that, if he had supposed any action on the part of the corporation was necessary, it would have been sought and obtained. But it is not a case where equity can interfere to remedy a de-

fective execution of a power. * * * The insurance company did not in the lifetime of the insured assent to the change of the beneficiary." In *American Legion of Honor v. Smith*, 45 N. J. Eq. 472, 17 Atl. 772, it was said: "No person can successfully assert a right to the fund payable on the death of a member, unless he can show that he has been appointed the beneficiary of such member in the manner required by the contract, and that, in cases where the contract requires the assent of the corporation to his designation, he will acquire no right to the fund, unless such assent be given." See, also, *National Mutual Aid Society v. Lupold*, 101 Pa. 111; *Wendt v. Legion of Honor*, 72 Iowa, 685, 34 N. W. 470; *Jinks v. Banner Lodge*, 139 Pa. 418, 21 Atl. 4; *Mutual Life Ins. Co. v. Watson* (C. C.) 30 Fed. 658; *McLaughlin v. McLaughlin*, 104 Cal. 176, 37 Pac. 865, 43 Am. St. Rep. 83; *Grand Lodge of A. O. U. W. v. Gandy*, 63 N. J. Eq. 692, 53 Atl. 142. In the case at bar, the attempted change of June 16, 1902, from the son to the wife was not made in accordance with the provisions of the statute and the contract.

Third. It is insisted, however, on the part of the appellee that if the insured does all that he is required to do, and all that it is in his power to do, and dies, equity will declare the change complete. In other words, it is said that in the case at bar Josef Freund took his written notice of change and his policy on June 16, 1902, to the cashier at the local branch office in Chicago, and delivered them to him, to be forwarded to the home office in New York for the requisite indorsement; and that, although he died on the next day, June 17, 1902, he had done all that he was required to do, and that nothing remained for the company to do, except the formal act of making the required indorsement upon the policy. Whether this rule laid down in some of the cases applies here depends upon several considerations. In the first place, it must be true that the company was obliged to make the indorsement upon the policy upon the ground that the making of such indorsement was a merely formal act, not requiring the exercise of any discretion. The question then arises whether or not the making of such indorsement was merely a ministerial act. It is said in *Joyce on Insurance* (volume 2, § 751): "As a general rule, it is probably true that if the assured has taken all the steps necessary, and otherwise done all in his power to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the officers of the society, then the change will be regarded as complete." In *Niblack on Accident Insurance and Benefit Societies* (2d Ed.) § 223, it is said: "When a member has done all that he is required to do under the contract to effect a change of beneficiaries, the change will be deemed complete, even though some ministerial acts of the officers of the society are still to be per-

formed." A ministerial act may be defined to be "one which a person performs upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of doing the act." 20 Am. & Eng. Ency. of Law (2d Ed.) p. 793.

In the case at bar the company, under the statute, was required to give its consent to the change, and under the contract the company could only indicate its consent to such change by an indorsement in writing upon the policy at the home office. Certainly the statute meant something, when it stated that the right of the assured to change the beneficiary was dependent upon the consent of the company. The giving of consent is not a mere ministerial act, because it involves the exercise of judgment. We do not construe the New York statute as requiring the company to give its consent independent of the exercise of any judgment on its part whether it was right or proper to give such consent. Therefore the act here required to be done by the company not being a mere ministerial act, the principle invoked does not apply. The principle thus invoked by counsel for appellee, that when the assured has done all that he is required to do, and dies, equity will declare the change complete, is not really a rule, but is an exception to the general rule that the change can only be accomplished in compliance with the provisions relating to such change by and with the consent of the company. Most of the cases cited in support of this exception to the rule are cases in relation to certificates issued by fraternal or benefit insurance societies. In many of these cases the assured was required to surrender the old certificate that had been issued to him before a new certificate was issued, and the facts showed that the beneficiary had refused to surrender the old certificate, so that the insured was unable to deliver it up to the company when he applied for a new certificate; and in such cases it was held that the assured had done all he could do, and that it would be inequitable to allow a beneficiary to take advantage of his own wrong. No such state of facts exists here.

In the next place, although it may be true that the beneficiary has no vested right in the fund named in the policy during the life of the assured, and has no greater interest than a mere expectancy, yet, when the assured dies, the beneficiary acquires rights which cannot be cut off, except in the manner prescribed by the contract. If no other valid appointment has been made—that is to say, if no other selection of a beneficiary has been made in the manner prescribed by the statute and the contract before the assured dies—then upon his death the beneficiary whose selection was valid, or was in accordance with the provisions of the statute and the contract, has a vested interest in

the fund. So, in the case at bar, although the interest of the son, Karl Freund, was a mere expectancy during the lifetime of his father, yet, when his father died on June 17, 1902, the son's interest became a vested one, because the change sought to be made in favor of his mother had not been made in accordance with the provisions of the statute and the contract, and did not amount to a valid appointment. This is the rule in the case of a mutual benefit society, and is much more readily applied in case of a regular insurance policy issued by an insurance company. In Niblack's Work on Accident Insurance and Benefit Societies (2d Ed. § 218), it is said: "The power reserved to the member to change the beneficiary qualifies the right of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power to revoke the appointment continues; but this expectancy becomes an absolute right upon the death of the member, unless he has, in the manner prescribed, defeated it by the affirmative act of changing the beneficiary." This doctrine is sustained by many of the authorities, already referred to and quoted from. Such is the rule as laid down by the decisions in this state. In *Martin v. Stubbings*, 128 Ill. 337, 18 N. E. 657, 9 Am. St. Rep. 620, where the contest was between the widow of the deceased and a creditor, it was held that in the case of mutual benefit societies the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member until such death occurs, and that all the beneficiary has during the life of the member, owing to the right of revocation in the latter, is a mere expectancy dependent upon the will and act of the holder of the certificate; and it was there said: "She was to all intents and purposes a stranger to the transaction. Her rights could arise only upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place." In *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 989, it was held that the person designated in the certificate of membership of the assured during the lifetime of the latter has no vested interest in the certificate or the money that may become payable thereunder, and that the position and rights of the beneficiary become vested at the death of the assured; and it was there said: "Her title to the position and rights of beneficiary became vested, if at all, at Benton's death, and must depend upon the facts as they then existed." So, here, the rights of Karl Freund, the son, depend upon the facts as they existed at the time of the death of his father, and the rights of appellee, the wife of the assured, must depend upon the facts as they then existed. This being so, Karl Freund, the son, was the legal beneficiary, and the attempted appointment of the wife on June 16, 1902, had not become complete by rea-

son of the failure of the company to consent thereto and to make the indorsement upon the policy, as required thereby.

Fourth. It follows from this that under the facts of this case there was no waiver by the company of its right to give its consent in the way required by the statute and the policy. It is said by counsel for appellee that the provisions in regard to consent and indorsement, and in regard to the mode of changing the name of the beneficiary, were solely for the protection of the company, and therefore could be waived by the company. This is true, provided the acts, alleged to amount to a waiver, were performed during the lifetime of the assured; but the company could not perform any acts, which would amount to a waiver as against the son, Karl Freund, after his rights had vested by the death of his father. The contention is that the company, by filing the present bill of interpleader and paying the money into court, thereby waived a noncompliance with the provisions for a change of beneficiary. But the filing of the bill for interpleader was an act which occurred long after the death of the assured, Josef Freund. Some of the authorities seem to hold that the filing of such bill of interpleader amounts to a waiver even after the death of the assured, but these are cases which arose where there was no such statute as that of New York, here quoted, and where the fact that the rights of the beneficiary had become vested by reason of the death of the assured seems to have been overlooked. In Niblack's work on Accident Insurance and Benefit Societies (2d Ed. § 222) it is said: "The member and the society may, during the life of the member, waive these requirements, and may agree upon a new beneficiary of the contract in any manner satisfactory to both parties. It does not follow, however, that after the death of a member the society may waive these requirements and recognize as valid an attempted change of beneficiaries, made by the member in a manner different from that set forth in the contract. The rights of the parties are controlled by the contract as it was at the date of the death of the member, and, after these rights have attached by the death of the member, no consent or act of the society can defeat or even affect them. * * * The payment of the fund into court for the benefit of the person who may be declared to be entitled to it in no way improves or prejudices the legal position of either the original or the substituted beneficiary." See, also, *Fink v. Fink*, 171 N. Y. 623, 64 N. E. 506; *Thomas v. Thomas*, 131 N. Y. 210, 30 N. E. 61, 27 Am. St. Rep. 582; *Wendt v. Legion of Honor*, 72 Iowa, 686, 34 N. W. 470. In *Ballou v. Gile*, 50 Wis. 619, 7 N. W. 563, it was said: "The fact that the association had paid the money into court, instead of paying it directly to the widow to avoid litigation with other claimants, can make no difference as

to the rights of the persons claiming the same. If the appellant could not have recovered this money in a direct action against the association, he cannot recover it in this action." In *Ireland v. Ireland*, 42 Hun, 214, it was said: "The insurance association was thus allowed to drop out of the contest upon the theory that it was ready to pay the rightful claimant. Its payment of the money does not in any way better or prejudice the legal position of either party against the other. The party that succeeds must make a case that would have entitled her to succeed against the association." So, in the case at bar, the mere fact that the company paid the money into court to be disposed of as the court should direct cannot operate as a waiver of any of the vested rights of Karl Freund which accrued by reason of the death of his father. The waiver by the company can only operate in favor of the assured as between the company and the assured, but not as between the company and the third persons, whose rights have vested by the death of the insured.

For the reasons above stated, we are of the opinion the decree of the superior court of Cook county was correct, and that the judgment of the Appellate Court reversing the decree was erroneous. Accordingly, the judgment of the Appellate Court is reversed, and the decree of the superior court is affirmed.

Judgment reversed.

(183 N. Y. 623)

FLYNN v. McDERMOTT.

(Court of Appeals of New York. Nov. 21, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ASSETS—COLLECTION.

Where a widow, entitled to a legacy under her husband's will in lieu of dower, dies within a year without having exercised her right of election under the real property act (Laws 1896, p. 586, c. 547, §§ 180, 181), the right to collect the legacy is vested in her executor.

2. WILLS—ELECTION BY WIDOW—WHAT CONSTITUTES.

An action by a widow to contest the probate of her husband's will is not an election to take dower if the will is set aside, or take the devise under the will if it is sustained.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 2050.]

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Paul V. Flynn, executor of Mary M. McDermott, against Michael F. McDermott, executor of John McDermott. From a judgment of the Appellate Division (89 N. Y. Supp. 506, 92 N. Y. Supp. 1123, 102 App. Div. 56) on an order affirming a judgment for plaintiff, entered on a decision of the court at Trial Term, defendant appeals. Affirmed.

Bertram L. Kraus and Henry B. Wesselman, for appellant. Thomas F. Magner, for respondent.

BARTLETT, J. This is an action against the estate of John McDermott, deceased, brought by the executor of the widow, Mary M. McDermott, to recover a legacy in her favor under her husband's will. John McDermott died on the 18th of March, 1902, leaving a last will and testament which was executed on June 19, 1900. The third and fourth subdivisions of the will read as follows: "Third. I give, devise, and bequeath to my beloved wife, Mary M. McDermott, the sum of nine thousand dollars in cash to be paid to her by my executor and trustee hereinafter named out of my estate within one year after my decease, with legal interest thereon, to be computed from the day of my death until such payment shall be made by my said executor and trustee to my said wife, Mary M. McDermott. Fourth. The above legacy of nine thousand dollars, and the one-half of said policy of insurance hereinbefore mentioned I hereby declare is given to my said wife in full satisfaction and for and in lieu of her dower or thirds which she can in anywise claim or demand or which the statutes of the state of New York give to her and which she might in any way claim out of my estate." The will of John McDermott was duly proved on the 26th of March, 1902. On the 12th of July, 1902, his widow, Mary M. McDermott, instituted an action in the Supreme Court to determine the validity of the probate of the will, which action was pending on the 11th of September, 1902, when said Mary M. McDermott died. The will of the widow was duly proved soon after her death. The death of the widow occurred within the statutory year allowed her for election to take the provisions of the will in lieu of dower, and without her having exercised the same.

Section 180 of the real property law (Laws 1896, p. 586, c. 547) reads as follows: "If real property is devised to a woman, or a pecuniary or other provision is made for her by will in lieu of her dower, she must make her election whether she will take the property so devised, or the provisions so made, or be endowed of the lands of her husband; but she is not entitled to both." It is provided in section 181, in substance, that, where a woman is entitled to an election, she is deemed to have elected to take under the provisions of the will, unless within one year after the death of her husband she enters upon the lands assigned to her for her dower, or commences an action for the same. This presumption does not apply in the present case, as the widow died within the year. After the expiration of the year from the death of John McDermott, due demand having been made by the executor under the will of the widow for payment of her legacy, this action was commenced to enforce the same.

The claim of the defendant appears to be inconsistent with the allegations of his answer, stating that the widow had elected to take her dower, which position seems to have

been abandoned, and the charge now is that the widow died within one year without having made an election. This latter contention is in accordance with the allegation of the complaint, and the questions in this case are: (1) What is the effect of the widow having died within the year making no election? (2) What is the effect of the widow having begun an action in her lifetime to set aside the will on the ground that the same was not executed according to law and that her husband was of unsound mind and incapable of making a will? We are cited to no decision in this state passing directly upon the effect of a widow dying within the year allowed her for election. It has been frequently held in other states that this privilege of election is purely personal, so far as the widow is concerned, and does not pass to her legal representatives. *Sherman v. Newton*, 6 Gray, 307; *Crozier's Appeal*, 90 Pa. 384, 35 Am. Rep. 686; *Boon's Representatives v. Boon*, 3 Har. & McH. 95; *Welch v. Anderson*, 28 Mo. 293; *Eltzroth v. Binford*, 71 Ind. 455; *Donald v. Portis*, etc., 42 Ala. 29.

We agree that this is a proper construction of the statute. The widow is given one year from her husband's death in which to make an election between the legacy given in lieu of dower and the enforcement of the dower right. The position taken by the appellant is that as the right of election is personal, and the widow having died without exercising it, she must be deemed to have abandoned her right to the legacy. It has been held that a bequest in lieu of dower, and the acceptance of same, amounts to a matter of contract and purchase; that the wife is to be paid the bequest in preference to other legacies and without abatement, the debts being first paid. *Isenhardt v. Brown*, 1 Edw. Ch. 411; *Hathaway v. Hathaway*, 87 Hun, 266. The appellant argues, from this undoubted principle of law, that a legacy left in lieu of dower differs from an ordinary legacy and is purely personal to the widow, as it is coupled with the statutory right of election vested in her, and, the latter failing by reason of her death, the legacy falls with it. This construction is unreasonable and unwarranted. The effect of the widow's death within the year is to vest the right to collect the legacy in her executor.

The second point presented is the effect of the widow's action in contesting her husband's will. We are of opinion that, where a widow is left a legacy in lieu of dower, her right to attack the will for any legal reason still exists, and an action to contest its probate is not to be construed as an election to take dower if the will is set aside, or to take the devise or bequest under the will if it is sustained. In other words, her rights are in abeyance until the determination of the will contest. This position is directly recognized under the real property law (section 181), which provides, in substance, that if, during the period of one year given the widow for election, it is

made to appear to the court by affidavit, among other things, that an action is pending to contest the probate of the will, her time in which to make such election may be enlarged by order. It follows that the executor of the widow is entitled to collect the legacy due under the third subdivision of her husband's will, with interest from the date of his death.

The judgment and order appealed from should be affirmed, with costs.

CULLEN, O. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment and order affirmed.

(183 N. Y. 45)

FOSTER v. INTERNATIONAL PAPER CO.
(Court of Appeals of New York. Oct. 27, 1905.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF SUBORDINATE FOREMAN.

In an action by an employé for personal injuries, the evidence showed that during the alterations made in the mill in which plaintiff was employed the master mechanic had instructed the head millwright that the machinery should be shut down when the belts were to be run on. *Held*, that it was reversible error to refuse to instruct that, if such order was given to the head millwright, he did not stand in the place of the master in disregarding that order, and, if the accident resulted from his violation of such order, there would be no cause of action against the master.

2. SAME—DANGEROUS PREMISES — INSUFFICIENT LIGHT.

Where the evidence of plaintiff showed that a place where plaintiff was working was so insufficiently lighted that he could not see the set screw in the machinery in which his clothing became entangled, and the evidence of defendant was to the effect that the place was well lighted and that there were appliances for more light, if necessary, it was error to refuse to charge that, if the master furnished means of lighting the place and competent men to do it, he had performed his whole duty so far as the lighting was concerned.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Joseph Foster, Jr., against the International Paper Company. From a judgment of the Appellate Division (88 N. Y. Supp. 1101, 94 App. Div. 612), modifying and affirming as modified a judgment for plaintiff, defendant appeals. Reversed.

See 75 N. Y. Supp. 610.

This action was brought to recover damages for personal injuries which the plaintiff claims to have sustained by reason of the defendant's alleged negligence. The defendant owns and operates a large plant at Niagara Falls, N. Y., for the manufacture of paper, and the plaintiff was there employed as a common laborer. The accident which caused the injuries complained of occurred at about 4 o'clock in the morning of the 8th of January, 1900. At that time the plaintiff was assisting in throwing a

belt upon a pulley attached to a shaft in what is known as the "wood room," located in the basement of the defendant's mill. The shaft was mounted on a frame which stood near one of the walls of the wood room; the distance between the shaft and the wall being about 28½ inches, and between the shaft and the floor about 41 inches. Attached to this shaft and about 16 inches from the pulley was a small sprocket wheel. The plaintiff had gone into the space between the shaft and the wall for the purpose of throwing a belt on the pulley, when his clothing was caught in a set screw attached to the hub or flange of the sprocket wheel, with the result that he was whirled around by the rapidly revolving shaft and seriously injured. At the time of the accident the plaintiff was 22 years of age and had been employed by the defendant as a general laborer for a period of four or five months. He had also worked for the defendant at various other times during the preceding five years. One Bowman was the general superintendent in charge of the mill. One Jones was the master mechanic having charge of certain additions and alterations which were then being made. Morgan was the head millwright under Jones, and plaintiff's immediate foreman was a man named Jury. On the morning of the accident, and before it happened, Jones, the master mechanic, had given orders that the machinery should be shut down when the men were ready to run on belts. Just before the accident, Shedd, an electrician and engineer, who seems to have served in the capacity of a general utility man about the mill, had shortened the belt which was to be placed upon the pulley in question. He reported to Morgan, the head millwright, that he had completed this work, and suggested that he could throw on the belt without stopping the machinery. Morgan replied, in substance, that Jones, the master mechanic, had ordered the machinery to be shut down when the belts were to be run on; but, when Shedd again insisted that he could run on this belt without stopping the machinery, Morgan gave him permission to do so, but advised him to be careful. At this time, according to the plaintiff's version of the case, the plaintiff and Bowman, the general superintendent, were standing near each other on the floor above the basement. The plaintiff testified that Shedd came up the stairway and called to him to come down and help throw on the belt. The plaintiff responded to the call, and while he was thus engaged in assisting Shedd the accident happened as above described. There were no windows in the wood room where the accident occurred, but it was furnished with electric lights. Plaintiff's evidence tended to show that the room was insufficiently lighted, and that, while he was able to see the

shaft and the pulley, he was unable to distinguish the sprocket wheel. The defendant's evidence, on the other hand, tended to show that it had installed a sufficient number of lights on an extension wire or wires, upon which additional lights could be placed, if the workmen found it necessary. Further essential facts appear in the opinion.

Alfred W. Gray, for appellant. Thomas Watts and Abram F. Servin, for respondent.

WERNER, J. (after stating the facts). The only questions that survive the unanimous affirmance by the Appellate Division of the judgment entered upon the verdict recovered by the plaintiff are those that arise upon exceptions to the charge and to rulings upon evidence. Many such exceptions appear in the record, but we shall consider only two exceptions to refusals to charge, and these we regard as fatal to the judgment.

The gravamen of the charge of negligence set forth in the complaint is that the defendant, as master, failed to provide for the plaintiff, as servant, a safe and proper place in which to work, and that by reason of this neglect of defendant's duty the plaintiff sustained the injuries complained of. The theory of the plaintiff's case is that the plaintiff was directed by one of his superiors, and in the presence of the master, to assist in throwing a belt upon a rapidly revolving pulley in a place where dangerous machinery was left unguarded, and that it was not sufficiently lighted to enable the plaintiff to discern the hazards of the work. The defendant's contention in that behalf is that the place was sufficiently lighted; that there was ample provision for additional lights, if any were needed; and that the task of putting on the belt was a matter of detail as to which the negligence of any servant, whatever his grade, would not be chargeable to the master. As bearing upon this well-defined issue, defendant's counsel requested the court to charge: "That if the order was given Morgan to shut down to run on belts, and the jury find that he did not stand in the place of the master, and disregarded that order, and the accident resulted therefrom from that violation of the master's order, that then there is no cause of action." This request was followed by a series of questions by the court and explanations by the requesting counsel which it is unnecessary to reproduce here. Suffice it to say, therefore, that the request was refused and an exception taken.

The main charge of the learned trial court had not touched upon the precise point presented by the request. The substance of the request was that, if the jury should find that Morgan did not represent the master in acquiescing in Shedd's request to be permit-

ted to run on the belt without stopping the machinery, then the plaintiff could not recover. The state of the evidence was such that the jury, under proper instructions from the court, might have found that Morgan was merely a co-employee of the plaintiff in finally directing that the belt could be run on without stopping the machinery. But, if that were not so, the legal result is the same, because the putting on of the belt was a detail of the work, as to which the negligence of Morgan or Shedd, or both, was simply that of co-employees. In the latter view of the case, the defendant was entitled to a charge even more favorable to him than that which he requested. The principle that the liability of a master for an injury to an employee occasioned by the negligence of another employee does not depend upon the grade or rank of the latter, but upon the character of the act, is illustrated in *Crispin v. Babbitt*, 81 N. Y. 518, 37 Am. Rep. 521, where the person in control of an iron works carelessly turned on steam and suddenly started machinery, by which Crispin was injured; and in *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905, where defendant's foreman negligently omitted to remove an undischarged blasting charge in a quarry, and directed Cullen to dig so near to it that, when the charge was accidentally disturbed by the tools of the other workmen, there was an explosion and Cullen was killed. Assuming the truth of the defendant's evidence to the effect that Jones, the master mechanic, had given orders that the machinery should be shut down when the belts were ready to be run on, the defendant would not be liable if its subordinates disregarded these orders, and the injury was occasioned as a result thereof. This was a matter of detail which the defendant had the right to leave to its subordinates, upon the assumption that its orders in this respect would be properly carried out; and the failure to do so by any servant, no matter what his grade, was the negligence of a fellow servant. *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Flike v. B. & A. R. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545; *Cooper v. N. Y., O. & W. R. Co.*, 25 App. Div. 383, 49 N. Y. Supp. 481; *Labatt on Master & Servant*, § 608. We think the learned trial court should have charged the request referred to, and, as it related to a vital point that had not been covered by the main charge, the refusal was a substantial error.

The other request which we think should have been charged related to the lighting of the place where the accident happened. The plaintiff's evidence tended to show that the place was so insufficiently lighted that he could not see the sprocket wheel and set screw in which his clothing became entangled. The defendant's evidence was to the effect that the place was well lighted and equipped with appliances for more light if it

was needed. Defendant's counsel requested the court to charge: "That if the master furnished proper means of lighting this place, proper supplies, and competent men to do it, if the jury so find, that then the master has performed its whole duty so far as lighting is concerned." The court declined to charge this request. Thereupon defendant's counsel, after taking an exception, proceeded to prefer another request, when he was interrupted by the court with the following remarks: "That is, of course, true. If the employes failed to do their duty in reference to not having light there if it was furnished—that is to say, so far as the specific thing of not availing themselves of the light is concerned—the defendant would not be liable for that omission. The question, however, that arises, is as to whether, under the circumstances in this case, it was contemplated that any more light should be furnished for the purpose of doing this work than was, and whether, in view of all the circumstances, it may not have been negligent upon the part of the defendant not to have made this place more safe than it was, and in determining that question they may take into consideration, not only the matter of lights, but all the other circumstances to which attention has been called and regarding which the evidence has been given."

The request was explicit, and clearly within the well-settled rule of law that, when a master has done his whole duty in providing the proper means of lighting the place in which his employes are to work, he is not liable for the failure of the co-employes, as between themselves, to avail themselves of the means of lighting at hand. *Madigan v. Ocean Steam Nav. Co.*, 178 N. Y. 242, 70 N. E. 785, 102 Am. St. Rep. 495. The request was, not that the master had done the particular things mentioned, but that, if the jury should find that it had done them, then the measure of its legal duty had been fulfilled. The response to this charge should have been equally clear and unequivocal. Instead of that, however, the court, in the effort to illuminate the issue, beclouded it with language which left the matter practically where it had been before the request was made.

As already intimated, we regard none of the other exceptions as of sufficient importance to justify discussion; but, since the two which we have discussed relate to vital questions, we think the judgment must be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, and VANN, JJ., concur. HAIGHT, J., not sitting. O'BRIEN, J., absent.

Judgment reversed, etc.

(183 N. Y. 98)

PENN COLLIERIES CO. v. MCKEEVER.

(Court of Appeals of New York. Nov. 21, 1905.)

CORPORATIONS—FOREIGN CORPORATIONS—DOING BUSINESS IN STATE.

Corporation Law, Laws 1892, p. 1805, c. 687, § 15, which requires a foreign corporation to procure certificate of authority to transact business in the state, implies, by the phrase "doing business in this state," a continuity of conduct in that respect; and a sale of a single cargo of coal in the city of New York by a foreign corporation through an agent whose territory was the New England district and the state of New Jersey, though he had an office in the city of New York, does not constitute doing business in the state, so as to require a certificate from the Secretary of State in order to maintain an action for the price of coal.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Penn Collieries Company against Edward J. McKeever. From a judgment of the Appellate Division (87 N. Y. Supp. 869, 93 App. Div. 303), affirming a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff, a foreign corporation organized under the laws of West Virginia, sued for the price of a cargo of coal, which it had sold and delivered to the defendant, in the city of New York. The defense to the suit was that, as the plaintiff was doing business in this state, without having procured from the Secretary of State the certificate required by section 15 of the general corporation law (Laws 1892, p. 1805, c. 687), it could not maintain any action upon its contracts. The evidence showed that the coal had been sold by an agent of the company in the city of New York, where he had an office and which he made his headquarters, as the company's sales agent for the middle New England district and New Jersey, an agency which included that city within its territory. The cargo of coal sold to the defendant appears to have been the only sale of coal ever made by the plaintiff within this state. The coal was mined in Pennsylvania. It was, originally, sold in New Jersey. It had been rejected by the purchaser in New York, and, while there and in the canal boat, had been resold, through a broker, to the defendant. Usually orders for coal were forwarded to the Pennsylvania office and were filled from there directly. No books of account, nor bank account, were kept in the city of New York, and no coal, or other goods, of the company, were kept in this state; the office there being solely for the agent's convenience. Upon the evidence, the trial judge made these findings of fact, a jury having been waived; that the plaintiff had not procured the statutory certificate; the sale and delivery to the defendant; his promise to pay therefor and his refusal to make payment; and that the plaintiff was not doing business in the state within the meaning of the statute. The judgment recovered by the plaintiff has been

affirmed by the Appellate Division in the First Department by a divided court. The defendant further appeals to this court, and insists that the plaintiff was doing business within this state, under the facts disclosed by the evidence, within the purview of the provisions of the general corporation law.

Frank B. York, for appellant. John Waring Parks and Francis S. McGrath, for respondent.

GRAY, J. (after stating the facts). I think that the determination below was correct. Section 15 of the general corporation law (Laws 1892, p. 1805, c. 687) prescribes that "no foreign stock corporation, other than a moneyed corporation, shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business," etc. Further it provides that "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." I am, clearly, of the opinion that the statutory provisions were not intended for any such case as this. I think that they should be construed, both upon the fair import of their language, as well as upon a just consideration of the public policy and of the state interests to be promoted, as simply preventing foreign corporations from entering the state by agencies and there engaging in the general prosecution of their ordinary business without first complying with certain requirements of a reasonable nature and evidencing their compliance by obtaining a certificate to the effect.

The policy of our state, as manifested in its laws, is not to impose any unconscionable restrictions upon the transactions of foreign corporations here. Their right to transact business here has always been conceded. Indeed, the effect of the legislation of recent years has been to remove all barriers in their way and to enable them to come here freely, provided they subjected themselves to our laws and exercised no powers not conferred by their charters; that is to say, a foreign corporation may enter our boundaries as freely as may natural persons and it may transact any lawful business here, provided that it takes those preliminary steps, prescribed by our statutes, which evidence its corporate nature and purposes and which secure to the state government an effective supervision and control of the business to be carried on. The statute of 1892 only declared the policy of this state that a foreign stock corporation should not carry on any business

therein which a domestic corporation of similar nature could not lawfully conduct. It was intended to place them upon a similar footing. See *Lancaster v. Amsterdam Imp. Co.*, 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; *Neuchatel Asphalte Co. v. Mayor, etc.*, of N. Y., 155 N. Y. 373, 49 N. E. 1043. The rule was early declared that, unless interdicted by the state, a foreign corporation could perform within its boundaries single corporate acts, or conduct its corporate business, when not prohibited by our laws, or when not violative of public policy (*Bard v. Poole*, 12 N. Y. 495; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166); and the enactment of the present general corporation law was intended to regulate its existence, if proposing to conduct a business, by the imposition of reasonable conditions. But no such narrow policy was intended to be declared by the statute as the prohibition of all corporate transactions by foreign corporations, irrespective of their nature, or of the condition under which they occurred; nor does the language indicate it. To bring into operation the statutory provision, the facts should show more than a solitary, if not accidental, transaction as was the one before us. They should establish that the corporation was conducting a continuous business.

To be "doing business in this state" implies corporate continuity of conduct in that respect, such as might be evidenced by the investment of capital here, with the maintenance of an office for the transaction of its business, and those incidental circumstances which attest the corporate intent to avail itself of the privilege to carry on a business. In short, it should appear, as it was intimated in the opinion in *People ex rel. Armstrong Cork Co. v. Barker*, 157 N. Y. 150, 165, 51 N. E. 1043, that the corporation and its officers intended "to establish a continuous business in the city of New York, and not one of a temporary character." In this case there was no circumstance to evidence in any degree anything of the kind. In a very recent case it appeared that a foreign corporation having a manufacturing plant without the state maintained a salesroom in the city of New York to which some of its manufactures were consigned for distribution elsewhere, upon sales made at the home office, or for sales in that city, and it was sought to assess it, upon capital employed here, for a business franchise tax. It did not appear that anything was done here by the corporation beyond the mere maintenance of an office for such a purpose, and the determination turned upon whether the two essential conditions concurred of "doing business in this state" and of some portion of its capital being employed here. We affirmed a determination made below that the corporation was not assessable, and necessarily that determination rested upon the insufficiency of the facts to establish that it was "doing business" here. *People ex rel. A. J. Tower Co. v. Wells*, 182

N. Y. 553, 75 N. E. 1132, affirming 98 App. Div. 82, 90 N. Y. Supp. 313.

I advise the affirmance of the judgment with costs.

CULLEN, C. J., and BARTLETT, HAIGHT, and WERNER, JJ., concur. VANN, J., concurs in result. O'BRIEN, J., absent.

Judgment affirmed.

(183 N. Y. 14)

IN RE CRESCENT AVE. IN CITY OF NEW YORK.

(Court of Appeals of New York. Oct. 24, 1905.)
EMINENT DOMAIN — AWARD — CONFLICTING CLAIMANTS—PROCEDURE.

The city of New York took part of certain lands covered by a mortgage for the opening of a street, and the mortgagee petitioned the Special Term for an order directing the comptroller of the city to pay to such mortgagee the amount of damages awarded, less the taxes and assessments due the city, to be applied on the mortgage. A lien on the award had been previously filed with the comptroller by the attorneys for the owner for services rendered in the condemnation proceedings, and they filed an affidavit denying the allegations of the petition, and challenged the jurisdiction of the Special Term. *Held*, that under the city charter (Laws 1901, p. 426, c. 466, § 1001) the Special Term had jurisdiction to determine the controversy and to try the issues raised by the petition and affidavit, or send them to a referee to take the proof, and it was reversible error to grant the order on the papers submitted only.

Appeal from Superior Court, Appellate Division, First Department.

In the matter of the opening of Crescent avenue. From an order of the Appellate Division, affirming an order of the Special Term directing the comptroller of the city of New York to pay to the Empire City Savings Bank a sum of money remaining out of an award to one Margaret Stonebridge, Barclay E. V. McCarty and another appeal. Reversed.

Barclay E. V. McCarty and Jared G. Baldwin, Jr., in pro. per. Charles W. Dayton and Joseph E. Bullen, for respondent.

BARTLETT, J. On November 14, 1896, the city of New York instituted this proceeding under the consolidation act to condemn for the purposes of a public street land now known as Crescent avenue, from Arthur avenue to East 187th street, in the borough of the Bronx. Margaret Stonebridge was the owner of part of the land taken in the proceedings, and also of other lands assessed for benefits thereon. The appellants herein, McCarty & Baldwin, were retained in March, 1897, to represent Mrs. Stonebridge in this proceeding as her attorneys, and from that time to the confirmation of the report of the commissioners on April 23, 1903, rendered her certain services alleged to be of the value of \$949.36. On January 30, 1903, the appellants duly filed in the office of the comptroller

of the city of New York a lien upon the awards made in favor of Mrs. Stonebridge. The petitioner in this proceeding, the Empire City Savings Bank, is the alleged holder of two mortgages covering premises belonging to Mrs. Stonebridge—one for the sum of \$6,500, and the other for the sum of \$4,000. The \$6,500 mortgage covers a triangular piece of land coming to a point at the junction of Arthur avenue and Crescent avenue. The \$4,000 mortgage covered other portions of Mrs. Stonebridge's land and is not involved in this proceeding save incidentally as herein-after stated. The city of New York did not take in the condemnation proceedings the entire property covered by the \$6,500 mortgage. On November 30, 1904, the Empire City Savings Bank served upon the appellants a notice of motion, petition, and affidavit, wherein it set up the facts constituting its claim and prayed that an order be made authorizing and directing the comptroller of the city of New York to pay the sum of \$6,558.54 now remaining in the possession of the comptroller, to the end that the said sum may be applied to the payment of said mortgages and interest due thereon. The award made to Mrs. Stonebridge for the land covered by the \$6,500 mortgage and the piece not taken as aforesaid was \$9,255.57. The city of New York had, with her consent, deducted from that award certain taxes, assessments, and water rates, and the balance remaining in the possession of the comptroller was the said amount of \$6,558.54. The appellants submitted an opposing affidavit, challenging the jurisdiction of the Special Term to dispose of the questions presented, and denying in detail the important allegations of the petition. The Special Term made an order granting the prayer of the petition, which was affirmed by the Appellate Division.

We are of opinion that the Special Term had jurisdiction in this proceeding to determine the controversy between these parties. At the time this condemnation proceeding was instituted under the consolidation act (Laws 1882, p. 277, c. 410) section 992 thereof permitted, in case of neglect or default in payment of an award as therein provided, the person interested to sue for and recover the same. Section 1001 of the present charter of the city of New York (Laws 1901, p. 426, c. 466) provides for damages for land taken. Among other provisions is the following: "The person or persons to whom awards shall be made in such proceedings, and the person or persons in whose favor costs and expenses may be taxed, shall not have an action at law against the city of New York for such awards, costs, or expenses, but the court in which said proceedings have been had, upon the application of any such person or persons, in case of the failure of the comptroller of said city to pay the same within thirty days after demand therefor, shall require and direct the comptroller to

pay said awards, costs, and expenses from the said fund, and enforce said order or mandate in the same manner as other orders and mandates of said court are enforced." As these sections deal simply with the remedy, it was proper for the petitioner herein to proceed by applying to the Special Term. The rights of these parties are worked out through Mrs. Stonebridge and her award.

We are, however, of opinion that an improper disposition of this application was made by the Special Term to the possible prejudice of the appellants. The appellants raise several points which may be briefly stated: (1) That the petition and diagram annexed thereto showed that there still remained subject to the lien of the alleged \$6,500 mortgage other lands in addition to that for which the award resulting in the \$6,558.54 fund was made. It is insisted that the value of the additional land should be ascertained. (2) That it also appears that the award, of which \$6,558.54 is the balance, was made, not only for land covered by the \$6,500 mortgage, but for other land as well, and that the deduction from that award of certain taxes, assessments, and water rates was chargeable in part to property not covered by the \$6,500 mortgage. (3) That the appellants were afforded no opportunity of attacking the existence of the \$6,500 mortgage, the amount due thereon, and other issues raised by their affidavits, unnecessary to mention in detail, in view of the conclusion we have reached. The issues raised by the petition and affidavits should be tried by the Special Term, or sent to a referee to take the proof and report same to the court with his opinion.

The orders of the Appellate Division and Special Term should be reversed, with costs to the appellants in all the courts as against the respondent, the Empire City Savings Bank.

CULLEN, O. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Orders reversed, etc.

(73 Ohio St. 7)

MCNEAL v. PIERCE.

(Supreme Court of Ohio. Oct. 31, 1905.)

1. LIMITATION OF ACTIONS — ACKNOWLEDGMENT OF DEBT—BEQUEST.

A legacy reciting that it is "in consideration of her care for my invalid mother many years preceding her death, and also her care of my infant son," does not imply a debt, but a bounty. It is not an acknowledgment of a legal obligation, and, when pleaded in an action barred by the statute of limitations to recover for such services, does not remove the bar of the statute.

2. WILLS—LAPSED LEGACY.

A legacy, given in payment of a debt by the express terms of the will, does not lapse by the death of the legatee before the testator; but when, by the terms of the will, it appears

that the intention of the testator was to confer a bounty, it is not competent to show a different intent and to prevent a lapse by proof that the legacy was given in payment of a debt. (Syllabus by the Court.)

Error to Circuit Court, Marion County.

Action by one Pierce, administrator, against one McNeal, executor. Judgment in the court of common pleas for defendant on demurrer was reversed in the circuit court, and defendant brings error. Reversed.

The tenth item of the will of William P. Hazen, executed in 1896, is as follows: "Tenth. I give and bequeath to my niece, Miss Mary Pierce, daughter of my sister, Emily Pierce, of Middlefield, Geauga county, Ohio, \$5,000, the same being in consideration of her care of my invalid mother many years preceding her death, and also her care of my infant son, Martin L. Hazen, after the death of his mother." The legatee died without issue in the lifetime of the testator. Suit was brought by the administrator of the legatee against the executor to recover the amount of the legacy. It is averred in the petition that in 1858 the testator was indebted to the legatee for services then and theretofore rendered by her at his request in the care of his invalid mother and of his infant son, which were of the value of \$5,000. The tenth item of the will is then set out as an acknowledgment of the debt in writing, and signed by the party to be charged to remove the bar of the statute of limitations. The court of common pleas sustained a general demurrer to the petition. The circuit court reversed.

J. F. McNeal and L. B. McNeal, for plaintiff in error. N. H. Bostwick and Crissinger & Guthery, for defendant in error.

SUMMERS, J. (after stating the facts). Two questions are presented: First, whether the will removed the bar of the statute of limitations, and, second, whether the legacy lapsed.

The claim for services is barred, unless the will is an acknowledgment. The natural and ordinary meaning of the words "in consideration of," in the connection used, is not compensation, but a mark or token of affection or appreciation. The testator does not acknowledge that there ever was any liability, debt, or claim. He acknowledges merely the fact that his niece did care for his invalid mother and for his infant son, and, feeling grateful therefor, in recognition or consideration of the fact he gives her \$5,000. The services may have been paid for or rendered gratuitously. He acknowledges a debt of gratitude—not a legal obligation; and he does not direct the payment of a debt, but confers a bounty. In *Duncan v. Franklin Township*, 43 N. J. Eq. 143, 10 Atl. 546, where the item of the will under consideration read as follows: "I give and bequeath to Henry Benson Duncan, for his services in assisting me at different times, the sum of \$2,000"—it is

said in the opinion (page 145 of 43 N. J. Eq., page 547 of 10 Atl.): "The expression 'for his services in assisting me at different times' does not, standing alone, import an indebtedness from her to the legatee for which payment may be exacted by process of law. For aught that appears to the contrary, the services may have been rendered gratuitously, and the legacy may have been given in grateful recognition of that."

The second question is whether the facts set out in the petition state a cause of action for the recovery of the legacy. It is conceded that the general rule is that a legacy lapses when the legatee dies before the testator, and that section 5971, Rev. St. 1892, enacted to prevent mischief from the operation of the rule, does not apply; but it is contended that a legacy does not lapse when it is given to pay a debt, citing *Ward v. Bush*, 59 N. J. Eq. 144, 45 Atl. 534. The cases that hold that a legacy given in payment of a debt does not lapse do so for the reason that such is the manifest intention of the testator. That is the ground of the decision in *Williamson v. Naylor*, 3 Younge & Coll. 208. There it is held that certain creditors, whose claims were barred, but who were named in the will, which provided that a certain part of the estate should be divided among them, should not be considered as legatees, but rather as creditors, and consequently that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will. In the note to that case it appears that Lord Lyndhurst, C. B., in disposing of the matter when it was before him said: "I cannot consider this as a mere voluntary bounty on the part of the testator, but we must consider that the testator meant this money to be applied in satisfaction, or part satisfaction, of an obligation in reduction of his debts, which, though they could not be enforced against him at law, were, nevertheless, subsisting debts. * * * In this case the testator has manifested an anxious desire to fulfill his just obligations; and it was plainly his intention, not to make a gift to the persons named in the schedule, but to waive the legal bar to the recovery of his debts." In *Phillips v. Phillips*, 3 Hare, 281, where the testator gave the residue of his estate to trustees, upon trust, to divide the same among certain creditors, it is held that "the shares attributed to the debts of creditors who died in the lifetime of the testator do not lapse by their death." Again, "that the testator must be considered as proceeding upon a mixed principle of bounty and obligation; that the will must be read as, to some extent, directing payment of debts." The vice chancellor says (page 292): "In coming to the conclusion that the representatives of the creditors who died in the testator's lifetime are entitled to claim, I consider that I follow the case of *Williamson v. Naylor*, that I am giving effect to the trusts of the will, and that I am doing that which

the conscience of the testator led him to do, in discharging pro tanto his obligations to his creditors, notwithstanding the bar of the statute. If that were his intention, which on the face of the will and on the authority of *Williamson v. Naylor* I will assume, I cannot suppose that the testator contemplated the depriving of the benefit given by the will those creditors who might happen to die between the date of his will and his death." Again (page 300): "Another observation strongly in favor of *Williamson v. Naylor* is this: If the claimants had been treated as legatees, and not as creditors, the rights of the creditors to the benefit of the trust might have lapsed by his death in the lifetime of the testator. This could not have been in accordance with the intention of the testator." In *Turner v. Martin*, 7 De G., M. & G. 429, 432, the Lord Chancellor says: "The object of the testator was to do that which was honest and just, namely, to pay those creditors in full who had proved against the joint estate of his father and himself. That object could not have been attained if his intended bounty was to be limited to those creditors only who might happen to survive him; he having lived 20 years after the debts were proved."

In the present case the claim is barred. The testator does not acknowledge it. In law it is no debt, and it cannot be said that the intention of the testator was to discharge an obligation and not to confer a bounty. The intention of the testator must be given effect according to what appears upon the face of the will. There is no ambiguity, and evidence to prove an intention different than that implied in the terms of the will would be incompetent. *Comfort v. Mather*, 2 Watts & S. 450, 37 Am. Dec. 523.

The judgment of the circuit court is reversed, and that of the common pleas is affirmed.

Reversed.

DAVIS, C. J., and SHAUCK and CREW, JJ., concur.

(73 Ohio St. 54)

BARTLETT et al. v. STATE.

(Supreme Court of Ohio. Oct. 31, 1905.)

1. CONSTITUTIONAL LAW—LEGISLATIVE POWERS.

It is not within the power conferred on the General Assembly by the Constitution to declare that things done and created under and by virtue of unconstitutional acts of the General Assembly nevertheless "shall continue to be and remain and be recognized and regarded as legal."

2. SCHOOL AND SCHOOL DISTRICTS—SPECIAL SCHOOL DISTRICTS—ESTABLISHMENT.

Section 3891 of the Revised Statutes of 1892 and sections 3891 and 3928 of the Revised Statutes of 1892 as amended and supplemented by "An act to provide for the organization of the common schools of the state of Ohio, and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio herein named," passed April 25, 1904 (97 Ohio

Laws, p. 334), are unconstitutional and void, in so far as they declare to be legal and valid special school districts all special school districts which have been created under the provisions of special acts of the General Assembly. (Syllabus by the Court.)

Error to Circuit Court, Washington County.

Quo warranto by the state against Bartlett and others. Judgment for the state, and defendants bring error. Affirmed.

A. D. Follett, for plaintiffs in error. J. D. Preston, for the State.

DAVIS, C. J. This is a proceeding in quo warranto to oust each of the plaintiffs in error from the office of director of the Coal Run special school district, in Waterford township, Washington county, and to require them to show by what right, if any, they claim to exercise the powers and authority of such office. In the petition it is averred that the Coal Run special school district was created by an act of the General Assembly entitled "An act to establish a special school district in Waterford township, Washington county, Ohio" (94 Ohio Laws, p. 630), and that said act violates section 26 of article 2 of the Constitution. The respondents admit in their answer that under the ruling of this court in *State ex rel. v. Spellmire et al.*, 67 Ohio St. 77, 65 N. E. 619, the act creating the Coal Run special school district is unconstitutional; but they aver that by virtue of an act of the General Assembly entitled "An act to provide for the organization of the common schools of the state of Ohio, and to amend, repeal and supplement certain sections of the Revised Statutes and laws of Ohio herein named," passed April 25, 1904 (97 Ohio Laws, p. 334), and especially by virtue of Rev. St. §§ 3891, 3928, as amended by said act, the Coal Run special school district is made a valid special school district, and that the respondents are the duly elected, qualified, and acting directors of the same. The circuit court sustained a demurrer to the answer and rendered a judgment of ouster against the respondents. This proceeding in error is prosecuted in this court to reverse the judgment of the circuit court.

The two sections of the School Code of 1904, upon which the respondents rest their claim, are as follows:

"Sec. 3891. Any school district, now existing, other than a city, village or township school district, and any school district organized under the provisions of chapter 5 of this title, shall constitute a special school district."

"Sec. 3928. [After first making provision for creation of special school districts by probate judge.] Nothing herein contained shall be so construed as to abolish any special school district now existing, but all such districts, whether created under the provisions of a general or special act, including the territory now constituting such special dis-

trict shall, unless changed under the provisions of this chapter, continue to be and remain and be recognized and regarded as legal special school districts, excepting, however, such special school districts which do now or may hereafter include within their boundaries an incorporated city or village, and in such cases such special districts shall become a city or village school district with or without territory attached or detached, as the case may be. And all officers and members of boards of education of existing special school districts heretofore created, whether by special or general act, shall continue to hold and exercise their respective offices and the powers thereof until their successors are elected and qualified as provided herein; provided that all such officers of such districts created by special act shall hold such offices only until the first Monday of January following the first election for school officers to be held after the passage of this act, at which election their successors shall be elected."

It seems to be true, as claimed by the counsel for the defendants in error, that these sections of the act of April 25, 1904, which repeal and amend Rev. St. §§ 3891, 3928, do not affect this action, which was pending at and before their enactment. Rev. St. 1892, § 79. But since the original section 3891 contains the provision that "any school district now existing, other than, * * * which has been established by a vote of the people in accordance with any act of the General Assembly, or which has been established by a general or local act of the General Assembly, shall constitute a school district to be styled a special school district," the question still remains as to the constitutional power of the General Assembly to so legislate. This question underlies not only sections 3891 and 3928 as they now exist, but the original section 3891 also.

The contention made on behalf of the plaintiffs in error is that the legislation in these sections of the Revised Statutes is general in its nature and uniform in its operation throughout the state, and that it recreates and re-establishes, as legal and unquestionable special school districts, such special school districts as are confessedly illegal if these sections do not so operate. The power of the Legislature to validate any void or ineffectual act is limited to such acts as it might have originally performed or authorized. It therefore cannot, under the mere form and pretense of general legislation, make valid any special legislation which it had enacted in violation of the Constitution. If this could be permitted, we would at once be back to the point from which we started when this court declared that special legislation in regard to municipal corporations would not be recognized as constitutional, although it were clothed in a plausible appearance of general legislation. The General Assembly has created special school districts by special laws, as in this

case, definitely locating them and defining the boundaries thereof. We need not repeat the reasons which we gave in *State ex rel. v. Spellmire et al.*, 67 Ohio St. 77, 65 N. E. 619, for declaring such acts to be in violation of the Constitution. It is sufficient to say that we adhere to the ruling made in that case, and that the sections of the statutes now under consideration do not stop short of being a mandate to all of the courts that "all such districts, whether created under the provisions of a general or special act, including the territory now constituting such special district, shall . . . continue to be and remain and be recognized and regarded as legal special school districts," etc. This we regard as wholly beyond the power conferred upon the General Assembly by the Constitution. The power conferred upon the General Assembly is legislative power, and that body is expressly prohibited from exercising any judicial power which is not expressly conferred by the Constitution. Article 2, § 32.

At this time, the limits of the power invested in the respective co-ordinate branches of the government is so well defined and so generally understood, that we are constrained to believe that, whatever may have been the thought of the persons who drafted them, the enactment of these sections was an inadvertence on the part of the General Assembly; for it is well settled that the Legislature cannot annul, reverse, or modify a judgment of a court already rendered, nor require the courts to treat as valid laws those which are unconstitutional. If this could be permitted, the whole power of the government would at once become absorbed and taken into itself by the Legislature. It does not appear from the record in this case that any contractual obligation is involved, and therefore *Lewis v. Symmes*, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428, cited by the plaintiffs in error, does not apply. We are therefore of the opinion that the original section 3891 and the amended sections 3891 and 3928 of the Revised Statutes are ineffectual and void, so far as they would make legal and valid special school districts of those special school districts which had been created under or by special statutes.

The judgment of the circuit court is affirmed.

SHAUCK, PRICE, CREW, SUMMERS,
and SPEAR, JJ., concur.

(73 Ohio St. 46)

**METROPOLITAN LIFE INS. CO. v.
FELIX.**

(Supreme Court of Ohio. Oct. 31, 1905.)

1. INSURANCE—PREMIUM—CONSIDERATION.

To constitute a consideration for the payment of premiums on a policy of life insurance, it is essential that the insurer incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a

defense to an action on the policy if the life insured should end.

2. SAME — RECOVERY BACK OF PREMIUMS PAID.

In an action to recover premiums paid to an insurer which has not incurred such risk, the rights of the parties at the beginning of the action should determine the judgment, and the insurer cannot by the averments of its answer effectively waive such defense.

(Syllabus by the Court.)

Error to Circuit Court, Hamilton County.

Action by Minnie Felix against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Felix brought suit in the court of common pleas to recover from the plaintiff in error the amount of premiums which she had paid to it upon the policy on the life of her husband; the right to recover being placed upon the ground that the policy was void. The company denied that the policy was void, and alleged that it had treated it as valid from the time of its issuance in April, 1886, receiving premiums thereon until April, 1894, when she ceased to pay premiums, and on June 25, 1894, she forfeited the policy for nonpayment of premiums, and for no other reason. In the court of common pleas a jury was waived and the cause was submitted to the court upon the following agreed statement of facts: Minnie Felix, the plaintiff in the case, upon the solicitation of an agent of the defendant, insured her husband, Michael Felix, in the defendant company for the sum of \$660, under the following circumstances: On April 2, 1886, Mrs. Felix, upon the solicitation of an agent of the defendant, stated to said agent that she would like to insure her husband for \$1,000, but that her husband objected to being insured, and would not sign an application nor submit to a medical examination. The agent said he could insure the husband for \$660, that he need not sign the application, nor be examined nor know anything whatever of the matter. Relying on these representations, Mrs. Felix consented to take out the policy and to pay for the same the sum of 55 cents weekly as premiums. An application was made out and the name of Michael Felix signed thereto, and it was upon said application that the company issued the policy, but it does not appear who made it out or signed the same, except that it was not done by either Mr. or Mrs. Felix, or any one acting for them. April 12, 1886, Mrs. Felix received the policy in question and the receipt book, both of which are hereto attached. See Exhibits A and C. Mrs. Felix continued to pay the premiums from April 12, 1886, to April 16, 1894, when the same amounted to the sum of \$233.20, at which time she discontinued payment of premiums and paid no more, and the policy was upon June 25, 1894, forfeited and canceled for nonpayment. Mrs. Felix told her husband of the existence of the insurance in April, 1894, and because he still objected to being insured, and also because she then became convinced that the policy

had always been void, she refused to make further payment of premiums. The company had always treated the policy as valid, and after Mrs. Felix stopped payment she was solicited by the company's agent to reinstate the policy and resume payments of premium, but she declined. Demand was made for a return of the premiums paid on the ground that the policy was void ab initio, and the premiums paid were unearned, the company refused to pay, and this suit is brought for their recovery.

Plaintiff claims that the policy of insurance in question, No. 2,485,016, the application for the same (attached hereto as Exhibit B), and the premium receipt book, in which were entered premiums paid on said policy, and in which were printed "Rules and Regulations" of the company, to which plaintiff refers in her petition, all together constituted the contract of assurance. Defendant denies that the said rules and regulations constitute any part of said contract. Plaintiff never read the said rules and regulations, until, upon said 16th day of April, 1894, her husband called her attention more particularly to that portion thereof which is referred in the petition, and she then read all of said rules and regulations in said receipt book contained. Plaintiff had never read the application nor seen the original or a copy of it, until the original was exhibited to her in the court room at this trial. Michael Felix, the assured, was never examined by any physician for said insurance and never consented nor desired to be insured in this defendant company, nor did he know of the existence of the policy in question until the plaintiff accidentally revealed its existence to him on April 16, 1894, at which time he insisted that plaintiff cancel the same, and called plaintiff's attention to the fact that according to the rules and regulations there had been no valid insurance.

The material representations and stipulations of the exhibits are the following:

"Application to the Metropolitan Life Insurance Co. J. Hurley, agent at Newport, under John Garrett, assistant superintendent. The undersigned hereby declares and warrants that the representations and answers made below, and in the examination on the other side, are strictly correct and wholly true; that they shall form the basis and become part of the contract of insurance (if one be issued), that any untrue answers will render the policy null and void, and that said contract shall not be binding upon the company unless upon its date and delivery the insured be alive and in sound health. The undersigned further agrees to be governed by the rules and regulations of the Metropolitan Life Insurance Company as they now exist, or may hereafter be altered or amended. The provisions of chap. 347 of the laws of New York, passed May 21, 1879, are hereby waived.

"[Signature of applicant.] Michael Felix.

"Rules and Regulations. Under no circumstances can an application be written upon the life of a husband for the benefit

of his wife, or vice versa, or upon the life of any person for the benefit of another (children excepted), unless the life proposed for insurance fully understands the matter and consents to the issuance of the policy, and personally signs the certificate of examination on the back of the application. Any policy obtained in violation of this will be void. An adult application must be signed on its face directly under the warranty by the applicant in person, and on the back, at the foot of the examination form by the life proposed for insurance, and an infantile application by one of the parents of the child, or, if they be dead, by the person who has undertaken its support. * * * No policy on an adult life will be binding upon the company unless the person against whose death it insures is aware of the insurance—consents to the same—is examined by a physician of the company if the amount applied for is over \$200, or by an agent if under that amount, and personally signs the examination form after the answers in said form are all recorded, and not otherwise."

The material stipulations of the policy are: "In consideration of the representations and agreements in the printed and written application for this policy respecting the person named in the schedule hereinafter contained which application is hereby referred to and made a part of this contract * * * if any of the representations above referred to and upon which said policy is granted be not true this policy shall thereupon become void."

Upon these facts the court of common pleas rendered judgment in favor of Mrs. Felix, and that judgment was affirmed by the circuit court.

Robertson & Buchwalter, for plaintiff in error. S. B. Deal and Dudley P. Wayne, for defendant in error.

SHAUCK, J. (after stating the facts). More than a century ago it was held by Lord Mansfield in *Tyre v. Fletcher*, Cowp. 668, that premiums paid upon a void policy of insurance may be recovered because "the underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it may be owing to, if he does not run the risk the consideration for which the premium or money was paid into his hands fails, and therefore he ought to return it." Such appears to have been the accepted law since that time. In supposed deference to it, counsel for the company here insists that the policy was not void, even if voidable at the option of the company, and that it did not declare the policy forfeited until the payment of the premiums had been refused. In this connection he directs our attention to the uncontroverted allegations of the company's answer that at the time of the refusal to pay the premiums, and prior thereto, the company had treated said insurance as valid, and was ready and willing to carry out the terms and conditions of said policy by it to be kept and

performed and to keep in force said policy, and was never willing to rescind the contract or to have it rescinded. The company's willingness to keep the contract alive while that consisted only in accepting premiums may be readily believed; but the choice of its attitude, if the life insured had ended, would have been determined by other considerations. In attempting to apply the admitted rule to the case, we should look to the stipulations whereby the company has provided for immunity from liability rather than to its ineffectual declarations respecting its intentions. The rule requires the presumption that it would have paid the amount of the policy only in performance of a binding obligation to do so. If this presumption appears too weak to attract confidence, it might be much strengthened by reference to reports of judicial proceedings in the several states illustrating this company's dealings with holders of its policies.

Since it cannot be assumed that we are dealing with a sporadic case of philanthropy, we must inquire whether the company bore a risk in consideration of the premiums paid. In this connection its counsel say that although the pretended application by the insured was a forgery, not perpetrated by the beneficiary, its representations may all have been true, and that, under the circumstances presented, sections 3625 and 3626 of the Revised Statutes of 1892, prevented its interposing their falseness, if they were false, as a defense to an action on the policy. These propositions need not be discussed, for they miss the point in the case. The company did not incur the liability which Minnie Felix thought it incurred, and for which she paid the premiums, because the terms of the application upon which the company acted showed her express consent to be bound by its regulations. The terms of the policy made the application a part of the contract. The regulations provided that no policy on an adult life should be binding upon the company unless the person against whose death it insures is aware of the insurance, and Michael Felix, the adult subject of the insurance, was not aware that it had been effected. The distinction between a policy void and voidable at the election of the insurer cannot be important here. It is of the essence of the doctrine stated by Lord Mansfield, and approved in the considerate cases upon the subject, that, there being no fraudulent conduct by the beneficiary, to constitute a consideration for the payment of premiums, there must be a contract against which at the time of its execution the insurer cannot interpose a valid defense. Such a ground of defense is shown in the stipulations and facts stated. The judgment below is in accordance with the doctrine of *Insurance Co. v. Pyle*, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781. It is in all respects supported by *Fisher v. Metropolitan Life Ins. Co.*, 162 Mass. 236, 38 N. E. 503, where the company unavailingly urged the same objec-

tions to the right to recover the premiums paid.

Judgment affirmed.

DAVIS, C. J., and PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(78 Ohio St. 59)

OGG v. STATE.

(Supreme Court of Ohio. Oct. 31, 1905.)

BASTARDS — FAILURE TO SUPPORT — INDICTMENT.

An indictment under section 3140—2, Rev. St., for failure to provide for an illegitimate child under 16 years of age, need not allege that under a previous proceeding under the bastardy act the defendant had been adjudged to be the reputed father of such child, nor is evidence of such former adjudication necessary to a valid conviction.

(Syllabus by the Court.)

Error to Circuit Court, Perry County,

One Ogg was convicted of failing to support a child under the age of 16, and brings error. Affirmed.

T. B. Williams, for plaintiff in error. J. E. Powell, for the State.

PER CURIAM. Plaintiff in error was indicted at the November term, 1904, of the common pleas court of Perry county, under section 3140—2 of the Revised Statutes, for having failed to provide his illegitimate child under the age of 16 years with proper care, food, and clothing from the 20th of January, 1903, to the date of the indictment. The indictment did not charge that in proceedings under the bastardy act Ogg had been adjudged to be the reputed father of the child, and upon that ground the sufficiency of the indictment was challenged in the court of common pleas where its sufficiency was sustained. Defendant then entered a plea of not guilty and was convicted without any evidence showing such adjudication under the bastardy act. His motion for a new trial was overruled and sentence pronounced against him in accordance with the verdict. He then filed a petition in error in the circuit court, where the judgment of the court of common pleas was affirmed.

The view urged upon us by counsel for the plaintiff in error is that in the absence of such allegation and proof there can be no valid conviction. The statute under which the indictment was found and conviction had affords no support for the point now made, for it does not suggest such adjudication as a condition of guilt. While the two acts contain provisions which contemplate the support of an illegitimate child, the bastardy act also contains provisions for the benefit of the mother. Proceedings under that act are instituted by her and are in a large measure controlled by her. Proceedings under the act here involved are instituted and maintained by the state as against a purely public offense. The relation of the

statutes does not seem to support the point urged against the validity of the conviction. The judgments of the courts below seem to be fully supported by *Gee v. State*, 60 Ohio St. 485, 55 N. E. 48, where it was held that on the trial of an indictment under this section the record of a previous bastardy proceeding, in which the defendant was adjudged to be the reputed father of the child neglected, is not admissible in evidence because that adjudication may proceed upon a mere preponderance of the evidence, while under the statute here involved it is necessary that conviction be by evidence establishing defendant's guilt beyond a reasonable doubt. It is quite generally known that that which need not be proved need not be alleged; and certainly that conclusion may be urged with no less confidence with respect to a matter which is not permitted to be proved.

Judgment affirmed.

DAVIS C. J., and SHAUCK, PRICE, CREW, SUMMERS, and SPEAR, JJ., concur.

(73 Ohio St. 63)

STERWERF v. SMITH.

(Supreme Court of Ohio. Oct. 31, 1905.)

ERROR—BOND FOR COSTS—PLAINTIFF IN ERROR.

A nonresident plaintiff may be required to give security for costs in a proceeding in error, and in default thereof his petition may be dismissed.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 948.]

(Syllabus by the Court.)

Error to Circuit Court, Butler County.

Action by one Smith against one Sterwerf. Judgment for plaintiff in the common pleas. From a judgment of the circuit court dismissing proceedings in error, defendant brings error. Affirmed.

Smith brought suit in the court of common pleas of Butler county against Sterwerf for a revivor of a judgment. Judgment was rendered against Sterwerf reviving the original judgment, and such proceedings were had that Sterwerf filed a petition in error in the circuit court of Butler county to reverse the judgment in favor of Smith against Sterwerf. Smith filed a motion in the circuit court to require Sterwerf to give security for costs, on the ground that Sterwerf was a nonresident of Butler county. The circuit court sustained the motion, and Sterwerf being in default for security for costs, the proceeding in error was dismissed at his costs. Sterwerf prosecutes a proceeding in error here to reverse the judgment of the circuit court.

Eugene C. Pocley, for plaintiff in error.

PER CURIAM. Without determining whether or not the courts have inherent power to require security for costs, as has

been held sometimes, we are of the opinion that within the language of Rev. St. §§ 5340—1 and 5340—2, the judgment of the circuit court was right. The power conferred by the statute is not limited to "civil actions," originally commenced; but it is provided that the plaintiff shall be bound for the payment of the costs which may be adjudged against him in the court in which the action is brought, "or in any other court to which it may be carried," etc. This broad language covers appellate jurisdiction, whether by appeal or in error; for, although a proceeding in error is not a "civil action," the identity of the action is not lost in the proceeding in error, and hence the action may be "carried" to a court of review by a proceeding in error.

Affirmed.

DAVIS, C. J., and SHAUCK, PRICE, SUMMERS, and SPEAR, JJ., concur.

(129 Mass. 542)

ELLIOTT v. WORCESTER TRUST CO.

(Supreme Judicial Court of Massachusetts. Worcester. Dec. 1, 1905.)

1. PLEADING—VARIANCE—PARTIES.

A count in a declaration, alleging that plaintiff delivered or caused to be delivered to defendant bank a sum claimed to be held by the defendant for plaintiff's use, is broad enough to cover a deposit made with the defendant by the plaintiff personally.

2. SAME—TIME.

In an action against a bank, an allegation of the declaration that plaintiff made a deposit on or about February 21st did not preclude plaintiff from relying on a deposit made February 24th.

3. BANKS AND BANKING—DEPOSITS—NOTES PAYABLE IN BANK—AUTHORITY OF BANK.

Plaintiff, after giving a note payable at a bank, compromised with creditors and received a release from the holder of the note, of which plaintiff notified the bank, and subsequently defendant bank took over the property, assets, and liabilities of the other bank, including a deposit belonging to plaintiff. *Held*, that defendant bank was bound to know the terms under which the deposit was held by the other bank, and it had no authority to pay the note on its maturity out of plaintiff's deposit.

4. SAME—NOTES PAYABLE.

Rev. Laws, c. 73, § 104, provides that, where an instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereof. *Held*, that a bank has no authority to pay notes of a depositor made long before and payable at another bank.

5. SAME—ACTION BY DEPOSITOR—PLEADING—ISSUES.

Where a bank paid the note of a depositor, and charged it to his account, and the depositor brought an action for the amount so paid, and the answer was a general denial and plea of payment, and no claim in set-off was filed, nor an averment of ownership made, a defense that the bank had the rights of a bona fide purchaser for value before maturity, and that it was a holder in due course, was not open to defendant.

6. SAME—CONDITION PRECEDENT TO ACTION.

Where a bank, without authority so to do, paid the note of a depositor and charged the same to his account, and the note was returned

to the depositor with canceled checks, it was not necessary for the depositor to return the note to the bank before bringing an action for the amount paid.

Report from Superior Court, Worcester County; Frederick Lawton, Judge.

Action by James I. Elliott against the Worcester Trust Company. Judgment for plaintiff, and the case reported to the Supreme Judicial Court. Affirmed.

Rufus B. Dodge and Wm. J. Taft, for plaintiff. Henry F. Harris and Smith, Gage & Dresser, for defendant.

KNOWLTON, C. J. The defendant, as a banking corporation, held money belonging to the plaintiff as a depositor. It paid a note of \$157.12 made by the plaintiff, and afterward refused to pay the amount to the plaintiff, or to account for it, otherwise than by claiming credit for it as properly paid to the holder. This note was one of four given for the same sum by the plaintiff to one Adams. After giving it the plaintiff compromised with his creditors by the payment of a percentage of his indebtedness, which he gave to Adams upon these notes. He received from Adams, in return, a release under seal of all claims and demands. These notes were payable at the City National Bank in Worcester, and the plaintiff notified the cashier of that bank, after the settlement, not to pay any of his notes that might be presented without first notifying him. Three of these notes were afterwards presented for payment at the bank, and payment was refused. Before the fourth became due, the defendant "took over the property and assets, and assumed the liabilities, including that of the plaintiff, of the City National Bank, which at that time went into liquidation." The accounts of the City National Bank were transferred to the defendant, including a deposit of \$201.10 belonging to the plaintiff, and the following statement was stamped in the plaintiff's deposit book, bearing date February 21, 1903: "The balance of two hundred and one and ten one-hundredths dollars, standing to the credit of this account, has this day been transferred to the Worcester Safe Deposit & Trust Company, to be held by it as a deposit upon the same terms as it was held by the City National Bank. Checks drawn upon the City National Bank, and not yet presented, will be honored by the Worcester Safe Deposit & Trust Company to the extent of said balance. S. H. Clary, Treasurer." On the 24th day of February, 1903, the plaintiff made a deposit of \$1,470.44 with the defendant on this account, and on the same day drew a check for \$125. On February 27th the defendant paid for the plaintiff two checks of \$100 each. Other checks were drawn and other deposits were made, from time to time, before April of the same year. In April the fourth note of Adams was presented for payment at the defendant's banking room, through the clear-

ing house, from the Quinsigamond National Bank, and was paid. At the end of the month the note was returned to the plaintiff, with his paid and canceled checks. The officers of the defendant had not been informed of the notice from the plaintiff to the City National Bank not to pay his outstanding notes, although the cashier and bookkeeper of that bank, who had received the notice, were employed by the defendant in subordinate positions. The case was heard in the superior court upon an agreed statement of facts, the substance of which is given above.

This was the form of the agreement: "The following are agreed to be all the facts, and may be used in the trial of the case of Elliott v. Worcester Trust Company, so far as they are material and competent under the pleadings." Generally the submission of a case upon agreed facts waives all questions of pleading. *Brettun v. Fox*, 100 Mass. 234. But by this agreement the parties have limited themselves to a consideration of only such matters as are pertinent under the pleadings. See *Esty v. Currier*, 98 Mass. 500, 502; *Com. v. Worcester & Nashua Railroad*, 124 Mass. 561. Treating the defendant's argument on this point as open to it, we are of opinion that the declaration is broad enough to justify the different claims that the plaintiff makes. The first count is for money had and received to the plaintiff's use, with a bill of particulars specifying the receipt by the defendant from the City National Bank of the sum claimed. The third is a special count setting out the transaction between the defendant and the bank, and the agreement with the plaintiff in regard to the deposit. The second is also a special count, averring that the plaintiff delivered, or caused to be delivered, to the defendant the sum claimed to be held by the defendant for his use, to be paid upon his order on demand, etc. This count is broad enough to cover a deposit made with the defendant by the plaintiff personally, and the averment of time as on or about February 21, 1903, does not preclude the plaintiff from relying upon a deposit made on February 24th. We think this count should be construed as general in its application, as the third is limited to the money transferred by the City National Bank. The sum claimed in each count is the same, namely, the balance that the defendant refused to pay over because of its payment on the note. Of course, there was no deposit of this precise sum, either by the transfer from the City National Bank or by the plaintiff personally, but this sum was included in a larger deposit.

If we consider the case in reference to the deposit transferred to the defendant from the City National Bank, we find that the defendant succeeded to the rights of that bank, and acquired no additional rights. In taking over the deposit, it took it with the same obligations to the plaintiff that its predecessor was under, one of which was not to pay

out this money or any part of it on his old notes without obtaining authority from him. The statement stamped in the deposit book recognized the same obligation. The money was "to be held by it as a deposit upon the same terms as it was held by the City National Bank." Under this contract the defendant had no right to pay this note. It was bound to know the terms under which the deposit was held by its predecessor. If we look at the relations of the parties in regard to deposits subsequently made, we reach the same result. There was an implied understanding that the defendant should pay the plaintiff's checks drawn on the account, and notes made by him payable at its banking rooms. *Carr v. National Security Bank*, 107 Mass. 45, 48, 9 Am. Rep. 6. But this would not include notes made long before, payable at another bank. *Rev. Laws, c. 73, § 104*. As to such notes, if they were presented for payment at the defendant's banking house, it had no authority to do anything as the plaintiff's agent. In either view the payment of this note was unauthorized, and it constitutes no defense to the plaintiff's claim.

It is contended that the defendant has the rights of a bona fide purchaser for value before maturity, and that it is a holder in due course, within the meaning of *Rev. Laws, c. 73, §§ 69-75*. But no such contention is open under the pleadings. The answer is a general denial and a plea of payment. The defendant has not filed a claim in set-off, nor made any averment of ownership of the note. At maturity the note was presented by the holder for payment. The defendant assumed to pay it as the plaintiff's agent, and in that capacity received it as a paid note for delivery, to its principal, the maker. The rights of the defendant in this action, under its plea of payment of the money deposited, depend upon the question whether it had authority from the plaintiff to make this payment. This case is quite unlike *Manufacturers' National Bank v. Thompson*, 129 Mass. 438, 37 Am. Rep. 376, which was an action brought upon a promissory note indorsed in blank by the holder of it.

Nor can the defendant prevail upon its defense that the plaintiff did not return the note before bringing the suit. The note was voluntarily put into his possession, with canceled checks, as a paper which had ceased to be of value. The delivery was not made in the execution of a contract in reference to the note, or as a part of any transaction to which the plaintiff was a party and with which the note was connected. It was not necessary for the plaintiff to rescind the contract, or to do anything to change the existing legal relations between the parties, before demanding his money and suing to recover it. If the defendant had demanded the note of the plaintiff, and he had refused to deliver it before bringing his suit, a different question would have been presented. But

even then, if the collection of the note was made by the Quinsigamond National Bank as the agent of Adams, and not as owner—and there is nothing to show the contrary—it is at least doubtful whether it would have been the plaintiff's duty to return it. However that may be, before the trial of the case was concluded he voluntarily offered to return it. The defendant does not appear to have been injured by the plaintiff's failure to make the offer before bringing the suit. In the nature of the transactions and the relations of the parties, the case differs materially from *Northampton National Bank v. Smith*, 189 Mass. 281, 47 N. E. 1009, 61 Am. St. Rep. 283.

Judgment for the plaintiff affirmed.

(189 Mass. 513)

EVERETT et al. v. CITY OF FALL RIVER.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 28, 1905.)

1. BOUNDARIES—DESCRIPTION—STREETS.

Where there is nothing to control the effect of a deed of land described as situated on the side of a contemplated street, the grantee's land extends to the middle of the street.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 123.]

2. HIGHWAYS—LAYING OUT—DAMAGES—RECOVERY BY PROPERTY OWNER—PETITION—TIME FOR BRINGING.

Under *Rev. Laws, c. 48, § 28*, providing that in the case of a taking of land for a highway a petition for the recovery of damages resulting therefrom may be made by an injured property owner at any time before the expiration of one year from the day when the highway is entered on and possession taken for the purpose of constructing the same, in case of specific repairs from the day when the work is actually commenced on the way, and in all other cases from the date of the order providing for the same, where petitioner's deed described his land as situate on the northerly side of a contemplated street, and the point of beginning and ending of the boundaries of the land was on the northerly line of the street, there being nothing to control the effect of the deed, the land extended to the middle of the street, and a petition to recover damages caused by the laying out of the street could be brought at any time before the expiration of one year from the day the highway was entered on and possession taken for the purpose of construction.

3. SAME—ENTRY AND POSSESSION FOR PURPOSE OF CONSTRUCTION—SUFFICIENCY OF EVIDENCE.

Under *Rev. Laws, c. 48, § 28*, providing that in the case of a taking of land for a highway, a petition for the recovery of damages resulting therefrom may be made by an injured property owner at any time before the expiration of one year from the day when the highway is entered on and possession taken for the purpose of constructing the same, evidence examined, and held insufficient to show any entry on or taking possession of petitioner's land for the construction of a highway before the bringing of the petition.

4. SAME—TIME FOR BRINGING PETITION.

Under said section 28 and section 13 (*Rev. Laws, c. 48*), providing that damages shall not be payable until the land over which the highway is located has been entered on and posses-

sion taken for the purpose of constructing it, no petition can be brought until actual entry for the purpose of construction.

Report from Superior Court, Bristol County; Lloyd E. White, Judge.

Petition by Nathan B. Everett and others against the city of Fall River. Reported from the superior court. Judgment for respondent.

L. Elmer Wood and A. S. Phillips, for petitioners. Hugo A. Dubuque, for respondent.

SHELDON, J. This is a petition, filed June 8, 1903, to recover damages caused by the laying out of Barnes street in Fall River, and the establishment of the grade thereof. The layout was made after proper order and notice, by a report dated October 27, 1902, which was signed individually by the mayor and aldermen, was received, read and accepted by the board of aldermen on that day, and sent to the common council, in which, on the 3d day of November, after all proper preliminaries had been complied with, it was voted that this report of the mayor and aldermen be accepted and allowed, and on the same day, it was again transmitted to the board of aldermen, and there accepted and allowed in concurrence. It did not appear ever to have been either approved or vetoed by the mayor or to have been presented to him. At the close of the petitioners' evidence, a verdict was ordered for the respondent; and the case comes before us on a report made by the judge who presided at the trial.

The respondent's first contention is that this layout was invalid, because not signed by the mayor. There is no doubt that ordinarily every order of the city council must be presented to the mayor, and can become valid only by his approval or failure to act upon the question of approval, or by being passed over his veto. Rev. Laws, c. 26, § 9; Pub. St. 1882, c. 28, § 6; Quinn v. Cambridge, 187 Mass. 507, 73 N. E. 661; Murphy v. Webster, 181 Mass. 482. But the city charter of Fall River then in force gave exclusive power to lay out streets to "the mayor and aldermen with the concurrent vote of the common council." St. 1885, p. 710, c. 269, § 19. This layout was made by the mayor and aldermen acting together, and was afterwards concurred in by vote of the common council. We should hesitate to say that the layout was invalid because not thereafter approved by the mayor. But it is unnecessary to pass upon this question because we are of the opinion that the respondent was entitled to a verdict for another reason. Indeed, the case of Baker v. Fall River, 187 Mass. 53, 72 N. E. 336, would be decisive against the contention of the defendant, except that it does not appear that the question whether the layout must finally be approved by the mayor was raised in that case. Certainly the terms of the statute

here in question are very different from those considered in Quinn v. Cambridge and Murphy v. Webster, *ubi supra*.

The next question raised is whether this petition was prematurely brought. It is provided by statute that such a petition as this may be made at any time before the expiration of one year, in the case of the taking of land from the day when the highway is entered upon and possession taken for the purpose of constructing the same, in the case of specific repairs from the day when the work is actually commenced on the way, and in all other cases from the date of the order providing for the same. Rev. Laws, c. 48, §§ 28, 80. This petition was brought within one year from the date of the order for the layout, and no question is made that it was properly brought if none of the petitioner's land was taken. The petition, as at first filed, averred that the way was laid out over the petitioners' land. The amended petition, on which the trial was had, averred only that the way had been laid out adjoining their land. The petitioner's deed and prior deeds of the property were put in evidence, and they all described the land as "a certain lot of land and the buildings thereon, situate on the northerly side of contemplated Barnes street, in said Fall River, and bounded and described as follows, viz.: Beginning at the southwesterly corner of said lot, at a point in said northerly line of Barnes street four hundred and eight and nine-tenths (408.9) feet easterly thereon from County street, and thence running northerly, at right angles with said street, one hundred (100) feet, for a corner; thence easterly, by land now or formerly of Leonard N. Slade, fifty (50) feet, for a corner; thence southerly, one hundred (100) feet, to said Barnes street; and thence westerly, by said street, fifty (50) feet, to the point of beginning—containing eighteen and $\frac{886}{1000}$ (18.365) square rods of land." As there was nothing to control the effect of this deed, it follows that the petitioners' land extended to the middle of the street. McKenzie v. Gleason, 184 Mass. 452, 69 N. E. 1076, 100 Am. St. Rep. 566; Lemay v. Furtado, 182 Mass. 280, 65 N. E. 395; Dean v. Lowell, 135 Mass. 55, 60; O'Connell v. Bryant, 121 Mass. 557; Peck v. Denniston, 121 Mass. 17; Boston v. Richardson, 13 Allen, 146. This was a case, therefore, in which land of the petitioners was taken by the layout, and the petition could be brought at any time before the expiration of one year from the day when the highway was entered upon and possession taken for the purpose of construction. Without recapitulating the evidence, it is enough to say that there was absolutely nothing to show such entry and taking of possession of any part of this street, except what related to work done in the fall, about October of 1903, after the filing of this petition, and except some testimony that city teams had collected ashes and garbage on the street

since November, 1902. There was also evidence that this street was numbered with the regular city numbers, though it appeared that this was done in Fall River on private as well as public ways, and there was nothing to show when this was done, and that after the bringing of this petition, but not before, a sign, "Barnes Street," from the city engineer's office and like the labels on the other streets, was on the side of this street. On the other hand, there was affirmative evidence from the petitioners' witnesses that no plan had been furnished by the city engineer to the superintendent of streets by which to grade the street, as is usually done; that no work had been done towards making a street; that no work had been done there by the city before June, 1903; and that the street never had been worked. There was no evidence whether the mayor or board of aldermen had ordered the superintendent of streets to work the street to grade or not. Manifestly, upon this evidence, the jury could not have been warranted in finding that there had been any entry or taking possession for the purpose of construction of this way before the bringing of the petition (*Corey v. Wrentham*, 164 Mass. 18, 41 N. E. 101); and the question whether the city could be bound by apparently unauthorized acts of its engineer or superintendent of streets does not arise and need not be discussed.

But the petitioners contend that they had a right to bring their petition before such entry and taking of possession; that their time was limited on one side by the layout, and on the other by a year after such entry, so that it might cover a period much longer than a year. Prior to 1892, such a petition must be brought within one year from the adoption of the order (Pub. St. 1882, c. 49, § 33; *Childs v. Franklin County*, 128 Mass. 97), although the damages could not be paid until after such entry and taking of possession (Pub. St. 1882, c. 49, § 14. *Commonwealth v. Noxon*, 121 Mass. 42, 44; *La Croix v. Medway*, 12 Metc. 123). As, however, the city might delay such actual entry for any time short of two years, under Pub. St. 1882, c. 49, § 88, now Rev. Laws, c. 48, § 92, it would sometimes happen that a petition must be brought, and that a trial would be had and assessment of damages made before any actual construction of the way was begun, and when the amount of damages and the final right to require payment might be somewhat conjectural. *Harding v. Medway*, 10 Metc. 465. Under these circumstances, Pub. St. Supp. 1892, c. 415, was passed, making the amendment now embodied in Rev. Laws, c. 48, § 28. The natural construction of this statute is that the right to file the petition does not accrue until the right to compel payment of the damages to be assessed arises; i. e., until actual entry for the purpose of construction. Rev. Laws, c. 48, § 13. And the natural construction has been adopt-

ed by this court in a carefully reasoned opinion. "No petition for a jury shall be brought until an entry is made upon the land taken for the purpose of constructing the way." *Loring, J.*, in *Bates v. Boston Elevated Railway*, 187 Mass. 328, 72 N. E. 1017, citing Rev. Laws, c. 48, §§ 28, 68, 80. For a history of the legislation upon this subject and a discussion of the effect of the statutes now in force, see *Corey v. Wrentham*, 164 Mass. 18, 22, 41 N. E. 101. Accordingly we are of opinion that this action was prematurely brought, and that the judge who presided at the trial rightly ordered a verdict for the defendant.

As this conclusion is decisive of the case at bar, we have not thought it necessary to consider the respondent's third contention that, although at the time of the trial more than two years had passed since the right to take possession first accrued, no possession had been taken of any of the land over which the street was located for the purpose of construction, and accordingly, that the layout had become void under Rev. Laws, c. 48, § 92, and the petition could not be maintained under the rule of *Drury v. Boston*, 101 Mass. 439; for although this contention is doubtless open to the respondent, under its request that a verdict be ordered in its favor, we are apprehensive that this position was not clearly understood by the petitioners at the trial, and the facts may appear differently upon another petition.

The result is that, following the terms of the report, judgment must be entered for the respondent on the verdict. So ordered.

(189 Mass. 505)

HARVEY v. INHABITANTS OF EASTON.
(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 28, 1905.)

HIGHWAYS—BOUNDS—FAILURE TO ERECT—LIABILITY OF TOWN.

Rev. Laws, c. 48, § 104, provides that the county commissioners, mayor and aldermen, selectmen, or road commissioners shall cause permanent bounds to be erected "at the termini and angles of all ways laid out by them," and prescribes a penalty for neglect so to do, to be recovered by the owner of land abutting on the way. *Held*, that said section 104 applies merely to the laying out of ways, and not to alteration by relocation, widening, or otherwise.

Appeal from Superior Court, Bristol County; Pierce, Judge.

Action by Sarah W. Harvey against the inhabitants of the town of Easton. Judgment for defendant, and plaintiff appeals. Judgment for defendant.

Arthur E. Perry, Otis Seabury Cook, and Morris R. Brownell, for appellant. Hall & Hagerty, for appellee.

SHELDON, J. This action is brought under Rev. Laws, c. 48, § 104, against the town of Easton, to recover the penalty therein provided for the failure of its road commissioners to erect permanent bounds at the termini and angles of Center street in said

town, as relocated and widened by them. The statute reads as follows: "The county commissioners, mayor and aldermen, selectmen or road commissioners, shall cause permanent bounds to be erected at the termini and angles of all ways laid out by them. Such bounds shall be of stone, not less than three feet long, two feet of which at least shall be set in the ground, or of stone not less than three feet long with holes drilled therein and filled with lead placed a few inches below the travelled part of the way, or if stone bounds are impracticable, a heap of stones, a living tree, a permanent rock, or the corner of an edifice, as said officers may determine. If they neglect to establish such monuments after being notified so to do by an owner of land abutting on such way, the county or city if it is a highway or street or the town if it is a town way, shall forfeit to him fifty dollars for each month during which such neglect continues." The case was heard upon agreed facts.

The plaintiff contends that this statute applies to every case where the boundary of a way is altered by relocation, widening, or otherwise; and his right to recover manifestly depends upon this contention, since in the case at bar nothing was done but to relocate and widen a public way which had existed for more than 40 years, apparently altering somewhat its side lines and boundaries, but not making any change in its termini. We are of opinion that this contention cannot be supported, and that the statute applies merely to the laying out of ways. It is to be observed that throughout this chapter care is taken to mention every operation to which the different regulations made are to be applied. In the first eight sections provision is made for new highways and the alteration or discontinuance of existing highways, and the distinction is clearly drawn between a laying out, an alteration, and discontinuance. Section 9 makes provision for either a laying out or an alteration, as each case may demand. Section 12 is confined to relocations. The provisions for the recovery of damages (section 13 et seq.) are carefully made to include cases of laying out, relocation, alteration, and discontinuance. Section 58, by giving to town officers concurrent jurisdiction over petitions for altering, widening, or relocating ways or bridges or making specific repairs, but not including the laying out of highways, shows plainly the legislative intention to distinguish between a lay out and an alteration, widening, or relocation; and the grant in section 65 to town officers of power both to lay out and to alter town ways emphasizes this distinction. The use of the word "termini" in section 104 also tends to indicate that the Legislature had in mind the laying out of a new way rather than a mere case of widening or other alteration. Moreover, it is to be observed that this is a penal statute, and is to be construed strictly. Commonwealth

v. Worcester & Nashua Railroad, 124 Mass. 561, 563; Commonwealth v. Loring, 8 Pick. 370, 374. It would scarcely be consistent with this well-established principle to extend the liability created by the statute in question from the case of the laying out of a way, which its words do include, to that of the relocation or widening of a way, which they do not include. And, see, *Ilsley v. Essex County*, 7 Gray, 465. We are of opinion that on the agreed facts the plaintiff is not entitled to recover.

Judgment for the defendant.

(189 Mass. 507)

RADOVSKY v. SPERLING et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 28, 1905.)

EXECUTION—ARREST OF JUDGMENT DEBTOR—PROCEEDING FOR DISCHARGE—JURISDICTION—LIABILITIES ON RECOGNIZANCE.

After default of appearance at the adjournment of the hearing of a judgment debtor's application to take oath for relief from his arrest, based solely on the charge mentioned in the first clause of Rev. Laws, c. 168, § 17, of having property which he did not intend to apply to the payment of plaintiff's claim, the magistrate to whom he applied had no jurisdiction to refuse the oath for his relief, and hence a second notice, having been given more than seven days after the service of the first and there having been no valid refusal of the oath under the first notice, was properly issued, and, the debtor having been discharged thereon, there was no breach of the condition of his recognizance.

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Joseph Radovsky against Abraham Sperling and others. There was a judgment for plaintiff, and defendants bring exceptions. Exceptions overruled.

David R. Radovsky, for plaintiff. Frank Wasserman, for defendants.

SHELDON, J. This is an action on a poor debtor's recognizance, and the facts are exactly the same as stated in the report of this case in 187 Mass. 202, 72 N. E. 949, except that it now appears that the only charge filed by the judgment creditor in the Second district court of Bristol was that mentioned in the first clause of Rev. Laws, c. 168, § 17, and that the examination of the judgment debtor, which was begun in that court upon his application to take the oath for the relief of poor debtors, was upon this charge only. The single question in the case, therefore, is whether the judge of that court, upon the default of the judgment debtor for failing to appear at the time to which the hearing had been adjourned, had jurisdiction also to refuse the oath for the relief of poor debtors.

We are of opinion that the judge had not such jurisdiction. The default of the debtor was entered in his absence, and apparently for his failure to be present at the expiration of the hour allowed. It could according-

ly have been entered only at the expiration of the hour. *Hills v. Jones*, 122 Mass. 412; *Sweetser v. Eaton*, 14 Allen, 157; *Russell v. Goodrich*, 8 Allen, 150. And after the hour had elapsed without any appearance by the debtor, or continuance or adjournment of the hearing, the jurisdiction of the judge was exhausted, and he no longer had the power either to grant or to refuse the oath to the judgment debtor. *Russell v. Goodrich*, ubi supra; *Sweetser v. Eaton*, ubi supra; *Lincoln v. Cook*, 124 Mass. 383, 386. A fortiori this would be so when the debtor's examination was unfinished. The breach of the recognizance is completed for the time being by the default, and any subsequent proceedings are beyond the power of the court. *Damon v. Carroll*, 163 Mass. 404, 40 N. E. 185; *Morgan v. Curley*, 142 Mass. 107, 7 N. E. 726; *Fuller v. Meehan*, 118 Mass. 135. No doubt the judgment creditor might waive his right to avail himself of this default and to sue for a breach of the recognizance, as was held in *Vinal v. Tuttle*, 144 Mass. 14, 10 N. E. 489, and *Mt. Washington Glass Works v. Allen*, 121 Mass. 283, and cases there cited; but, apart from the fact that it is difficult to see how, after having waived a default, he could set it up as ground for requiring other final action upon the default, it does not appear that there was any such waiver. Doubtless, also, the magistrate, if he chooses, can retain jurisdiction after the hour upon his own action taken within the hour, as held in *Mann v. Mirick*, 11 Allen, 29, or upon any question of sentence or motion in arrest of judgment under Rev. Laws, c. 168, §§ 52, 55, raised before the default is entered, as in *McLeod v. Freeman*, 122 Mass. 441. But no question of that kind arises in this case. We are therefore of opinion that this magistrate had no jurisdiction to refuse the oath for the relief of poor debtors to this judgment debtor after his default upon the first charge mentioned in Rev. Laws, c. 168, § 17. It follows that the second notice, having been given more than seven days after service of the former one, and there having been no valid refusal of the oath under the first notice, was properly issued, and, the debtor having been discharged thereon, there was no breach of the condition of the recognizance. Exceptions overruled.

(189 Mass. 424)

LYONS v. URGALONES.

(Supreme Judicial Court of Massachusetts.
Franklin. Nov. 27, 1905.)

1. FRAUDULENT CONVEYANCES—CONVEYANCE BY WIFE—EVIDENCE.

Where a married woman holding a bond for a deed procured the property to be conveyed to defendant when not insolvent or under pecuniary difficulties, and plaintiff testified that at the time defendant placed a mortgage on the property, a portion of the proceeds of which plaintiff received, he did not believe she intended to defraud him, but had the deeds made to defendant because of difficulties with her hus-

band, such facts were insufficient to justify a finding that by such conveyance she intended to defraud her creditors generally.

2. ATTACHMENT—LANDS STANDING IN THE NAME OF ANOTHER—SPECIAL ATTACHMENT.

Where land standing in the name of a third person is attached as land held in trust for the debtor, within Rev. Laws, c. 178, § 1, providing that all lands so held shall be subject to execution for debts, it may be levied on by a general attachment.

3. SAME—LAND FRAUDULENTLY CONVEYED.

St. 1844, p. 211, c. 107, § 2, authorizing the special attachment of lands fraudulently conveyed and standing in the name of a third person, has no application to lands standing in the name of a third person held in trust for the debtor.

4. TRUSTS—PAYMENT OF PURCHASE MONEY.

Where T., after taking possession of land in controversy under a bond for a deed, procured the land to be conveyed first to D. and then to defendant, and defendant admitted that she did not own the property, but that it had been conveyed first to D. and then to her because T. wanted to get rid of her husband, such evidence warranted a finding that the whole purchase price had been paid by T., and that defendant held the property for her in trust, entitling T. to a present conveyance.

5. EXECUTION—SALE OF PROPERTY—TITLE OF PURCHASER.

Where land standing in the name of a third person on a trust for the judgment debtor, under which the latter is entitled to a present conveyance, is levied on and sold under execution, as authorized by Rev. Laws, c. 178, § 1, the purchaser acquires a legal estate, and not a mere equitable right.

Exceptions from Superior Court, Franklin County.

Writ of entry by Fred L. Lyons against Margaret Urgalones. From a judgment in favor of defendant, plaintiff brings exceptions. Sustained.

Burt H. Winn, for plaintiff. Fredk. L. Greene and Wm. A. Davenport, for defendant.

LORING, J. This is a writ of entry to which the tenant pleaded nul disseisin. The presiding judge directed a verdict for the tenant on the ground "that the plaintiff has mistaken his remedy, and, if there is any remedy at all, it must be in a court of equity." The case is here on an exception to that ruling.

It appeared that the land in question originally belonged to a Mrs. Weatherhead, and that she gave a bond for a deed of it to Agnes Tuttle "about 10 years ago"; that is to say, about 1895. It also appeared that the purchase money to be paid under this bond for a deed was \$1,800, and that she got \$2,000 from certain insurance companies for a loss by fire which apparently occurred after Mrs. Tuttle had gone into possession under the bond. On February 17, 1901, Mrs. Weatherhead conveyed the property to one John B. O'Donnell, and on September 7, 1901, he conveyed it to the tenant. It further appeared that somewhere at the end of July Mrs. Tuttle employed the plaintiff to rebuild the house which had been burned, and that he began work in the early part of August.

finishing in the early part of September, or on the 1st day of October, as the defendant testified. On September 14, 1901, the tenant made a mortgage of the land to a savings bank in the sum of \$1,000, \$600 of which was paid to the plaintiff. What became of the other \$400 did not appear.

The plaintiff testified that before the house was plastered, in the early part of September, he had a talk with Mrs. Tutlis and the tenant, and that at that time both of them told him that Mrs. Urgalones did not own the property; that it only stood in her name. Mrs. Tutlis said she had "deeded the property to these people because she was going to get rid of her husband," and that O'Donnell was not willing to sign a mortgage note, so that she had the property put in the name of Mrs. Urgalones, the tenant. Mrs. Weatherhead testified as a witness for the plaintiff, but she did not state what sum was paid her as the purchase money, nor by whom it was paid. On July 12th of the following year (1902), the plaintiff brought an action of contract against Mrs. Tutlis to recover for the work of rebuilding the house. In this action he attached all the defendant's real estate and put a special attachment on the lot here in question, being (in the words of the attachment) the same premises conveyed by O'Donnell to the tenant, "which deed is claimed to be fraudulent and void." Judgment was entered against Mrs. Tutlis in the sum of \$668.39, on which an execution issued, and under it a levy was made on "all the right which the within named Agnes Tutlis had on the 12th day of July, 1902, the day when the same was attached on mesne process, the following described real estate, to wit," the land here in question. The plaintiff became the purchaser at the execution sale and received a deed from the sheriff. The return day of the execution was November 4, 1903, and this writ of entry is dated November 5, 1903.

The defendant's story, among other things, was that she or her husband bought the property (there was testimony to both), that it was bought of Mrs. Tutlis and also of O'Donnell (again there was testimony to both), and that \$500 had been paid to one and the other; and the tenant testified that she employed Mrs. Tutlis to act for her (it appeared that she spoke broken English). In rebuttal the plaintiff put in evidence that this \$500 was lent by the tenant to Mrs. Tutlis, and that the tenant, who had been in occupation of a part of the house, paid rent therefor to Mrs. Tutlis as owner of the house.

We are of opinion that the plaintiff was not entitled to go to the jury on the ground that the conveyance of the tenant was a fraudulent conveyance as against the plaintiff, who was a subsequent creditor. There was no evidence that Mrs. Tutlis was insolvent or in pecuniary difficulties at any time. The plaintiff, on cross-examination, testified

that when the mortgage for \$1,000 was made by the tenant, out of which he received \$600, he "Didn't think Agnes Tutlis intended to defraud me, and I didn't think that the property was conveyed in intent to defraud me." It is under these circumstances that the statement must be interpreted that Mrs. Tutlis had the deeds made to O'Donnell and to the tenant because she was going to get rid of her husband; and under these circumstances we do not think that a jury would be justified in finding that she intended to defraud her creditors generally. The only case relied on by the plaintiff in this connection is *Livermore v. Boutelle*, 11 Gray, 217, 71 Am. Dec. 708. But in that case no question was made as to the conveyance being in fact fraudulent. The only question there was whether a wife, to whom alimony was due under a decree entered after the fraudulent conveyance was made, came within St. Eliz. c. 5.

The plaintiff's second contention is that he duly attached and levied on the land in question as land held in the name of the tenant on an implied trust for Mrs. Tutlis, whereby she was entitled to a present conveyance within the last clause of Rev. Laws, c. 178, § 1. By the terms of the levy, what was taken was what was attached, and the special attachment is in terms limited to a title in the tenant "claimed to be fraudulent and void." But, in addition to the special attachment, the plaintiff made a general attachment of all the defendant's real estate in Franklin county; and we are of opinion that where land standing in the name of a third person is attached as land held in trust for the debtor, within Rev. Laws, c. 178, § 1, no special attachment is necessary.

It is anomalous that a special attachment should be necessary in case of land standing in the name of a third person which has been fraudulently conveyed, but that no special attachment should be necessary in case of land standing in the name of a third person under a trust express or implied for the debtor, whereby the debtor is entitled to a present conveyance. This is without doubt an oversight, and it came about in this way: In case of lands fraudulently conveyed, no special attachment was necessary until St. 1844, p. 211, c. 107, although while standing in the name of a third person they could be attached and taken on execution as the lands of the debtor. It appears from a note of the commissioners for the Revised Statutes that before that time such lands could be attached and taken on execution, although there was no express provision to that effect in the acts of the commonwealth. See Report of Commissioners, Rev. St. c. 73, § 1, note. The explanation probably is that a statute to that effect had been passed by the province. See Prov. Laws 1696, c. 10, § 3 (State Ed. vol. 1, p. 254). A provision covering lands fraudulently conveyed was inserted by the commis-

sioners in their report for the Revised Statutes, and became Rev. St. 1836, c. 73, § 1, and is now found in Rev. Laws, c. 178, § 1.

The provision for a special attachment was first enacted in St. 1844, p. 211, c. 107, § 2. At that time no equitable interests in land could be taken on execution. *Russell v. Lewis*, 2 Pick. 508. The new statute (St. 1844, p. 211, c. 107, § 2) unquestionably related to lands fraudulently conveyed only. The right to take land held by another in trust for the debtor was inserted in the General Statutes by the Legislature after the commissioners had made a report which did not contain that or any similar provision. When the Legislature added the provision subjecting to execution lands standing in the name of a third person held in trust for the debtor, they left undisturbed the section reported by the commissioners, which in terms, and as matter of history, applies only where lands have been fraudulently conveyed to and stand in the name of a third person. See Commissioners' Report for Gen. St. 1860, c. 108, § 1, and chapter 123, § 54; also Gen. St. 1860, c. 108, § 1, and chapter 123, § 55.

Aside from the testimony put in by the plaintiff in rebuttal (to the effect that the \$500 paid by the tenant or her husband as the purchase money was in fact lent to Mrs. Tuttle), the plaintiff had a case for the jury that this land was held in trust for her, whereby she was entitled to a present conveyance, within Rev. Laws, c. 178, § 1. The plaintiff had proved that she had gone into possession under a bond for a deed given by Mrs. Weatherhead, and there was evidence that the tenant had admitted that she did not own the property, that it only stood in her name, and that Mrs. Tuttle had it deeded first to O'Donnell and then to the tenant, because she wanted to get rid of her husband. This warranted a finding that the whole purchase money had been paid by Mrs. Tuttle, in which case the tenant held the property for her on a trust, whereby she was entitled to a present conveyance. The statement in *Snow v. Paine*, 114 Mass. 520, 525, that "the equitable interest of the debtor, if any, which arises from his part payment of the purchase money, cannot be reached by proceedings under the statute," was made with reference to that case, where there was no trust, because the sum paid was not paid for an interest in the estate in common with the person who paid the rest of the purchase price, as is stated in *Bresnahan v. Sheehan*, 125 Mass. 11, 13. See, also, in this connection, *Skehill v. Abbott*, 184 Mass. 145, 68 N. E. 37.

The presiding judge seems to have ruled that a purchaser gets an equitable title only when he buys at an execution sale of land standing in the name of a third person on a trust for the judgment debtor, whereby he (the judgment debtor) is entitled to a present conveyance. But in our

opinion that is not so. When such an interest of the judgment debtor was first made subject to be taken on execution, the only way of levying an execution on it was by set-off. Gen. St. 1860, c. 108. The present provision for an execution sale originated in St. 1874, p. 120, c. 188. The only provision for a levy by sale which existed before St. 1874; p. 120, c. 188, was confined to levying on the equity of redeeming a mortgage, and originated in St. 1798, p. 128, c. 77, § 3, re-enacted in Rev. St. 1836, c. 73, §§ 37, 38; Gen. St. c. 108, §§ 39, 40. See *Warren v. Childs*, 11 Mass. 222. So long as the interest in the land here in question could be levied on by set-off only, there was, in our opinion, no escape from the conclusion that a legal, not an equitable, right was obtained. The subsequent act (St. 1874, p. 120, c. 188) did not make a change in that. The same result was reached in case of lands fraudulently standing in the name of a third person. *Hunt v. Mann*, 132 Mass. 53. And in England this result is reached in case of the same equitable interest in land here under discussion, by force of the act which subjects it to be levied upon, to wit, the tenth section of the statute of frauds. St. 29 Car. II, c. 3. That act expressly provides that by force of the execution the lands taken shall be held and enjoyed free and discharged from all incumbrances of the third person or persons who shall be so seized or possessed in trust for the debtor. As was pointed out in *Russell v. Lewis*, 2 Pick. 537, 511, this section of the statute of frauds was not included in the province statute of frauds (Prov. Laws 1692-93, c. 15; State Ed. vol. 1, p. 46); but it is of some importance in construing our act. The same conclusion had been reached in New Hampshire, in case of a general statute which had been held to authorize a levy on land standing in the name of another in trust for the judgment debtor. *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431. It is to be noted that the clause of the section here in question is restricted to a trust "whereby he [the debtor] is entitled to a present conveyance." This means that to bring a case within Rev. Laws, c. 178, § 1, the creditor must prove that the debtor is absolutely entitled to an immediate conveyance without any action on his (the debtor's) part. For this reason it was held that the debtor's right in land conveyed as security for a debt due from him, by an absolute deed, cannot be taken on execution, but can be reached only by a bill to reach and apply under what is now Rev. Laws, c. 159, § 3, cl. 7. *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722. This makes possible the conclusion that a legal right passes under the sheriff's deed.

It may be that in the case at bar the rule of *Rawson v. Plaisted*, 151 Mass. 71, 23 N. E. 722, would prevent the plaintiff from levying on this land if it appeared on all the evidence that the \$500 referred to in the

plaintiff's evidence in rebuttal was lent to pay for the land. It may be that on a bill being brought by Mrs. Tutlis for a conveyance the tenant could have set up in defense that she was not entitled to a decree until the \$500 was paid, on the principle that he who seeks equity must do equity. However that may be, the jury were not bound to find that the \$500 referred to in the plaintiff's evidence in rebuttal was connected with the purchase of the land in question, and, if it was not, she certainly was entitled to a present conveyance if the jury found that Mrs. Tutlis paid the purchase money.

For these reasons we are of the opinion that the jury would have been warranted in finding that the land in question was land conveyed to the tenant on an implied trust for Mrs. Tutlis, whereby she was entitled to a present conveyance within Rev. Laws, c. 178, § 1. If that was found, the plaintiff, as the purchaser at the execution sale, got by the sheriff's deed a legal title which supported his writ of entry; and the entry must be:

Exceptions sustained.

(189 Mass. 439)

HYDE et al. v. CITY OF FALL RIVER.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 27, 1906.)

1. EMINENT DOMAIN—COMPENSATION—INJURY TO PROPERTY—PECULIARITY OF INJURY.

Neighboring property owners, who, by reason of the discontinuance of a street at a point where it crosses a railroad, are obliged to go around some distance by a new street and over a bridge in order to cross the railroad, do not suffer any special and peculiar damage for which they may recover, although the inconvenience experienced by them is greater in degree than that suffered by other members of the public.

2. SAME—ALTERATION OF HIGHWAY GRADE.

Under Rev. Laws 1902, c. 111, § 153, providing for the assessment of damages on the abolition of a grade crossing in the same manner as damages are determined when caused by the taking of land for the location of railroads and the laying out of public ways, one whose land is not taken for the abolition of a grade crossing, but in front of whose house, at a distance of only 40 feet, a street nearly 15 feet high, over which teams are frequently passing, is built, may recover the damages sustained.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 269.]

Lathrop, J., dissenting.

Report from Superior Court, Bristol County; Frederick Lawton, Judge.

Petition for the assessment of damages, caused by the abolition of a grade crossing, by Samuel Hyde and others against the city of Fall River. In the superior court a verdict was directed for respondent. Petitioners excepted, and the case was reported to the Supreme Judicial Court. Verdict set aside.

J. W. Cummings, E. Higginson, and C. R. Cummings, for petitioners. H. A. Dubuque and F. S. Hall, for respondent.

KNOWLTON, C. J. Grade crossings were abolished and changes of streets were made in Fall River, under St. 1900, p. 471, c. 472, by which act the provisions of St. 1890, p. 463, c. 423, as amended by St. 1891, p. 784, c. 123, are made applicable to the proceedings, so far as they are not inconsistent therewith. These latter statutes are now found in Rev. Laws 1902, c. 111, §§ 149-160. This is a petition to recover damages for the abolition of the grade crossing of Ferry street. The petitioners owned land next to the crossing on the northerly side of Ferry street. That portion of Ferry street which is within the location of the railroad was discontinued, but the street immediately in front of the petitioners' premises was left without change. Land was taken along the line of the street on the opposite side, on which an embankment was built, beginning some distance from the premises of the petitioners, and gradually ascending, so as to carry the public travel over the railroad in a line just southerly of the former line of Ferry street. Ferry street is 40 feet wide, and the embankment, supported by a wall, is from 5½ feet to 14½ feet high in front of different parts of the petitioners' premises. These premises were built upon close to the line of the street before the change was ordered. The petitioners made various offers of proof tending to show special and peculiar damages, all of which were rejected. After a verdict had been ordered for the respondent, the case was reported to this court upon the question whether, upon the admitted facts and the offers of proof, the petitioners were entitled to go to the jury. There were various other changes in connecting streets at and about the crossing, which we need not consider. By reason of the discontinuance of the street within the location of the railroad, the petitioners, in order to cross the railroad, are obliged to go back on Ferry street, and pass around up the new street and over a bridge. If they suffer damages by reason of the discontinuance of Ferry street at the point where it crossed the railroad, their damage is not special and peculiar, but is the same in kind as that of the general public, although it may be relatively great in degree.

It is well settled that there can be no recovery for such damage. *Davis v. County Commissioners*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Hammond v. County Commissioners*, 154 Mass. 509, 28 N. E. 902; *Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377. They are left with a street nearly 15 feet high and only 40 feet away, built in front of their premises, over which teams are frequently passing. The jury might well find that they have suffered special and peculiar damages in their property from the taking of land and the appropriation of it to this use. The question is whether, under our statutes, there can be a recovery for such damage. The statute which governs this case is that under which *Rand v. Boston*, 164 Mass. 354,

41 N. E. 484, was decided, and the material facts in the two cases are almost identical. Questions of law were very much considered and discussed in that case, one of which was whether special and peculiar damages to real estate can be allowed in similar proceedings under the Public Statutes, if they arise from the taking of land and its appropriation to a use which is similar in its nature to that which an individual owner of the fee might lawfully make without liability. The opinion of the majority of the court conceded that such damages might be recovered by one a part of whose land was taken, but intimated, without deciding, that they could not be recovered by one whose only damage was of that kind. In addition to numerous decisions previously made, and referred to in the discussion of that case, this court has since repeatedly held that such damages may be recovered by one, no part of whose land was taken. *Dana v. Boston*, 170 Mass. 593, 40 N. E. 1013; *Bickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343; *Putnam v. Boston & Providence Railroad Company*, 182 Mass. 351, 65 N. E. 790; *Sheldon v. Boston & Albany R. R. Co.*, 172 Mass. 180; 51 N. E. 1078. In reference to this kind of damage, therefore, as distinguished from the damage suffered from the taking of a title to other land belonging to them, the petitioners stand, under the latest as well as the early decisions of this court, as they would have stood if a part of their own land had been taken. In *Munn v. Boston*, 183 Mass. 421-423, 67 N. E. 312, numerous authorities are cited in support of the general rule, which is there stated as follows: "It is established, under the statute before us and other similar statutes, that if, from the laying out and construction of a public way, damage results to real estate, which is direct and proximate as distinguished from remote and consequential, and which is special and peculiar as distinguished from general, the fact that the property does not abut upon a public highway will not bar a recovery."

Each one of the above cases, decided since the decision in *Rand v. Boston*, covers all the questions discussed in the opinion of the court in that case, except the question upon which the decision was made to turn. This question has since been carefully reconsidered by the court. The decision was that St. 1890, p. 464, c. 428, § 5, and St. 1891, p. 734, c. 123, § 1 (Rev. Laws 1902, c. 111, § 153), do not open to persons injured in their property so liberal rights to the recovery of damages as do the Public Statutes in reference to laying out highways and sewers and locating railroads. When the question again came before the court, in *Sheldon v. Boston & Albany Railroad Company*, 172 Mass. 180, 51 N. E. 1078, an opposite conclusion was reached. Under the statute, the damages are to be assessed "in the same manner and under like rules of law as damages may be determined when occasioned by the taking of

land for the locating and laying out of railroads and public ways, respectively, in such city or town." Of this provision the court said, in *Sheldon v. Boston & Albany Railroad Company*: "Where statutes are parts of a general system relating to the same class of subjects, and resting upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish." After pointing out another reason why the damages should be assessed in the same way in this statute as under the Public Statutes, and referring to *Rand v. Boston*, the court stated its opinion that the case should be decided as if brought under the Public Statutes, even if no sound distinction could be made between the two cases. The reports of the two cases show that they are identical in the principles involved in the decisions, and the later one necessarily overruled the earlier.

This later case has often been cited and referred to with approval in decisions, some of which are under similar statutes, and it is now the law by which we must be governed. *Penney v. Commonwealth*, 173 Mass. 507-509, 53 N. E. 865, 73 Am. St. Rep. 312; *Bickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343; *Putnam v. Boston & Providence Railroad Company*, 182 Mass. 351, 65 N. E. 790; *Munn v. Boston*, 183 Mass. 421, 67 N. E. 312; *Sheehan v. Fall River*, 187 Mass. 356-358, 73 N. E. 544. We are of the opinion that upon some of the offers of proof the petitioners were entitled to be heard by the jury.

Verdict set aside.

LATHROP, J., dissents, on the ground that he sees no reason for overruling *Rand v. Boston*.

(189 Mass. 451)

CUTTER v. MIDDLESEX COUNTY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 28, 1905.)

COUNTIES—PUBLIC BUILDINGS—STATUTES—CONSTRUCTION.

St. 1896, p. 497, c. 500, authorized certain county commissioners to construct a county building, the expense not to exceed \$500,000, and declared that the commissioners should not make any contracts calling for a larger expenditure in the aggregate than that amount. It prohibited the making of any contracts whatsoever except for plans, until responsible bids for the whole work had been made within such amount and accepted by a special board created by section 2 (page 498), and section 4 (page 499) required every contract to contain a provision that the contractor should receive nothing for additional work or material, etc., unless, before the same should have been done or furnished, the board should approve the same and the additional sums to be paid therefor. *Held*, that the supervision of such board was not confined to the original contracts, but extended as well to those made to finish the work of the original contractor, who failed to perform his contract.

Report from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Action by one Cutter against Middlesex

County for services rendered and money expended at the request of the county commissioners in the completion of a county building. A finding was made in favor of plaintiff, and damages assessed in the sum of \$2,259.01. On report from the superior court. Judgment for plaintiff for \$950, with interest.

Z. S. Arnold, for plaintiff. Geo. L. Mayberry, for defendant.

HAMMOND, J. St. 1896, p. 497, c. 500, under which the building in question was constructed, is peculiar. It authorizes the county commissioners "to provide accommodations at Cambridge for the registry of deeds and for the probate court * * * by the erection of a suitable building on the site heretofore acquired" by them under a previous statute. "The expense incurred for constructing said building, in addition to the cost of the site, shall not exceed the sum of five hundred thousand dollars; and said commissioners shall not make any contracts calling for a larger expenditure in the aggregate, for said purpose than the amount herein specified." Section 1. Section 2 (page 498) provides that "no contracts shall be made for the construction and furnishing of said building until plans, together with detailed estimates of cost from responsible parties, who are willing and prepared to furnish bonds with satisfactory sureties for the actual performance of the work and the furnishing of the materials for the amounts specified in said estimates, have been submitted to a board to consist of the judges of probate for the county of Middlesex and the clerk of courts of said county, and approved by said board. Such approval shall not be given until said board is fully satisfied that the cost of the building and its furnishings, ready for the use of said registry and court of the offices incident thereto, will not exceed the sum of five hundred thousand dollars." Section 3 provides that "after said plans shall have been so approved," the commissioners "shall advertise for proposals for doing the work and furnishing the materials required by such plans." It then sets forth the manner of the advertising, and provides that the contracts for the work shall be awarded to the "lowest responsible bidder who offers to do the same within the limits prescribed by this act, but shall not be so awarded until said contracts shall have been approved by the board provided for in section two." Power to reject any and all bids is reserved to the commissioners. Section 4 (page 499) is as follows: "At the end of every contract awarded under the provisions of this act shall be inserted the following clause: But said party of the second part shall not receive or be entitled to receive any sum in addition to the sum named in this contract, for any additional work done or material furnished, or for any other matter or claim whatsoever, unless, before the additional work or material or matter of claim

shall be done or furnished, the board constituted by chapter five hundred of the Acts of the year eighteen hundred and ninety-six shall first approve the same and the additional sum or sums to be paid therefor." Section 5 provides that to meet the expenses incurred under this act the commissioners may issue bonds "not exceeding in the aggregate five hundred thousand dollars." Section 6 provides that "the receiving by the county commissioners of bids from responsible parties for the complete construction of the building authorized by this act and for furnishing and equipping the same ready for the use of said registry and court within the sum of five hundred thousand dollars, said receipt being evidenced by a certificate to that effect signed by the members of the board named in section two of this act, shall be a condition precedent to the authority of said commissioners to borrow or to incur indebtedness under this act * * * except for procuring plans and specifications."

It is impossible to read this act without seeing that it differs widely from the ordinary act authorizing or requiring certain public officers to erect a building and making an appropriation therefor. It is very stringent. It plainly shows a rigid determination on the part of the Legislature to limit the expense of the building and its equipments to the sum of \$500,000, and contains elaborate provisions designed to carry out that intention. Except for plans and specifications, no contract is to be made until the whole question whether the building can be erected and equipped within the sum named has been carefully considered by the special board named in section 2, and until they are fully satisfied that it can be made; nor can any expense be incurred or bond issue until responsible bids for the whole undertaking have been received by the county commissioners and the fact evidenced as stated in section 6. No one contract is to be made for any part of the work and chances taken as to whether the rest of the work can be done within the remainder of the money appropriated. The statute plainly contemplates that the opinion of the special board as to whether the work can be done within the sum appropriated shall be based, not upon loose estimates, but upon bids of responsible parties willing to contract in accordance with their estimates. And, as if to make the matter beyond doubt, if possible, no contractor is to have any pay for additional or extra work except with the approval of the special board; and such a provision shall be inserted in every contract. These provisions, taken in connection with that in the first section as to the cost of the building and the power of the commissioners to make contracts, conclusively show that the authority granted by this act is exceptionally limited. It is difficult to see how the Legislature could have announced its

purpose more emphatically, or provided for the accomplishment of it in a more reasonable way. One of the most noticeable features of the act is the limitation placed upon the powers of the county commissioners as to the making of contracts. Although by the general laws they were at that time vested with the authority "to provide for erecting and repairing courthouses, jails and other necessary public buildings within and for the use of the county" (Pub. St. c. 22, § 20) yet, on account of the cost of this particular undertaking or for some other reason, the Legislature concluded not to intrust this matter solely to the county commissioners. They could reject bids, but they could not award a contract without the approval of the special board named in the second section.

It is contended by the plaintiff that this supervision of that board over the making of contracts is confined to those originally made, and does not extend to those made to finish the work of an original contractor who has failed. But the act is not open to that construction. The one central feature of it is the limitation of authority as to cost, and the one central feature of the plan adopted to make the limitation effectual is the supervision of the special board over the contracts. And not only does this supervision exist over the contract at the time the county commissioners make it, but, by the express language of section 4, it is to be exercised over every subsequent claim made by any contractor for extra compensation for "any additional work done or material furnished or for any other matter or claim whatsoever." Such a claim is not to be allowed until approved by this board. In other words, the supervision is to be continuous. It was just as necessary for the purpose of the Legislature that this board should approve of one contract as of another, and it was immaterial to this purpose whether this new contract was founded upon extra work done by the original contractor or became necessary through his failure to complete his contract. It cannot be presumed that the Legislature, fully bent on its purpose as to cost, did not foresee the contingency of the failure of a contractor to carry out his contract and the consequent necessity for a new contract. Such a failure is not unusual in building operations. The act clearly indicates that the supervision of the board was to follow every contractual claim whether made under an original contract or in some modification thereof, and whether made by virtue of any arrangement with the original contractor or any substitute or successor of him in the work. To adopt the construction contended for by the plaintiff would be inconsistent with the leading purpose and plan of the Legislature, and indeed might have defeated them.

It is further contended by the plaintiff that in any event the provision is not applicable

to a contract such as his was. That contention is not tenable. There was no difficulty in making a contract with him sufficiently definite to meet the requirements of the act. Inasmuch as the contracts upon which the items 1 and 2 of the plaintiff's declarations are based were not approved by the special board, and therefore were not authorized by the statute, he cannot recover anything upon these items; and the first ruling requested by the defendant should have been given. The conclusion to which we have come upon this branch of the case makes it unnecessary to consider the other grounds of the defense.

In accordance with the terms of the report there should be judgment for the plaintiff for \$950, with interest from the date of the writ; and it is so ordered.

(130 Mass. 421)

PUTNAM v. MISOCHI et al.

(Supreme Judicial Court of Massachusetts, Suffolk, Nov. 28, 1905.)

1. CORPORATIONS — STOCKHOLDERS — PAYMENT OF DEBTS — CONTRIBUTION.

Where a stockholder in a Maine corporation was there compelled to pay a judgment against it under Rev. St. Me. c. 48, §§ 37, 38, 44-47, making each stockholder liable for corporate debts to the amount of his capital stock unpaid, he was entitled to maintain a suit in equity for contribution in Massachusetts against other solvent stockholders similarly liable within that jurisdiction.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1178.]

2. SAME — DEMAND ON CORPORATION.

Where a stockholder of a Maine corporation was compelled to satisfy a judgment against it to the extent of unpaid subscriptions to the capital stock, the fact that after satisfying the judgment he made no demand on the corporation, and took no action against it, as authorized by Rev. St. Me. c. 48, § 49, did not affect his right to contribution from other stockholders similarly liable.

Case Reserved from Superior Court, Suffolk County; Franklin G. Fessenden, Judge.

Bill by one Putnam against one Misochi and others. Case reserved. Decree for plaintiff.

H. V. Cunningham, for plaintiff. Arthur H. Russell and Manson, Hall & Coville, for certain defendants. Geo. Libby, for defendant Hoak.

KNOWLTON, C. J. This is a bill in equity brought against certain stockholders of a corporation organized under the laws of Maine, to obtain contribution towards the payment of a judgment against the corporation, made by the plaintiff, under a liability created by the statutes of that state. The plaintiff failed to make full payment for his subscription to the capital stock of the corporation, and was therefore liable for the corporate debts, under Rev. St. Me. c. 48, §§ 37, 38, 44-47, to an amount equal to the sum left by him unpaid. For the same rea-

son each of the defendants was equally liable for these debts. Each had subscribed for the same number of shares of the capital stock, and had made the same payment for them.

It is a familiar principle that when several parties are equally liable for the same debt, and one is compelled to pay the whole of it, he may have contribution against the others to obtain from them the payment of their respective shares. This right to contribution is not founded upon contract, but upon a principle of natural equity and justice. To use the language of the court in *Aspinwall v. Sacchi*, 57 N. Y. 331-334: "The doctrine of contribution rests on the principle that where the parties stand in equal jure, the law requires equality, which is equity; and one of them shall not be obliged to bear the burden, in case of the rest. It is founded, not on contract, but on the principle that equality of burden as to common right is equity, and the obligation to contribute arises from the nature of the relation between the parties." See, also, *Stone v. Fenno*, 6 Allen, 579; *Cary v. Holmes*, 16 Gray, 127; *Ray v. Powers*, 134 Mass. 22; *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259; 1 Story's Eq. Jur. §§ 493, 495; 7 Am. & Eng. Encl. of Law (2d Ed.) 363. The principle has long been applied to the liability of stockholders in corporations for the corporate debts. In 1 Cook on Corporations (5th Ed.) § 211, we find the law stated as follows: "A court of chancery will compel the subscribers to pay in full the amount of their unpaid subscriptions, if the corporate indebtedness makes it necessary, leaving them to seek contribution from the other stockholders. The rule, however, is well settled that a stockholder who has been compelled to pay more than his proportion of the debt of the company may maintain an action against his co-stockholders for contribution." The neglect of a subscriber for stock to pay for it in full is not a tort, which deprives him of his right to contribution, but it leaves him in the position of a surety, who is liable for a debt equally with other sureties. *Nickerson v. Wheeler*, 118 Mass. 295. This is recognized in the numerous suits for contribution by stockholders which are sustained by the courts. This case is therefore one of a common class, in which a plaintiff's right to relief is plain, unless there is something peculiar in the facts that the corporation was established in another state and that the original liability arose under the laws of that state. In this respect there is nothing in this case materially different from the liability, under the laws of other states, which has been enforced repeatedly by this court in other cases. While this liability for corporate debts is statutory

in terms, it is contractual in its nature. In this respect it is like the liability referred to in *Broadway National Bank v. Baker*, 176 Mass. 294, 57 N. E. 603, in *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301, in *Hancock National Bank v. Ellis*, 172 Mass. 39, 51 N. E. 207, 42 L. R. A. 396, 70 Am. St. Rep. 232, in *Whitman v. Oxford National Bank*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, in *Hancock National Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, and in *Flash v. Connecticut*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966. Such a liability, unless an exclusive mode of enforcing it under local laws is prescribed by the statute, is enforceable anywhere. If we assume, without deciding, that the remedy by a bill in equity, prescribed by Rev. St. Me. c. 46, § 47, is only by a suit brought in that state, this same section permits an action at law against a single stockholder. In view of the decisions above referred to, we see no good reason why such an action may not be brought in any state where a stockholder is found. But whether it may or may not, the action in this case was brought against the plaintiff in Maine, and he was compelled to pay the amount of the judgment previously recovered against the corporation. The liability which he thus met was properly enforceable against him, and it gave him a right of contribution against other stockholders who are under the same liability, which right rests on broad principles of equity. It is a right which he carries with him into any state where he invokes the aid of the courts against other stockholders. There is nothing in the origin or nature of the liability on which the suit against him was founded, that deprives him of the remedy in equity which belongs to one who has paid more than his proper proportion of a debt for which others are equally holden. For other cases bearing upon the general subject, see *Allen v. Fairbanks* (C. C.) 45 Fed. 445; *Moxham v. Grant*, 1 Q. B. (1900) 88; *Richter v. Henningsan*, 110 Cal. 580, 42 Pac. 1077; *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 846, 42 L. R. A. 804, 68 Am. St. Rep. 194; *Buchanan v. Meisner*, 105 Ill. 638-644.

The fact that the plaintiff, after satisfying the judgment, made no demand upon the corporation and took no action against it, under Rev. St. Me. c. 46, § 49, does not affect his right to contribution. The contribution should be decreed against the solvent defendants who are within this jurisdiction. *Ward v. Allen*, 2 Metc. 53, 35 Am. Dec. 387; *Cary v. Holmes*, 16 Gray, 127; *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259; 7 Am. & Eng. Encl. of Law (2d Ed.) 341 et seq.

Decree for the plaintiff.

(189 Mass. 503)

COFFIN et al. v. JERNEGAN et al.

(Supreme Judicial Court of Massachusetts. Dukes. Nov. 29, 1905.)

WILLS—CONSTRUCTION—HEIRS OF LIFE TENANT.

Testator left the residue of his estate in trust for the support of his daughter for life, and provided that, on her failure to make a will, the same should go to "her heirs at law." The daughter died intestate without issue. *Held*, that the residuary estate passed on her death to those who were then her heirs at law, and not to those who would have been her heirs had she died when the testator did.

Appeal from Supreme Judicial Court, Dukes County.

Suit by one Coffin and another against one Jernegan and others. From a decree of the probate court dividing the residuary estate under the will of John Mayhew, deceased, the children of Jared Jernegan appealed to the Supreme Judicial Court, and to a ruling made by a single justice upholding the probate court decree they except. Overruled.

J. N. Pierce, for appellants. Raymond & Mitchell and S. Keniston, for petitioners.

LORING, J. This case comes up on an exception taken to a ruling made by a single justice in a probate appeal. John Mayhew left the residue of his estate to trustees, in trust for the comfortable support and maintenance of his daughter during her life. She had been married and divorced, and was then insane. After giving instructions at great length for her support, he directed that the trustees should, "upon the death of my said daughter, provide a suitable stone for her grave, and cause a suitable inscription appropriate to her to be carved upon the family monument, and make over so much of said estate and its accretions as is then in their hands, after the payment of bequests and devises as hereinbefore provided, to my said daughter's executor for the benefit of such persons as she shall nominate in her will, if she shall have made a will, being competent thereto; or in default of such will to her heirs at law." The trust estate consisted of personal property only, and his daughter died intestate, without having had a child. When John Mayhew died, the daughter had no next of kin on her father's side. On her mother's side, she had an aunt, Dencie Mudgett, and two uncles, Thomas and Jared Jernegan. Jared died before the daughter, and Dencie Mudgett died after the daughter. It was held in the probate court that the estate should be divided between the administrator of Dencie Mudgett and Thomas Jernegan, being her next of kin, under Rev. Laws, c. 133, § 1, cl. 6. From this decree an appeal was taken by the children of Jared Jernegan to this court. At the trial of this appeal the appellants asked for this ruling: "In the above-entitled case, the appellants request the court to rule, as matter of law, that the next of kin or heirs at law of D.

Anna Mayhew were the next of kin, or heirs at law of said D. Anna Mayhew at the time of the death of John Mayhew, deceased, testate." The court refused so to rule, but affirmed the decree of the probate court. The case is here on an exception to "said refusal so to rule."

The ruling was rightly refused. The appellant has argued that there is nothing in the will showing more affection for the aunt and uncle who survived than for the uncle who died. But the interpretation of John Mayhew's will does not depend upon that. It depends upon the interpretation of the words which he used to express his intention. Of the meaning of these words there can be no doubt. The gift over is to the heirs at law of the life tenant, not to the persons who would have been her heirs at law if she had died when the testator did, as the appellants ask us to interpret them. See *Richardson v. Wheatland*, 7 Metc. (Mass.) 189; *Putnam v. Story*, 182 Mass. 205, 210. Exceptions overruled.

(189 Mass. 518)

BUSIERE v. REILLY.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 28, 1905.)

1. EQUITY—BILL—SUBSTITUTION OF PARTIES—AMENDMENT.

Where suit was brought by the special administrator of a deceased grantor to set aside a conveyance by the testator for fraud, it was within the discretion of the court, after proof of the will, to permit one to whom the property had been devised after the conveyance to be substituted as complainant.

2. SAME—EFFECT.

Where a suit was brought by a special administrator to set aside a conveyance by his testatrix for fraud prior to the proving of the will, and after the will was proved the bill was amended by substituting a devisee of the property as plaintiff, the bill when amended should be treated as having been brought by such devisee before the will had been allowed.

3. WILLS—TITLE OF DEVISEE.

Where a will devised to complainant testatrix's right of action to recover certain property which she had been induced to convey by fraud, complainant's title to the property on the allowance of the will related back to testatrix's death.

4. ABATEMENT AND REVIVAL—DEEDS—VACATION—FRAUD.

Where a grantor was induced to convey certain real estate to defendant by fraudulent representations, the right of action to have such deed set aside did not abate on the grantor's death.

5. CANCELLATION OF INSTRUMENTS—FRAUD—FINDINGS.

Where a jury found that a deed had been obtained by fraud alleged, such finding must be construed as conclusive that all elements necessary to constitute actionable fraud were found to have existed.

6. DEEDS—VALIDITY—FRAUD.

Where a deed was obtained by fraudulent representations as to the character of the instrument and its effect, such representations were not so merged in the deed that they could not be made the basis of a decree vacating the same.

7. SAME — FRAUDULENT REPRESENTATIONS — CHARACTER.

Defendant, who was testatrix's brother, while a visitor at her house, induced her to execute to him a deed of certain property in question, by falsely representing to her that the instrument would not deprive her of the right to dispose of the property as she might desire during her lifetime. Testatrix was ignorant of the law and also of the character of the conveyance, and defendant recorded the instrument during testatrix's lifetime in violation of his express agreement not to do so. *Held*, that defendant's misrepresentations were misrepresentations of fact, constituting actionable fraud, justifying a vacation of the deed.

8. SAME — MISTAKE OF LAW.

Where a grantor was ignorant of the law, and the grantee, with knowledge of such fact and knowing the law, took advantage of the grantor's ignorance to misstate the law to her, and by inequitable and deceptive conduct confirmed such mistake and concealed the truth to obtain the deed, the grantor would be entitled to a vacation thereof in equity.

Appeal from Superior Court, Bristol County; Chas. W. Bell, Judge.

Bill by Louis Busiere, as special administrator of the estate of Ellen Reilly, deceased (Annie M. Reilly being substituted as complainant), against Maurice J. Reilly. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Fuller & Davison, for appellant. Fredk. S. Hall and Chas. C. Hagerty, for appellee.

SHELDON, J. This is a bill in equity brought by the special administrator of the estate of Ellen Reilly to cancel a deed given by her to the defendant, her brother. In March or April, 1901, the defendant came from his home in Ohio to visit her in Taunton. During this visit she executed and delivered the deed to him, conveying the property to him in fee, on condition that he hold it subject to a life estate for her benefit. The deed was dated April 12, 1901. He recorded it in May, 1902. She died September 11, 1908, leaving a will dated September 5, 1903, by which she left all her property, "and whatever rights I may have for the recovery of certain property obtained from me" by the defendant "through fraud and deceit," to Annie M. Reilly. This will had not been admitted to probate when the bill was filed, but has since been proved and allowed. Issues were framed for a jury trial; and the jury found that the deed was obtained from Ellen Reilly by the defendant "by his false and fraudulent representation to her that said instrument would not deprive her of the right to dispose of her property in any manner she might desire during her lifetime," and under an express agreement and understanding that he would not record it during her lifetime, and that when she executed it she did not know it to be a deed which constituted a present transfer of her property. On November 9, 1904, Ellen Reilly's will was proved and allowed. The bill was then amended by substituting Annie M. Reilly, the devisee, as plaintiff, and a final decree was entered that the deed be canceled and set aside. The defendant ap-

peals, and in his brief complains only of the order of the court allowing the amendment, and of the final decree.

1. The amendment was within the discretion of the court. *King v. Howes*, 181 Mass. 445, 63 N. E. 1062; *Lewis v. Austin*, 144 Mass. 383, 11 N. E. 538. Doubtless the bill, when amended, must be treated as having been brought by Annie M. Reilly before the will containing the devise to her had been allowed; but upon the allowance of the will her title related back to the death of the testatrix. *Drury v. Natick*, 10 Allen, 169, 182; *Ex parte Fuller*, 2 Story, C. C. 327, Fed. Cas. No. 5,148; *Ives v. Allyn*, 13 Vt. 629; *Hamilton v. Porter*, 63 Pa. 332. And, as the final decree was not entered until the will had been allowed, it cannot now be assailed for the lack of a proper plaintiff. Nor was the right of action abated by the death of the person defrauded. *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073.

2. The question remains whether the final decree was properly entered on the averments of the bill and the finding of the jury. The bill avers, and the jury found, that the defendant obtained the deed from Ellen Reilly, the plaintiff's devisor, by false and fraudulent representations to her that the instrument would not deprive her of the right to dispose of her property in any manner she might desire during her lifetime, and that she did not know it to be a deed transferring her property. As the jury have found, under instructions which do not appear to have been objected to, that the defendant's representations were in fact false and fraudulent, the only question here open is whether they were such as to afford a ground for relief. If so, there is no question that equity can give relief by canceling the deed and, if necessary, by ordering a reconveyance of the property. *Weeks v. Currier*, 172 Mass. 53, 51 N. E. 416; *Fuller v. Percival*, 128 Mass. 381; *Martin v. Graves*, 5 Allen, 601. The finding of the jury that the deed was obtained by this fraud, no further evidence having been offered by either party, must now be taken to have settled that all the elements necessary to constitute actionable fraud were found to have existed. *Dudley v. Dudley*, 176 Mass. 34, 56 N. E. 1011; *Langmaid v. Reed*, 159 Mass. 409, 34 N. E. 593; *Franklin v. Greene*, 2 Allen, 519; *Crocker v. Crocker*, 188 Mass. 16, 18, 19, 73 N. E. 1068. And the fraudulent representations were not so merged in the deed procured by means of them that they may not be made the basis of a decree to set it aside. *Weeks v. Currier*, 172 Mass. 53, 55, 51 N. E. 416.

The only question remaining is whether the fraudulent representations could be found to be of such a nature that equity may relieve against them. The defendant argues that they were not statements of fact, but merely representations of the legal effect of the instrument, and so cannot be made a ground of relief either at law or in equity; and he relies on *Taylor v. Buttrick*, 165 Mass. 547,

43 N. E. 507, 52 Am. St. Rep. 580. But we think that this case comes rather under the rule of *Motherway v. Wall*, 168 Mass. 333, 47 N. E. 135. This deed was not explained to the grantor therein, nor did she understand its contents, as in *Taylor v. Buttrick*. On the contrary, the jury have found that she did not know it to be a deed constituting a present transfer of her property. The defendant's representations related to a question of fact, namely, her title to the property, and were of exactly the same character as in *Motherway v. Wall*, *ubi supra*. Moreover, he was her brother, a visitor at her house from his home in a distant state, and, so far as the existence of a relationship of trust and confidence between him and her had a bearing, it must now, after the verdict of the jury, be presumed that this was sufficiently proved. A mistake as to title is a mistake of fact, even though arising from an erroneous view of the legal effect of a deed. *Livingstone v. Murphy*, 187 Mass. 315, 72 N. E. 1012. And it has been held that, although a misrepresentation as to matter of law may not of itself constitute an actionable fraud, yet any misrepresentation of the legal effect of a deed or other instrument which has deceived one who had justifiably reposed special trust and confidence in the maker of such representation may constitute such fraud. *Townsend v. Cowles*, 31 Ala. 428; *Decker v. Hardin*, 5 N. J. Law, 579; *Jordan v. Stevens*, 51 Me. 78, 81, 81 Am. Dec. 556; *Abbott v. Treat*, 78 Me. 126, 3 Atl. 44. So, if a grantor is ignorant of the law, and the other party, knowing this fact and also knowing the law, takes advantage of his ignorance to misstate the law, and by inequitable, unfair, and deceptive conduct confirms his mistake and conceals the truth, the grantor has been allowed relief in equity. *Townsend v. Cowles*, *ubi supra*; *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958; *Berry v. Whitney*, 40 Mich. 72.

The final decree in this case provided simply for a cancellation of the deed. We are of opinion that it might well have included an order for a reconveyance. As, however, there has been no appeal by the plaintiff, the order must be:

Decree of the superior court affirmed.

(189 Mass. 537)

BOUTHILLIER v. OLD COLONY ST. RY. CO.

(Supreme Judicial Court of Massachusetts. Bristol. Nov. 29, 1905.)

STREET RAILROADS—INJURIES TO CHILDREN—NEGLIGENCE—WARNING—SIGNAL.

Plaintiff, a child less than three years old, in attempting to cross a street, darted from a

sidewalk behind a wagon standing in front of plaintiff's home, and struck the running board of defendant's street car. The car was going at a moderate speed, and as it approached there was nothing in sight, and no children in the street for a distance of 200 yards. *Held*, that defendant was not guilty of negligence in failing to sound the gong on the car as it approached the place of the accident.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 202.]

Exceptions from Superior Court, Bristol County; Lloyd E. White, Judge.

Action by Jane A. Bouthillier, by her next friend, Adelard Bouthillier, against the Old Colony Street Railway Company. In the superior court a verdict in favor of defendant was directed, and plaintiff brings exceptions. Overruled.

Alvin G. Weeks, for plaintiff. Jas. M. Swift and John A. Kerns, for defendant.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff, a child a little less than three years of age, by being struck by an open electric car. At the trial in the superior court, at the close of the plaintiff's evidence, the judge directed a verdict for the defendant, and the case is before us on the plaintiff's exceptions.

Without stopping to consider whether the case does not fall within *Cotter v. Lynn & Boston Railroad*, 180 Mass. 145, 61 N. E. 818, on the question whether there was due care on the part of the parents of the child or of the guardian, a boy of 15, in whose care the child was left, we find no evidence of negligence on the part of the defendant. A wagon drove up in front of the house where the plaintiff lived shortly before the car came along. The plaintiff was then on the sidewalk, near the gate leading into the yard. There was a space of a foot and a half between the wagon and the nearest rail of the track. The plaintiff, attempting to cross the street, darted behind the wagon and struck the running board of the car, and sustained the injuries complained of. The car was going at a moderate speed, and was quickly stopped. The plaintiff contends that the gong should have been sounded; but there is no evidence in the case that it was a usual place to sound the gong. There was no occasion to sound it. As the car approached there was nothing in sight for 200 yards, and there were no children in the street. See *Bartlett v. Worcester Consolidated Street Railway* (October, 1905) 75 N. E. 706.

Exceptions overruled.

(183 N. Y. 38)

McCLURE v. LEAYCRAFT.

(Court of Appeals of New York. Oct. 27, 1905.)

1. APPEAL—REVIEW—DENIAL OF INJUNCTION.

The Court of Appeals will reverse an order of the Appellate Division, reversing a judgment of the Special Term which denied a permanent injunction, if the facts found compel the conclusion as a matter of law that an injunction should be refused as inequitable.

2. INJUNCTION—BREACH OF COVENANT—REMEDY AT LAW.

Plaintiff sued to enforce a covenant running with the land against the erection thereon of any buildings, except brick or stone dwelling houses, or any apartment, tenement, or community house, and 19 of the 25 years to which the covenant was limited had expired. The object of the parties to the covenant had been defeated by the erection of stores and apartment houses in the immediate vicinity, so that the enforcement of the covenant would not restore the neighborhood to its former condition. *Held*; that the injunction would not be granted; the damages sustained, if any, being recoverable at law.

Appeal from Supreme Court, Appellate Division, First Department.

Action by John McClure, trustee of Julia P. Kirkland, under the will of Charles P. Kirkland, against Robert J. Leaycraft. From an order of the Appellate Division (97 App. Div. 518, 90 N. Y. Supp. 233), reversing a judgment for defendant on dismissal of the complaint, and granting a new trial, defendant appeals. Reversed.

This action was brought to restrain the defendant from erecting an apartment house upon premises owned by him situate on the southwest corner of 145th street and St. Nicholas avenue in the city of New York. Either party owns land nearly adjacent to that of the other and on the same block. There is a four-story dwelling, designed for but one family, standing on the land of the plaintiff, while the premises of the defendant are vacant. Both parties took title from a common source and subject to a covenant, made November 9, 1886, against the erection at any time upon any part of the tract to which the lands of the respective parties belong "of any buildings, except brick or stone dwelling houses," or "any tenement, apartment, or community house." On the 8th of December, 1886, the covenant was so modified as to permit the erection of churches upon the tract and to limit the period of restraint to 25 years. These covenants by express agreement ran with the land, and the instruments containing the same were duly recorded as conveyances in the proper office. Shortly before the commencement of this action the defendant filed plans to erect and had begun the erection upon his premises of a six-story modern apartment house, "divided into 42 independent and separate suites of rooms or apartments, each suite containing a complete set of rooms and improvements such as are usually found in a first-class private dwelling house."

In addition to the foregoing facts, the trial

75 N.E.—61

court found as follows: "Tenth. That at the time when the conveyances hereinbefore set forth were made and entered into, the real property in the vicinity of the property hereinbefore described was occupied exclusively by small private dwellings, and was classed as a private residential district, and such houses were built solely for one family and occupied by one family, and there were no places of business, flats, tenements, or apartment houses in the immediate neighborhood of the property affected by the said covenants. Eleventh. That since the making of the said covenants, and within the period of about 10 years last past, great changes have occurred in the neighborhood and in the class of buildings erected upon the property in said neighborhood, and in the immediate vicinity of the premises owned by the plaintiff and the defendant, and there has been erected upon such property, including the three corners directly opposite to defendant's premises, large apartment houses having a great many apartments therein, several on each floor and several stories in height, and which are occupied on the ground floor by places of business and used for business purposes. Numerous flats or tenement houses have been built on the block fronting on 145th street between St. Nicholas and Bradhurst avenues, which is in the vicinity of plaintiff's and defendant's property."

* * * Fourteenth. That the erection upon the said land of the said apartment house which the defendant proposes to erect thereon will not decrease the fee value of the plaintiff's premises, or of the land and dwellings within the tract hereinbefore described, but will increase the value thereof, and the use of the same as an apartment house will not make the neighborhood undesirable nor decrease the values of the adjoining property. Fifteenth. That the change which has taken place in the character of the neighborhood has made the property, including the tract hereinbefore described, especially the land owned by the defendant, undesirable for the erection of a private dwelling thereon. Sixteenth. That by reason of the change in the character of the neighborhood and of the immediate vicinity of plaintiff's property and defendant's property the same has been so altered as to render inexpedient the observation of the said covenants, and it would be inequitable to enforce the covenants hereinbefore set forth against the defendant, as the enforcement of the same would cause him great damage and would not benefit the owners of the adjoining property."

The complaint was dismissed on the merits, for the reason, among others, "that the character and condition of the neighborhood have so changed since the making of the said agreements that it would be inequitable to enforce a covenant prohibiting the erection of a structure such as the defendant proposes to erect, and equitable relief enjoining the defendant from erecting the said

structure should be refused." Upon appeal to the Appellate Division the judgment of the Special Term was reversed, and a new trial ordered. The defendant appealed to this court.

Bertram L. Kraus and Henry B. Wesselman, for appellant. David McClure, for respondent.

VANN, J. (after stating the facts). As the order of reversal is silent as to the ground, we are required to presume that the judgment of the trial court was not reversed upon a question of fact, and that the facts as found were approved by the Appellate Division. *Bomeisler v. Forster*, 154 N. Y. 229, 48 N. E. 534, 39 L. R. A. 240; *Petrie v. Trustees of Hamilton College*, 158 N. Y. 458, 463, 53 N. E. 216; Code Civ. Proc. § 1338. As said facts find ample support in the evidence, and no exception was taken to any ruling relating to evidence, the only question presented for decision is whether upon those facts the plaintiff or the defendant is entitled to judgment. *Spence v. Ham*, 163 N. Y. 220, 224, 57 N. E. 412, 51 L. R. A. 238; *National Harrow Co. v. Bement & Sons*, 163 N. Y. 505, 57 N. E. 764.

The covenant in this case differs from the one recently under consideration by us, in substance as well as in the date when it was made. *Kitching v. Brown*, 180 N. Y. 414, 73 N. E. 241. In that case the covenant was made in 1873, when the modern apartment house was unknown, and the promise was not to erect any "tenement house" upon the premises then in question. The covenant now before us was made in 1888, when apartment houses were not unknown, and it runs against the erection of an apartment house *eo nomine*. Assuming, therefore, that the defendant was about to violate the covenant, the question is whether, upon the facts found and approved by the courts below relating to the radical change in the situation of the property affected by the covenant, a court of equity was bound to refuse equitable relief in the form of an injunction and to leave the injured party to recover his damages in an action at law. If the granting or withholding of a permanent injunction is within the absolute discretion of the Supreme Court, the exercise of that discretion by the Appellate Division in favor of the plaintiff is beyond our power to review; but if the facts found compel the conclusion, as matter of law, that an injunction should be refused, as inequitable, the order of reversal was wrong, and the judgment rendered by the trial court should be restored.

While a temporary injunction involves discretion, a permanent injunction does not, when the facts conclusively show that it would be inequitable and unjust. A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice,

when the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. It withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless. It cannot set aside a binding contract; but when the effect would be inequitable, owing to facts arising after the date of the agreement and not within the contemplation of the parties at the time it was made, it refuses to enforce the contract and remands the party complaining to his remedy at law through the recovery of damages. These principles were applied by this court in an important case which we regard as analogous and controlling. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365. In that case adjoining landowners in the city of New York had entered into reciprocal covenants restricting the use of their respective lands to the sole purpose of a private residence and expressly excluding "any kind of manufactory, trade, or business whatsoever." After the lapse of nearly 20 years the defendant permitted a building upon his land, which was bound by the covenant, to be used for the business of a tailor, a milliner, an insurance agent, a dealer in newspapers, and a tobacconist. After the commencement of an action by the other landowner to restrain such use, an elevated railway was built and a station located in the street in front of the premises of both parties. It was found as a fact that the "railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth street and included in the said covenant, but only a comparatively small part thereof." The trial court awarded a permanent injunction, and the General Term affirmed the judgment; but the Court of Appeals reversed and dismissed the complaint on the ground that a contingency, not within the contemplation of the parties, had frustrated the scheme devised by them and rendered the enforcement of the covenant oppressive and inequitable. This court obviously held that an injunction, under the circumstances, was not within the absolute discretion of the Supreme Court; for otherwise, according to its uniform rule of action, it would not have reversed the judgment or dismissed the complaint. The opinion of Judge Danforth, concurred in by all the members of the court, declared that there was a clear breach of the covenant, which, under ordinary circumstances, would entitle the plaintiff to an injunction; but, he said, "though the contract was just and fair when made, the interference of the court

should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Thomson v. Harcourt*, case 66, p. 415, vol. 2, *Brown's Parliamentary Reports*; *Davis v. Hone*, 2 Sch. & Lef. 340; *Bally v. De Crespigny*, L. R. [4 Q. B.] 180; *Clarke v. Rochester, Lockport & Niagara Falls Railroad Company*, 18 Barb. 350." After reviewing the authorities cited, the learned judge continued: "In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have been sustained, they must, in any proper action, be allowed. But, on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference if the discretion of the court is to be governed by the principles I have stated, or the cases which those principles have controlled. * * * The road was authorized by the Legislature, and, by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood and property values. It has made the defendant's property unsuitable for the use to which by the covenant of his grantor it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity." This case was followed in *Stokes v. Stokes*, 155 N. Y. 581, 590, 50 N. E. 342; *Amerman v. Deane*, 132 N. Y. 355, 359, 30 N. E. 741, 28 Am. St. Rep. 584; *Conger v. N. Y., W. S. & B. R. R. Co.*, 120 N. Y. 29, 32, 23 N. E. 983; *Page v. Murray*, 46 N. J. Eq. 325, 331, 19 Atl. 11. See, also, *Jewell v. Lee*, 96 Mass. 145, 92 Am. Dec. 744; *Taylor v. Longworth*, 14 Pet. 170, 174, 10 L. Ed. 405; *Duke of Bedford v. Trustees British Museum*, 2 My. & K. 552; *Sayers v. Collyer*, 24 L. R. (Ch. Div.) 170.

So long as the Columbia College Case stands, the judgment appealed from cannot; for the same principle controls both. In each the changed condition was wholly owing to the lawful action of third parties, which made the allowance of an injunction inequitable and oppressive. Indeed, an injunction in the case before us would be more oppressive than in the case cited; for it is expressly found, and the finding is final here, that the proposed erection would actually increase the value of the plaintiff's premises, while the enforcement of the covenant, without benefiting any one, would cause great

damage to the defendant. It is a reasonable inference from the evidence that the rent roll of the defendant's land, with such dwelling houses on it as would rent to the best advantage, would not exceed \$4,500 a year, while an apartment house such as he proposes to erect would rent for over \$40,000 a year. Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value, to the dominant estate, a court of equity might enforce it, even if the result would be a serious injury to the servient estate; but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive. No injustice is done, for the damages sustained can be recovered in an action at law, and the material change of circumstances so affects the interests of the parties as to make that remedy just to both.

We think that both reason and authority require a reversal of the order of the Appellate Division, but exact justice calls for a modification of the judgment of the Special Term. As that court found that the proposed erection would cause no damage to the plaintiff, its judgment might be held a bar to an action at law, unless it expressly appeared that it was without prejudice to that remedy for the recovery of all damages sustained. We therefore reverse the order appealed from, and so modify the judgment of the Special Term as to declare that it is without prejudice to an action at law, and, as thus modified, we affirm it, without costs in this court or in the Appellate Division to either party.

CULLEN, C. J., and GRAY, BARTLETT, and WERNER, JJ., concur. O'BRIEN and HAIGHT, JJ., absent.

Order reversed, etc.

(183 N. Y. 52)

PEOPLE v. PATRICK.

(Court of Appeals of New York. Oct. 27, 1905.)

1. CRIMINAL LAW—APPEAL—REHEARING.

Where, in a capital case, no important objection has been overlooked, a motion for reargument will be denied; the fact that exceptions raised upon the trial are not separately discussed in the prevailing opinion not indicating that they were not considered.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2984.]

2. JUDGES—DISQUALIFICATION.

A judge is not disqualified in a capital case because his son, as assistant district attorney, opposed defendant's motion for new trial on the ground of newly discovered evidence; nor does such relationship render it improper for him to sit in the case, or justify him in refusing to do so.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 213.]

Motion for reargument. Denied.

For former opinion, see 182 N. Y. 131, 74 N. E. 843.

CULLEN, C. J. Though I am one of the minority who dissented from the affirmance of the judgment of conviction in this case, I am entirely clear that the present motion for reargument should be denied. The grounds for such an application are stated by Judge Peckham in *Fosdick v. Town of Hempstead*, 128 N. Y. 651, 27 N. E. 882: "A motion for reargument must be founded on papers showing that some question decisive of the case and duly submitted by counsel has been overlooked by the court, or that the decision is in conflict with the statute or a controlling decision." The learned judge further observed: "While it is very possible we err in many cases, yet the rule adopted is a proper one, considering that there must be at some point an end of litigation." While in a capital case we would not hold an appellant to the rule that the point overlooked must have been raised by counsel on the argument, it is just as true of such a case as of a civil case "that there must at some point be an end of litigation." That point was reached in this case when, after a hearing accorded counsel far more extended in time than any that has been had before this court for years, after a consideration of the case for some months, and after frequent discussions at the consultation table, the court announced its decision. The matter should not now be reopened, unless some important objection has been overlooked by us. We have examined with care the elaborate brief filed by the appellant's counsel, and find no objection discussed therein that was not considered by the court before it decided the appeal. In the opinions that were then written all of the questions raised that were deemed important were considered and discussed, and the opinions clearly expressed the views of the several members of the court thereon. It is true that in the prevailing opinion some of the exceptions raised upon the trial of the case were not specifically alluded to or separately discussed; but they all appear in the dissenting opinions, and were, therefore, necessarily passed upon by the court before it announced its determination. There is, therefore, no valid reason for granting this motion.

It is urged, however, as a ground for the application, that Judge GRAY, who wrote the prevailing opinion, is the father of a

subordinate counsel in the office of the district attorney of New York, Mr. Henry G. Gray, who appeared with Mr. Garvin, another deputy assistant, in opposition to the motion made by the defendant for a new trial on newly discovered evidence. It is conceded that this relationship constituted no legal disqualification of the judge, but it is contended that the fact rendered it improper for Judge GRAY to sit in the case. It would be a sufficient answer to this claim that of an objection of that character—impropriety, as distinguished from legal disqualification—the judge himself is the sole arbiter. *Matter of Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579. But the objection is now presented, not to Judge GRAY alone, but to the whole court, and it is only just to our associate that we should express our views on the subject. Many and great judges have allowed their relatives to practice before them; others have declined to hear cases in which near relatives appeared as counsel; but we have never heard of a judge refusing to sit in any case because at some earlier period his relative had taken part in the legal proceedings in the cause. This appeal was argued in this court by Judge Landon and Mr. Howard S. Gans for the prosecution. Mr. Gray in no way appeared in the preparation or in the argument of the appeal, and his sole connection with the case was that already stated. We think it would not occur to the most sensitive judicial officer that such a previous appearance in a case by his son, not as counsel for a private litigant, but as a public officer in the performance of official duties, would either bias his action or affect public confidence in the impartiality of that action. While, if Judge GRAY had retired from the hearing of the appeal, his associates would have respected his motives, at the same time they would have felt that delicacy had been indulged in to an excessive degree at their expense, and that a burden which in the ordinary practice of the court would in the first instance have fallen upon him had been rather unwarrantably imposed upon one of them. It may be further said that, if any objection was entertained to Judge GRAY'S participation in the hearing of this appeal, it should have been made at the commencement of the argument, when, if he had sought counsel of his associates, we should have advised Judge GRAY that it was his duty to sit. Counsel should not have awaited Judge GRAY'S action, and, finding that action unfavorable, now take the objection.

The motion for reargument should be denied.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Motion denied.

(183 N. Y. 67)

KELLER v. ERIE R. CO.

(Court of Appeals of New York. Nov. 21, 1905.)

1. RAILROADS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action to recover for the alleged negligent killing of plaintiff's intestate on defendant's railroad track, where the evidence either shows an unimpeded view of the approaching train for several hundred feet at a point near to defendant's tracks, or that the smoke and steam from a train on an intersecting road had so settled down upon the tracks as to obstruct the view at the time, so that it was the duty of the deceased to stop until the obstruction had ceased, it establishes contributory negligence as a matter of law.

2. SAME — PRESUMPTIVE RIGHT TO CROSS TRACKS.

Under Laws 1892, p. 1894, c. 676, § 53, providing that no person other than those connected with the railroad shall walk upon the track, except where the same crosses streets or highways, a presumptive right to cross the tracks of a railroad company at a point not a highway or street crossing cannot be acquired, even by long user, where it is necessary to walk along the tracks of an intersecting railroad to reach such point of crossing.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 955, 1228-1230.]

Cullen, C. J., and Vann and Bartlett, JJ., dissenting in part.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William C. Keller, administrator of Daniel Keller, against the Erie Railroad Company. From an order of the Appellate Division (90 N. Y. Supp. 236, 98 App. Div. 550), reversing a judgment for plaintiff, he appeals. Affirmed.

The action was brought to recover damages of the defendant for having negligently caused the death of the plaintiff's intestate. The negligence alleged is that, while the deceased was lawfully and rightfully upon the defendant's railroad tracks, one of its trains, through carelessness in operation, came into collision with him. The accident occurred in a part of the city of Buffalo where the defendant's tracks cross an unoccupied tract of land between city streets. Hertel avenue lies to the north of this land, on the east is Military Road, (an important street of the city), and on the west are the tracks of the Niagara branch of the New York Central & Hudson River Railroad Company. Towards those tracks the defendant's road curves, in a southwesterly direction, from Military Road. A Y branch of the New York Central & Hudson River Railroad Company, crossing Hertel avenue and curving in a southeasterly direction, crosses the defendant's tracks, at a point some 420 feet distant from Military Road, and connects, some 170 feet beyond, with the belt line of the New York Central & Hudson River Railroad Company, which lies to the south of the defendant's road and is parallel therewith and close thereto. This Y branch consists of a double track, and is built, as are the other tracks over this tract of land, upon an embankment; the general surface of

the land being considerably depressed below the street levels. Near where Hertel avenue is crossed by the Y branch is a malthouse, in which the deceased was employed. He and his fellow workmen had been accustomed, as had other persons, for many years, to walk along the tracks of this Y branch, in order to reach Military Road by a short cut. Upon the day in question, March 25, 1902, at about 5 o'clock in a clear afternoon, the deceased and two companions were walking from Hertel avenue, upon the tracks of the Y branch. In approaching its point of junction with the defendant's tracks, a pile of stones, placed between the two railroads, obstructed the view from the latter's tracks to the west; but, when passed, a clear view was possible in that direction, for upwards of 400 feet. When they were approaching the defendant's tracks, a train of the New York Central & Hudson River Railroad Company was passing, upon that company's tracks, to the west. According to the testimony for the plaintiff, the deceased and his companions stopped, looked up the defendant's tracks to the west, saw no train, and continued walking upon the Y tracks and over those of the defendant. A train of the defendant, coming from the west upon defendant's southerly track, without signals or warning of its approach, struck two of them, killing the one and injuring the other. From the testimony of one of the party, the jury might have believed that steam and smoke from the passing train of the New York Central & Hudson River Railroad Company obstructed for the moment a view to the west. The plaintiff recovered a verdict against the defendant at the Trial Term, but, upon appeal to the Appellate Division in the Fourth department, the judgment entered upon the verdict was reversed, and a new trial was ordered; the reversal being upon questions of law only.

J. H. Metcalf and Frederick G. Bagley, for appellant. Adelbert Moot, for respondent.

GRAY, J. (after stating the facts). It appears, upon reference to the opinion below, that the Appellate Division justices considered the evidence as conclusively proving the deceased to have been guilty of contributory negligence. It either showed that an unimpeded view of the approaching train was possible for several hundred feet, at a point near to the defendant's tracks, in which case the deceased could have seen the train, had he actually looked, or, if it could be believed that smoke and steam from the passing train of the New York Central & Hudson River Railroad Company had so settled down upon the tracks as to obstruct the view at the time, then it was his duty to stop until the obstruction had ceased. *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122, 19 N. E. 422. It was said that, "whether we accept as the truth that the smoke and steam temporarily obscured the outlook, or whether there was nothing to shut off the sight of the train, the plaintiff ought not to

have recovered." We quite agree with the learned justices that the deceased had been guilty of contributory negligence, as matter of law. He was indifferent, apparently from the evidence, to an imminent and evident peril. If, and the plaintiff so contends, the evidence did not show that the view was obstructed by smoke and steam, then the testimony that the witnesses did not see the defendant's train, on this bright, clear afternoon, with no intervening obstruction, is incredible as matter of law. It was inherently improbable; for it was impeached by physical facts and should be rejected. See *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1, 4, 70 N. E. 68; *Hudson v. R. W. & O. R. R. Co.*, 145 N. Y. 408, 412, 40 N. E. 8.

We would be satisfied to affirm the order of reversal without further opinion, were it not that another ground, upon which the plaintiff should have failed in his action, has been negatived in the opinion below. It was considered, as "the use of the defendant's tracks at this point by pedestrians had been so general, notorious, and long-continued, that the defendant can fairly be said to have acquiesced in that use," and that persons, who had been in the habit of making use of its tracks, stood towards it in the character of licensees, to whom the duty was owing of giving warning of the approach of trains at that point. This, in my judgment, was distinctly erroneous. I think that it was not within the power of the defendant to permit or to suffer persons not in its employment to walk upon and along its tracks at a place where there was no highway and but an intersection of railroad tracks, and that no length of acquiescence in their doing so, under the circumstances of this case, could create a right of user, by license or by sufferance. This ought to be clear from section 53 of the railroad law (Laws 1892, p. 1894, c. 676), which was intended to protect the traveling public, as well as the railroad companies. It reads that "no person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. An act expressly prohibited by the public statute is, in its inception and always must continue to be, unlawful. The defendant's powers and capacity to act are defined and controlled by statute law and, as a creature of statute, it could neither expressly nor passively confer a right which the statute denies. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are un-

der no other obligation than to refrain from willfully or recklessly injuring him.

The case falls within the precise inhibition of the railroad law, because, at the point where the accident happened, there was neither street nor highway justifying the use of the tracks for a crossing. As it has been shown, the use was merely for convenience in making a short cut between the streets, and the traveling of the public was from railroad track to railroad track. Even in cases where persons were killed or injured while merely crossing railroad tracks, and where, by reason of the situation and from the force of circumstances, a license to cross was deemed to be implied, it has been held that they took the risks incident thereto and of the dangers, to which they might be exposed from the management of the road in the usual and ordinary way, and that no other duty rested upon the railroad company than not to intentionally or wantonly injure them. See *Nicholson v. Erie Railway Co.*, 41 N. Y. 525; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *Gunther v. N. Y. C. & H. R. R. Co.*, 81 App. Div. 606, 81 N. Y. Supp. 395; *Lagerman v. N. Y. C. & H. R. R. Co.*, 53 App. Div. 283, 65 N. Y. Supp. 764. The cases of *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377, and *Byrne v. Same*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512, are not in point; because the persons injured were crossing the tracks at points where it was conceded that there was a right of way, or an alley, or public passageway, by reason whereof it was incumbent upon the railroad company to exercise reasonable care in the movement of its trains. Such cases as those come manifestly within the exception of the statute. Here there was nothing of the kind. The defendant's tracks, in the locality of the accident, were distant from any street or highway, and no excuse, save that of convenience, justified their use by the deceased and his companions. The engineer had the right to assume that they would get off the tracks and was under no obligation to depart from the usual way of operating his train. *Spooner v. Del., L. & W. R. R. Co.*, 115 N. Y. 22, 33, 21 N. E. 696.

The question discussed was sufficiently raised by the denials of the motion to dismiss the complaint and to direct a verdict; inasmuch as the evidence had failed to show any neglect of a duty owing to the deceased, or any wanton or willful conduct on the part of the defendant's servants, and it was expressly raised by the exception to the refusal of the court to instruct the jury that the defendant was not required to treat the place of the accident as a public street or sidewalk or alleyway.

For the reasons which have been given, the order appealed from should be affirmed, and judgment absolute should be awarded to the defendant, upon the plaintiff's stipulation, with costs in all the courts.

VANN, J. I concur in the result only, and expressly dissent from the last ground upon which the judgment is based by the prevailing opinion. The effect of the decision is that any one not connected by employment or otherwise with a railroad company, who walks upon its tracks at a point where there is no highway, even with its consent, is a trespasser, and the company need use no care whatever to avoid running over him, provided it does not do so wantonly or recklessly. The sole reason advanced for this harsh conclusion is that a statute prohibits all persons from walking upon the tracks of a railroad, except where they are laid across or along a street. Railroad Law, Laws 1892, p. 1394, c. 676, § 53. The next sentence of the same section, however, prohibits a person from leading a horse on a railroad track under like circumstances "without the consent of the corporation." According to the result reached by the court, the more dangerous act can be effectively permitted by a railroad company, while the less dangerous cannot.

The statute is not new, for the same prohibition, in substantially the same words, appears in the act under which nearly all the railroads in the state were organized. Laws 1850, p. 233, c. 140, § 44. The Legislature, as I think, did not intend to make one a trespasser, or an outlaw, or to withdraw from him the ordinary protection of the law, if he walks on a railroad track with the consent of the company that owns it, given either expressly or by acquiescence for so long a period as to have the same effect. That would not be a reasonable or humane construction, nor has the statute been so understood by the bar or the courts during the long time it has been in force.

Thus, in a case which arose long after the original statute was passed, the decedent was negligently run over by a railroad train while crossing the track at a point where the owners of adjacent land had a right of way and the public had been in the habit of crossing for 30 years. The court held the company liable, giving no heed to the private right of way with which the decedent had no connection, and sustaining the recovery on the ground of implied permission. Judge Andrews, speaking for the court, said: "There can be no doubt that the acquiescence of the defendant for so long a time in the crossing of the tracks by pedestrians amounted to a license and permission by the defendant to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant in respect of persons using the crossing to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but, so long as it permitted the public use, it was charge-

able with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury.

* * * In the case of the movement of a train of cars over a track at a place which the public are permitted to use as a crossing, the company are necessarily apprised that it is attended with danger to life. The company is an actor at the time in creating the circumstances which imperil human life, and it would be alarming doctrine that it was under no duty to exercise any care in the movement of its trains." *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 280, 292, 44 Am. Rep. 377. The same result was reached in a later case, in which Judge Earl, after reviewing all the authorities, held, as stated in the syllabus, that: "Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in running its trains so as to protect them from injury." *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512. These cases have never been overruled. They are later in date than any decision by this court cited in the prevailing opinion to uphold the doctrine there laid down. I regard them as controlling, although the effect of the statute was not considered in either.

Moreover, the same section which contains the prohibition in question relieves a railroad company from liability to a passenger injured while on the platform of a car in violation of a regulation duly posted, but it does not relieve the company from liability for negligently running over a man walking on its tracks in violation of the statute. It creates no right which the defendant can enforce against a pedestrian who did nothing but what it consented to. There is no breach of duty to the defendant, but, according to the most extreme view, a breach of duty to the state. Assuming that the state might punish him for violating the statute, the defendant is estopped from pleading an act done with its consent, as a defense to its own negligence. Pen. Code, § 155. It cannot consent to an act and then claim that the act excused its own wrongdoing. If the violation of a statute directly contributes to the injury, a recovery may be denied on the ground of contributory negligence, but that falls far short of the proposition that one walking on the track with the consent of the owner of that track may be run over without any liability for gross carelessness, provided only the company mercifully refrains from wanton or reckless injury.

Even if the act of the decedent in walking on the track, although consented to by the

defendant, was unlawful, it constituted no defense to the action. The only effect of his act was to place him in a position where the defendant's negligent act could injure him. It was a condition, not a cause. Walking on the track did not injure him. His own act was not the agency which caused his death, but the negligent running of the train by the defendant. He did not kill himself. The defendant killed him. His act, if unlawful, was not the proximate cause, for the result would have been the same if his act had been lawful. The statute does not make his act a defense, and the courts should not, any more than if he had been negligently run over by the defendant while traveling in violation of the Sunday law, or while driving at a rate of speed forbidden by law. In such cases, as this court has always held, the violation of the statute is not the immediate cause of the injury and will not defeat a recovery. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 108, 21 N. E. 101, 11 Am. St. Rep. 617; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Wood v. Erie Ry. Co.*, 72 N. Y. 190, 28 Am. Rep. 125; *Hoffman v. Union Ferry Co.*, 68 N. Y. 885; *Carroll v. Staten Island Railroad Co.*, 58 N. Y. 126, 132, 17 Am. Rep. 221.

Finally, no such defense was set up in the answer and no such question was raised by any exception taken at the trial. So far as the appeal book shows, the statute was not alluded to, directly or indirectly, from the service of the summons until after the verdict was rendered. The trial court had no opportunity to consider it. If the point had been raised, non constat evidence of willful and intentional injury would have been introduced by the plaintiff. "An objection cannot be taken for the first time upon appeal which might have been obviated if raised below; it must appear that no possible answer could have been made to it." *Osgood v. Toole*, 60 N. Y. 475, 479. With the record in this condition we have no power to consider or decide the question, because it is not before us. *Hecia Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 52 N. E. 650; *Wicks v. Thomson*, 120 N. Y. 634, 29 N. E. 301.

I vote to affirm and for judgment absolute, but solely on the ground that the plaintiff's intestate was guilty of contributory negligence as matter of law.

CULLEN, C. J. As to the point of difference between my Brothers GRAY and VANN I entertain this view: The statute prescribes: "No person other than those connected with or employed upon the railroad, shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." I concur with Judge VANN in the proposition that by long user the public may acquire, despite the terms of the statute,

a presumptive right to cross a railroad track at a point that is not a street or highway. The proposition seems to be sustained by the authorities. In this case, however, the point at which the deceased sought to cross the defendant's railroad was where it was intersected by the tracks of the New York Central Railroad Company, which tracks he had been using as a path in traveling to and from the brewing house where he was employed. The command of the statute is explicit, and subject to no qualification, that a person other than an employé of a railroad shall not walk upon its tracks, except where it is necessary to cross the same. The deceased was not only crossing the tracks of this defendant at a point that was not a highway or street crossing, but he was traveling along the tracks of the New York Central Railroad Company. Now, if we assume that, by acquiescence on the part of the company and user by the public, the public may acquire a right to cross the company's tracks, at any other point, there is, nevertheless, a point at which the public cannot acquire such a right, and that is where another railroad intersects those tracks. In the face of the explicit command of the statute the public cannot by user acquire the right to use the tracks of one railroad as a highway, and therefore it cannot acquire the right to cross the tracks of another railroad at its intersection with the first.

I concur in the affirmance of the judgment appealed from; also upon the ground stated by the learned Appellate Division.

HAIGHT and WERNER, JJ., concur with GRAY, J. BARTLETT, J., concurs with VANN, J. CULLEN, C. J., reads for affirmance. O'BRIEN, J., absent.

Ordered accordingly.

(165 Ind. 461)

STATE v. MORRISON. (No. 20,506.)
(Supreme Court of Indiana. Nov. 14, 1906.)

1. CRIMINAL LAW—APPEAL—RIGHT OF PROSECUTION.

A trial for murder in the first degree resulted in a verdict of murder in the second degree. A new trial was granted, and defendant permitted to plead guilty to manslaughter. Held that, as the judgment disposed of the case and barred further prosecution for murder, it was a judgment of acquittal of the higher offense, so that an appeal by the state would lie.

2. SAME—BILL OF EXCEPTIONS.

Burns' Ann. St. 1901, § 1915, does not require a bill of exceptions to present a reserved question of law on an appeal by the state; the record proper presenting the facts.

3. SAME—PLEA OF GUILTY.

On trial of a charge of murder in the first degree, the action of the court in receiving a plea of guilty to the included offense of manslaughter was a violation of Burns' Ann. St. 1901, § 1742, declaring that no indictment shall be nolle pros'd, save on written motion of the prosecuting officer.

4. JURY — RIGHT TO TRIAL — ASSESSMENT OF PUNISHMENT.

Burns' Ann. St. 1901, §§ 1903, 1904, provide that, on indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged on the indictment or guilty of any inferior degree, and in all other cases defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment. *Held*, that an indictment for murder in the first degree is an indictment for distinct offenses as to the different degrees, and, if on such indictment the defendant is permitted to plead guilty to manslaughter, the case is no longer capital, and therefore it is not required to submit the case to a jury, under Burns' Ann. St. 1901, § 1890.

Appeal from Circuit Court, Perry County;
C. W. Cook, Judge.

Thomas W. Morrison was charged with murder in the first degree, and permitted to plead guilty to manslaughter, and the state appeals. Appeal sustained.

C. W. Miller, Atty. Gen., John H. Luckett, Phillip Zoercher, W. C. Geake, C. C. Hadley, and L. G. Rothschild, for the State.

GILLETT, J. Appellee was charged in the court below with murder in the first degree. A trial resulted in a verdict of murder in the second degree. Appellee filed a motion for a new trial, and his motion was sustained. The court then, over the objection and exception of the state, permitted appellee to enter a plea of guilty to the involved offense of manslaughter, and rendered judgment on the plea. The state appeals, under sections 1915, 1955, Burns' Ann. St. 1901.

Appellee, however, has interposed a motion to dismiss the appeal, and this motion presents the threshold question in the case. By said motion our jurisdiction over this cause is challenged because there was a judgment of conviction. It is undoubtedly required that it should appear that the defendant was acquitted to authorize us to pass on the law question sought to be presented. It is true that there was a conviction of the lowest offense involved in the charge, but the legal effect of receiving a plea of guilty to manslaughter, and rendering the judgment on the plea thereto, was to dispose of the whole case, since there was but one count, and appellee could not afterwards be convicted of murder in the first or second degree because of the commission of the same unlawful homicide. Irrespective of the question as to the correctness of the action of the lower court, it must be affirmed that it possessed jurisdiction to render the judgment that it did (*Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124), and as its ruling had the effect, not alone to dispose of the case, but also to bar a subsequent prosecution for murder, we are of opinion that there has been in legal effect a judgment of acquittal of the higher offense. See *State v. Arnold*, 144 Ind. 651, 42 N. E. 1095, 43 N. E. 871; *State v. Johnson*, 102 Ind. 247, 1 N. E. 377. The motion to dismiss is overruled.

Counsel for appellee contends that a bill of exceptions is required, under section 1915, Burns' Ann. St. 1901, to present a reserved question of law. Assuming, without deciding, that this appeal is to present a reserved question of law under the third subdivision of section 1955, Burns' Ann. St. 1901, and that the complaint of the state is not based on a quashing or setting aside of the indictment as to the charges of murder which it contained, so as to authorize an appeal under the first subdivision of said section, we hold that, as the record proper presented the facts, a bill of exceptions was unnecessary. *State v. Vanderbilt*, 118 Ind. 11, 18 N. E. 266, 9 Am. St. Rep. 820.

Taking up the question as to the propriety of the action of the court in receiving a plea of guilty to manslaughter, we have to say that we deem it clear that the course pursued was not proper. Subject to the limitation that the parties must not offend against the rules of pleading, it is a settled doctrine of the common law, as stated by Sir Frederick Pollock, "that the court is not to dictate to parties how they shall frame their case." *Expansion of the Common Law*, 33. This rule applies to public prosecutions. It is for the state, acting through the instrumentalities provided by law, to determine the nature of the criminal charges that shall be brought forward, and, upon a criminal charge being preferred, it can be properly dismissed only by *nolle prosequi*. The record entry of the fact that the state does not care to proceed is based on the declaration of the prosecuting officer. *Com. v. Casey*, 12 Allen, 214; *State ex rel. Graves v. Primm*, 61 Mo. 166; *Anderson's Law Dict.* tit. "Nolle Prosequi." But the whole matter of the respective powers of court and prosecuting attorney in regard to the dismissing of criminal prosecutions is set at rest in this state by section 1742, Burns' Ann. St. 1901, which provides as follows: "No indictment shall be nonprossed or information dismissed except by order of the court on motion of the prosecuting attorney; and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court before such order is made." As before pointed out, the effect of the action of the court in receiving a plea of guilty to the charge of manslaughter, and proceeding to judgment on the plea, operated to acquit appellee of the substantive offense charged in the indictment, as well as of murder in the second degree; and as this result was brought about by an act of sheer power on the part of the court, which involved a setting aside without trial of the charges of murder embraced in the indictment, it is evident that the spirit, if not the letter, of section 1742, *supra*, was violated. We hold that the exception of the state was well taken.

It is contended by the state that, as this was a capital case, the court was required

to submit the cause to a jury, under section 1890, Burns' Ann. St. 1901. This point is not well taken. Sections 259 and 260 of the Criminal Code of this state provide as follows: "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto or of an attempt to commit the offense." "In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information." Sections 1903, 1904, Burns' Ann. St. 1901. In *Moon v. State*, 3 Ind. 438, this court said: "An indictment for murder in the first degree is really an indictment for one of three distinct crimes, viz., murder in the first, murder in the second degree, and manslaughter." The case cited was followed in *Hasenfuss v. State*, 156 Ind. 246, 59 N. E. 463. If, with the consent of the prosecuting attorney, the defendant to a charge of murder is permitted to plead guilty to manslaughter, the case is no longer capital; and therefore it is not required that a jury shall be called to assess the punishment. *People v. Smith* (Sup.) 28 N. Y. Supp. 912.

Appeal sustained on the ground first above stated.

(165 Ind. 484)

**PARSCOUTA et al. v. STATE ex rel.
BAKAJSA.** (No. 20,573.)

(Supreme Court of Indiana. Nov. 16, 1905.)

1. APPEAL—WAIVER OF OBJECTIONS.

Where a defendant fails to answer and no default is taken against him, but he goes to trial, he cannot, on appeal, claim that no issue was formed.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 8596.]

2. SAME—REVIEW—PLEADINGS.

Where defendant fails to answer and no default is taken against him, but he goes to trial, the Supreme Court, on appeal, must treat the case as if the complaint had been answered.

3. MANDAMUS—PROCEEDINGS IN CIVIL ACTIONS—ISSUES.

Under Burns' Ann. St. 1901, § 1185 (Rev. St. 1881, § 1171; Horner's Ann. St. 1901, § 1171), providing that, on return of a peremptory writ of mandamus, issues may be joined and like proceedings had as for the trial of issues in civil actions, where an order book entry shows that defendants' demurrer to the alternative writ was overruled, and they excepted and filed their return, the defendants' contention on appeal that the trial as to them was without an issue is not sustained.

4. SAME—PLEADINGS—WITHDRAWAL OF RETURN.

Where an order book entry in a mandamus proceeding shows that the defendants filed an answer, but the answer copied into the transcript is that of only one of the defendants, that does not withdraw the return of all the defendants previously filed.

Appeal from Circuit Court, Lake County; Willis C. McMahan, Judge.

Mandamus by the state, on the relation of Joseph Bakajsa, against Freu Parscouta and others, to compel defendants, as officers of a private corporation, to perform an alleged duty. From a judgment granting the writ, defendants appeal. Affirmed.

J. Kopelke, for appellants.

MONKS, C. J. This action was brought by the relator to compel by mandate three persons, officers of a private corporation, to perform an alleged duty. A trial of said cause resulted in a final judgment for a peremptory writ of mandate against said defendants. Two of said defendants appeal, and insist that said judgment must be reversed, because said trial was, as to them, "without an issue."

It is now settled under the Code that, where a defendant fails to file an answer and no default is taken against him, but he goes to trial, he cannot on appeal to the Supreme Court complain that no issue was formed. 1 *Work's Practice & Pleading* (3d Ed.) § 736; *Elliott's App. Proc.* §§ 352, 682; 1 *Woolen's Trial Proc.* § 1744; *Bender v. State*, 26 Ind. 285, 286; *Trentman v. Eldridge*, 98 Ind. 525, 527, 528; *Citizens' Bank v. Bolen*, 121 Ind. 301, 304, 23 N. E. 146. In such a case this court must treat the case as if the allegations of the complaint had been controverted by answer. *Hartlep v. Cole*, 101 Ind. 458, 459, and cases cited. The record, however, does not sustain appellants' contention that the trial was without an issue. An order book entry dated November 24, 1904, copied into the transcript, shows that the defendants filed a demurrer to the alternative writ, which was overruled, to which ruling defendants except, and said defendants thereupon file their return to said alternative writ of mandate herein, and the same is in the words and figures following, to wit: "Said return is not copied into the transcript, but the clerk has written in lieu thereof. Note. Said return is not on file." In making the issues, the return to the writ is the same as an answer in a civil action. Section 1185, Burns' Ann. St. 1901 (section 1171, Rev. St. 1881; section 1171, Horner's Ann. St. 1901); *Board, etc., v. State*, 61 Ind. 879, 384; *Potts v. State*, 75 Ind. 336, 339, 340. It is true that a subsequent entry shows that on December 20, 1904, the defendants "filed an answer in the words and figures following, to wit"; and the answer copied into the transcript as a part of this entry is that of only one defendant. This, however, did not affect or withdraw the return of all the defendants filed on November 24, 1904. It is evident that said cause was not "tried without an issue."

Judgment affirmed.

(38 Ind. App. 308)

GRAND LODGE A. O. U. W. v. BARWE
(No. 5,432.)¹(Appellate Court of Indiana, Division No. 2,
Nov. 7, 1905.)**1. APPEAL AND ERROR—REVIEW—CONFLICTING EVIDENCE.**

The Appellate Court will not disturb the findings of the trial court on conflicting evidence.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 3983-3989.]

2. INSURANCE—MUTUAL BENEFIT INSURANCE—ACTION FOR BENEFITS—SUFFICIENCY OF COMPLAINT.

A complaint, in an action against a mutual benefit association on a benefit certificate, which alleges that deceased was received as a member of the association, and a certificate issued to him whereby the association agreed to pay a specified sum on his death, which states the date of his death, and further alleges that plaintiff is the father of deceased and had a valuable interest in his life at the time of his death and when the certificate was issued, that deceased and plaintiff have performed all the conditions of the contract required of them, that plaintiff is still the owner and holder of the certificate, that defendant has not paid the amount of the certificate and refuses to do so, and that such sum is still due, and which has attached thereto a copy of the certificate, is sufficient to withstand a demurrer for want of facts.

3. SAME—CONSTRUCTION OF CERTIFICATE.

A mutual benefit certificate which contains a promise to pay a specified sum to the party named in the certificate as beneficiary is a written promise to pay money.

Appeal from Circuit Court, Vanderburgh County; Louis O. Rasch, Judge.

Suit by the Grand Lodge Ancient Order of United Workmen of Indiana against John H. Barwe. Judgment for defendant, and plaintiff appeals. Affirmed.

C. L. Wedding, Ireland & Reister, and Chas. B. Harris, for appellant. A. D. Jones, G. K. Denton, and Geo. A. Cunningham, for appellee.

COMSTOCK, J. Appellant brought suit against appellee to vacate and set aside a judgment rendered in the Vanderburgh circuit court in 1902 against appellant for \$2,200 in round numbers. The complaint is in two paragraphs. In the first the vacation is sought on the ground that the judgment involved the same questions of fact as the case of *Marshall v. appellant*, rendered by the same court, and which was afterwards appealed to the Appellate Court, and by said court reversed (68 N. E. 606); it being agreed as alleged that the decision in the *Marshall Case* should control the judgment in the *Barwe Case*, and, that judgment having been reversed, appellant was entitled to have the *Barwe* judgment vacated; and because it was wrong and unjust. The second paragraph asked a review of the judgment for the reason that the complaint in the original action was insufficient. A general denial was filed to each paragraph. The court found for appellee. Appellant relies for reversal upon the following errors: (1) That the court erred in overruling appellant's motion for a new trial; (2) that the decision of the court was

against the weight of the evidence; (3) that the court found for the defendant appellee on the second paragraph of complaint to review the judgment.

As to the claim based upon the first paragraph, there is a conflict of evidence as to the alleged agreement. We are called upon to weigh the evidence. This we cannot do. *Smith v. Smith* (Ind. App.) 74 N. E. p. 1011, and cases cited.

In support of the second paragraph, it is contended that the original complaint is insufficient because it does not allege any consideration for the issuing of the certificate. Appellee insists that the sufficiency of the paragraph is not presented, because it is not shown that the demurrer to the complaint in the original action was for want of facts. Cases are cited in support of this position; but, without reference to the form of the demurrer, if in the original action the complaint states a valid cause of action, the second paragraph of the complaint under consideration is without support. The complaint in said original action in substance alleges that on the 19th day of October, 1900, one Joseph Barwe was received in said association as a member therein, and at the time he was so received the defendant executed and delivered to him a certain membership certificate bearing date of said day, whereby said defendant undertook and promised to pay to this plaintiff, at the death of said member, the sum of \$2,000, a copy of which certificate is filed herewith and marked "Exhibit A," and made a part hereof; that on the 22d day of November, 1900, the said Joseph Barwe died; that this plaintiff is the father of said Barwe, had a valuable interest in his life, both at the time said certificate was executed and delivered to said member and at the time of his death; that said Joseph Barwe has performed all the conditions of said certificate and contract of insurance required by him to be performed, and this plaintiff has performed all of the conditions of said certificate and contract of insurance on his part to be performed, and that he is still owner and holder of said certificate; that the defendant has not paid said sum or any part, and has refused and still refuses to pay the same; and that the same is now due and has been since the 22d day of November, 1900, etc. These allegations are sufficient to withstand a demurrer for want of facts. *Supreme Lodge v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *People's Mutual, etc., v. McKay*, 141 Ind. 415, 39 N. E. 231, 40 N. E. 910.

Counsel for appellee admits that *Supreme Lodge v. Knight*, supra, supports the proposition that contracts of insurance, "such as in this case, are written promises to pay money," but that in that case the certificate contained an agreement to pay the appellee the sum of \$2,000 upon the death of the assured, while the certificate in this case contains no such promise, but only certifies that the member is entitled "to designate the beneficiary to

¹ Rehearing denied. Transfer to Supreme Court denied.

whom the sum of \$2,000 of the beneficiary fund of the order shall at his death be paid"; and that this is an important distinction in the two certificates. We see no difference in the agreement to pay the specified sum to the party named in the certificate as beneficiary, and to pay a person designated by the member of the society. In the certificate before us the member designates as "beneficiary, under the terms hereof, J. H. Barwe, bearing to him the relation of father." The case of *Supreme Lodge v. Knight*, supra, is decisive of this branch of the case.

Judgment affirmed.

(36 Ind. App. 450)

PRICE et al. v. HUDDLESTON.¹
(No. 5,726.)

(Appellate Court of Indiana, Division No. 1.
Nov. 2, 1905.)

1. APPEAL—BOND—SUFFICIENCY.

The fact that an appeal bond filed within the time fixed by the court stipulated for a greater penalty than the amount fixed by the court is a matter of which appellee cannot complain.

2. SAME—MANNER OF PERFECTING APPEAL—WAIVER.

Appellee was present when the court in term time granted an appeal, and ordered appellant to file an appeal bond in a fixed sum to be approved by the clerk. No objection was made to the order, and the bond was filed and approved and the transcript filed in the Appellate Court as a term-time appeal. Appellee acquiesced in the proceedings until the expiration of the time for completing the appeal as a vacation appeal. *Held*, that appellee in effect consented that the sureties might be approved by the clerk, instead of by the court, as provided by statute, and waived his right to question the appeal as a term-time appeal.

Appeal from Circuit Court, Wabash County; A. H. Plummer, Judge.

Action by Milbert F. Price and another, copartners doing business under the name of the Puritan Manufacturing Company, against James Huddleston. From a judgment for defendant, plaintiffs appeal. On motion to dismiss. Overruled.

Walter S. Bent, Thomas L. Stitt, and R. P. Howell, for appellants. W. G. Todd, for appellee.

ROBINSON, J. Appellee moved to dismiss this appeal on the ground that appellants have not taken the steps necessary to constitute this an appeal in term, and that nothing has been done to perfect it is an appeal in vacation. The suit was brought by appellants, and upon a trial the jury returned a verdict for appellee. On March 15, 1905, the fifty-seventh day of the January, 1905, term, the following proceedings were had: "Come now the parties by their attorneys; and the court, being advised, now overrules the plaintiff's motion for a new trial. * * * And on motion the court now renders judgment on the verdict of the jury herein. It is therefore considered and decreed * * * that plaintiffs take nothing

by their suit herein and that the defendant recover * * * his costs. * * *

And the plaintiffs now pray an appeal to the Appellate Court of Indiana, which appeal is now granted. And the plaintiffs are now ordered to file an appeal bond in the sum of \$150 within 30 days herefrom with sureties to the approval of the clerk of the court." Afterwards, "on the 1st day of April, 1905, in vacation of said court, the plaintiffs in the above-entitled cause filed their appeal bond in the sum of \$500 with the United States Fidelity & Guaranty Company, by Nell Lumaree, attorney in fact, as surety thereon in these words [followed by a copy of the bond and clerk's approval], which bond is now approved by the clerk." The transcript was filed in this court May 18, 1905, and the cause was submitted June 17, 1905. Appellant's brief was filed July 7, 1905. On September 4, 1905, appellee entered his special appearance and moved to dismiss the appeal.

The statute provides that "when an appeal is taken during the term at which judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant with such penalty and surety as the court shall approve, and within such time as it shall direct. * * * The court fixed the penalty of the bond and the time within which it should be filed, but left the sureties to the approval of the clerk. The bond was filed within the time fixed, and with a penalty greater than the amount fixed by the court; but we do not think that is a matter of which appellee can complain. The surety was not approved by the court as the statute directs, and the question is whether the approval of the security by the court could be waived, and, if so, was it waived by appellee? In *Smock v. Harrison*, 74 Ind. 348, the court had granted an appeal on condition that a bond in a penal sum named be filed, "to the approval of the clerk of said court," within a time named. The bond was taken and approved by the clerk, and immediately following such approval was the following: "Plaintiffs consent that the clerk may approve the within bond"—signed by plaintiff's attorney. It was held that this consent made the bond a lawful bond. In that case the court said: "In *Jones v. Dronenberger*, 23 Ind. 74, it was held that 'the bond was for the individual benefit of the appellee; and the provisions in the statute, requiring the court to approve it in term time and the clerk in vacation, were inserted for the purpose of securing a good bond for the appellee'; that the parties may waive the approval of the court or clerk, in any given case, where their own individual interests alone are at stake, and, if they do mutually agree upon a bond, the bond so given is valid." See also, *Easter v. Acklemire*, 81 Ind. 163; *Buchanan v. Milligan*, 125 Ind. 832, 25 N.

¹ Transferred to Supreme Court, 79 N. E. 496.

El. 349; McCloskey v. Indianapolis, etc., Union, 87 Ind. 20; Small v. Kennedy, 12 Ind. App. 155, 89 N. E. 901; Pierce v. Banta, 9 Ind. App. 376, 81 N. E. 812. In Buchanan v. Milligan, supra, where by agreement of the parties a different surety signed the appeal bond from that designated by the court, the court said: "It is settled by the decisions that an appeal bond is required for the benefit of the appellee, and that the court, in fixing the amount of the bond and approving the sureties, acts merely as an arbiter for the purpose of securing a sufficient bond. If the parties mutually agree upon a surety different from that designated and approved by the court, the bond is as effectual to stay proceedings as if it had been signed by the court."

The record shows that appellee was present when the court ordered appellants to file an appeal bond in a sum named within a time specified and with sureties to the approval of the clerk. No objection was made to such an order, the bond was filed and approved, and the transcript filed in this court as a term-time appeal. Appellee seems to have acquiesced in all the proceedings taken in the attempted perfecting of a term-time appeal, until after the cause had been on the docket of this court for more than 90 days and the time for completing the appeal as a vacation appeal had expired. We think it must be held that appellee impliedly consented in open court that the sureties on the bond might be approved by the clerk of the trial court, and that upon the whole case, taking into consideration the action of appellee at the time and since the appeal was prayed and granted, he has waived his right to question the appeal as a term-time appeal.

Motion overruled.

(38 Ind. App. 217)

CHICAGO & W. I. R. CO. et al. v. MARSHALL (No. 5,441).¹

(Appellate Court of Indiana, Division No. 1. Nov. 2, 1905.)

1. VENUE—OBJECTION—WAIVER.

Under Burns' Ann. St. 1901, § 846, providing that if an objection is not taken by demurrer or answer it shall be deemed waived, except exceptions to the jurisdiction of the court over the subject of the action and objections that the complaint does not state a cause of action, an objection that, owing to the residence of defendant, the action was brought in the wrong county, not made by answer or demurrer, is waived.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 431, 495; vol. 48, Cent. Dig. Venue, § 47.]

2. PROCESS—CODEFENDANTS—SERVICE.

Where an action against one was properly brought in a certain county, process might be sent for service on a codefendant in another county, if they were properly joined.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 70.]

3. APPEAL—REVIEW—RULINGS ON PLEADING.

The action of the trial court in sustaining

a demurrer to a plea raising the question of proper joinder of defendants is to be considered with reference to the complaint on file when the court made its ruling, without reference to subsequent developments.

4. NEGLIGENCE—CONCURRING NEGLIGENCE—LIABILITY.

Where the negligent conduct of several at the same time and place combined in causing an injury, they acting in concert, though they did not conduct themselves negligently by preconcert, all were liable.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 18.]

5. MASTER AND SERVANT—INJURIES—COMPLAINT—SUFFICIENCY.

Plaintiff, employed as a brakeman by the E. Railroad Company, which, together with the M. Company, operated trains over the tracks of the W. Company, was injured in a collision between a train of the M. Company and his train, and in an action for the injuries a paragraph of the complaint alleged that under orders of the W. Company plaintiff's train had pulled in upon a target switch, and, just as it started to leave the switch, the train of the M. Company rapidly approached the signal station and ran into plaintiff's train; that the train of the M. Company was a special one, of which plaintiff had no knowledge; and that the running of the trains was under the orders and directions of the W. Company. It was alleged that the W. Company carelessly omitted to give plaintiff any orders as to the running of the extra train; that the M. Company carelessly and negligently ran its trains at a high rate of speed, without having any signal giving it the right to run onto the semaphore; and that the E. Company negligently ran its train, and permitted the same to stand on the tracks at the time when the passenger train was approaching. *Held*, that the complaint showed a cause of action against all the defendants.

6. SAME.

A paragraph of the complaint alleging that plaintiff's train had reached a signal station, and had gone under signal within the semaphore, and that the train of the E. Company ran into the train of the M. Company, and that the injuries were caused by the carelessness of the railroad companies in running their trains and in their neglect in giving and receiving orders, and the neglect of defendants to observe signals, was insufficient; it being indefinite as to what orders were given or received, no act or omission being directly charged against any one or all of the defendants, and it not being directly alleged that defendants, or either of them, neglected or failed to observe the targets and signals.

7. APPEAL—REVIEW—SCOPE—PLEADING—DEMURRER—MATTERS CONSIDERED.

Where a complaint is demurred to for want of facts and the demurrer overruled, the pleading must be construed on appeal with reference to the requirement that it contain a statement of the facts constituting a cause of action, and the Appellate Court cannot indulge intendment allowed after verdict to cure a defective complaint.

Appeal from Circuit Court, Huntington County; James O. Branyan, Judge.

Action by Samuel R. Marshall against the Chicago & Western Indiana Railroad Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Kenner, Lucas & Kenner, W. O. Johnson, E. C. Field, and H. R. Kurrie, for appellants. R. A. Kaufman and C. W. Watkins, for appellee.

¹ Rehearing denied.

BLACK, J. The appellee brought his action against the Chicago & Erie Railroad Company and the appellants, the Chicago & Western Railroad Company and the Chicago, Indianapolis & Louisville Railway Company, to recover damages for personal injury suffered by the appellee while in the employment as rear brakeman on a freight train of the first-named company, which we will designate as the "Erie Company." The judgment being in favor of the Erie Company, the appeal is brought by the other two companies, which we will designate as the "Western Company" and the "Monon Company."

The complaint at first consisted of one paragraph, in which it was in substance shown, after preliminary averments concerning the corporate character and the business of each of the defendants, that August 16, 1902, the Western Company was the owner of a line of railroad from Hammond, Ind.; to Chicago, Ill., with side tracks and switches, and was operating and controlling a double track line of railroad between those places; that each of the other companies was running its cars and locomotives over these tracks under a contract of lease, but subject to the orders and directions and rules of the Western Company, and each of the other companies received all its orders and directions for the running of its trains from the Western Company and was so running its trains of cars and locomotives on the morning of the day above mentioned; that the appellee was in the employ of the Erie Company as brakeman on a freight train, and it was his duty to obey the orders and signals of the conductor and engineer of said train, who were also in the employ of the Erie Company, which was running a train of cars, on which appellee was engaged as rear brakeman, from Chicago to Huntington, Ind., over the lines of the Western Company; that under the orders of the Western Company, they had advanced and were at or near the state line, and had arrived at the target station, and had received the target to enter the semaphore, and had pulled the train upon the target switch, and were standing within the distance semaphore, awaiting the orders of the Western Company; that while they were thus standing, the Monon Company, which was running one of its passenger trains as a special train over the tracks of the Western Company from Chicago to Indianapolis, on the same line of tracks over which the Erie Company was running its train, and over and on the track on which the Erie Company's train was so standing, and just as the last-mentioned train had started to leave the distance semaphore, approached the signal station with its train at a rapid rate of speed, and ran into the rear end of the Erie Company's train, and over the appellee while he was in its caboose; that the appellee was buried under the wreckage, and crushed,

bruised, mangled, and permanently disabled, his injuries being described; that when he was struck by the locomotive engine of the Monon Company, he had just entered the caboose of the train on which he was so employed, which had just started to leave the track in the distance semaphore, and he had no knowledge that any train was being run on said tracks; that the train which ran into and over him was an extra train, and was not on any regular time card, and had no regular time limit known to the appellee, and he had no notice or knowledge of the running of said train, or that another train or extra passenger train was being run on said tracks, and he received no orders or directions from any one with reference to any extra train; that the conductor in charge of the Erie train had no notice or knowledge or orders with reference to the running of this extra train at the time he reached the signal station on which the appellee was struck, and only received such notice when his train was starting to leave that point, and no notice was ever given the appellee. There were further averments relating to the damages sustained by the appellee. It was alleged that the Western Company "carelessly and negligently omitted to give the plaintiff any orders as to the running of said extra passenger train"; that the Monon Company "carelessly and negligently ran said train at a high rate of speed when approaching said signal station, and carelessly and negligently ran their said train over and against this plaintiff, without having any orders or direction or signal to cross over the tracks at the signal station, and without having any signal giving that company the right to run on said semaphore or distance switch, but carelessly and negligently ran its said locomotive and cars against the plaintiff, and against the car in which this plaintiff was at that time, without having received any signal to so run its said cars and locomotive, and with the signal at said station turned against the running of its said train"; that the Erie Company "so negligently ran its train of cars, and permitted the same to be and remain on said tracks at the time when said passenger train was approaching, and carelessly and negligently managed the running of its said train in such a manner as to permit it to remain on said tracks, in front of said approaching train, after the engineer and conductor in charge of said train had been notified of the approach of said passenger train, for the period of about two minutes, without in any manner notifying this plaintiff of the approach of said train; that by reason of such negligence on the part of the defendants herein, and the carelessness in the running of said trains, and the neglect to execute and deliver the proper orders for the running of said trains, the plaintiff herein received the injuries stated," etc.

The appellants, appearing specially, sepa-

rately, and severally, "for the purposes of contesting the sufficiency of the summons and service and return thereon only," filed a verified motion to quash the summons and return thereof, alleging that the action was brought against their railroad corporations; that these defendants had no connection with each other, except such as one company has with another in usual traffic and business connections; that the action was not on contract, but was in tort; that the appellants or neither of them ran through Huntington county, and had no office or agents in that county; that the only summons or service upon the Monon Company was a return of service on an agent of that company at Hammond, Ind.; that the only service of summons on the Western Company was service on a railroad telegraph operator at the same place; and that a summons and return upon the appellants did not give jurisdiction over the parties and subject-matter in the court below. The appellee, treating this motion as a plea to the jurisdiction of the court, demurred to it, and the demurrer was sustained.

The objection which it was thus sought to raise did not relate to the form of the summons or the manner of service shown by the return, but was an objection that as to each of the appellants the action against it was brought in the wrong county. Such objection, if not taken by answer or demurrer, is to be deemed as waived. Section 346, Burns' Ann. St. 1901; *Eel River Co. v. State ex rel.*, etc., 143 Ind. 231, 42 N. E. 617; *Globe Acc. Ins. Co. v. Reid*, 19 Ind. App. 203, 218, 47 N. E. 947, 49 N. E. 291. No objection was made in the plea to the bringing of the action in Huntington county against the Erie Company. The action against that company being properly brought in that county, process might properly be sent for service on the appellants in another county, if the appellants were properly joined with the Erie Company as defendants; that is, if the complaint showed facts which not only rendered the appellants liable to the appellee for his injury, but which also rendered the Erie Company likewise liable, and which authorized the joining of the appellants as defendants with the Erie Company. The action of the court in sustaining the demurrer to the plea is to be considered with reference to the complaint on file when the court made its ruling upon the demurrer to the plea, without reference to subsequent developments in the cause.

The complaint then on file, the substance of which we have set forth, showed a cause of action at common law against all of the defendants for a single injury inflicted at one time by the collision of the engine of the Monon Company with the train of the Erie Company; and, while it was not shown that any particular alleged negligent act or omission was the act or omission of all the defendants jointly, it was shown that the defendants were all using the same railroad

track and operating under common rules, and that negligent conduct of all at the same time and place combined and concurred in causing the single injury. They were acting in concert in the use of the track, and, though they did not conduct themselves negligently by preconcert, yet it was by their united negligent acts and omissions that the appellee was damaged. In such case he might sue one or all for the resulting injury. *Sherman & R. Neg.* § 122; *Colegrove v. New York, etc., R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418. After the ruling upon this plea, the appellee filed a second paragraph of complaint. The appellants demurred to each paragraph of the complaint for want of sufficient facts, and the demurrer was overruled.

In the second paragraph, after allegations relating to the corporate character and the business of the defendants, and stating where the lines of railway of the defendants respectively ran, and showing that the defendants were jointly using the lines of the Western Company, it was further alleged that on August 16, 1902, the appellee was in the employ of the Erie Company as brakeman on one of its trains of cars, which was being run from Chicago over the lines of the Western Company; that he was performing the duties of brakeman on that train, and was acting under the orders of the Western Company, from which all orders for the running of trains from Chicago to Hammond were received; that said train had proceeded on its way from Chicago, and had reached a point on the line of the Western Company near the State Line, a signal station on that railway line, and had received the target, and had run the train within the semaphore, and the train had stopped to receive orders for the purpose of continuing forward to its destination; that on that day the Monon Company was running one of its trains from Chicago over the same line and under orders from the same company as the Erie Company; that both of these trains were being run in the same direction and on the same line of track; that, while they were being so run and operated, and while the appellee was engaged in the line of his duty as brakeman on the train of the Erie Company, the train of the Monon Company run into and over and on the cars of the Erie Company, and into and over the car on which the appellee was, and crushed, maimed, and bruised him, etc., stating his various injuries. Next in this paragraph were the only charges of negligence in any acts or omissions, in the closing portion of the pleading, as follows: "That his said injury was caused by the carelessness of said railroad companies, these defendants, in the running of their said trains, and in their neglect and carelessness in giving and receiving and executing orders for the running of said trains, and in the careless and negligent manner that said trains were run and left standing on the tracks of said defend-

ants' railroad, and the neglect of said defendants to observe the targets and danger signals, and in the running of said trains at a high and ungovernable rate of speed when approaching the said target station and signal, and not having their said trains under control when approaching said target and signal station, and to the injury of this plaintiff in the sum of," etc. In this closing portion of the pleading each and all of the acts and omissions there characterized as negligent are charged against all the defendants without discrimination. No act or omission is here directly alleged or charged against any one or all of the defendants, and the general and indefinite averments attributing negligence do not even refer by way of recital to any other averments making such necessary direct charges.

The railroad companies were authorized by their corporate franchises to run trains, and they could not therefore be negligent merely "in the running of their trains." It is nowhere alleged that they, or either of them, negligently did or omitted anything relating to the running of trains, or negligently ran a train upon the appellee, or upon the car in which he was when injured. It is not stated what orders were given or received or executed, nor that any orders were negligently given, or negligently received, or negligently executed, nor does it appear in what respect there was negligence in the giving or the receiving or the executing of any orders. It is not made to appear in what respect the trains were negligently "run and left standing," nor is it alleged that any train or trains were negligently run and negligently left standing. It is said in the former portion of the pleading that the Erie Company had received the target; and had run the train on which the appellee was acting as brakeman within the semaphore, and that the train had stopped to receive orders. No negligence is in this connection attributed to any of the defendants, and in the closing portion quoted no reference is made to the running or stopping before mentioned in the

pleading, so as to identify what was before alleged with the running and leaving standing mentioned as having been done in a negligent and careless manner. It is nowhere in the complaint directly alleged that the defendants, or either of them, neglected or even failed to observe the targets and signals, nor is there any statement as to what targets and danger signals there were which might have been observed, but were not. It is not directly alleged in the pleading that the defendants or any of them ran "said trains" or any train at a high and ungovernable rate of speed, or did not have "said trains" or any particular train under control.

When a complaint is seasonably attacked by demurrer for want of sufficient facts, and the demurrer is overruled, the pleading must be construed in this court with reference to the legislative requirement that it shall contain a statement of the facts constituting the cause of action; and we are not at liberty to indulge those intendments which are allowed after verdict to cure a defective complaint. The demurring party has a right to correct ruling by the trial court, and the deprivation of such right may be remedied on appeal. It cannot be held that the second paragraph comes within the requirements heretofore enforced in such cases. See *Pittsburgh, etc., R. Co. v. Conn.*, 104 Ind. 64, 3 N. E. 636; *Corporation of Bluffton v. Mathews*, 92 Ind. 213; *Harris v. The Board*, etc., 121 Ind. 299, 23 N. E. 92; *Baltimore, etc., R. Co. v. Young*, 146 Ind. 374, 45 N. E. 479; *Ohio, etc., R. Co. v. Engler*, 4 Ind. App. 261, 30 N. E. 924; *Lake Erie, etc., R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488; *South Chicago, etc., R. Co. v. Moltrum*, 26 Ind. App. 550, 60 N. E. 361; *Toledo, etc., R. Co. v. Beery*, 31 Ind. App. 556, 63 N. E. 702; *City of Hammond v. Winslow*, 83 Ind. App. 92, 70 N. E. 819.

Judgment against the appellants reversed, and cause remanded, with instruction to sustain the demurrer of the appellants to the second paragraph of the complaint.

(218 Ill. 337)

WAGG et al. v. PEOPLE ex rel. HANBERG, County Treasurer.

(Supreme Court of Illinois. Dec. 20, 1905.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—JUDGMENT OF SALE.

The pendency of the original assessment proceedings, at the time a proceeding to confirm a new assessment is taken, is a defense which comes too late, when urged on an application for judgment of sale for the new assessment.

Appeal from Cook County Court; Orrin N. Carter, Judge.

Action by the people, on the relation of John J. Hanberg, county treasurer, against E. R. Wagg and others. Judgment for plaintiff, and defendants appeal. Affirmed.

George W. Wilbur and Ira J. Geer, for appellants. Robert Redfield and Frank Johnston, Jr. (James Hamilton Lewis, Corp. Counsel, of counsel), for appellee.

WILKIN, J. At the June term, 1905, of the county court of Cook county, the appellee, as ex officio county collector, made application for judgment and order of sale against appellants' property for delinquent special assessments for paving Evanston avenue from North Fifty-Ninth street to Lawrence avenue, in the city of Chicago. Objections were filed on behalf of appellants, which were overruled and judgment entered. The main contention of appellants is that the county court had no jurisdiction to entertain the application for the judgment of sale, for the reason that the ordinance which was the basis of the assessment and confirmation proceedings is void.

On February 1, 1897, an assessment was made for said improvement, but the judgment of confirmation was reversed by this court as to certain pieces of property assessed. Afterward a new assessment was made, based upon the allegations in the petition and ordinance that by reason of the setting aside of the judgment of confirmation in the original proceedings the assessment could not be collected under such original proceedings and that a new assessment had become necessary. Appellants claim that the original proceeding was still pending at the time of the application for the second judgment of confirmation, and that the county court had no jurisdiction to enter a second judgment while the first was still pending. Section 66 of chapter 24, p. 406, Hurd's Rev. St. 1903, provides that upon application for judgment of sale upon an assessment no defense or objection shall be made or heard which might have been interposed in the proceedings for the making of such assessment, and no errors in the proceedings not affecting the power of the court to entertain and consider the petition shall be deemed a defense to the application for judgment and order of sale. In the case of *People v. Fuller*, 204 Ill. 290,

75 N.E.—62

68 N. E. 371, the question presented for decision was whether or not judgment of confirmation of a prior assessment for the same improvement under a previous ordinance could be pleaded in bar on an application for judgment and order of sale under the second ordinance. We there held that the defense sought to be interposed should have been made at the time of the application for confirmation of the assessment, and was not a proper defense upon application for judgment of sale. No reason is shown why the facts of this case are not within the rule there announced.

It is conceded that the proceedings for the levy of the last assessment were in strict compliance with all of the provisions of the statute. The appellants received notice that the assessment roll had been made and that at a certain term of court all objections would be heard. By this notice the court obtained jurisdiction of the persons of all of appellants, and under the statute had jurisdiction of the subject-matter of the suit. The appellants at that time knew of the existence of the prior assessment. It was not a matter which has arisen since the confirmation. They could have appeared and availed themselves of any rights which they had in defense of the confirmation. Having failed to do so, under the provisions of the statute and repeated decisions of this court, they were barred from insisting upon those defects at the time of the application for judgment of sale. The defect was one which did not go to the jurisdiction of the court, and therefore the county court committed no error in overruling the objections interposed.

We find no reversible error in the record, and the judgment of the county court will be affirmed.

Judgment affirmed.

(218 Ill. 340)

EDDLEMAN v. FASIG.

(Supreme Court of Illinois. Dec. 20, 1905.)

APPEAL — JURISDICTION — GROUNDS — DETERMINATION OF FREEHOLD.

A suit to have a deed absolute in form declared to be a mortgage and to permit redemption, involving as incidental to the relief asked a cancellation of a deed by the mortgagee to a third person, does not involve a freehold, and an appeal will not lie to the Supreme Court from a decree granting relief.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 571.]

Appeal from Circuit Court, Union County; A. K. Vickers, Judge.

Bill by George W. Smith against Ida M. Browning; in which Arnaud A. Fasig was substituted as complainant and Dora E. Eddleman as defendant. From a decree in favor of complainant, defendant appeals. Dismissed.

This was a bill filed in the circuit court of Union county seeking to have a deed absolute on its face declared to be a mortgage and to

permit a redemption therefrom. The bill was originally filed by one George W. Smith against Ida M. Browning, who was defaulted. On petition of appellant, who claimed to be the owner of the premises in controversy under an unrecorded deed made by Mrs. Browning prior to filing the bill, she was permitted to come in and defend. While the litigation was pending, the appellee purchased Smith's alleged equity of redemption and became complainant by substitution. The trial court found that the transaction between Smith and Mrs. Browning was a mortgage and that appellant had notice of that fact at the time the premises were conveyed to her, and a decree was entered permitting a redemption. A motion was made to dismiss the appeal on the ground that a freehold was not involved, and therefore this court was without jurisdiction, which was reserved until the hearing.

David W. Karraker, for appellant. James Lingle, for appellee.

HAND, J. (after stating the facts). In the case of *Lynch v. Jackson*, 123 Ill. 360, 14 N. E. 697, which was a bill to redeem, framed on the theory that a deed made by Lynch to Jackson, though absolute in form, was nevertheless a mortgage, an appeal direct to this court was dismissed, and the court say (page 361 of 123 Ill., page 697 of 14 N. E.): "On the theory on which the bill is framed, that the deed from complainant to Jackson is only a mortgage, it follows the title to the mortgaged premises is not involved in the litigation, for the obvious reason the payment of the indebtedness secured discharges the mortgage lien, and the appeal should have been taken, in the first instance, to the Appellate Court." This reasoning was followed in *Kirchoff v. Union Mutual Life Ins. Co.*, 128 Ill. 199, 20 N. E. 808, which was a bill seeking a decree, as in this case, declaring a certain deed absolute on its face to be but a mortgage and that appellant be allowed to redeem, and the appeal was dismissed. In *Adamski v. Wleczorek*, 181 Ill. 361, 54 N. E. 1034, the foregoing cases were cited with approval, although it was contended that they were not in point, for the reason that the decree would necessitate the setting aside of a deed made by the grantee in the deed alleged to be a mortgage, to a third person; but the court held that the deed to the third person was made pending the litigation, and that when the court found and decreed that defendant in error was entitled to redeem, the mere fact that the deed to the third party was set aside as a cloud on the title did not change the character of the bill or the relief sought. The setting aside of the deed was a mere incident to the right of redemption sought in the bill, and it had no bearing on the real question in controversy between the parties. It is contended in this case that appellant had actual notice of the nature of the transaction between Smith and her grantor, and the trial court

so found. In the *Adamski Case*, *supra*, the notice to the subsequent purchaser was by *lis pendens*. In this case it was actual notice. Aside from the nature of the notice we are unable to distinguish the cases, and are of the opinion that under the authorities above cited this court has no jurisdiction to entertain this appeal.

The appeal must be dismissed.

Appeal dismissed.

(218 Ill. 342)

R. & C. GROSSE v. PEOPLE ex rel. RUCH,
County Treasurer.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. TAXATION—LIABILITY OF SCHOOL PROPERTY.

Const. 1870, art. 8, § 2, requiring all property donated or received for schools to be faithfully applied to the objects for which it was given or granted, does not extend to gifts or grants made subsequent to the adoption of the Constitution, but refers only to those made previously, and particularly to those received from the United States government; and property acquired by school trustees by foreclosing a school fund mortgage is not exempt from taxation or special assessment under said section, unless it is shown that the money loaned on the mortgage was received by the trustees prior to the adoption of the Constitution.

2. SAME—EXEMPTIONS—WHAT PROPERTY EXEMPT.

The revenue act (Hurd's Rev. St. 1903, art. 12, § 6), providing that funds derived from the sale of school lands or from the sale of any real estate, or property taken on any judgment or for any debt due to the principal of any township or county fund, shall constitute a part of the principal of such fund and shall not be disbursed for any purpose, etc., does not exempt the property therein mentioned from taxation or special assessment.

Error to Monroe County Court; Paul C. Brey, Judge.

Application by the people, on the relation of Thomas Ruch, county treasurer, for judgment and order of sale against lands for drainage assessments against R. & C. Grosse. There was a judgment and order of sale, and R. & C. Grosse bring error. Affirmed.

This is a writ of error sued out to review a record of the county court of Monroe county. The facts are as follows: In 1883 one James Canniff was the owner of certain lands in Monroe county. On July 9th of that year he borrowed \$1,000 from the trustees of schools of one of the townships of that county. The money was a part of the public school fund of the township, but the source from which it was derived is not disclosed by the evidence. To secure this loan Canniff executed a mortgage to the trustees on his lands. Subsequently this mortgage was foreclosed, and the property was purchased at the sale by the said trustees for the amount of the debt and costs. Thereafter, in 1888, a deed was executed and delivered by the master in chancery conveying the premises to the trustees, and they held the legal title until October 1, 1898, when they conveyed the lands to the plaintiffs in error. These lands are lo-

cated within the boundaries of a drainage district which was organized in 1884. Assessments for drainage purposes made by the drainage district upon these lands during the time the legal title was held by the trustees of schools have never been paid. The county collector of Monroe county applied to the county court, at the June term, 1904, for judgment and order of sale against said lands for the assessments above mentioned. The plaintiffs in error appeared and filed objections to the application so made. The first objection was that the lands are described so imperfectly that they cannot be located. The second and last objection was that at the time the assessments were made the lands constituted a part of the school funds of township 5 S., range 9 W., in Monroe county, and were for that reason exempt from taxation and special assessment, and that the assessments so made by the drainage district against the lands were and are therefore void. The objections were overruled by the county court, which entered judgment and order of sale against the property for the amount of the assessments. The second objection above mentioned is the only one relied upon in this court by the plaintiffs in error for a reversal of the judgment entered below.

Charles Morrison and Dill & Pfingsten, for plaintiffs in error. Winkelmann & Ogle, for defendant in error.

SCOTT, J. (after stating the facts). The only question arising upon the record and assignments of error in this case is whether the assessments made by the drainage district upon the lands in question, while they were a part of the township school fund, were void. It has been held by this court that the school section in each township, granted by the United States to the state for the use of the inhabitants of such township for the use of schools, so long as it remains a part of the school fund, is exempt from taxation and special assessment, and that this exemption extends to property exchanged for the school section or representing its proceeds. *City of Chicago v. People*, 80 Ill. 384; *People v. Trustees of Schools*, 118 Ill. 52, 7 N. E. 262; *People v. City of Chicago*, 216 Ill. 537, 75 N. E. 239. This exemption is not placed upon any language of the statutes or the Constitution expressly relieving such property from taxation, but upon the ground that section 2 of article 8 of the Constitution of 1870 prohibits the depletion of the fund resulting from such grant by taxation or special assessment; and plaintiffs in error contend that there is no reason why the constitutional provision does not equally protect property arising from other sources.

The section of the Constitution referred to reads as follows: "All lands, moneys, or other property, donated, granted or received for schools, college, seminary or university purposes, and the proceeds thereof, shall be faith-

fully applied to the objects for which such gifts or grants were made." From an inspection of this section it is apparent that it applies only to gifts or grants made prior to the adoption of the Constitution of 1870. Its language plainly indicates that lands, money, and other property had been theretofore donated, granted, and received for schools, college, seminary, and university purposes, and directs that such gifts or grants shall be faithfully applied to the objects for which they were made; and when it is considered that the federal government had, prior to the adoption of the Constitution of 1870, granted section 16 in each township, or lands equivalent thereto, to the state for the use of the inhabitants of such township for the use of schools, and had also granted lands and donated funds to the state for the establishment and maintenance of a state college or university and for the founding and support of a state seminary, it becomes apparent that the section of the Constitution had reference, primarily, to these gifts and grants from the federal government. It manifestly does not extend to gifts or grants made subsequent to the adoption of the Constitution; and since the record in this case does not show that the money loaned to Canniff was money received by the trustees prior to August 8, 1870, it will not be presumed to have been so received, for the reason that it was incumbent upon the plaintiffs in error to bring their property clearly within the provision under which they claimed it exempt from the assessments. In the matter of *Swigert*, 119 Ill. 83, 6 N. E. 469; *McCullough v. Board of Review*, 183 Ill. 373, 55 N. E. 685; *In re Walker*, 200 Ill. 566, 66 N. E. 144. It follows that the cases first above cited are not applicable to the case at bar, and that the property in question is not protected from special assessment by the constitutional provision above quoted.

Plaintiffs in error also urge that the lands were exempt under section 6, art. 12, c. 122, *Hurd's Rev. St.* 1903, which provides that the funds derived from the sale of section 16, "or from the sale of any real estate or other property taken on any judgment or for any debt due to the principal of any township or county fund, and all other funds of every description," shall constitute a part of the principal of the township or county fund, and no such part shall be distributed or expended for any purpose whatever, but shall be loaned, etc., and that the rents, interest, issues and profits arising from said principal shall be distributed as provided by law, etc. That section does not in terms purport to relieve the property therein mentioned from taxation or special assessment, and hence it will not be construed to have such effect. The law is well settled that an exemption cannot be raised by implication, but the intention to relieve from the burden of taxation must appear affirmatively. *In re Walker*, supra. We therefore hold that the section of the statute referred to did not exempt the

lands in question from the special assessments. In the case of *City of Chicago v. City of Chicago*, 207 Ill. 37, 69 N. E. 580, this court held that school property in the city of Chicago, not being part of section 16 nor acquired with funds derived therefrom, was not exempt, either under the constitutional provision above quoted or under section 6 of article 12, supra, of the statutes, from a special assessment which was levied for the purpose of paving the street upon which the school property abutted. Part of that property was used for school purposes, part was vacant, and the remainder was occupied by buildings from which rents and profits were received. It was there held that there was no distinction between the property used for school purposes and that which was vacant, so far as the liability for special assessment was concerned. There was no material distinction between that case and the one at bar. The property here in question was liable to assessment for drainage purposes while constituting a part of the school fund, and the court below did not err in overruling the objections and entering a judgment and order of sale for the special assessments.

The judgment of the county court will be affirmed.

Judgment affirmed.

(218 Ill. 348)

STONE et al. v. CITY OF CHICAGO.

HATTERMAN et al. v. SAME.

(Supreme Court of Illinois. Dec. 20, 1905.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—APPEAL.

A writ of error to review a levy under a supplemental assessment, under Hurd's Rev. St. 1903, c. 24, §§ 57, 58, will be dismissed, where the affidavit required by section 96 has not been filed, though the original assessment proceeding was begun before the provisions of chapter 24 went into effect.

Error to Cook County Court; W. H. Hinebaugh, Judge.

Actions by the city of Chicago against Walter H. Stone and others, and by the city of Chicago against William E. Hatterman and others. Judgment for plaintiff in each action, and defendants bring error. Dismissed.

On March 24, 1902, the city of Chicago filed its petition in the county court of Cook county for a supplemental or new assessment, under the law of 1897, for the purpose of collecting the unpaid balance of the cost of improving Hamlin avenue from Chicago avenue to North avenue. This is the fourth time this proceeding has been before this court. On the first occasion a writ of error was sued out to reverse the original judgment of confirmation, upon the ground that the ordinance was insufficient. Under that proceeding the judgment of confirmation was set aside and the cause remanded. *Lingle v. City of Chicago*, 178 Ill. 628, 53 N. E. 266.

The cause was redocketed, and on May 9, 1900, objections were filed and the case was submitted to the court. Upon hearing the evidence offered the court sustained the objections and dismissed the petition. In 1901 the petitioner sued out a writ of error, and this court sustained the judgment of the county court in dismissing the petition. *City of Chicago v. Sherman*, 192 Ill. 576, 61 N. E. 850. The petitioner on March 24, 1902, filed a supplemental petition, based on a new or supplemental ordinance passed by the city council on February 17, 1902. A trial was had under the new petition, and objections were again sustained by the county court and the petition dismissed. This order of the county court was set aside by this court and the cause remanded for further proceedings. *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 896. The cause was redocketed, and on a trial the objections were overruled and judgment of confirmation was entered. This court is now asked to review the latter judgment.

George W. Wilber and Ira J. Geer, for plaintiffs in error. Robert Redfield and Frank Johnston, Jr. (James Hamilton Lewis, Corp. Counsel, of counsel), for defendant in error.

WILKIN, J. (after stating the facts). A motion has been made by defendant in error to dismiss the writ of error for failure to file the affidavit required by section 96 of the act of 1897. The original petition for the first assessment was filed under the special assessment law of 1872. Under section 46 of article 9 of that act (Laws 1871-72, p. 256) a party aggrieved had the right to a writ of error without the statutory notice required by the act of 1897; but on July 1, 1897, a new special assessment law went into effect, taking the place of the act of 1872. Section 96 of the new act provided that in every case there shall be filed with the clerk of the Supreme Court, with the application for a writ of error, an affidavit by the plaintiff in error, or his agent, setting forth the time when said warrant as to such property was returned delinquent or so certified, and further setting forth that the person to whom such notice of the filing of the assessment roll as to such property was given, as shown by the record, did not receive the same or otherwise learn of the pendency of the proceedings for the confirmation of said assessment until less than 10 days before the entering of default against the said property in the court below. Hurd's Rev. St. 1903, p. 414, c. 24, § 96.

Section 99 of the act of 1897 provides that the laws subsisting at the time of the taking effect of the local improvement act of June 14, 1897, shall continue to apply to all proceedings for the confirmation of special assessments for local improvements which were pending in any court of the state at the time of the taking effect of the local improvement

act of June 14, 1897, and to all proceedings for the collection of any deficiency under past levies already made under any laws existing at the time of the taking effect of the local improvement act of June 14, 1897; also to all proceedings for new assessments made in lieu of others annulled by order of some court before the act concerning local improvements of June 14, 1897, took effect; also when any installment of an assessment confirmed under prior acts shall mature, proceedings to return the same delinquent and to collect the same shall conform to the provisions of this act; and also where proceedings for local improvements to be made by special assessment shall have been instituted when this act shall take effect and the assessment provided for therein has not been confirmed by any court, any future proceedings thereunder shall be as herein provided, with the same effect as if such proceedings had been commenced in accordance with the provisions herein provided. Hurd's Rev. St. 1903, p. 415, c. 24, § 99. It is admitted that on July 1, 1897, the special assessment proceedings in question were not pending in any court, and therefore did not come within any of the exceptions provided in section 99. It is also admitted that the affidavit provided in section 96 was not filed; but this omission is sought to be excused upon the ground that the original proceedings were commenced under the act of 1872, while the supplemental or new proceedings were commenced under sections 57 and 58 of the act of 1897 (Hurd's Rev. St. 1903, p. 404, c. 24) and the amendments thereto, and that plaintiffs in error had all of the rights to a writ of error which they would be entitled to under the law of 1872. When the new ordinance was passed and the petition for the additional and supplemental assessment filed, it was under the act of 1897. This is admitted by the plaintiffs in error in their briefs and arguments, and it is not contended that the proceedings were not properly brought under the act of 1897. In the case of *City of Chicago v. Sherman*, 212 Ill. 496, 72 N. E. 396, no question was raised as to the act under which the proceeding was commenced. If the petition was properly filed under the act of 1897, then the proceeding was governed by all of the sections of that act, including the provisions of section 96. No part of the act of 1872 had any application to the supplemental petition, any more than if that act had never existed. Judgment of confirmation was rendered under the provisions of the act of 1897. The court had jurisdiction of the person of plaintiffs in error and of the subject-matter of the suit. To set aside that judgment of confirmation the writ of error must be sued out under section 96 of the act of 1897, which required a certain affidavit to be filed with the clerk of the Supreme Court. We have held in the cases of *Hart Bros. v. West Chicago Park Com'rs*, 186 Ill. 464, 57 N. E. 1036, and *Lingle v. City of Chicago*, 212 Ill. 512, 72 N. E. 677, that the failure to file this

affidavit is ground for dismissing the writ of error. We see nothing to take this case out of the operation of that rule.

The writ of error will therefore be dismissed.

Writ dismissed.

(218 Ill. 352)

O'SHEA v. PEOPLE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. CRIMINAL LAW—CONDUCT OF TRIAL—REMARKS BY JUDGE.

In homicide, where the sole defense is insanity, and the evidence is conflicting and the question close, the jury should be given no intimation by the trial judge as to the merits of the defense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1525-1533.]

2. SAME.

The defense of insanity, in a prosecution for homicide, involves defendant's knowledge of right and wrong; and it is error for the trial judge, in cross-examining witnesses, to state that insanity does not involve such question.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 56, 1825.]

3. SAME—RECEPTION OF EVIDENCE—EXAMINATION BY COURT.

A conviction of homicide would be reversed, where the trial judge, in cross-examining witnesses testifying on the defense of insanity, persists in such a course of examination that the jury may conclude therefrom that the defense is without merit unless it is positively proven that accused is an imbecile or the victim of an insane delusion.

4. SAME.

Where the trial judge in a criminal case cross-examines witnesses, he must be careful not to give the jury the impression that he is biased against accused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1525-1533.]

Error to Criminal Court, Cook County: W. M. McEwen, Judge.

Victor Roland O'Shea was convicted of manslaughter, and brings error. Reversed.

Victor Roland O'Shea, the plaintiff in error, was indicted in the criminal court of Cook county, on September 22, 1902, for the murder of his wife, Amy M. O'Shea, on September 10, 1902. A trial was had, which, on November 15, 1904, resulted in a disagreement of the jury. Upon a second trial the jury found him guilty of manslaughter. After overruling a motion for a new trial and a motion in arrest of judgment, the court entered judgment upon the verdict and sentenced the defendant to the penitentiary at Joliet. The record of the criminal court is brought to this court for review by writ of error. O'Shea (hereinafter referred to as the defendant), at the time he killed his wife, was 22 years old. The maiden name of the deceased was Hogen-son. He met her for the first time at Lake Villa, Ill., during the year 1899. After their return to Chicago he frequently called upon her at her home in Chicago, where she resided with her parents. Neither her father nor mother made any objection to the defendant's visits, but apparently encouraged

them. On July 2, 1901, that being the defendant's twenty-first birthday, he was secretly married to Amy M. Hogenson at Waukegan, Ill. They immediately returned to Chicago and lived at their respective homes and conducted themselves, to all outward appearances, as though they were still unmarried. At the time of the marriage he was a student and clerk in the law office of his father, with whom he lived. He earned about \$8 per week. In the fall of 1901 the parents of the wife learned of the marriage of their daughter to the defendant. Her father had a conversation with him, and, upon being informed that his income amounted to only \$8 per week and that he was unable to support a wife, upbraided him for getting married. Thereafter the defendant continued to call on his wife at her home, but his relations with her parents were strained and unpleasant, and it appears that the frequency of his visits was objected to by the parents, and that they tried to limit them to one or two a week in number. On the evening of September 9, 1902, the defendant called at his wife's residence and inquired of her mother if she was at home. Upon being informed that she was not, he went away and returned later, when he was told through a speaking tube by Mrs. Hogenson that his wife had returned but had gone to bed, and that she had told her mother to tell him that she would not see him that night but for him to come the next day. On the following morning he went to the house shortly after 9 o'clock. The Hogenson home was a second flat of a building on West Division street. He was admitted to the parlor by his wife, and the two sat down in that room. Mrs. Hogenson was at work in the kitchen. The doors between the parlor and kitchen were open, and she was able to see into the parlor. The defendant and the deceased talked in a low tone, and Mrs. Hogenson could not distinguish what was said by either of them. After the defendant had been in the room about 20 minutes, his wife went into the kitchen for a glass of water and returned with it to the parlor. Several minutes afterwards the defendant and his wife went into the hall, and soon afterwards Mrs. Hogenson heard shots proceeding therefrom. She seized a small club and ran into the hall, where she found her daughter lying upon the floor, shot twice in the breast, and the defendant upon the stairs leading down from the flat, with a revolver in his hand. She attempted to strike him with the club, but dropped it down the steps. He advanced up the steps towards her, and she ran into the parlor, locking the door after her. Soon thereafter she heard more shots proceeding from the hall. Seizing a piece of a broken bedstead she again went into the hall and found the defendant lying upon the floor. He had shot himself twice in the breast, a little to the right of the heart. The wife of the defendant died almost immediately from

the wounds received by her. The defendant was taken by the police to a hospital, where he remained for a period of three months, and he was under the care of surgeons for more than six months before he recovered. Up to the time of the tragedy the relations existing between the defendant and his wife were apparently those of affection and devotion to each other. The defendant did not deny the killing in the manner and under the circumstances above stated, but pleaded insanity at the time of the homicide as a defense. A large number of witnesses testified that he was insane at the time of the homicide and for a period of several months prior thereto, while others called by the people were of the contrary opinion. Grounds relied upon for a reversal of the case are: That the verdict was against the manifest weight of the evidence, that the trial court erred in giving to the jury certain instructions for the people, and that the judge before whom the case was tried conducted a cross-examination of a number of the defendant's witnesses in an improper and prejudicial manner, and asked them questions which were not proper to be asked even by the attorney for the people on cross-examination.

Henry E. Murphy and P. J. O'Shea, (James Hamilton Lewis, of counsel), for plaintiff in error. William H. Stead, Atty. Gen., and George Gillespie (John J. Healy, State's Atty., and Harry Olson, of counsel), for the People.

SCOTT, J. (after stating the facts). The defense interposed was insanity. The evidence was very conflicting. Thirty-one witnesses testified that O'Shea was insane at the time of the homicide, while 16 witnesses, called on behalf of the prosecution, testified that he was sane at that time. A careful examination of the testimony of these witnesses leads us to the conclusion that those who testified on the part of O'Shea were better qualified by observation of and association with him to know what his mental condition was. They seem to have testified as fairly and candidly as, and were not inferior in intelligence to, those who spoke for the people. It was highly important that the jury should have been left to consider the evidence without anything whatever intervening which could have been regarded by them as an intimation of the view of the trial judge in regard to the merits of the plea of insanity. In the cross-examination of several of the lay witnesses called by O'Shea who testified to his insanity, the presiding judge took an active part. On some occasions, after the cross-examination conducted by the prosecuting officer had proceeded for some time, the judge took up and conducted the cross-examination at some length, and when his interrogatories were ended the cross-examination was resumed by the prosecutor. At other times the judge's cross-examination followed that of the people's

representative. The cross-questions propounded by the judge were vigorously objected to by the attorney for O'Shea; the objection in every instance being promptly overruled without discussion.

Among the witnesses called by the defendant below was Edward G. Stockert, an attorney at law, who testified on his direct examination to a large number of circumstances affording foundation for the conclusion finally sworn to by him that O'Shea was insane at the time the fatal shots were fired. The assistant state's attorney then cross-examined him very fully. The witness was examined on redirect, and the judge then cross-examined him. Space forbids that we reproduce this entire examination, as it covers six pages of the typewritten transcript of the record. We set out sufficient thereof to show the objectionable character of some of the questions propounded. Interrogatories of the same general character were asked by the judge of each witness whom he cross-examined. "By the Court: * * *

Q. How would you define the condition of mind in which a man is when he does not know the difference between right and wrong—how would you describe it? A. Well, I would say I am not an expert on insanity, I would say he was mentally unbalanced. That is about the only expression I would use. Q. Well, are you of the opinion that every person who is mentally unbalanced does not know the difference between right and wrong? A. Well, I believe some people are unbalanced on certain occasions. They have intervals when they are perfectly lucid. Some people are unbalanced on certain things, certain subjects. Q. Are there conditions of lack of mental balance where a party does know the difference between right and wrong? A. I do not know. I am not an expert. Q. Insanity does not involve the question of right and wrong. A. I am not an expert on insanity. I am not a student of the subject—would not want to be. * * * Q. Do you think that the defendant had such mentality as that he comprehended what he was doing? A. Well, he could not tell whether the action was right or wrong; he could not distinguish between them. I am sure of that. Q. Well, that is not an answer to my question. A. I do not know whether he knew that or not. I would not want to say whether he knew or not. I could tell you what he told me afterwards in regard to that. That is the only thing upon which I could base my opinion upon it. Q. You better not; that is not admissible. Do you think that he knew that he was armed with a weapon which would discharge bullets and produce death if fired into a vital spot? A. Well, I knew always that he did carry a revolver because of collecting his money for the distilling company. Q. Well, I think I will have to strike that out. What I am asking you is whether, at the time he

was firing the shot, whether he knew he was firing a revolver loaded which would discharge a bullet into his wife? Do you think he knew the identity of his wife, and do you think he knew he had a revolver in his hand with a trigger, and that it required pulling of the trigger to discharge weapon? Do you think he apprehended all these things in that act? A. I do not think he appreciated all of these things in that act. I think he was in such a state of mind, if he had apprehended it, he would not have done it. Q. Would you say that his mind was in a delusory state? What do you say about that? Do you think his mind—are you of the opinion that his mind—was in a delusory state at that time, that he was imagining a condition of things that did not exist? For instance, that he was shooting some one who was not a human being, perhaps in some sort of mental wandering of mind, so there was a delusory state of things? A. That may have been. Q. Have you any opinion on that? A. Well, I do remember of his saying something about— Q. No, that is not the question. Have you an opinion—it is not what you remember about—have you actually the opinion? A. He may have been laboring under a delusion of that kind. I don't know. I really haven't an opinion, Mr. McEwen." To another witness the judge propounded such questions as: "Do you think he knew enough to go home? What car to take? Were you of the opinion that he could find his way home at that time?" And further, whether O'Shea knew the revolver from its pouch; whether he knew the trigger from the hammer of the revolver; whether he knew which he pulled, the hammer or the trigger; whether he knew that his wife was a human being.

We regard as error the question or suggestion of the judge to the effect that "insanity does not involve the question of right and wrong." Where insanity is interposed as a defense to crime, it involves the defendant's knowledge of right and wrong (*Hornish v. People*, 142 Ill. 620, 32 N. E. 677, 18 L. R. A. 237; *Meyer v. People*, 156 Ill. 126, 40 N. E. 490); and we think the jury would understand the interrogatory or statement as referring to that knowledge or lack of knowledge on the part of the accused. We are constrained to believe that the cross-examinations by the judge suggested false tests of sanity to the jury and that they might well conclude that the judge believed that the defense was without merit, unless it was made to appear by direct and positive testimony that the defendant was an imbecile or was the victim of an insane delusion.

As argued by the representatives of the people, the *nisi prius* judge is not a mere umpire presiding over a contest of skill and ingenuity between the respective attorneys. On the contrary, it is his duty to see that justice is done; and, where justice is liable

to fail because a certain fact has not been developed or a certain line of inquiry pursued, it is his duty to interpose, and either by suggestion to counsel or an examination conducted by himself obviate the miscarriage of justice. Under unusual circumstances it may become his duty to call and examine witnesses himself, but where he does this he must not forget the function of the judge and assume that of the advocate. Necessarily, the extent to which the trial judge will participate in the examination of a witness is largely a matter of discretion with him, to be determined from the circumstances of the particular case as they arise; but in a jury trial, where the parties, as here, are represented by able, conscientious, and experienced attorneys, it is scarcely possible to conceive circumstance under which the court is, in the performance of his duty, free to enter upon a lengthy cross-examination of witnesses. A suggestion to one or the other of the attorneys of the matter or line of inquiry which the judge desires developed is ordinarily all that is necessary.

The valid objections to the course pursued by the trial judge in this case are several, irrespective of the erroneous character of the questions which were here propounded. In the first place, counsel is placed in a most embarrassing position where he deems the questions improper, as he is loath to enter into a discussion of their propriety with the judge who has propounded them. Then, where the examination so conducted is lengthy and the objections from one party are many, it is almost impossible for the judge to preserve a judicial attitude. It is difficult for him, however wise, experienced, and impartial, to pass on objections to his own questions fairly. Again, where objections are constantly made to the judge's questions and they are constantly overruled, as they are apt to be, the jury, in many cases prone to guide themselves by an intimation of the opinion of the judge, may conclude that he looks with disfavor upon the cause of the party objecting. And as heretofore pointed out by this court in the Dunn Case, cited below, it is a "task of great delicacy and extreme difficulty" for the presiding judge to conduct the examination of a witness so that no intimation of the examiner's opinion of the witness' credibility will be conveyed to the jury. The views just expressed find support in the cases of Dunn v. People, 172 Ill. 582, 50 N. E. 137, and Cunningham v. People, 195 Ill. 550, 63 N. E. 517. The law guarantees O'Shea a fair and impartial trial. The course pursued by the presiding judge amounted to a denial of this right.

It is unnecessary to consider the other errors assigned. The judgment of the criminal court of Cook county will be reversed, and the cause will be remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

(218 Ill. 361)

BROWN v. PEOPLE.

(Supreme Court of Illinois. Dec. 20, 1905.)

LARCENY — ADMINISTRATOR — APPROPRIATION OF ASSETS.

Laws 1903, p. 156, § 81½, providing that an administrator who fails to turn over funds of the estate on demand without good cause shall be deemed guilty of larceny, does not apply to an administrator who loaned the money of the estate in good faith many years before the passage of the act, and by reason of the subsequent insolvency of the borrower has never been able to collect the same, and who from the time of the passage of the act never had the funds in his hands with which to pay on demand.

Error to Criminal Court, Cook County; George Kersten, Judge.

John G. Brown was convicted of larceny, and brings error. Reversed.

This was an indictment of the plaintiff in error by the grand jury of Cook county on July 30, 1904, charging him with larceny in violation of an act of the Legislature of Illinois approved May 13, 1903, whereby an administrator, who without good cause fails or refuses to account for or pay over money or other property when legally required so to do, is made guilty of larceny. The plaintiff in error was on September 15, 1892, appointed administrator of the estate of his father, James M. Brown, deceased, by the probate court of Cook county. He gave a bond, with Michael C. McDonald and George V. Hankins as sureties, in the penal sum of \$50,000. The heirship, as established, was: Amanda C. Brown, widow; John G. Brown, the plaintiff in error, son and administrator; Luna R. Testard, daughter; James T. Brown, son; Annie L. Stouffer, daughter; and Billy Brown, son. The administrator's report showed the receipt of \$87,400.66. Various sums of money were disbursed by the plaintiff in error as administrator, and on June 7, 1893, the remaining assets of the estate in his hands were \$32,513.04. This money belonged to the heirs of James M. Brown, of whom the plaintiff in error was one. On June 7, 1893, Hankins, one of the sureties on the bond of plaintiff in error, sent for him—he, Brown, being at that time in St. Louis—to come to Chicago. Plaintiff in error came to Chicago, and Hankins, the surety, stated that the Globe Savings Bank, in which this money was deposited, was in bad shape and it was probable that it was going to fail; that on that account he did not think the money was safe in the bank; and that if plaintiff in error did not let him (Hankins) take the money he would cease to be surety upon the bond. Thereupon plaintiff in error loaned the whole sum to Hankins, the surety on his bond, taking therefor a note signed by Hankins and another, dated June 7, 1893, and payable 15 months after date. The indorsements on the back of this note show payments by Hankins from time to time prior to January 1, 1898, amounting to a

little over \$5,000, but no more was ever paid by him so far as the record shows. The payments so made were properly distributed and are not in any way involved in the present proceeding.

Plaintiff in error states in his evidence that he loaned the money to Hankins, believing at the time that the latter was several times a millionaire. This loan was made without the consent of the probate court, without the knowledge of the distributees, except plaintiff in error, and without the knowledge of the attorney for the estate or of the other bondsman, McDonald. Brown filed a report and account on October 2, 1903, on which day the court disallowed the account and ordered him to file an amended account, eliminating therefrom the credit which he gave himself for the money loaned to Hankins. On October 13, 1903, plaintiff in error filed an additional report eliminating said credit. On January 4, 1904, the probate court entered an order finding the distributive share of the widow, Amanda C. Brown, to be \$3,174.89, and charged plaintiff in error with the penalty of 10 per cent. per annum for having failed to turn over the money on March 15, 1895. This distributive share and penalty of 10 per cent. amounted to \$6,631.91. The share of Amanda C. Brown in the fund in the hands of plaintiff in error was \$13,552.89. He paid to her, as one of the distributees, between November 20, 1892, and December 12, 1899, sums aggregating \$10,378, leaving the amount due her to be said sum of \$3,174.89, without the 10 per cent. interest above mentioned. An attorney, Warren Wilson, having a power of attorney dated in August, 1903, from Amanda C. Brown to collect her distributive share, made a demand on January 14, 1904, upon plaintiff in error for \$6,631.91, found to be due to the widow by the order of the probate court, and consisting of said sum of \$3,174.89 and interest. This demand was made by Wilson upon plaintiff in error at the courthouse in Cook county, but the latter failed to pay over the money demanded of him, saying that he had nothing to pay with—that Hankins had it. He admits in his testimony that the demand was made on him in the sheriff's office of Cook county; shows that he failed to pay over the money because he did not have it; shows, further, that he was never able to collect the money in question from Hankins or the other maker of the note, as they had become insolvent prior to 1903; and shows, further, that plaintiff in error did not himself have property with which to make the deficit good and was unable to obtain money from any source with which to make the required payment. The amount which plaintiff in error is charged in the indictment with having failed to turn over in accordance with such demand is the sum of \$3,174.89.

Upon the trial under the indictment the jury rendered the following verdict: "We, the jury, find the defendant, John G. Brown,

guilty of larceny in manner and form as charged in the indictment, and we further find the value of the property which said defendant failed or refused to turn over to be \$3,174.89; but we would recommend leniency, as we cannot find that any of the defendant's acts were committed with a knowledge of their criminal nature." After motions for new trial and in arrest of judgment were overruled, judgment was rendered on the verdict; the sentence being an indeterminate one and the punishment imprisonment in the penitentiary. The present writ of error is sued out for the purpose of reversing the judgment of conviction so entered by the criminal court of Cook county.

James R. Glass, Warren B. Wilson, and S. P. Shope, for plaintiff in error. W. H. Stead, Atty. Gen., and John J. Healy, State's Atty. (George B. Gillespie, Harry Olson, and Edward Maher, of counsel), for the People.

SCOTT, J. (after stating the facts). The statute under which plaintiff in error was convicted, and which became effective July 1, 1903, is section 81½ of the Criminal Code (Laws 1903, p. 156), which reads as follows: "Whoever, being the administrator of the estate of a decedent, or the executor of a last will, or guardian of any minor, conservator of any idiot, distracted person, drunkard, spendthrift or insane person, or trustee or other person acting in any fiduciary capacity, without good cause, fails or refuses, when legally required by the proper person or authority, to account for or pay over to such person or persons as may be lawfully entitled to receive the same, any money, choses in action, or other property which may have come into his hands, by virtue of his office, duty or trust, shall be deemed guilty of larceny." On January 4, 1904, demand was made upon him for the payment of money due from him as administrator to the widow of his intestate. He failed to comply with the demand, for the reason that he did not have the money and could not get it.

It is apparent from the record in this cause that John G. Brown never had the power to pay this money at any time after this statute came into force, and it is insisted on his behalf that the statute, therefore, should not be construed so as to bring him within its terms. The real wrong which plaintiff in error did consisted in unlawfully loaning funds in his hands as administrator to Hankins, one of the sureties on his administrator's bond, on June 7, 1903, and he has been unable at all times since to pay the money which the jury found that he failed to turn over, for the reason that the loan to Hankins could not be fully collected, and for the further reason that plaintiff in error was insolvent and was unable to obtain the money from any source with which to make full payment to the distributees of the deceased. Certain payments were made on the note prior to January 1,

1898, by Hankins, and were properly distributed by plaintiff in error to the heirs; but the moneys so paid and distributed were aside from the sum which the jury found that the administrator had failed or refused to distribute. We are of the opinion that the statute above set out cannot be made to apply to this administrator under the facts disclosed by this record. It is true that he wrongfully loaned the money in 1893, and as a consequence thereof became unable to comply with the demand made under the law of 1903. The wrong he did was in lending the money to Hankins; but at the time he made the loan the law did not provide that he should be guilty of larceny if he failed to pay, upon demand, to the distributees, at the proper time, the money so wrongfully loaned. If, therefore, this statute be held to apply to him, it would result in making his failure to pay over the money larceny, and subject him to punishment for that crime—a failure which was the direct consequence of the wrongful act in question, which wrongful act was done long prior to the passage of the statute; the failure in question not being larceny by any law in force at the time the wrongful act was done. Such a construction would make the statute obnoxious to section 14 of article 2 of the Constitution of 1870, which forbids the passage of any ex post facto law. *Johnson v. People*, 173 Ill. 181, 50 N. E. 321.

The judgment of the criminal court of Cook county will be reversed, but the cause will not be remanded.

Judgment reversed.

(218 Ill. 366)

FIELD v. KENNEWEG et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

ERROR, WRIT OF—DISMISSAL.

Where several plaintiffs in error sue out a writ of error, any of them who desire may dismiss the writ at their pleasure, and their purpose in exercising that right cannot be reviewed by the courts.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3115-3119.]

Appeal from Branch Appellate Court, First District.

Bill by Marshall Field against Christian F. Kenneweg and others. Decree for plaintiff, and from an order of the Appellate Court, dismissing the writ of error, as to certain plaintiffs in error, plaintiff appeals. Affirmed.

The appellant, on the 3d day of January, 1894, filed four bills in chancery in the circuit court of Cook county to foreclose four separate trust deeds, all executed by Howard Butcher on June 7, 1890, upon contiguous parcels of land located in the village of Western Springs, in said county. The cases were subsequently consolidated, and on July 13, 1900, a final decree of foreclosure and sale was entered in the consolidated case, under which

a sale of the premises was made by the master, and his report of sale and distribution was confirmed on November 21, 1900. No appeal was taken from the decree of foreclosure and sale entered in the consolidated case, but on February 12, 1903, a writ of error was sued out from the Appellate Court to review said decree by 11 of the defendants. Subsequently 7 other defendants entered their appearance as plaintiffs in error and joined in the assignment of error of the 11 original plaintiffs in error and with them filed briefs. There were numerous defendants in the consolidated case, other than the 18 who assigned error upon the record, who declined to join in the writ of error. A severance was ordered as to such defendants, 226 in number, and they were brought in as plaintiffs in error by service of process, and on the 5th of March, 1905, an order was entered by the Appellate Court that, for want of an assignment of error upon the record as to those plaintiffs in error who had not assigned error, they be forever barred from questioning or impeaching the decree of the circuit court sought to be reviewed in that court by the writ of error. Afterwards the case was taken under advisement by the Appellate Court, and on May 5, 1905, the 18 plaintiffs in error who had filed briefs obtained an extension of time in which to file reply briefs, and on June 23, 1905, a motion was made in the Appellate Court on behalf of "certain plaintiffs in error" who were not specifically named "that the writ be dismissed without prejudice to the starting of further suit." That motion was denied, and on July 13th following, which was within one day of five years from the date upon which the decree of foreclosure and sale was entered in the circuit court in the consolidated case, the 18 plaintiffs in error who were actively prosecuting said writ moved the Appellate Court "that the said writ be dismissed as to them," and over the objection of the defendant in error in the Appellate Court (the appellant in this court) the motion was allowed and the writ of error dismissed as to said 18 plaintiffs in error, and the defendant in error prosecuted an appeal to this court, and by his assignment of errors seeks to have the order of the Appellate Court dismissing said writ of error as to said 18 plaintiffs in error reversed, and the cause remanded to the Appellate Court with directions to dispose of said writ of error upon its merits.

Holt, Wheeler & Sidley, for appellant. Franklin L. Chase (Colin C. H. Fyffe and Edmund D. Adcock, of counsel), for appellees.

HAND, J. (after stating the facts). The suing out of a writ of error is deemed the beginning of a new suit, and in *Granat v. Kruse*, 213 Ill. 328, 72 N. E. 744, it was said (page 331 of 213 Ill., and page 745 of 72 N. E.): "A plaintiff in error has the same right to dismiss a writ sued out in his name

that he has to dismiss a suit begun by him in a court of original jurisdiction." It is urged, however, by the appellant that 226 of the plaintiffs in error did not join in the motion to dismiss the writ of error, and it is said the apparent object of the 18 plaintiffs in error in dismissing the writ was for the purpose of suing out a new writ with a view to cloud appellant's title, and that a second writ of error from the Appellate to the circuit court to review the final decree entered in said consolidated case will not lie. In *Thorp v. Thorp*, 40 Ill. 113, it was held that, where a writ of error is sued out by several, a part may dismiss the writ as to themselves and leave the remaining plaintiffs in error to prosecute their suit if they desire. The 18 plaintiffs in error were the only persons who were prosecuting the writ of error, and they clearly had the right to dismiss the writ as to themselves. What effect the dismissal as to them had upon the order entered by the Appellate Court against the 226 defendants who refused to join in the writ of error and against whom a severance was had and who were brought in as plaintiffs in error by the service of process, and whether the plaintiffs in error have the right to sue out another writ of error from the Appellate Court to review the final decree entered in the consolidated case, are questions not presented upon this record for decision, and we at this time express no opinion upon those questions. If the 18 plaintiffs in error had the right, as they clearly did, to dismiss the writ as to themselves, their purpose in exercising that right is a matter which cannot be reviewed or controlled by the courts.

The judgment of the Appellate Court, allowing the 18 plaintiffs in error who were actively prosecuting the writ of error to dismiss the writ as to themselves, is affirmed.

Judgment affirmed.

(218 Ill. 399)

FOLSOM v. HARR et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

SPECIFIC PERFORMANCE — UNCERTAIN CONTRACT.

A lease provided that, if the party of the first part should conclude to sell the property, then the second party was to have the first chance to buy it. No price was stated, nor any method of ascertaining the price was fixed. Held too uncertain to be specifically enforced as an agreement to convey to the party of the second part.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 62-64.]

Appeal from Superior Court, Cook County; Theodore Brentano, Judge.

Bill by Eugene Folsom against Henry Harr and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Franklin L. Chase, for appellant. Pierson, Pease & De Young, for appellees.

MAGRUDER, J. The original bill in this case was filed on January 5, 1905, to which a demurrer was sustained. An amended bill was filed on March 13, 1905, to which a demurrer was filed and sustained. A second amended bill was filed on May 22, 1905. A general demurrer was filed to the latter bill, and sustained. The plaintiff elected to stand by his second amended bill, and it was thereupon dismissed for want of equity at complainant's costs. The present appeal is prosecuted from such decree of dismissal.

The bill alleges that on September 25, 1902, the appellee Harr, being the owner in fee of a certain lot 29 in Staples' subdivision, etc., in Cook county, by William P. Gronen, his agent thereunto duly constituted, on the day aforesaid entered into a certain written agreement under seal with appellant, Eugene Folsom, complainant in the bill, for the lease and sale thereof to appellant. The bill sets out said agreement in *hæc verba*, dated September 25, 1902, between William P. Gronen, agent, party of the first part, and Eugene Folsom, party of the second part. By the terms thereof the first party leased said lot to the second party from October 1, 1902, to September 30, 1905, for the rental of \$276, payable monthly in advance at the rate of \$7 per month the first year, and at \$8 per month for the residue of the term, with covenants for yielding possession, payment of water tax, against subletting, for re-entry, and for removal of improvements made by second party, and containing the following covenant: "Should said party of the first part conclude to sell this property, then said second party is to have the first chance to buy the same." The said contract is signed: "William P. Gronen, Agent. [Seal.] Eugene Folsom. [Seal.]" It was filed for record in the recorder's office of Cook county on December 13, 1904. The bill alleges that under the contract appellee Harr let appellant into possession of said lot on or about October 1, 1902; that appellant ever since has been and is now in possession and occupation of the same; that, in expectation that a sale would be made to him of said lands under the terms of the said contract, appellant has expended more than \$2,000 in improving said lands and erecting buildings thereon; that since September 25, 1902, appellant has been and is now ready and willing and able to perform said agreement on his part and accept a deed of said lot; that on November 24, 1904, appellee Harr concluded and determined to sell said lands for the sum and price of \$2,600, and in violation of his said contract with appellant, without giving appellant any chance or opportunity to buy said land, and without notice to or the knowledge of appellant, entered into a contract in writing with one John W. Warnshuis, of Chicago, for the sale and conveyance to said Warnshuis of said lot for \$2,600. The bill then sets out in *hæc verba* the contract between Harr and Warn-

shuis, by which Harr agrees to convey to Warnshuis in fee simple by good and sufficient warranty deed said lot 29, and Warnshuis covenants to pay therefor \$2,800; \$1,500 on the signing of the contract, and the balance of \$1,100 on or before six months after date, with interest at 6 per cent., and pay all taxes and assessments after 1903. The contract contains covenants for forfeiture of same and all payments made thereon in case of nonpayment, for re-entry, making time of the essence of the contract, and making the contract binding on the heirs and personal representatives of both parties, which contract was duly signed by the parties and recorded in the recorder's office of Cook county on December 20, 1904. The bill alleges that Warnshuis had notice and knowledge, when the contract was executed to him on November 25, 1904, of the prior contract of September 25, 1902, for the leasing and sale of said lands to appellant, and that any interest which Warnshuis took in the lands is charged with the older and superior equity of appellant; that in and by said contract with Warnshuis Harr has concluded to sell said land at the price of \$2,800; that appellant is ready and willing and able and offers to pay Harr said sum of \$2,800 for said lands, and applied to Harr and offered to pay him said sum, and requested him to make to appellant a deed, but Harr denied that appellant had any right to such a conveyance, and refused to make the same, or to receive payment; that appellant is now entitled to have said lands conveyed to him by Harr for the price of \$2,800. The bill makes Harr and Warnshuis defendants, but does not make Gronen a defendant, and prays that the contract made by Harr with appellant may be specifically performed, and Harr be decreed to make complainant a deed of the said lands, and, in case of his failure to do so, that one of the masters may be ordered to make the same.

The question in the case is whether the court properly sustained the demurrer to the bill, and properly dismissed the same for want of equity. The bill is alleged by appellees to be demurrable upon several grounds. We only deem it necessary, however, to mention one of them. The demurrer to the bill was properly sustained, because the contract therein set up is so uncertain, and indefinite that a court of equity could not decree its specific performance. It is well settled that a contract, in order to be specifically enforced by a court of equity, must be complete and specific and certain. *Brix v. Ott*, 101 Ill. 70; *Hamilton v. Harvey*, 121 Ill. 469, 18 N. E. 210, 2 Am. St. Rep. 118; *Barrett v. Gelsinger*, 148 Ill. 98, 35 N. E. 354; *Winter v. Trainor*, 151 Ill. 191, 37 N. E. 869. The contract is uncertain, in that it states no price for which the land is to be sold and states no method for the determination of such price. The language is: "Should said party of the first part conclude

to sell this property, then said second party is to have the first chance to buy the same." The terms upon which the second party is to buy the land are not stated, nor is it stated at what price the party of the first part is to sell the land. In *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, the covenant was: "If the premises are for sale at any time, the lessee shall have the refusal of them." In that case it was said in regard to this covenant: "This is simply an agreement to give the lessee the first chance to make a contract; an agreement to sell, if the parties can agree, and not otherwise. It neither fixes the price nor provides a way in which it can be fixed." In *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, in commenting upon the case of *Fogg v. Price*, supra, this court said (page 417 of 149 Ill., and page 76, of 37 N. E. [23 L. R. A. 555]): "And it is manifest, as said by that court, that to justify specific performance at the suit of the lessee 'a term would have to be added which is not in the contract.' And the court in that case further say: 'The contract certainly does not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor will sell to the lessee.'" In this respect the contract in the case at bar is different from the contract in *Hayes v. O'Brien*, supra. In the latter case the stipulation was as follows: "Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and after this date, but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms and at the same price per acre as any other person or purchaser might have offered therefor." There the lessee was to have the privilege of purchasing the land upon such terms and at the same price as any other purchaser might offer therefor. No such language is contained in the covenant in the case at bar. Appellant was not given, by the clause contained in the lease to him, the first chance to buy the property at any price which another purchaser might offer therefor. If such language had been contained in the covenant, then it might be said, under the doctrine announced in *Hayes v. O'Brien*, supra, that he could compel a specific performance of the contract upon offering to pay the price offered by Warnshuis and upon the terms agreed upon with Warnshuis.

But in the case at bar the covenant not only does not fix any price, but it does not provide a way in which a price can be fixed; that is, it does not state that appellant should have a chance to buy the property upon such terms as another purchaser may offer to buy the same, the latter words amounting to the provision of a way, in which the price could be fixed. In *Hayes v. O'Brien*, supra, it was said: "In most of the reported cases there has been an offer to sell, or an option to

purchase, at a fixed price named in the written contract. But this is not necessary where the written instrument fixes a definite mode of its ascertainment." In that case it was also said that under the language there used, to wit, "upon such terms and at the same price per acre as any other person or purchaser might have offered therefor," the lessor "covenanted that, before he would sell to any other person than the lessee at any price, the lessee might exercise his option to take the land at the price offered; that is, the lessee might purchase upon the terms and at the price the lessor was offered by another, which he decided to accept." There is no such language in the covenant here under consideration. In *Hayes v. O'Brien*, supra, quoting from *Fry on Specific Performance*, it is said: "It is evident that the price is an essential ingredient in the contract, and that, where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should determine the price in the first place. It may appoint a way, by which it is to be thereafter determined, in which case the contract is perfected only when the price has been so determined. * * * The principle governing is: When the contract appoints the mode of determining the price, and the price is determined according to that mode, the contract becomes perfect and complete, in all respects as if it had been originally fixed in the writing." For the reason that the covenant in the lease, executed between appellant and appellee Harr, fixed no price and fixed no mode of determining the price, the contract is so uncertain and incomplete that a court of equity will not grant a specific performance of it. Consequently the demurrer to the bill was properly sustained.

The decree of the superior court of Cook county, dismissing the bill, is affirmed.

Decree affirmed.

(218 Ill. 375)

PEOPLE ex rel. RUSSELL, County Treasurer, v. BROWN.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—SUFFICIENCY OF ORDINANCE.

Failure of a special assessment ordinance to fix the grade of the street to be improved does not deprive the court of jurisdiction of the subject-matter, so as to render a judgment confirming the assessment subject to attack on application for judgment of sale for the tax.

2. SAME—CONFIRMATION.

The county court has jurisdiction under Local Improvement Act, § 51 (Hurd's Rev. St. 1903, c. 24, § 557), and County Court Act, § 5 (Hurd's Rev. St. 1903, c. 37, § 98), to confirm a special assessment or render judgment of sale thereunder at a probate term.

Appeal from Christian County Court; James H. Forrester, Judge.

Application by the people, on the relation of T. F. Russell, for judgment for taxes

against Samuel Brown. Judgment for defendant, and plaintiff appeals. Reversed.

Arthur Yockey, City Atty., and R. C. Neff, State's Atty. (James M. Taylor, Leslie J. Taylor, and Crea & Housam, of counsel), for appellant. Frank P. Drennan (Provine & Provine, J. C. & W. B. McBride, and J. A. Merry, of counsel), for appellee.

PER CURIAM. This was an application to the June probate term, 1905, of the county court of Christian county, by the collector of that county, for judgment and order of sale for delinquent special assessments against certain property belonging to Samuel Brown, the appellee, for paving certain streets and constructing sewers and drains for surface drainage in the city of Taylorville. The assessments were made under five ordinances passed by the city. The ordinance for paving was adopted on July 14, 1903, and that for the sewers on August 17, 1903. There were three ordinances for drains, all passed by the city council on October 28, 1903. Separate petitions were filed in the county court under these ordinances, and an assessment roll was prepared and confirmed by the county court at a probate term in each case. Appellee owns property against which assessments were levied under each of the ordinances above mentioned. He did not file objections in any of the confirmation proceedings. He failed to pay the assessments when due, and they were returned delinquent to the county collector, who made the application herein. The appellee filed six objections to the application of the county collector in the court below. The second is not urged. The others are as follows: (1) That there was no petition of property owners presented to the board of local improvements, without which the city had no authority to pass the ordinances for the improvements. (3) That the judgments of confirmation were entered at probate terms, instead of at law terms of the county court. (4) That the ordinances were void for uncertainty and indefiniteness, in that they did not sufficiently set forth the nature, character, location, and description of the improvements therein proposed to be made. (5) That the ordinances delegated to the city engineer discretionary powers in the fixing of the grades and choosing of materials and in the construction of the improvements. (6) That the county court had no jurisdiction to enter judgment and order of sale for delinquent taxes at a probate term of such court. The court rendered judgment sustaining the objections, and dismissing the application. The collector, in the name of the people of the state of Illinois, prosecutes this appeal from that judgment.

Appellee, in support of his objections, in the court below, introduced in evidence the petition, ordinance, and judgment in each of the confirmation proceedings, and here contends that the first, fourth, and fifth objections are established by the records so

introduced, and for the reasons stated in those objections the court did not have jurisdiction in the confirmation proceedings. We do not think that it can fairly be said that the matters set up by either the first or fifth objection are proved by inspection of the record of the confirmation proceedings, and for that reason it is unnecessary to discuss whether they would have affected the jurisdiction of the court had they appeared as facts from the record. The fourth objection is based upon the ground that none of the ordinances heretofore mentioned attempted to fix any grades for the proposed improvements, and this fact appeared upon the face of the ordinances, which were attached to and filed with the petitions in the confirmation proceedings. It is contended that, unless the ordinance upon which the proceedings for a special assessment is based establishes a grade for the improvement, the court does not acquire jurisdiction of the subject-matter, and a judgment rendered in such case is void and may be attacked in a collateral proceeding if the omission to fix the grade appears from the record of the confirmation proceeding.

In the recent case of *Sumner v. Village of Milford*, 214 Ill. 388, 73 N. E. 742, it is said that jurisdiction of all special assessment cases is conferred upon the county court by the statute, and that upon the passage of an ordinance for a local improvement the court acquires jurisdiction to hear and determine the particular case by the filing of a petition by the officer specified in that ordinance, praying for an assessment in accordance with the provisions of such ordinance. It is there said that it is necessary to the jurisdiction of the court that there should be an ordinance, passed by the legislative body of the municipality, providing for the improvement; but, if such ordinance is duly passed and approved, the jurisdiction of the court is not defeated because there may be some defect in the ordinance. It is further said, citing *Gross v. People*, 172 Ill. 571, 50 N. E. 334, that the ordinance must include a description of the improvement in order to confer jurisdiction upon the court; but that, unless there is a total failure to include in the ordinance the necessary element of a specification of the nature, character, location, and description of the improvement, the fact that the specification is defective will not be a defense to the application for judgment of sale. In the case at bar a petition was filed in each of the confirmation proceedings, with a copy of an ordinance passed by the legislative body of the city attached thereto. The petition was filed by the officer specified in the ordinance and prayed for an assessment in accordance with the provisions of the ordinance, which contained specifications of the nature, character, locality, and description of the improvement. Every element was therefore present in each of these proceedings which was necessary to give the

court jurisdiction of the subject-matter, measured by the law as laid down in *Sumner v. Village of Milford*, supra. In the case of *People v. Lingle*, 185 Ill. 65, 46 N. E. 10, which was a case in which a judgment of confirmation was attacked upon application for judgment because the ordinance did not sufficiently specify the nature, character, locality, and description of the proposed improvement, this court said: "On an application for judgment against lots or lands for delinquent special assessments, an objection to the judgment because of the insufficiency of the ordinance under which the assessment is made is a collateral attack on the judgment of confirmation of the assessment. The judgment of confirmation cannot be thus attacked, except for matters affecting the jurisdiction. The sufficiency of the ordinance is not of that character, and must be determined on the proceeding to confirm the special assessment." In the case of *Blount v. People*, 188 Ill. 538, 59 N. E. 241, it was held that an ordinance which failed to describe the height of the curbs to be used in an improvement, although invalid when objected to at the confirmation proceedings, could not be attacked on that ground upon application for judgment and order of sale, as the omission in the ordinance, was only a defect and did not affect the jurisdiction of the court.

The same reason exists for requiring an ordinance to specify the height of curbs to be used in an improvement as for requiring it to fix a grade for such improvement, viz., in order that the commissioners may make an intelligent estimate of the cost of the improvement and the contractor an intelligent bid for the work. *Holden v. City of Chicago*, 172 Ill. 268, 50 N. E. 181; *City of Carlinville v. McClure*, 156 Ill. 492, 41 N. E. 169; *Foster v. City of Alton*, 173 Ill. 587, 51 N. E. 76. No requirement that an ordinance shall contain either is found in the local improvement act, except under the general terms that the ordinance shall set forth the nature, character, locality, and description of the improvement. There is therefore no apparent distinction, in principle, between the case of *Blount v. People*, supra, and the one at bar. In the case of *Perry v. People*, 206 Ill. 334, 69 N. E. 63, this court held that an objection to a petition for the confirmation of a special assessment on the ground that the ordinance under which the assessment was made failed to specify the width of the street to be paved should be sustained; but that, when an objection was made on that ground to the application of the collector for judgment, it cannot be considered. It was there said, in discussing the question whether the omission in the ordinance rendered it void and deprived the court of jurisdiction: "An ordinance which does not attempt to comply with the requirement of the statute that it shall contain the description of the improvement is a nullity. If an ordinance on which an application for a judgment of confirmation

is based contains sufficient allegations descriptive of the proposed improvement to challenge the attention of the court, jurisdiction attaches in the court to judicially determine as to the legal sufficiency of the description, and the decision and judgment of the court thereon, however erroneous, is not void, nor can it be attacked as for error in a collateral proceeding." In view of the conclusions reached by this court in the above cases, we are of the opinion that the failure of the several ordinances to establish grades did not deprive the court of jurisdiction in the confirmation proceedings, and therefore cannot be urged as a defense upon this application for judgment.

Appellee's third and sixth objections, to the effect that the county court had no jurisdiction to confirm the assessment rolls or to entertain this application for judgment and order of sale at a probate term, are without merit. Section 51 of the local improvement act (being section 557, c. 24, Hurd's Rev. St. 1903) provides that "the hearing in all the cases arising under this act, if in the county court, may be had at either a law or a probate term of said court." The cases cited by the appellee, which hold that the county court has no jurisdiction to confirm an assessment roll at a probate term, arose under statutes which contained no such provision as that above quoted. Section 93, c. 37, Hurd's Rev. St. 1903, confers jurisdiction upon county courts to render judgment and order of sale for delinquent taxes and assessments at probate terms.

The county court erred in sustaining the objections filed by appellee and in dismissing the application, as none of such objections constituted a defense in this proceeding. The judgment will therefore be reversed and this cause will be remanded to the county court, with directions to enter judgment and order of sale as applied for by the county collector.

Reversed and remanded, with directions.

(218 Ill. 645)

PEOPLE ex rel. **RUSSELL**, County Treasurer, v. **COLEGROVE**.

(Supreme Court of Illinois. Dec. 20, 1905.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DESCRIPTION OF PROPERTY.

In an application for judgment of sale under a special assessment, a description of the land as a "tract 62½ feet wide by 142 feet in the S. E. ¼ of section 27, town 13, range 2 W.," being the same as the description in the delinquent list returned by the city collector, except that it shows the land abuts on a certain street, is too indefinite.

Appeal from Christian County Court; James H. Forrester, Judge.

Action by the people, on the relation of T. F. Russell, county treasurer, for judgment for tax assessment against John B. Colegrove. Judgment for defendant, and plaintiff appeals. Affirmed.

Arthur Yockey, City Atty., and R. C. Neff, State's Atty. (James M. Taylor, Leslie J. Tay-

lor, and Hugh Crea, of counsel), for appellant. J. C. & B. B. McBride and Frank P. Drennan (Provine & Provine and J. A. Merry, of counsel), for appellee.

PER CURIAM. This case involves the same objections to an application to the county court of Christian county for judgment and order of sale for delinquent special assessments that were passed upon by this court in the case of *People ex rel. v. Brown*, 75 N. E. 989, where a complete statement of the facts will be found. It is unnecessary to discuss those objections here.

An additional objection was made, however, to the application for judgment against the property here involved which was not made in the *Brown* Case, viz., that the description of the property against which judgment is sought is so indefinite that the property is not capable of identification. We think this is a meritorious objection. The property is described in the application for judgment as being a tract of land 62½ feet by 142 feet in the S. E. ¼ of section 27, town 13, range 2 W. The description is the same in the list of lands returned delinquent by the city collector of special assessments, except that it shows that the tract of land abuts on Market street. The description in the assessment roll is still more ambiguous, as it does not even give the dimensions of the tract of land. It is apparent that the property against which judgment is here sought cannot be located by a competent surveyor, either by the description under which it was assessed or by the description under which it was returned delinquent, which forms the basis for the application for judgment. A judgment rendered under such circumstances could attach to no property, and would therefore be a nullity. *People v. Eggers*, 164 Ill. 515, 45 N. E. 1074; *People v. Clifford*, 166 Ill. 165, 43 N. E. 770; *Upton v. People*, 176 Ill. 632, 52 N. E. 358; *Vennum v. People*, 188 Ill. 158, 58 N. E. 979; *Carrington v. People*, 195 Ill. 484, 63 N. E. 163.

The court did not err in sustaining this objection to the application for judgment and order of sale. The judgment of the county court will be affirmed.

Judgment affirmed.

(218 Ill. 381)

PARKS v. NORTHWESTERN UNIVERSITY.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. CHARITIES—WHAT ARE CHARITIES—LIABILITY FOR SERVANT'S ACTS.

Priv. Laws 1851, p. 20, granting a special charter to the trustees of a certain university, provides that such university shall hold the property of the institution solely for the purpose of education, and not for the benefit of themselves or any contributor; requires the university to accept all persons who may apply to it for education; grants it powers to carry out the purpose of its creation, which is education solely; and provides for a forfeiture in case it acts contrary to the provisions of its

charter. The statute of charitable uses (St. 43 Eliz. c. 4), which is a part of the common law of the state, mentions schools of learning as charitable objects. *Held*, that the university in question is a charitable institution, notwithstanding it requires its students to pay tuition, within the rule exempting a charitable institution from liability for the negligence of its servants.

Appeal from Appellate Court, First District.

Action by Robert Smith Parks against the Northwestern University. From a judgment of the Appellate Court, affirming a judgment of dismissal, plaintiff appeals. Affirmed.

Ashcraft & Ashcraft (E. M. Ashcraft, of counsel), for appellant. H. H. C. Miller and C. G. Little, for appellee.

BOGGS, J. The declaration in this case, after alleging that the appellee undertook for hire to teach the appellant the science of dentistry, dental surgery, etc., charged that the appellant received injuries resulting in the loss of an eye through the negligence of one of the professors employed by the appellee while the appellant was in his charge as a student in a classroom or laboratory of the appellee. A demurrer was sustained to the declaration by the superior court of Cook county, and the cause dismissed; and this is an appeal from the judgment of the Appellate Court for the First District, affirming the judgment entered in said superior court.

The ground of the demurrer was that the appellee university is a charitable institution organized for the purpose of disseminating education and professional learning, and that the doctrine that the employer shall be liable to respond for the negligent act of the employé has no application to it. The question as to whether the defense should be raised by demurrer or plea was waived by counsel, and by agreement the charter of the university was produced, and it is agreed that the cause should be considered as if the charter of the appellee was fully pleaded and the issue of law made thereon. The appellee university was created by a special charter granted to its trustees by the Legislature of the state of Illinois (Priv. Laws 1851, p. 20), and is being operated under that charter and the amendments thereto passed in 1855, 1861, and 1867. By section 2 of the charter (Priv. Laws 1851, p. 21) it is provided that the appellee shall have perpetual succession, "and shall hold the property of said institution solely for the purpose of education, and not as a stock for the individual benefit of themselves, or any contributor to the endowment of the same." Section 9 (page 23) provides for a forfeiture, should "the corporation at any time act contrary to the provisions of its charter or fail to comply with the same." Appellee is required also, by the terms of said charter, to accept all persons who may apply to it for education, provided they meet the necessary educational requirements and are of good moral

character. Many other broad and extensive powers are granted to the appellee university, but they are all conferred to enable it to so manage its property that it may the more effectively carry out the main purposes of its creation—education—and for that purpose alone.

It is clear from the reading of this charter that the appellee's entire funds, whether from tuition fees received from students or other sources, must be used solely for educational purposes. The appellee corporation has no capital stock, it cannot declare dividends or share profits, and everything that it has is held in trust to be applied in such manner as to best accomplish the purpose for which it was created, viz., the diffusion of knowledge and learning. In the statute of charitable uses (St. 43 Eliz. c. 4), which is a part of the common law of this state (Heuser v. Harris, 42 Ill. 425; *Andrews v. Andrews*, 110 Ill. 223), "schools of learning, free schools," etc., are mentioned as charitable objects, and the fact that the appellee requires its students to pay tuition does not change its character as a charitable institution. 6 Cyc. 974; *Andrews v. Andrews*, supra.

The appellant insists that the appellee university is not a public charity, within the meaning of the rule that exempts such institutions from liability for the negligent acts of its servants. He first argues that the principle of exemption applies only to involuntary corporations, such as counties, towns, charitable institutions conducted by the state or general government, etc., which are a part of the government of the state, and the exemption exists because they are acting as agencies of the state, but that it does not apply to corporations accepting private charters, and that the appellee is liable upon the same principle that cities and villages are held liable for the negligent failure to properly maintain streets, sidewalks, etc., in a reasonably safe condition. Counties and towns under township organization are created as agencies of the state for the purpose of exercising locally certain governmental functions, and in the performance of duties of that character neither the state nor any of its agencies are liable to respond in damages for the negligent acts of any of its servants. An incorporated city or village may have, and usually has, cast upon it authority to perform certain public or governmental duties, and in the performance of such functions these municipalities are not subject to the doctrine of respondeat superior for the delinquencies of their agents or officers, for the reason, before given, that in such matters they are but arms of the state, and the non-liability of the sovereign covers and shields the acts of its agencies. *City of Chicago v. Chicago Ball Club*, 196 Ill. 54, 63 N. E. 695, 89 Am. St. Rep. 243. An incorporated city or village voluntarily accepts a charter granting to it certain private or proprietary powers—that is, powers to be exercised for the

benefit of its citizens—and a duty is thereby imposed upon them to properly exercise those powers without injury to others, and for the negligent breach of that duty by their servants they are liable to the injured party. But the exemption accorded to charitable institutions does not rest alone on the doctrine that the state or the sovereign is not liable for the acts of its servants. The doctrine of respondeat superior does not extend to charitable institutions for the reasons, "first, that if this liability were admitted the trust fund might be wholly destroyed and diverted from the purpose for which it was given, thus thwarting the donor's intent, as the result of negligence for which he was in nowise responsible; second, that, since the trustees cannot divert the funds by their direct act from the purposes for which they were donated, such funds cannot be indirectly diverted by the tortious or negligent acts of the managers of the funds or their agents or employees. 5 Am. & Eng. Ency. of Law (2d Ed.) 923. These reasons for exemption apply as well to private as to public charitable corporations.

The appellee university is a private corporation, but is organized for purely charitable purposes. It declares no dividends, and has no power to do so. It depends upon the income from its property and the endowments and gifts of benevolent persons for funds to carry out the sole object for which it was created—the dissemination of learning. Its charter secures to all persons of good moral character who have made sufficient preliminary advancement the benefits of the university, and all of its funds and property, from whatever source derived, are held in trust by it, to be applied in furtherance of the purpose of its organization and increasing its benefits to the public. The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An institution of this character, doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution.

That the appellee, though a private, and not a public, corporation, being a purely charitable institution, is not answerable for the negligent acts of its employees, is held but with little diversity of opinion. 5 Am. &

Eng. Ency. of Law (2d Ed.) 923, and many judicial decisions cited in the note. The only case we find in this country expressing a contrary view is *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 84 Am. Rep. 676; and since that decision the Legislature of Rhode Island has by appropriate enactment created the exemption here contended for by the appellee university as to all hospitals whose funds are exclusively devoted to charitable purposes. Gen. Laws R. I. 1896, c. 177, § 38.

The ruling of the superior court of Cook county in sustaining the demurrer to appellant's declaration was correct. The judgment of the Appellate Court must be, and is, affirmed.

Judgment affirmed.

(218 Ill. 386)

PARSONS v. PEOPLE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. HOMICIDE—EVIDENCE.

On trial for wife murder, where the killing is admitted, but is claimed to be accidental, prior disagreements between the parties may be shown.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 288, 843.]

2. SAME—BURDEN OF PROOF.

The burden of proving mitigating circumstances, or those excusing the homicide, is on accused, where the killing is proved.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, §§ 276-278.]

3. CRIMINAL LAW—INSTRUCTIONS.

An instruction as to circumstantial evidence stating that if the circumstances satisfy the jury of the guilt of the accused he should be found guilty, is not objectionable.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1885, 1888.]

4. SAME—MALICE.

An instruction that malice includes anger, hatred, and revenge, and every other unlawful motive, and denotes an action flowing from a wicked mind, and that the malice is inferred from any deliberate or cool act, however sudden, which shows a malignant heart, is not erroneous.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 25-28, 1816.]

5. HOMICIDE—JUSTIFIABLE HOMICIDE.

An instruction defining justifiable homicide in the words of Cr. Code, § 143, is not objectionable.

6. CRIMINAL LAW—INSTRUCTIONS.

An instruction that if the jury believe from the evidence and certain of its aspects that accused is guilty, and from other aspects that he is not guilty, they should acquit, if the latter view is as reasonable as that which would lead to conviction, is properly refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1904-1922.]

7. SAME.

Substantial repetition of instructions given may be refused.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 2011.]

Error to Circuit Court, St. Clair County; B. R. Burroughs, Judge.

Samuel Parsons was convicted of murder, and brings error. Affirmed.

On October 6, 1903, plaintiff in error was indicted by the grand Jury of St. Clair county for the murder of his wife, Virginia Parsons, by shooting her with a pistol on the 21st day of July, 1903, at their home in the city of East St. Louis. To the indictment a plea of not guilty was entered. The defendant was put upon his trial, and on November 14, 1903, the jury returned a verdict, finding the plaintiff in error guilty, and fixing his punishment at imprisonment in the penitentiary for the term of his natural life. A motion for a new trial was made and overruled, and judgment was thereupon entered upon the verdict and sentence passed against the plaintiff in error. Plaintiff in error was married to the deceased, then Virginia Bonner, at Little Rock, Ark., on October 30, 1897. Plaintiff in error appears to have been brought up on a farm in Texas, and before his marriage was a railroad man. For some time after his marriage he lived in Little Rock, and was engaged as an underwriter for an investment company. From Little Rock he went to Mt. Pleasant, Tex., where he was engaged in railroad work for the St. Louis, Iron Mountain & Southern Railway Company, and lived there for about a year. From there he went to Mississippi, and worked for a railway company; and in 1900, after living at Greenville, he went to Water Valley, Miss. During this time he and his wife lived together, though they appear to have been occasionally separated. Plaintiff in error and his wife came from Paducah, Ky., where her mother lived, to East St. Louis, some time after Christmas, 1902. Prior to that his wife had left him, and gone back to Paducah to her mother. They had one child, a little girl about four years old. Upon arriving at East St. Louis, they rented a couple of rooms where they lived for a few weeks. Then they went to live at a boarding house, where they stayed until some time in June, and then went to the house, known as 819 Winstanley avenue, where they lived when the shooting took place in the next month. Plaintiff in error's occupation when working for the railroad was that of a switchman. The evidence tends to show numerous quarrels between plaintiff in error and his wife, and that he several times left her. On July 21, 1903, plaintiff in error had charge of a gambling game, called a "crap game," in a saloon in East St. Louis, run by a man named Jones. On the night of that day, July 20, 1903, plaintiff in error went home, arriving there about 10 o'clock or a little after. The door was locked, and his wife let him in. A Mrs. Goldman or Coleman was boarding with them, and she and Mrs. Parsons had not retired for the night, but had let down the windows and closed and locked the doors. The house where they lived consisted of four rooms, the first of which is designated in the testimony as the "front room;" the next room was the sleeping room, in which there was a bed, and which was occupied by plaintiff in error and his wife as a bedroom, and

called in the testimony the "middle room." He and his wife and little girl slept in the bed in the middle room. There was a door leading from the front room into the bedroom or middle room. There was also a door leading from the porch into the front room, and to the right of this door was a window looking out upon the porch. There was also a window on the left side of the front room. The bed was placed diagonally across the middle room, the head being towards the right corner, and the foot towards the left corner.

The plaintiff in error claims that he went to bed, and went to sleep, and was awakened in the middle of the night, about midnight or shortly thereafter, and heard a noise in the front room. He states that he mistook his wife for a burglar, and shot her. His version of the shooting is that he had been sleeping about an hour and a half when he was suddenly awakened by a noise; that when he heard the noise, he raised up, but was not wide awake at that time, but dazed; that when he heard the noise he shot immediately just as he straightened up; that he turned and raised up, sitting in bed, and shot; that he hadn't his eyes open; that he could not see anything as it was dark. According to his statement, he shot through the door opening from the front room into the bedroom, and struck his wife, who appears to have been near the window of the left wall of the front room. A Mrs. Berry lived next door to plaintiff in error and his wife at 817 Winstanley avenue. She was on her front porch attending to a sick child in a hammock, and heard the firing of a revolver. She went into the house, and asked what had happened, and Parsons told her that he had shot his wife for a burglar. She says that Mrs. Parsons was lying where she was shot, under the side window of the front room next to Mrs. Berry's house, near to the window, but that her head was out about three feet from the window; that the window was up, and the screen was lying on the floor near the window where she had been shot; that the shot was fired at about 12:30 o'clock; that, when she got to where Mrs. Parsons was lying, Mrs. Parsons said: "You have killed me; get mother." Mrs. Berry states that Parsons came home about 10:30 that night, while she was on the porch with a sick child, and was talking loud; that she could hear more or less of what was said; that they were quarreling over the fact that Mrs. Parsons had purchased some rugs, and had given \$9.50 for them; that she heard Parsons say: "I know over the river, I can get all the rugs I can carry for \$2.50 a piece, and I won't pay no such prices, and you'll have to take them back;" that they spoke unusually loud; that she heard Mrs. Parsons say that she would just as leave pay the money for the rugs, as to pay it for "whisky, whoring, and gambling"; that they quarreled for about a half an hour and then were quiet, and then she heard nothing more, until she heard the re-

port of the revolver, and heard Mrs. Parsons scream; that she ran down to the corner of the house and called out: "What is the matter? What is the matter?" three or four times; that she did not get an answer right away, but finally Parsons came out of the door and said: "I have shot my wife; for God's sake get some one to get a doctor." The deceased lived until about 6 o'clock in the morning when she died. During the time while Mrs. Parsons lived the defendant did what he could to alleviate her pains, and frequently expressed his sorrow, giving vent to his feelings by the shedding of tears.

Webb & Webb and George A. Crow, for plaintiff in error. W. H. Stead, Atty. Gen., for the People.

MAGRUDER, J. (after stating the facts). It is admitted that the plaintiff in error killed his wife. The only question is whether or not his statement is true that he killed her accidentally, mistaking her for a burglar, or whether he willfully murdered her. He states that when he reached home, she told him that a burglar had tried to make an entry into the house, and that there had been previously thereto one or more attempts to enter the house. Section 155 of chapter 38 of the Revised Statutes, being the Criminal Code, is as follows: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." Hurd's Rev. St. 1899, p. 596.

Whether the homicide was justified or excusable for the reasons stated by the plaintiff in error was a question of fact for the determination of the jury. In *Steffy v. People*, 130 Ill. 98, 22 N. E. 861, which was an indictment for an assault with intent to murder, we said (page 99 of 130 Ill., page 861 of 22 N. E.): "Whether the evidence warranted the verdict was a question of fact peculiarly within the province of the jury to determine, and great weight is to be given to their finding. Courts are reluctant to substitute their opinion for that of the jury upon controverted questions of fact. To justify this court in reversing, on the ground that the evidence was insufficient, it must appear that the finding of the jury is not sustained by the evidence, or that it is palpably contrary to the decided weight of the evidence." *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109; *McCoy v. People*, 175 Ill. 224, 51 N. E. 777; *Gilman v. People*, 178 Ill. 26, 52 N. E. 967; *Johnson v. People*, 202 Ill. 53, 66 N. E. 877. In *McCoy v. People*, supra, which was an indictment for murder, it was said (page 229 of 175 Ill., page 779 of 51 N. E.): "Plaintiff in error insists that the evidence is not sufficient to sustain a conviction. The law has placed the determination of that question with the jury, and it is only when

this court is satisfied, from a careful consideration of the whole testimony, that there is a reasonable doubt of the guilt of the accused, that it will interfere with the verdict of the jury on the ground that the evidence does not support the verdict." We are unable to say, in the case at bar, that the evidence does not sustain the verdict of the jury.

There was much in the conduct of the plaintiff in error after the killing of his wife, which tended to confirm his statement in regard to it. But there was also much in the evidence to contradict the truthfulness of his statement. In the first place, the evidence showed that the plaintiff in error and his wife, both before they came to East St. Louis and after they came there, lived an unhappy life, and quarreled much with each other, and separated several times from each other. One witness, who was a next door neighbor when they lived in Water Valley, Miss., states that not a day passed when they did not quarrel; that one day he knocked his wife out of the back door of the house, and hit her on the left cheek, and struck her twice in the face with his fist; that on several occasions his wife was heard screaming, and he was heard cursing her. Another witness testified that when they lived at Water Valley, Parsons and his wife were engaged in a quarrel upstairs, and he cut up her dress and she came out of the house crying; that on the next day he stated to witness that he could not get along with her; that he cut up her dress for spite, and was going to leave her, and did leave her, and stayed away 8 or 10 days, and finally they made up, and went back together to the house; that he said he could not get along with her, and that she was hard to get along with. Another witness says that at one time he heard some one screaming and holloaing, and went to see what the matter was, and Mrs. Parsons was getting out of the window of the house, screaming like some one in trouble or distress; that Parsons locked her out of the house, and she stayed at the witness' house all night, and next morning plaintiff in error said that she was hard to get along with; that they could not get along together, and he was going to leave; that he left her, and she came to witness' house and stayed a couple of days when she went home to her mother at Paducah. Another witness testifies that, when they lived at Water Valley, Mrs. Parsons was taken sick, and the neighbors brought food for her, and Parsons refused to pay for it, and came home only occasionally during her sickness. Another witness testified that she heard him tell his child to call her mother ugly names; that he said: "Call your mother a bitch and a liar and a whore and a fool." Another witness testifies that at Paducah, Ky., plaintiff in error slapped his wife, and knocked her down.

There is also testimony on both sides of the question whether or not it was possible for the plaintiff in error to have shot his wife through the door, leading into the adjoining

room in the manner, in which he stated that he fired the shot. One of the physicians, who called to see the deceased after she was shot, stated that the window of the front room could not be seen by any one in the bed, except by a man sitting near the foot of the bed with his feet on the floor, and leaning forward. Another physician states, in substance, that one standing at the foot of the bed and on the right-hand side, could see through the door, but it is quite clear from the evidence that any one lying or sitting on the bed in any position could with difficulty see the window in the front room through the door. Plaintiff in error says that when he heard the noise at the window which aroused him from sleep, he took his revolver from under his pillow, and in a semiconscious condition raised up and fired. From all the evidence upon this subject, it was for the jury to say whether it was possible for him to have shot through the doorway towards the window with such deadly accuracy, while he was half asleep and could see nothing on account of the darkness. One of the physicians says that, when he asked Mrs. Parsons how it happened, she said: "He says he took me for a burglar."

Plaintiff in error gave contradictory statements as to the pistol, with which he did the shooting. He told the police officer who arrested him about 6 o'clock in the morning that "his brother was here on a visit last Christmas, and left the pistol with him, and ever since then he had no use for it, and he lent it to a man by the name of Taylor, who was bartender at this place, where he was working. He told me this before his wife died; that Taylor told him last night that he had no more use for the gun, that he had better take the gun home, and that Taylor gave him the gun, 'and if I had not taken the gun home, I would not have shot my wife.' Mr. Taylor is bartender at Mr. Jones', at 351 Broadway, East St. Louis. He told me he never carried it before. The defendant was very excited, I must say. He seemed as though he was very sorry for what he had done, the way it looked to me. He was not crying after our first conversation with him." The plaintiff in error in his testimony said that he carried the pistol with him backwards and forwards when he went home at night, and that he had the pistol with him under his pillow. The witness, Taylor, testified that plaintiff in error never gave him any pistol, and never asked him to keep any pistol; that there was one in the drawer at the saloon, but he "could not say whether that is the one or not; I could not say whether there was a pistol in the drawer after that night or not. He had access to the drawer where the pistol was kept. Mr. Parsons was running the crap game. * * * He left at 9 o'clock as near as I can remember. He seemed to be all right, sober." The testimony of plaintiff in error in regard to the pistol, as given upon the trial, differs from the statement made by

him to the policeman, who arrested him, and is contradicted in material respects by the evidence of the witness, Taylor. Without further discussion or analysis of the testimony it is sufficient to say that it is not of such a character, as to justify our interference with the verdict of the jury, nor can we say that such verdict is not supported by the evidence.

It is contended by the plaintiff in error that the court erred in admitting evidence as to quarrels and disagreements between plaintiff in error and his wife. But we are of the opinion there was no error in permitting such testimony to be introduced. It has been held that where a husband or wife is charged with the murder of the other, it is competent to prove their mutual conduct towards, and treatment of each other, as manifested by acts and words. Wharton in his work on Criminal Evidence (8th Ed.) § 786, states the rule as follows: "Long ill-treatment by husband of wife; misconduct leading to a suit against him by his wife to compel good behavior; and continual quarrels between husband and wife are relevant to prove motive in cases of marital homicide."

Objection is made to the first instruction, given on behalf of the prosecution, mainly upon the ground that it is argumentative in character. It states in substance that circumstantial evidence in criminal cases is the proof of such facts and circumstances, connected with or surrounding the commission of the crime, as tends to show the guilt or innocence of the party charged, and that, if the facts and circumstances shown by the evidence in this case are sufficient to satisfy the jury of the guilt of the plaintiff in error, they would be authorized in finding him guilty. It properly states to the jury that they must be satisfied of the defendant's guilt beyond a reasonable doubt, and that circumstantial evidence is legal evidence. The doctrine of the instruction is supported by the following cases decided by this court: *Adams v. People*, 109 Ill. 444, 50 Am. Rep. 617; *Bressler v. People*, 117 Ill. 422, 8 N. E. 62; *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *Carlton v. People*, 150 Ill. 181, 37 N. E. 244, 41 Am. St. Rep. 346; *Dunn v. People*, 158 Ill. 586, 42 N. E. 47; *Keating v. People*, 160 Ill. 490, 43 N. E. 724.

Objection is made that the court gave for the prosecution the third instruction, given by it, which is as follows: "The jury are instructed that malice includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty, and fatally bent on mischief; hence malice is implied from any de-

liberate or cruel act against another, however sudden, which shows an abandoned and malignant heart." This instruction was approved by this court in *Jackson v. People*, 18 Ill. 269, and *McCoy v. People*, 175 Ill. 224, 51 N. E. 777.

Objection is also made to the fifth instruction, given for the state. We see no objection to this instruction, as it merely defines justifiable homicide in the same language, *literatim et verbatim*, as is used in section 148 of the Criminal Code. *Hurd's Rev. St. 1899*, p. 595.

It is also claimed that the court erred in refusing to give the first refused instruction, asked by the plaintiff in error. This instruction told the jury that "as a matter of law, if you believe from an examination of the evidence in certain of its aspects that the defendant is guilty, and if you further believe from an examination of other aspects of the evidence, that the defendant is not guilty, then you should adopt that view of the evidence which will lead to the acquittal of the defendant rather than that view which leads to his conviction, if that view of the evidence leading to his acquittal is as reasonable as that which leads to his conviction." There was no error in refusing this instruction, inasmuch as one aspect of the evidence might have been that all the testimony on behalf of the people was false and perjured, and another aspect might have been that all the testimony on the part of the plaintiff in error was true, and the jury would be obliged to find the defendant not guilty. Substantially a similar instruction was condemned by this court in *Adams v. People*, *supra*. Complaint is made that the court refused to give the second refused instruction asked by the plaintiff in error, which is as follows: "The court further instructs the jury that you must presume the defendant to be innocent until his guilt is fully established by legal evidence, beyond a reasonable doubt, and the presumption of innocence prevails throughout the trial, and it is your sworn duty as jurors trying this case, to reconcile, if possible, the evidence in this case with this presumption." This instruction might well have been given, but its refusal was not erroneous, for the reason that its substance is embodied in other instructions, which were given for the plaintiff in error. The first instruction is as follows: "The court instructs the jury that the defendant at the outset of the trial is presumed by the law to be an innocent man, and he is not required to prove himself innocent or to put in any evidence at all upon that subject. And in considering the testimony in this case, you must look at the testimony and view it in the light of the presumption which the law clothes the defendant with, that he is innocent, and it is a presumption that abides with him throughout the entire trial of the case until the evidence convinces you to the contrary beyond a reasonable doubt."

Instruction numbered 6, given for the plaintiff in error, is as follows: "The court further instructs the jury that the law presumes the defendant to be innocent of the charge preferred against him by the indictment returned to the court by the grand jury, until all of the allegations in such indictment have been proven to be true, beyond a reasonable doubt, and the law is that he is entitled to have this jury indulge in such presumptions of innocence towards him until you may believe from all the evidence, that he has been proven guilty beyond a reasonable doubt, and the fact that he has been indicted by the grand jury upon a charge of murder, and is now being tried upon that charge is not evidence of his guilt, and you are not to consider that fact, or the indictment in this cause, any evidence of his guilt, and if you convict the defendant, you must do so upon all the evidence in the case, and you cannot give any weight to any belief to which you may arrive, except that belief be founded upon the facts and evidence introduced before you in this case. And if after you have heard all the evidence, you then have a reasonable doubt in your minds as to the defendant's guilt, then it is your duty to find him not guilty."

The seventh instruction given for the plaintiff in error, told the jury, among other things, as follows: "The burden of proof is upon the people in this case to show the guilt of the defendant, and all the presumptions of the law, independent of the evidence, are in favor of his innocence. The law presumes every defendant who has been indicted and charged with crime, to be innocent until he has been proven guilty, beyond all reasonable doubt. And in this case, the court instructs you that if, after you have considered all the evidence in the case, you then have a reasonable doubt as to the guilt of the defendant, then the defendant is entitled to the benefit of that doubt, and you should acquit him." Complaint is also made of the refusal of the court to give the third refused instruction asked by the defendant. Said third refused instruction is as follows: "The jury are further instructed that in order to convict the defendant upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that those circumstances are inconsistent with any other reasonable conclusion than that of his guilt. It is not sufficient to entitle the prosecution to a conviction that the circumstances coincide with, account for, and render probable, the hypothesis of guilt sought to be established by the prosecution, but those circumstances must exclude, to all moral certainty, every other hypothesis but the single one of the guilt of the defendant, or the jury must find the defendant not guilty." The substance of this instruction is set forth in the fourth instruction, given for the plaintiff in error, to wit: "The court further in-

structs the jury that to warrant the conviction of the defendant, each fact necessary to establish his guilt must be proven by competent evidence beyond a reasonable doubt, and all the facts and circumstances proven should not only be consistent with the guilt of the defendant, but inconsistent with every other reasonable hypothesis or conclusion than that of guilt, to produce in your minds a reasonable and moral certainty that the defendant committed the offense as charged in the indictment."

The judgment of the circuit court is affirmed.

Judgment affirmed.

(218 Ill. 399)

CRAWFORD et al. v. MOUND GROVE CEMETERY ASS'N et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. WILLS—CONSTRUCTION—RESIDUARY CLAUSES—WHO ARE LEGATEES.

Where a will provides that the property of testatrix otherwise undisposed of shall be sold, and proceeds paid to the "legatees hereinbefore named" in specified proportions, trustees previously named in the will, and who are thereby given the legal title to the trust fund during the period of the trust, are "legatees," and as such take the legal title to whatever share of the property not otherwise disposed of the trust fund is entitled.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1073.]

2. WILLS—LAPSED LEGACIES.

Where a will gives the residue of the property not otherwise disposed of to the specific legatees in stated proportions, a lapsed legacy does not fall into the residue, but becomes intestate property, and goes to the heirs at law.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 2171-2181.]

3. SAME—WHO ARE LEGATEES—CORPORATIONS.

Societies and corporations to whom legacies are given by a will are "legatees," within the meaning of a clause of the will providing that property of testatrix not otherwise disposed of shall be sold and the money "paid to the legatees hereinbefore named."

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1073.]

4. CHARITIES—UNCERTAINTY OF LEGACIES.

A legacy by which a charitable institution is given "a sufficient sum of money to produce \$50 per annum" is not void for uncertainty.

5. SAME—SPECIFIC LEGACIES.

A legacy of "a sufficient sum of money to produce an annuity of \$50 per annum" is not a specific legacy, and the legatee thereof is not within a clause of the will giving the property not otherwise disposed of to the "legatees hereinbefore named."

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1939-1942.]

Appeal from Circuit Court, Kankakee County; Dorrance Dibell, Judge.

Bill by H. L. Crawford against the Mound Grove Cemetery Association and others. From the decree rendered, complainants appeal, and certain defendants assign cross-errors. Reversed.

This was a bill filed to construe the will of Helen L. Huling, who died testate, leaving an estate of the value of about \$230,000 in personal property, and a homestead at Kankakee, Ill., of the value of about \$8,000. By the second clause of her will she gave to H. L. Crawford and H. M. Stone \$40,000 in trust, the income of which was to be paid to her nephew, Harry Lee Knight, during his life, and on his death the principal was to be paid to his three children, Gertrude L. Knight, Carolyn Knight, and Camden Knight; Carolyn Knight and Camden Knight being minors. To her niece, Emma Knight Crawford, she gave \$25,000 absolutely by the third clause. By the fourth clause she gave to her trustees, Crawford and Stone, \$30,000 for the use of her grandnephew George B. Knight, the income of which was to be paid to him until he should arrive at the age of 30 years, when, if living, the principal was to be paid to him, and in the event of his death the sum of \$30,000 was to be paid to the other legatees mentioned in the will, except Cornelia Stone, Genevieve Parker, and May Parker, in proportion to their legacies. By the fifth clause she gave to her grandnieces and nephew Helen Norton Carter, Mabel West Knight, and Solon De Witt Knight the sum of \$5,000 each, provided they should arrive at the age of 22 years, and, if any of them should not arrive at that age, then his or her legacy of \$5,000 was to be divided equally among the other legatees, except as to Cornelia Stone, Genevieve Parker, and May Parker. By the sixth clause she gave to the Mound Grove Cemetery Association the sum of \$5,000. By the seventh clause she gave to the Emergency Hospital a sufficient sum of money to produce \$50 per annum. By the eighth clause she gave to Harry L. Crawford the sum of \$25,000 absolutely. The ninth and tenth clauses gave to Cornelia Stone, Genevieve Parker, and May Parker \$1,000 each, absolutely. The eleventh clause of the will reads as follows: "Eleventh. I give, bequeath, and devise to the Helen Huling Home, an association to be organized and incorporated under the laws of the state of Illinois, that real property known as the 'George V. Huling Homestead,' and situated at the northwest corner of Station street and Indiana avenue, in the city of Kankakee, county of Kankakee, state of Illinois, and I do give and bequeath to the said Helen Huling Home the amount of \$25,000, to be held and managed and invested by the board of directors or the trustees of the said Helen Huling Home as an endowment, the income of which shall be used by said home and appropriated for the maintenance thereof, under said association." The twelfth clause of the will reads as follows: "Twelfth. It is my will that any property of my estate, real or personal, of whatever kind and whatever the same may be, which is not hereinbefore otherwise specifically mentioned and disposed of, be converted into money, and

such money shall be distributed and paid to the legatees hereinbefore named other than the said Cornelia Stone, Genevieve Parker, and May Parker, to each in proportion to the legacies hereinbefore specifically fixed and mentioned." The thirteenth clause gave to the St. Paul's Episcopal Church \$5,000. The fourteenth clause merely appointed executors. It will be observed that the cash legacies to be paid are as follows:

To trustees' fund, for use of Harry Lee Knight.....	\$ 40,000
To trustees' fund, for use of George B. Knight.....	30,000
To Emma Knight Crawford.....	25,000
To Helen Huling Home.....	25,000
To Harry L. Crawford.....	25,000
To Emergency Hospital, estimated....	2,500
To St. Paul's Church.....	5,000
To Mound Grove Cemetery Association.....	5,000
To Helen Norton Carter.....	5,000
To Mabel West Knight.....	5,000
To Solon De Witt Knight.....	5,000
To Cornelia Stone.....	1,000
To Genevieve Parker.....	1,000
To May Parker.....	1,000

Making a total of.....\$175,500

Besides the above legacies was the George V. Huling Homestead, valued at about \$8,000. After the payment of these cash legacies and expenses there would remain about \$45,000 or \$50,000, which would go to the residuum fund.

By a decree of the court the eleventh clause of the will was held void for uncertainty; that is to say, the clause of the will giving \$25,000 to the Helen Huling Home. Under the construction placed by the court upon the will, this \$25,000 passed to the residuum to be paid to the legatees mentioned in the will in proportion to the legacies specifically fixed and mentioned, and the real estate, consisting of the Huling Homestead, of the value of about \$8,000, was held to be intestate, and divided as intestate estate among the heirs at law of Helen L. Huling, deceased. It is conceded by all the parties interested that the eleventh clause of the will was void for uncertainty. The court further found in its decree that the homestead passed as intestate estate to Emma Knight Crawford, Harry L. Crawford, George B. Knight, Helen Norton Carter, Mabel West Knight, and Solon De Witt Knight as tenants in common, and that each was entitled to one-sixth part thereof; that the bequest mentioned in the seventh clause of the will should be paid to the Sisters of the Sacred Heart of Mary; that the sum of \$5,000 mentioned in the thirteenth clause of said will should be paid to the St. Paul's Church, Kankakee, Ill.; that the executors of said will, as trustees, should set apart and hold a sum sufficient to produce an annuity of \$50, which said annuity of \$50 should be paid to the Sisters of the Sacred Heart of Mary, as mentioned in the seventh clause of said will, to be used for the purposes as set forth therein; and, further, that there should be paid by the executors to the Mound Grove

Cemetery Association the sum of \$5,000 in trust for the purposes mentioned in the sixth clause of said will; further, that said executors, as trustees, should hold and set apart \$15,000 to be paid to Helen Norton Carter, Mabel West Knight, and Solon De Witt Knight in equal parts, to be paid as they should arrive at the age of 22 years, respectively; also found that, in the event either of them should die before arriving at said age of 22 years, the said sum of \$15,000, or such part thereof as should become lapsed by the death of the taker thereof, should become payable to the legatees, Harry Lee Knight, Emma Knight Crawford, Harry L. Crawford, George B. Knight, and the survivor or survivors of Helen Norton Carter, Mabel West Knight and Solon De Witt Knight, in equal parts thereof, as his or her own property; and provided that, if there should be any income arising from said sum of \$15,000 during the time said sum was so held in trust by said trustees, or any part thereof, such income should become a part of the residuum. The court further provided in the decree that said executors, as trustees, should set apart out of the funds of said estate the sum of \$40,000 to be held in trust, the income of which should be paid to Harry Lee Knight during his lifetime, and after his death the said principal sum should be payable to Gertrude L. Knight, Carolyn Knight, and Camden Knight, to each one-third part thereof; that the share of the residuum assignable to said sum of \$40,000 should be added to the said sum of \$40,000 and held in trust, the net income thereof to be paid to Harry Lee Knight, as aforesaid, and upon his death to be paid to his children, each a one-third part thereof. The court further decreed that the executors, as trustees, should take and set apart the sum of \$30,000 in trust, to be held by said trustees, the income to be paid to George B. Knight until he arrived at the age of 30 years, at which time said sum of \$30,000 should be paid to him, and that the share of the residuum assignable to said sum of \$30,000 should be added to said sum and held in trust, and the net income thereof paid to said George B. Knight; that, in the event of the death of the said George B. Knight prior to his arriving at the age of 30 years, the said sum of \$30,000, and the share in the residuum assignable thereto, should be divided among the legatees mentioned in said will other than the Mound Grove Cemetery Association of Kankakee City, St. Paul's Church of Kankakee, Ill., the Sisters of the Sacred Heart of Mary, Cornelia Stone, Genevieve Parker, and May Parker. The court found that the legatees should share in the residuum under the twelfth clause in said will in the following proportions: Harry Lee Knight, $\frac{40}{135}$; Emma Knight Crawford, $\frac{25}{135}$; George B. Knight, $\frac{30}{135}$; Helen Norton Carter, $\frac{5}{135}$; Mabel West Knight, $\frac{5}{135}$; Solon De Witt Knight, $\frac{5}{135}$; Harry L. Crawford, $\frac{25}{135}$ —and directed that Har-

ry L. Crawford and H. M. Stone, trustees, carry out the provisions of said will according to the decree.

This appeal is prosecuted from that decree by the executors and trustees to review the decree, who assign as error the holding in the decree giving the residuum following the \$40,000 in trust to Harry Lee Knight during his life, and contending that the residuum following said \$40,000 should be paid to his three children in equal one-third parts thereof. Cross-errors are assigned by Harry Lee Knight and Gertrude Knight—first, that the court below erred in holding that the real estate mentioned in the said will descended to the heirs at law, and that the same was intestate estate; second, that the court erred in holding that Harry L. Crawford and Emma Knight Crawford participated in the residuum; third that the court erred in not holding the seventh clause of the will void; and, fourth, that the court erred in finding that the share of the residuum following the \$40,000 was held in trust, contending that the same should have been paid to Harry Lee Knight absolutely, without any conditions or restrictions, and that the court erred in decreeing any part of said residuum should be held in trust by the said trustees. Cross-errors are also assigned by George B. Knight, a minor, by W. R. Hart, his guardian ad litem, which relate to the share of the residuum which is held to go to the trustees for his benefit, and raise practically the same questions as raised by Harry Lee Knight as above set forth. Cross-errors are assigned by the Sisters of the Sacred Heart of Mary, alleging that the court erred in finding and decreeing that the said Sisters of the Sacred Heart of Mary, being a legatee in the will, did not participate in the residuum under clauses 5 and 12 of said will. Other cross-errors are assigned by Mabel West Knight and Solon De Witt Knight, minor defendants, pro se, and also by Helen Norton Stockdale (formerly Helen Norton Carter), as to the disposition of the fund of \$25,000 mentioned in the eleventh clause of the will; their insistence being that the \$25,000 did not go into the residuum, but passed as intestate estate. The Mound Grove Cemetery Association assigns error, also, upon the refusal of the court to allow it to participate in the residuum under clauses 6 and 12 of the will. Separate briefs are filed by each of those assigning cross-errors; each giving his version as to the construction that should be placed upon the entire will.

H. K. & H. H. Wheeler, for appellants. W. J. Brock and O. F. Whitmore, Jr., for appellee Mound Grove Cemetery Ass'n. W. R. Hunter, for appellees Harry Lee Knight, Gertrude L. Knight, and George B. Knight. A. L. Granger, guardian ad litem, for Carolyn Knight and Camden Knight. C. B. Sawyer, guardian ad litem, for Mabel West Knight and Solon De Witt Knight. Thomas S. Sawyer & Son, for appellee Helen Norton Stockdale.

Granger & Granger, for appellee Sisters of the Sacred Heart of Mary.

RICKS, J. (after stating the facts). Appellants assign but a single error, and that is as to the disposition of that part of the residuum which follows the \$40,000 legacy to the benefit of Harry Lee Knight. They insist that the share of the residuum that follows that legacy goes direct to the children of Harry Lee Knight, and not to themselves as trustees, to be held in trust with the main legacy and upon the same conditions. Harry Lee Knight and his adult daughter assign errors, and insist that the part of the residuum which appellants claim goes to the children of Harry Lee Knight goes absolutely to Harry Lee Knight, and not to his children or his trustees. George B. Knight assigns error, and insists that the part of the residuum that follows the \$30,000 legacy that was given in trust for his use and benefit goes directly to him, and not to his trustees to be held in trust, as the principal fund is directed to be held. All these parties urge that it was the clear intent of the testatrix to establish but two trust funds—one for Harry Lee Knight and one for George B. Knight; and that after the principal of these funds was provided she made, and intended to make, an absolute and direct disposition of all the remainder of her property. Appellants further urge that as the income only was to be given to Harry Lee Knight, and the corpus or the principal fund was to go to his children, and as it was the intention of the testatrix to absolutely dispose of her property other than the two funds to be held in trust, the residuum that followed the legacy to Harry Lee Knight should naturally and properly follow the corpus of that fund and go to his children. Harry Lee Knight urges that as there is nothing in the residuary clause that refers to a trust, and as it is the policy of the law to so construe a will as to vest the property in the first donee, the court will not hold that it should be taken in trust, unless it clearly appears that such was the intention of the testatrix, and then cites the language of the residuary clause, which directs that the residue be converted into money and paid to the same legatees, and points out that in the fourth clause of the will the testatrix clearly recognized Harry Lee Knight as a legatee, as she there directs that the fund that is to be held in trust for George B. Knight is to be held by the trustees, and they are charged with "like duties as to the trusts created relative to the legacy of the above-named Harry Lee Knight"; that the language so used is a clear recognition of Harry Lee Knight as a legatee; and it is asked, if his children are legatees, why is he not a legatee? and, if he and his children are alike legatees, how will the fund be divided between them?

We think a single consideration will dispose of all the questions raised by the re-

spective parties touching so much of the residuum as follows the legacies for the benefit and use of Harry Lee Knight and George B. Knight. Harry Lee Knight was to take but a life estate in the legacy to him, and the vesting of the legacy to George B. Knight was contingent upon his attaining the age of 30 years. As we read and construe the will, the trustees are the legal legatees to whom the money in the second and fourth clauses of the will, being the corpus of the trust funds held for the benefit of Harry Lee Knight and George B. Knight, was given, and in whom, for all legal purposes, title was vested. The said trust funds so vesting in them pending the period of the trust for the purposes of the trusts, they took immediate title to the corpus of such funds. No other rational conclusion can be drawn from the language of the will that "such money shall be distributed and paid to the legatees hereinbefore named" than that it meant those persons as legatees who took the immediate title to the legacies provided for in the will. If it be held that Harry Lee Knight is a legatee, it must as well be held, and we think with greater force, that his children, in whom the corpus is vested and who are to take after his life, are also legatees; and the peculiar question would be presented that is suggested by Harry Lee Knight as to the basis upon which such residuum should be divided between them; that is to say, whether Harry Lee Knight should take a portion of the residuum absolutely, such as his prospects for life under the life tables would give, and the remainder be distributed among his children, or whether we should exclude his children from the class as legatees and give all to him, or exclude him from the class as a legatee and give all to the children. The mere suggestion of such a situation is a strong argument in favor of, the position that the testatrix never contemplated that such questions should arise, but rather that whatever portion of the residuum she distributed to the fund held for Harry Lee Knight and for George B. Knight should follow the same course that the principal or corpus of the fund was directed to go, and should vest in the trustees, and not in the children or in Harry Lee Knight or George B. Knight. In *re Logan's Estate*, 131 N. Y. 456, 30 N. E. 486; *Woman's Union Missionary Society v. Mead*, 131 Ill. 33, 23 N. E. 603. In *re Logan's Estate*, supra, is a case very similar to the case at bar upon the facts, and the reasoning therein contained is applicable to the case before us, and is cogent, and we are disposed to follow it.

The next important question arising under the assignment of errors to be determined is in regard to the eleventh clause of the will; it being conceded that the devise and bequest must fail, for the reason that no such institution as the Helen Huling Home is in existence or was in existence at the

death of the testatrix. The decree finds that the gifts lapsed, and that the real estate became intestate estate, but that the \$25,000, being personal property, went into the residuum under the twelfth clause of the will. But the decree finds that only Harry Lee Knight, Emma Knight Crawford, George B. Knight, Helen Norton Carter, Mabel West Knight, Solon De Witt Knight, and Harry L. Crawford should participate in the residuum as provided for under the twelfth clause of the will, thus excluding a number of the legatees named in the will. So far as the decree holds that the devise of the real estate lapsed and became intestate estate, we agree with the provision of the decree, but, under the authority of *Dorsey v. Dodson*, 203 Ill. 32, 67 N. E. 395, we must hold that the \$25,000 also became intestate estate, and accordingly should have been distributed to the legal heirs at law the same as the real estate. There is no doubt but that the general rule in vogue in a majority of the states where there is no statute governing is that all personal property not otherwise specifically disposed of goes into the residuum, unless otherwise specifically provided, and so all void or lapsed legacies of personal property go into a general residuary fund. But there is one well-defined exception, which is in cases where the testator gives legacies to the same persons that are provided for under the residuary clause. In that event the rule seems to be that such lapsed legacy does not fall into the residuum. In *Dorsey v. Dodson*, supra, it is said (page 37 of 203 Ill., page 397 of 67 N. E.): "Where legacies are given to several legatees, and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them. To hold, in such a case, that the testator intended the lapsed legacy to fall into the residuum, was said, in *Craighead v. Given*, 10 Serg. & R. 351, to hold that the testator intended to bequeath to one who died a portion of the residue happening in consequence of his own death—a construction which could never be supported. Where a testator gives specific legacies to several legatees, and gives the residue to them as tenants in common, if each one receives his share of the residue over and above the specific legacies, he receives exactly what the testator intended to give him. Having given to each specific sums and a specific share of the excess over the total of such sums, the proportion of those who live is not to be enlarged by a lapsed legacy. It is not to be inferred that the testator intended that a lapsed legacy to one should fall into the residue, so that the survivors should receive a different and increased proportion of the testator's estate." We think that part of the decree which provides that the \$25,000 should go into the residuum was erroneous. It should have held that it was intestate

estate, the same as the real estate mentioned in the said clause.

It is shown by the record that there were several thousand dollars, besides the amount provided for in the eleventh clause of the will that necessarily and properly go into the residuum, and the next question to be determined is, who participates in the residuum under the twelfth clause of the will? It will be noticed that the language used is, "such money shall be distributed and paid to the legatees hereinbefore named other than the said Cornelia Stone, Genevieve Parker, and May Parker, to each in proportion to the legacies hereinbefore specifically fixed and mentioned." A legatee, in legal acceptation, is a donee of personal property, and we are unable to see how, when used in their general sense, as above set forth, any other construction could be placed upon the terms of the will than that all the legatees receiving specific legacies (excluding those specifically excepted) should share in this residuum. It follows that all the legatees except Cornelia Stone, Genevieve Parker, May Parker, and the Emergency Hospital should participate in the residuum according to the proportion each received of the estate, and the fact that some of the legatees are societies and corporations does not of itself exclude them. *Woman's Union Missionary Society v. Mead*, supra; *Gray's Estate*, 147 Pa. 67, 23 Atl. 205. As to the Emergency Hospital, it will be noted that it does not receive a specific legacy, but is to receive a legacy sufficient to produce an annuity of \$50. When that provision is made, it is clear from the language of the testatrix used in the will that it was not her purpose to make the hospital the further object of her bounty, and we are of the opinion that it was not to share in the residuum.

The refusal of the court to hold that the seventh clause of the will, being the one in reference to the Emergency Hospital, was void, is assigned as error by some of the parties in interest. The ground urged is that the gift is not of any specific sum, and is therefore uncertain. The amount of the annuity that was designed by the testatrix to go to this hospital is clearly pointed out, and, while it is true that the sum to be set aside may be somewhat difficult to ascertain because of the varying rate of interest that may be realized from year to year on any sum, still we think it is such a matter as can be approximately and easily ascertained, and is not for that reason void. And as courts liberally construe clauses of wills which make gifts to charitable institutions, unless there is some insurmountable reason pointed out for the same being void, we feel it our duty to uphold the provision, and see no reason for going into an extended argument.

We think we have fairly considered all of the questions raised upon the errors and cross-errors assigned by the respective parties, and it necessarily follows that the de-

cree of the circuit court of Kankakee county must be reversed, and the cause remanded, with directions to that court to enter a decree in accordance with the views above expressed.

Reversed and remanded, with directions.

(218 Ill. 411)

HASTERLIK v. OLSON.

(Supreme Court of Illinois. Dec. 20, 1905.)

LANDLORD AND TENANT—LEASE—FORFEITURE.

A landlord sent through the board of health notice to his tenant to repair the premises after the current monthly rent had been paid, and withheld a letter declaring the lease forfeited for failure to make repairs, until the effect of the notice served was determined. The tenant, on receipt of the notice, made the repairs, in ignorance of the fact that the landlord had begun forcible detainer, and in ignorance of the letter. Held a waiver of the right to declare the lease forfeited for such cause.

Appeal from Appellate Court, First District.

Action by Charles Hasterlik against John Olson. Judgment for defendant was affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

Charles F. Lowy, for appellant. Samuel Friedlander, for appellee.

BOGGS, J. The appellant instituted an action in forcible detainer in the superior court of Cook county against the appellee, to recover possession of a lot in the city of Chicago on which was situate a business house, and was defeated. The judgment was affirmed by the Appellate Court for the First District, and this appeal brings such judgment of affirmance into review in this court.

The case was heard in the superior court before the court and a jury on a stipulated state of facts. The court directed a verdict for the appellee. It appeared from the statement of facts that the appellee occupied the premises in question as a tenant of appellant, under a written lease for a term of years terminating in the year 1906. The lease required the appellee, the tenant, to pay rent at the rate of \$45 per month monthly in advance, and, as the appellant construed it, required the tenant to keep the premises in good repair during the term. On January 29, 1904, appellee paid the rent in advance for the ensuing month of February. On or about February 1, 1904, the premises became out of repair, causing the basement to be flooded with water and damaging the building. The appellee, the tenant, on the 3d day of February notified the department of health of the city of Chicago that the premises were in bad condition and the basement flooded, and requested the board of health to notify the appellant and to require him to make the needed repairs. Notice, as so requested, was given the appellant by the board of health, but he refused to make the repairs. On the 15th day of February, 1904, the appellee again no-

tified the board of health of the condition of the premises, and on the same day the appellant wrote a letter, to be sent to the appellee, declaring the lease forfeited for failure to keep the premises in good repair and demanding possession of the premises, but this letter was voluntarily retained by the appellant in his possession until the 23d day of February. On the 18th day of February the appellant instituted this action, and on the same day notified the board of health of the city, requesting them to notify the appellee to make the needed repairs within a specified time or subject himself to prosecution under the city ordinances. The board notified the appellee accordingly, and he proceeded at once to have the premises repaired at his own expense. At the time of making and completing such repairs the appellee did not know that the action in forcible detainer had been begun against him, nor had the appellant then delivered to him the letter declaring the lease to be forfeited. The judgment entered in the superior court and the affirmance thereof in the Appellate Court were on the theory that the law would imply a waiver of the right to declare the lease forfeited.

The appellant had been paid the rent for the month of February. He claimed the right to declare the lease forfeited on the alleged failure of the tenant to make repairs, after he had received payment of the rent. He prepared a letter to the appellee declaring such forfeiture, but withheld the letter in his own possession and notified the board of health to require the appellee to make the repairs (which was the basis of his right of forfeiture) within a fixed time. The notice sent by the board of health to the appellee at the instance and demand of the appellant, requiring the appellee to make the repairs within a specified time, must be regarded as a notice given by appellant. The appellee had good reason to regard the notice to repair the premises, sent by the board of health on the application of the appellant, as an election on the part of the appellant to waive any right of forfeiture. Withholding the letter written to declare the forfeiture and procuring the notice to be given to the appellee to repair the premises is consistent only with the view that the appellant had determined not to elect to declare the lease forfeited if the appellee should comply with the notice to put the premises in repair. The appellee complied with the requirement of the notice, and it was properly ruled that the appellant could not declare a forfeiture of the lease.

The judgment must be, and is, affirmed.
Judgment affirmed.

(218 Ill. 414)

HAYES v. CHICAGO TELEPHONE CO.
et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. APPEAL—REVIEW—DECISIONS OF INTERMEDIATE COURTS—QUESTIONS OF FACT.

In an action to recover for the death of

plaintiff's intestate through a fallen telephone wire, dangerously charged with electricity, a finding by the Appellate Court, reversing the judgment for plaintiff on the ground that the wire was not owned or controlled by defendant, is conclusive on the facts.

2. JUDGMENT—PARTIES—JUDGMENT FOR CO-PARTY.

Where a telephone company and a city were sued to recover for the death of a person who took hold of a live telephone wire, and the liability of the telephone company was based on the alleged negligence of the city, which was in control of the wire by permission of the telephone company, a judgment in favor of the city releases the telephone company from liability on the ground of respondeat superior.

Appeal from Appellate Court, First District.

Action by Avery R. Hayes against the Chicago Telephone Company and the city of Chicago. Judgment for plaintiff was reversed by the Appellate Court, and he appeals. Affirmed.

Edmund S. Cummings, for appellant. Holt, Wheeler & Sidley, for appellee.

HAND, J. This was a suit brought by appellant against the city of Chicago and the Chicago Telephone Company in the superior court of Cook county to recover damages for negligently causing the death of Charles Anderson, appellant's intestate. The declaration charged, in substance, that the defendants were possessed of and using certain telephone poles and wires in a public alley in the city of Chicago; that there were near said telephone poles and wires other poles and wires, which wires were highly charged with electricity; that the said defendants negligently suffered one of said telephone wires to hang loosely from one of the poles used by it, down to and upon and against one of said other electric wires, and down to and upon the ground, and thereby said telephone wire became charged with electricity, and dangerous to any person coming in contact with the same; and that said Charles Anderson, while in the exercise of due care, being entirely ignorant of the fact that said telephone wire was charged with electricity, and having no notice thereof, and in the performance of his duties, took hold of said telephone wire and was killed. The evidence showed that at the time of granting the appellee the right to erect its poles in the alley in question the city of Chicago made the following reservation: "That the city of Chicago shall have the right to the top cross-arm of each of said poles free from charge, for the use of the city telegraph and telephone wires." It further appears from the evidence that appellant's intestate, who was a garbage collector in the city of Chicago, in the performance of his duties took hold of a wire hanging from one of said poles, which was in contact with a wire belonging to another company, strung on another set of poles, and heavily charged with electricity, and was instantly killed. There was a sharp conflict in the evidence as to which of the defendants

was the owner or in control of the broken wire hanging from the pole which caused the death of Anderson. The jury returned a verdict of not guilty as to the city of Chicago and of guilty as to the appellee, and assessed appellant's damages at \$3,500. Judgment was entered upon the verdict, and an appeal was taken by appellee here to the Appellate Court for the First district, and that court reversed the judgment of the superior court, without remanding, and made the following finding of fact: "That the fallen wire which caused the death of Anderson prior to and at the time of the accident was owned and controlled by the city of Chicago, and was not at any time owned or controlled by appellant, and that appellant was guilty of no negligence which caused or contributed to the death of Anderson." This finding of fact by the Appellate Court is conclusive, and this court is bound thereby, and is not permitted to look into the record for the purpose of reviewing the evidence, and passing upon the question as to whether the facts therein contained justify such finding. *Davis v. Chicago Edison Co.*, 195 Ill. 31, 62 N. E. 829. The Appellate Court is not required to recite the evidence, or to find the mere evidentiary facts, but only to find the ultimate facts. *Weeks v. Chicago & Northwestern Ry. Co.*, 198 Ill. 551, 64 N. E. 1039.

While this court is bound by the finding of fact of the Appellate Court, it can consider the question as to whether the Appellate Court has properly construed the law applicable to the facts found by it to exist, and appellant contends that it has erred in so doing. It is insisted that, regardless of the fact appellee has been found not to have been the owner or in control of the fallen wire, and not to have been guilty of negligence, still it is liable, for the reason that it had granted to the city of Chicago the right to use the poles erected by it for its corporate purposes, thereby permitting it to use a portion of its chartered powers; the result of which is to make appellee liable for any negligence on the part of the city of Chicago. The disposition of this case does not make it necessary to pass upon the question whether the rule heretofore established by this court in cases where one railway corporation has permitted another to use its tracks should be held to apply to the case at bar, for the reason that, if it did apply, under the facts in this case, appellant could not sustain a judgment. The rule as to railway corporations is based upon the relation of principal and agent. *Anderson v. West Chicago Street R. Co.*, 200 Ill. 329, 65 N. E. 717. In the trial below, the city of Chicago, which, under appellant's contention, occupied the position of agent, was found not guilty. No appeal was taken from that judgment, and it must be deemed to have settled the fact that the city of Chicago was not liable for the death of appellant's intestate. It necessarily follows that if the agent charged with the commis-

sion of the act complained of be not guilty, a judgment could not be recovered against appellee, the principal, upon the ground of respondeat superior. The judgment in this case in favor of the city of Chicago is a complete bar to an action against the appellee for its negligence in exercising any permissive rights appellee may have granted it. To make appellee liable upon the theory under discussion, a case must have existed against the city.

In *Anderson v. West Chicago Street R. Co.*, supra, where it appeared that a judgment had been entered in favor of the lessor railroad company in an action for alleged negligence of the lessee company, it was held that said judgment was res judicata in a subsequent suit upon the same cause of action against the lessee, and it was said (page 333 of 200 Ill., page 718 of 65 N. E.): "Both being liable to the party injured, such party could sue them both in the same action, or sue each one separately; but if one was not guilty of the tort, the other one could not be. * * * There is no question of fact to be tried whether the owner company is liable for the negligence of the lessee; it is so liable under the law. It must follow, then, that if, in a suit brought against the lessor in which the tort complained of is in fact the tort of the lessee, a verdict of not guilty is rendered—that is, that there was no actionable wrong committed against the plaintiff by the lessor—no actionable wrong could have been committed against him by the lessee in the premises, for it is the lessee's wrong that in these cases constitutes the basis of the action against the lessor."

In the case of *Doremus v. Root & Oregon R. & Nav. Co.*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, which was a suit brought against Root and the railroad company, for which he was working, jointly, to recover damages for a negligent act of Root's resulting in an injury to the plaintiff, a verdict was returned against the railroad company, which was construed by the court to be a verdict of not guilty as to Root, and a judgment was entered in his favor against the plaintiff for costs. An appeal was taken by the railroad company, and it was urged that a judgment in favor of Root, the agent whose alleged negligent act caused the injury, precluded a judgment against the railroad company, his principal; which contention was sustained. The court, in passing upon the question, said: "In such an action, whether brought against the employer severally or jointly with the employé, the gravamen of the charge is, and must be, the negligence of the employé; and no recovery can be had unless it be proved and found by the jury that the employé was negligent. Stated in another way: If the employé who causes the injury is free from liability therefor, his employer must also be free from liability." And again it is said: "So, too, from the principle that there can be no liability on

the part of an employer for the act of his employé in which he took no part, if the employer is free from liability, it follows that a judgment in favor of the employé in an action brought against him for an injury caused by such an act is a bar to a recovery against the employer in an action brought against him for the same cause of action."

In this case appellant has relied upon three theories to recover: First, that the city of Chicago had committed some actionable wrong which had resulted in the death of Anderson; second, that appellee had negligently caused the death of Anderson; and, third, that by reason of the contractual relation of appellee with the city of Chicago, appellee was liable for the alleged negligence of said city resulting in the death of appellant's intestate. As to the first contention, the jury found the city of Chicago not guilty, and no appeal was taken from the judgment entered upon such verdict. Upon the second proposition, the Appellate Court, by its finding of fact, has, in effect, returned a verdict that appellee was not guilty; and the third theory must fail for the reason that it is apparent that the finding by the jury that the city of Chicago was not guilty of actionable wrong effectually bars any recovery against appellee upon the ground that it was liable for the alleged negligence of the city of Chicago.

We are of the opinion the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

(218 Ill. 419)

PEOPLE ex rel. **DENEEN**, State's Attorney,
v. **SULLIVAN**.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. EVIDENCE—CHARGING CRIMINAL OFFENSE—PROOF REQUIRED.

Where a criminal offense is charged by the pleadings, except in cases of slander and libel, and must be established, either to sustain the cause of action or maintain a defense, the presumption of innocence arises, and the crime charged must be proved by evidence which removes every doubt of guilt.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 81, 2447.]

2. ATTORNEY—DISBARMENT—EVIDENCE.

Where an attorney was charged, in an information for disbarment, with conspiring with a court bailiff to bribe jurors and inducing the bailiff to abscond for the purpose of preventing his testifying against the respondent before the grand jury, and the only evidence to sustain the charge is the testimony of the bailiff, which is denied by the respondent, and the facts and circumstances tend to discredit his evidence, it is insufficient to justify disbarment.

Information by the people, on the relation of Charles S. Deneen, state's attorney, against Alexander Sullivan, for disbarment. Rule discharged.

Charles S. Deneen (Albert C. Barnes, Russell Whitman, and John L. Fogle, of counsel), for relator. Frank L. Kriete and Hiram T. Gilbert (S. S. Gregory, of counsel), for respondent.

BOGGS, J. This was an information filed in this court by the people of the state of Illinois, on the relation of the state's attorney of Cook county, against the respondent, Alexander Sullivan, praying that he be required to show cause why his name should not be stricken from the roll of attorneys and counselors at law of this state, and, upon a failure of respondent to show such cause, that an order be entered striking his name from such roll of attorneys. The petition alleged that the respondent had been guilty of conspiracies with one James J. Lynch, a bailiff of the circuit court of Cook county, to bribe and corrupt jurors to return unjust and corrupt verdicts, and with aiding and inducing said Lynch, after the (said Lynch) had been indicted for such corrupt practices, to forfeit his bond given to answer such charge and abscond from the state of Illinois, in order that said Lynch might not be secured to appear as a witness and give testimony showing the respondent to be guilty of so corrupting jurors until the period should expire within which any such charge against the respondent could be presented and prosecuted in the courts of the state. The respondent answered the petition, and the cause was referred to a master in chancery to take and report the proofs. The proofs have been reported, and the cause submitted upon the briefs of counsel for the respective parties.

The relator insists that the proofs establish the following to be facts: That the respondent was the attorney for the West Chicago Street Railroad Company, which was defendant in the several damage cases in which Lynch had bribed or attempted to bribe jurors; that this corruption of jurors was instigated by Alexander Sullivan shortly after January 1, 1897, when he became attorney for said company; that he had an interview with Lynch at his house, and sent him to Dan Coughlin for that purpose; that subsequently he had various interviews with Lynch at his office, as cases against said company came up on the trial calls of the courts; that he paid Lynch money for corrupting jurors, sometimes in person and sometimes through a boy messenger, who was sent to the court of which Lynch was bailiff; that Lynch paid from \$50 to \$100 to each juror corrupted, getting a like amount for himself; that this debauchery of the courts of justice, under Sullivan's direction, covered a period of nearly two years, while he was attorney for said company; that he paid Lynch in the aggregate during that time over \$6,000; that the fact of Lynch's connection with the bribery of jurors became public, resulting in his dismissal from office about December 18, 1898; that immediately thereafter he had a conference with Sullivan respecting his defense against prospective indictments; that indictments were so returned against him on December 30 and December

31, 1898; that shortly thereafter Sullivan met Lynch at the office of Dr. St. John, pursuant to arrangements, and advised him to leave the country, and arranged for subsequent interviews at Frederick St. John's office; that subsequently he sent Murray to bring Lynch to Sullivan's house, where he promised to indemnify Lynch's bondsmen against loss and to provide for the support of Lynch and his family during his absence; that Lynch, questioning the propriety and motives of some of Sullivan's propositions, failed to go as promised; that his bondsmen desired to be released, causing Lynch to go to Frederick St. John's office, as advised by Sullivan; that there he again met Sullivan, where each charged the other with failing to keep his promises, and arrangements were made that Frederick St. John would see to the settlement of the bond question; that immediately thereafter interviews were had with Frederick St. John and others, resulting in leaving with Lynch on January 20, 1899, the day of his departure, the sum of \$4,000 to remunerate his bondsmen and \$75 for Lynch's wife; that that night Lynch and Mulligan, his cousin, departed for Canada; that Lynch, failing to receive money as expected, and being sick, went to Mankato, Minn., where he remained for a few days, communicating in the meantime with Edward Maher, his (Lynch's) attorney, through Mulligan; that under the advice of Maher he, about February 8th, returned to Toronto, Canada, having furnished Maher his assumed name and house address, with the expectation of meeting Maher there; that Frederick St. John appeared, instead of Maher, with a proposition, purporting to come from Sullivan, that Lynch go to Guatemala, from which he could not be extradited, and that he would receive \$2,000 aboard a vessel when leaving Liverpool for that place, and \$3,000 additional would be deposited with an acceptable person in case his absence should become necessary for a second year; that the fact of an unknown man accompanying St. John led Lynch to distrust the real character of his mission and caused his and Mulligan's immediate return to Chicago February 20th, leaving St. John with the expectation of meeting Lynch the next morning; that Lynch remained in concealment in Chicago with friends, communicating directly with his sister, Mrs. Gordon, and through her with Maher and St. John; that Lynch, on the promises brought through the same channels, returned to Toronto about March 9th; that Edward Maher shortly afterwards visited him there, and endeavored to restore his confidence in Sullivan and St. John, and to persuade him to accept the Guatemala proposition, but brought no money as expected by Lynch; that Lynch there repudiated him as his attorney; that Lynch then sent for his sister, Mrs. Gordon, and money;

that she went to see him, and shortly afterwards, unexpectedly to him, made a second visit at the instigation of St. John to persuade Lynch to accept the Guatemala proposition; that Lynch resented her coming, claiming she came at the expense of St. John and Sullivan, who, as he claimed, had failed to keep their promises to him, causing her immediate return to Chicago; that thereupon Mrs. McGuirk obtained Lynch's address from his sister, saying Sullivan wanted to see him, and visited Lynch to persuade him, in Sullivan's behalf, to take some position that would be obtained for him in Montreal, to which Lynch submitted a counter proposition; that shortly afterwards Mrs. McGuirk made a second visit, submitting plans and propositions altogether unacceptable to Lynch; that Lynch then changed his place of concealment to New York, whence he communicated with his sister, Mrs. Gordon, and a friend, Dennis Ryan; that Mrs. Gordon then resumed negotiations with Maher and St. John to bring about some financial aid, Lynch having up to that time (June, 1899) defrayed his own expenses while away; that on June 23d a written proposition, dictated by St. John, was transmitted to Lynch for signature, providing for the payment to Lynch of \$150 per month from July 1, 1899, to January 1, 1902, and deposit of a sufficient sum of money for such purpose in the hands of an acceptable person; that Lynch returned the document unsigned, with a similar one signed, designating Dennis Ryan as the depositary of such fund; that Ryan and Mrs. Gordon and Frederick St. John consummated such arrangements; that St. John delivered \$4,500 to Ryan, and that the latter thereafter paid \$150 per month to Mrs. Gordon for transmission to Lynch, payments of which were made to him until the month of September, 1901, when the balance of \$450 was, at the request of St. John, returned to him; that in October Lynch returned, surrendered himself, and appeared before the grand jury, when the aforesaid indictment for conspiracy was returned.

That Lynch was guilty of bribing, or attempting to bribe, jurors to render unjust and corrupt verdicts favorable to the West Chicago Street Railroad Company in 2 cases, is shown by the proof. Lynch testified he had bribed, or attempted to bribe, jurors in many cases, 25 to 40, but could name 5 of such cases. He testified that the respondent instigated him to the commission of these corrupt practices and paid him the money which he paid to the jurors, sometimes \$50, sometimes \$100 each, and also paid him a like sum of money to be retained by himself in each instance. The respondent appeared as a witness, was fully examined and cross-examined, and denied these statements of Lynch in general and in detail. It is contended that Lynch's statements are in some

instances corroborated by other witnesses or by facts and circumstances appearing in the proofs. The evidence is very voluminous, and reference to such portions of it as are relied upon to corroborate Lynch will be sufficient for the purposes of this opinion. Lynch testified that some of the sums of money so, as he alleged, paid to him by the respondent were paid to him in the respondent's office, some in the courthouse in person by the respondent, and that other payments were sent to him in sealed envelopes and carried by one Robert Hill, office boy of the respondent, but would not specify when or where any alleged specific payment of money was made. The payments alleged to have been sent by Hill are relied upon as corroborative of Lynch's testimony. The offices of the respondent were in the Chicago Opera House Block, which is directly across Washington street from the courthouse, in which Lynch was employed as bailiff. Hill testified that he saw Lynch in Sullivan's office quite frequently—sometimes two or three times a week; that he saw him talking with Sullivan; that he took verbal messages to the courtroom from Sullivan to Lynch "that Sullivan would like to see him," and carried sealed envelopes from Sullivan to Lynch in Judge Clifford's courtroom once or twice a week; and that when he delivered the envelopes Lynch put them in his pocket. Hill did not know what was contained in any of the envelopes. The respondent admitted that he had sent sealed envelopes to Lynch by Hill on two occasions; that one time the envelope contained a letter relative to a position to which Lynch sought to have his brother appointed and to which he was subsequently appointed, and another time respondent sent in an envelope some tickets or printed matter connected with the election of one of the judges of the circuit court which Lynch had requested to be sent to him, and admitted that Lynch came to his office at times to notify him that motions pending in cases in which he was engaged as an attorney were to come up for hearing, but denied that Lynch ever came to his office for any improper purpose. On cross-examination Hill, with reference to the number of envelopes which he had carried from the respondent to Lynch, testified: "I could not say whether I took letters of anybody else from Mr. Sullivan's office and delivered them to Lynch. I could not say whether I did or not. I made no record of them. I do not know how many of them were from Sullivan or how many of them were from anybody else. Anybody that came and asked me to deliver a letter for them I would put on my hat and deliver it, whether for Mr. Sullivan or anybody else in the office. It made no difference to me. I delivered letters and notes for other people in the office and for other people in the building—lots of them—for anybody that asked me. I don't know how many letters I delivered for these people to Lynch. I think I have delivered

letters to Lynch from other people. Maybe I have, and maybe I have not. I think I have. I could not give the number of letters I have delivered, nor the dates, nor anything that occurred between him and Mr. Sullivan or anybody else about delivering them. Perhaps Miss Schottler, who was in Mr. Sullivan's office, would send me over to Mr. Lynch with a note to him from herself. I would not say she has not. I never made any memorandum. Anybody come and asked me to take a letter. I put it in my pocket and delivered it. Perhaps she has sent me over with a letter about the employment of Lynch's brother. I would not say she has. I don't know whether I took anything else over to Mr. Lynch, except those notes from Mr. Sullivan and other people in the office there. I may have delivered packages. I would not say that I did, and would not say that I did not. I have no recollection on that subject. As to these notes that I carried to Lynch, I am not able to say how many of them came from Sullivan, or how many came from other people. I don't know anything about the purpose of them. I don't know how many packages of tickets I carried to Lynch from Sullivan's office. I always got my messages and went and delivered them. I never kept any memorandums at all. If Mr. Sullivan gave me a note to deliver to anybody, I went and delivered it, and that is all I did. I didn't put it down in a book. There was no occasion to recollect it. All I have now is a general hazy recollection that I did go and deliver these notes." He further testified that the respondent never told him to conceal any envelopes that were to be given to Lynch, and that he never attempted to give them to Lynch secretly; that he would go up and give them to him in the courtroom in Judge Clifford's court; that sometimes Lynch would come to the railing of the courtroom and get what he had to give him, and sometimes he would give what he had to give Lynch when he was sitting at his desk, right beside the judge's desk, and sometimes he would lay them on the desk and Lynch would pick them up. Lynch testified: "He brought me the money in a sealed envelope and delivered it to me in the hallways; sometimes in my courtroom, provided it was the lunch hour and there was no one in there." In his examination in chief Hill stated that the envelopes were sealed, and on cross-examination he said he never noticed to see whether they were sealed or not, and could not state whether they were sealed or not.

Lynch testified: That he was frequently in the office of the respondent, and that the respondent often paid him money for corrupting jurors in his office: That he was in respondent's office so often that the employees therein began to notice it, and that it looked suspicious, and that respondent began to send the money by Hill, but that "I was not surprised the first time that I received money in that way. I can't state whether I was ex-

pecting it. I don't remember whether I had, prior to the first time that Hill brought over money in an envelope, had any conversation with Sullivan in which he intimated to me that he was going to send money over by Hill." That the money brought by Hill was in greenbacks—sometimes large ones, sometimes small ones. That "most of the bills were small bills, if you call a \$20 bill a small bill. Some were \$50. I don't think there was any \$5. I don't think we got down as low as that. We were dealing in big money." Again he testified that the bills were generally small, because "Mr. Sullivan was always afraid of a man (a juror) getting up in the neighborhood with a large bill, that the grocer and butcher would become suspicious of him, and consequently I tried to give them (jurors) small bills, so that if a man went into any place he would have a \$5 or \$10 note, because naturally otherwise the butcher and the baker and the grocer would become suspicious." It was shown that a brother of Lynch had a position in the office of the street railroad company and occupied an office in the same suite of offices occupied by Sullivan and others connected with the legal department of the company, and that Lynch at times went there to see his brother; that he had gone there at other times to deliver messages of information relative to motions and cases pending in the court, as claimed by respondent. That he was there frequently, and had opportunities to see the respondent and arrange for the bribing of jurors, and to receive money from the respondent therefor, was well established. That he did so rested solely on his testimony and was denied in toto by the respondent.

It is quite unreasonable to believe that the respondent would send money in amounts from \$100 to \$400 in currency in an envelope by an office boy to be delivered to a bailiff in the court for the purpose of corrupting jurors without first having arranged with the bailiff to receive the money in that way, and equally unreasonable that the boy would be intrusted with sums of currency so to be used without warning him to exercise care in carrying and delivering the same, and all of this is rendered still more unreasonable when the bailiff, it is remembered, had such ready and frequent opportunities to see the respondent and receive the money secretly. That Hill carried envelopes from the respondent, or from other persons in his office, to Lynch, was proven; but that these envelopes, or any of them, contained currency sent by the respondent to Lynch to be used in payment of jurors rests upon the testimony of Lynch alone, is denied by respondent, and the probabilities of the dispute are not with Lynch, but with the respondent. That Lynch had a conference with the respondent very soon after his corrupt practices were exposed, which was about December, 1898, was not denied by the respondent. Lynch testified that at that con-

ference respondent advised him with reference to the course to be pursued and told him that the trouble would soon blow over; advised him to do no talking, and to go and see one Edward Maher, an attorney, and to also see Ross & Fitzpatrick, who were operating a detective agency. This conference was arranged by telephone. One Richard W. Megary, now claim adjuster for the London Guarantee Accident Company and then engaged in legal work for the Union Traction Company, testified that he was in respondent's office and answered the phone; that Lynch asked if Sullivan was in his office, and, being informed that he was, said he would come over at once; that he (Megary) advised Sullivan that Lynch was coming, and Sullivan asked him (Megary) to remain in the room while Lynch was there, and Megary testified he did remain in the office and heard the conversation which occurred. Megary testified: "Lynch said: 'Mr. Sullivan, I suppose you have seen the papers. They are after me on the North Side, and I want you to defend me.' Mr. Sullivan said to him: 'Lynch, I cannot defend you. I have not been in the criminal business for a number of years, and I am totally unfamiliar with that class of work. You have been around the courts long enough to know somebody who could defend you. I absolutely refuse to have anything to do with it.' I do not recollect anything else that was said. Lynch asked Mr. Sullivan if he could recommend somebody to him, and Mr. Sullivan then said: 'No, you have been around the courts long enough to know lawyers. You ought to know somebody to take your case for you.' Nothing was said in that conversation about the employment of Edward Maher as an attorney, and nothing was said in that conversation about employing Dan Donohoe. I have seen in the newspapers about the time that this thing came out, and this interview was shortly after that. That is as close as I can come to it. I was there during the entire interview between Lynch and Mr. Sullivan." The respondent gives the same version of the interview. Miss Schottler, stenographer for respondent, testified that she was at her station in the reception room of respondent's office, and that Megary was there when the telephone rang and answered it, and that he remained in the office with respondent and Lynch, and was there when Lynch went away. Lynch, here again, not only fails of corroboration; but his testimony is directly contradicted upon material points by one who, so far as the record shows, was a disinterested witness. The truthfulness of respondent's version of the interview is sustained by the same witness.

The next alleged circumstance relied upon to connect the respondent with Lynch as the corrupter of jurors, and also as a conspirator in the matter of urging Lynch to abscond, so that he could not be obtained

as a witness until after the time had elapsed in which a prosecution could be maintained against respondent, is an alleged interview which Lynch testified was had between himself and respondent at the office of Dr. Leonard St. John. Lynch testified that respondent notified him by telephone to go to Dr. St. John's office and he would meet him there; that he (Lynch) was accompanied by his cousin, Phillip Mulligan, a young man about 21 years of age; that he and Mulligan went to Dr. St. John's office on January 2 or 3, 1899, and waited in the doctor's reception room; that he (Lynch) was called into the doctor's private office, and that soon after the respondent came in, and that they (Lynch and respondent) were shown into an adjoining private office and there had a private conversation; that the respondent urged him (Lynch) to go away—to leave the state; that he (Lynch) told respondent he had given bond and would not go unless his bondsmen were protected; that respondent promised to see what he could do about the matter of protecting the bondsmen. The pertinency of this testimony is rendered more apparent by the claim of the relator that the bondsmen were afterwards protected and that Lynch fled to Canada. Mulligan sustained Lynch to the extent of testifying that he went with Lynch to Dr. St. John's office, that they went into the reception room, that Lynch introduced him to the doctor at the door of the doctor's private office, and that Lynch went into the doctor's private office. The respondent denied that he ever sought to have Lynch go away, and denied that he arranged to meet him at Dr. St. John's office, or that he ever did meet him there. Dr. St. John denied that Lynch and respondent had the interview as testified to by Lynch. He further testified that, on the day Lynch claimed he met respondent at his office, he (the doctor) received a note written by Lynch, saying that it would not be possible for him (Lynch) to bring a boy to the doctor's office for treatment on that day, as had been arranged, and that he would bring him on a later day. The written note was produced in evidence.

Lynch and Mulligan testified that Mulligan had but recently been mustered out of the United States army and was wearing his uniform on that day. Dr. St. John denied that Lynch introduced him to anyone dressed in a soldier's uniform on that or any other occasion. Mrs. E. J. Young testified that at the time in question she was in charge of Dr. St. John's reception room; that she was on duty from 9 a. m. until 6 p. m., and did not go out for lunch; that Lynch and his wife were patients of the doctor, and that she knew them both; that Lynch was not there at any time, accompanied by a boy or young man dressed in soldier's uniform; that no one dressed in such uniform waited in the reception room on that day. Mrs. Mamie Anglin testified that she

was the nurse in charge of the inner rooms of the doctor's office at the time in question, and that the doctor did not meet Lynch at the door of his reception room and receive an introduction to a young man in a soldier's uniform. James A. Fraser, Mrs. Phillipine Trout, Charlotte H. Morrison, Mrs. Agnes McGrath, E. C. Anderson, and Mrs. Louisa March all testified that they were in the reception office of Dr. St. John on January 3, 1899, at the time when Lynch claimed to have called there, and that neither of them saw any man dressed in a soldier's uniform come into the office. Dr. Copeland had an office which could be entered from the same corridor as that leading to Dr. St. John's office and also by a private hallway from Dr. St. John's office. Dr. Copeland testified that he was in his office on that day and that he did not leave it January 3, 1899, before 2 o'clock in the afternoon, and that when he did leave it he left it in charge of Mrs. Anglin, and that there was no conference in it between Lynch and respondent. An unprejudiced consideration of all of the testimony relating to the alleged meeting of respondent and Lynch at the office of Dr. St. John fails to satisfy the impartial mind that the claim of Lynch that respondent was there has the support of a preponderance of the proof.

Lynch testified that he had an interview with respondent at the office of Frederick St. John with reference to the matter of protecting his bondsmen, and this is the next alleged incriminating circumstance. The respondent, on oath, denied that such an interview occurred or that he was at the office of Frederick St. John. The testimony of Mulligan is again relied upon to corroborate Lynch. Mulligan testified that respondent came into the office of Mr. St. John and with Lynch went into an adjoining room; but on cross-examination he admitted that he had never met and did not then know respondent, and was not at that time introduced to him. Lynch testified that he had a meeting with respondent at Ross & Fitzpatrick's detective agency; that they had a conversation relative to trying to get information as to the action of the grand jury through certain members thereof. The respondent denied that he ever met Lynch at the detective agency, or ever had any such conversation with him. F. R. Buckminster, superintendent of said agency, testified that he was there at the time Lynch came to the agency, and that the respondent was not with him there; that Lynch was at the agency twice, but at one time he was alone, and at the other he was accompanied by Edward Maher; and that respondent was not with him on either occasion. These repeated denials of Lynch's statements by uninterested witnesses tends strongly to discredit his truthfulness. Lynch testified that he had an interview with the respondent at the latter's house, and that respondent

suggested plans for the departure of Lynch and for the protection of his bondsmen, etc. The respondent denied that Lynch was ever at his house, or that any such conversation occurred there or anywhere else. The testimony of the same witness, Mulligan, and also that of one Hawley, who was also a relative of Lynch, is thought to corroborate Lynch to some extent. These witnesses testified that they understood Lynch, accompanied by one Murray, was going to respondent's house, and that they followed for a short distance and waited at a street corner until Lynch returned, and then went home with him. But these witnesses, according to their statements, did not go within 15 blocks of the respondent's home, or know where Lynch went, other than what was said by Lynch. Mrs. Lynch, wife of James J. Lynch, gave testimony as to this alleged incident which cannot be reconciled with the testimony of Lynch as to conversations at the house of Lynch. Said Murray was indicted with respondent and others for conspiring to induce Lynch to abscond, etc., and he pleaded guilty to the charge. He was not called as a witness by either party to this proceeding. That this alleged interview occurred, therefore, rests alone upon the testimony of Lynch, whose statements made as to former alleged occurrences, when contradicted by the respondent, have, as we have seen, been uniformly overcome and disproven whenever third persons who might testify were present.

It may be here appropriate to note that William E. Lynch, a brother of said James J. Lynch, testified that he knew the reputation of said James J. Lynch for truth and veracity in the neighborhood in which he lived, that such reputation was bad, and that from such reputation he (the witness) would not believe him under oath. Lynch was further discredited and his testimony as to the connection of the respondent with the alleged jury bribing rendered unreliable by proof of statements made by himself to others. John T. Smith testified as follows: "I reside in Chicago. I was born and raised here. I am claim agent for the Chicago & Eastern Illinois Railway Company and the Grand Trunk System. I have been connected with the Grand Trunk since 1884; the Chicago & Eastern Illinois since 1888. I know Alexander Sullivan, the defendant in this case. My first acquaintance with him was in court in 1896. I know this man, James J. Lynch, sitting there. I first became acquainted with him personally in 1898. I had known him before that by sight. I had some business in Judge Clifford's court in the month of February, 1898. I was interested on behalf of the Grand Trunk Company in a case on trial there in the early part of February, 1898. I had a conversation with James J. Lynch in the office of Mr. Lynde, attorney for the Grand Trunk company, during the month of February, 1898, in the First National Bank

Building, at the corner of Monroe and Dearborn streets, Chicago. James J. Lynch was then a bailiff in Judge Clifford's room. He said to me, in substance, 'I can fix that jury for you in the Porter case for \$150,' and he subsequently said he could fix the jury for \$50, so that we would either get a disagreement or a verdict of not guilty, and I said to him, 'I won't have anything to do with you; talk to Mr. Lynde,' and he replied, 'I never do business with lawyers; I had an experience once that has taught me better than to do business with lawyers,' and he further said in that conversation that he was doing business and fixing juries for the West Chicago Street Railroad Company; that he represented Mr. Yulie and the board of directors, and that the lawyers who were trying the cases were suckers; that they, meaning the lawyers, thought that they were winning the cases, 'but I,' meaning Lynch, 'am the thirteenth juror; I am the fellow who is winning the cases.'"

Other facts appearing in the record tend to confirm the alleged statement of Lynch to the witness Smith that he (Lynch), in attempting to bribe jurors, was not acting under the authority of the attorneys of the street railway company. Lynch testified that he had corrupted jurors in from 25 to 40 cases in which the West Chicago Street Railroad Company was defendant. He could name but 5 of such cases. He testified that his method was to approach jurors before they had been selected to sit in the cases; that he usually arranged to have two jurors to sit in the trial of each case; that he paid each of such jurors from \$50 to \$100 and kept the same amount for himself, and that he would notify the respondent which of the jurors had been so corrupted, in order that such jurors would be accepted by the attorneys for the railway company. It was proven that the respondent participated as attorney in the trial of but two of the five cases mentioned by Lynch, and that in one of such cases the jurors were examined and passed upon by other counsel; that in the other three cases mentioned by Lynch the jurors composing the panel before which the cases were tried were examined and selected and the cause tried by other counsel than the respondent; and that the respondent did not participate in the trial of either of said three cases. Counsel who tried those cases each appeared as witnesses and testified that no one attempted to inform them, or either of them, that any juror should be accepted or rejected, and that they accepted the jurors in each of such cases upon their own judgment, and that if any of such jurors had been tampered with, as alleged by Lynch, it was wholly unknown to them. Moreover, one of the cases, specified by Lynch, and in which, if his statements be true, jurors were corrupted, was an unimportant case against the said street railway company for damages arising from a personal injury, in which the plaintiff,

in the ad damnum of his declaration, claimed but \$500, and in which the plaintiff offered to accept \$150 in full settlement, and on the trial of which the verdict was for the plaintiff in the sum of but \$100. It seems incredible that the attorneys, having full knowledge of the comparatively trivial character of the case, would, to defeat the same, resort to a violation of the criminal law which would expose them to the danger of punishment of such serious nature and consequences, and would require the payment of a sum of money almost, if not quite, equal to that which, in all probability, would result from a trial.

The reliability of Lynch as a witness and the value of his testimony were also affected by still another circumstance. By agreement between the relator and the respondent the transcript of the testimony given by Lynch on the trial of the respondent on the charge of conspiracy was produced as the testimony of Lynch on the issue between the relator and the respondent in this proceeding. Lynch then testified that seven indictments were then pending against him for bribing jurors. He stated that no promises had been made to relieve him from prosecution under these indictments, but that he had a hope of immunity therefrom because of the treatment that other witnesses had received from the state and because he thought he had rendered great public service by exposing jury bribing, etc. The indictments against Lynch remained pending against him as long as the criminal proceeding against the respondent was undetermined, and were thereafter dismissed on motion of the prosecutor for the state. How far the belief that the dismissal of these indictments and his immunity from punishment for crimes of which he was confessedly guilty affected or influenced his testimony cannot be known. That it had some influence and effect can scarcely be doubted. Unless there be found in the record other testimony than that which we have reviewed, we would not be warranted in declaring that the proof established that the respondent had committed the crime of corrupting jurors or of conspiring with Lynch to commit that crime.

Lynch was induced to flee from the state, forfeit his bond given to secure his attendance to answer indictments which had been returned against him charging him with the crime of corrupting jurors, and to remain away until the period allowed for the prosecution of those who had conspired with him to commit that crime had expired. The relator contends that the proof shows that respondent, together with others, induced Lynch to so abscond and secrete himself. If there be found such proof in the record it would not only support the charge to that effect made in the petition, but would also have great weight, even controlling influence, in the state of the proof, in fixing upon the respondent the guilt of the charge of conspiracy to corrupt the jurors. The proof relied upon to show that the respondent participated in the

alleged conspiracy to induce Lynch to abscond is the same as, and no more than, that which we have considered, whereby it was sought to show that the respondent and Lynch met at the respondent's office, at the office of Dr. St. John, at the office of Frederick St. John, at the office of Ross & Fitzpatrick's detective agency, and at respondent's home, and that at these interviews the scheme and plan of arranging for Lynch to flee beyond the jurisdiction of the court were suggested and formulated and perfected. On the theory that this proof established the connection of the respondent with such alleged conspiracy, it is urged the alleged declarations of Edward Maher, George P. Murray, Mrs. Mary McGuirk, and Frederick St. John should be received as declarations of co-conspirators with the respondent, and given weight as testimony against the respondent. But we have found the proof was not sufficient to show that the respondent, at the interview had with Lynch at the respondent's office, made the statements and suggestions relative to the plan to enable Lynch to abscond, as testified to by Lynch. On the contrary, the preponderance of the evidence disproved it. As we have also seen, the evidence was not sufficient to sustain the contention that the respondent had the alleged interviews with Lynch at Dr. St. John's office, at Frederick St. John's office, at Orr and Fitzpatrick's office, or at respondent's house, being the only interviews relied upon to connect respondent with the alleged conspiracy. In such state of the proof, testimony as to the statements of other alleged conspirators would be but mere hearsay and inadmissible as against respondent.

Section 33 of the Criminal Code (Hurd's Rev. St. 1903, c. 38) makes it a criminal offense, punishable by fine and imprisonment in the county jail or imprisonment in the penitentiary, to corrupt or attempt to corrupt a juror with intent to bias his opinion or influence his decision, etc. Section 272 of the said Criminal Code (Hurd's Rev. St. 1903, c. 38) makes it a criminal offense, punishable by fine or imprisonment in the county jail, or both, to induce any person having knowledge of any fact tending to show the guilt or innocence of any other person to leave the state so that his testimony cannot be had, etc. The information herein charges the respondent with the commission of both of these crimes. The rule in Illinois, except as modified by statute in actions of slander or libel, is that when a criminal offense is charged in the pleadings, and must be established either to sustain the cause of action or maintain the defense, the presumption of innocence arises, and the crime charged must be proven by evidence which removes every reasonable doubt of guilt. *Crandall v. Dawson*, 1 Gilman, 556; *McConnel v. Delaware Mutual Ins. Co.*, 18 Ill. 228; *Harbison v. Shook*, 41 Ill. 141; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489. Reason-

able doubts as to the truth of the statements of Lynch can but arise. Even if no more than a mere preponderance of the evidence were required, we would not be justified in saying it is shown by that degree of proof that the respondent conspired with or induced Lynch to corrupt jurors or to abscond from the state.

We find in the record a statement in writing signed by 19 judges of courts of record in Cook county, namely, Judges Tuley, Windes, Baker, Ball, Kavanagh, Chetlain, Tuthill, Walker, Brown, Hanecy, Cutting, Holdom, Kersten, Gibbons, Brentano, Adams, Mack, Stein, and Freeman, to the effect that said judges had known, or known of, the respondent as a member of the bar of Cook county in active practice for 25 years, and that his professional character was never assailed to their knowledge until the charges here under consideration were made; that said respondent was never fined, rebuked, or censured by any of said judges. The same statement, save that they had known the respondent only 20 years, was signed by United States Circuit Judge Grosscup and United States District Judge Kohlsaat, and also by Judge Orrin N. Carter, judge of the county court of Cook county, modified only by the statement that he had known the respondent 15 years. It was agreed that this statement should be admitted in evidence as the sworn statements of said judges, subject, however, to the objection on the part of the relator that it was immaterial, irrelevant, and not admissible as character evidence. The statement did not relate to the general reputation of the respondent for any trait of character, but only to the personal knowledge or personal belief of the signers thereto. It is but the personal testimonial of the signers, and we know of no rule of evidence that would justify us in receiving and considering the statement as legally admissible evidence.

The rule against respondent to show cause why his name should not be stricken from the roll of attorneys is discharged.

Rule discharged.

(218 Ill. 439)

HARRIS v. PEOPLE ex rel. KNIGHT,
County Treasurer.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—PRESUMPTIONS.

Where two ordinances have been passed for the same improvement, one of which is valid and the other invalid, the law will presume that the improvement was made under the valid ordinance.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1137, 1138.]

2. SAME—ORDINANCES—TITLE—CONSTITUTIONAL PROVISIONS.

Const. art. 4, § 13, providing that no act shall embrace more than one subject, which

shall be expressed in the title, does not apply to municipal ordinances.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 258-261.]

3. SAME—SPECIAL ASSESSMENTS—ENFORCEMENT.

The fact that a village clerk fails to file his report of lands delinquent on account of a special tax on the day required by an improvement ordinance does not invalidate the tax, where he thereafter files his report in time to enable the county collector to apply for judgment against the delinquent lands.

4. JURY—RIGHT TO JURY TRIAL—SPECIAL PROCEEDINGS.

Under Hurd's Rev. St. 1903, c. 24, § 291, providing for the construction of sidewalks in cities and villages, a property owner is not entitled to a jury trial upon the question of whether his property is benefited to the extent of the tax levied against it for the construction of the sidewalk.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, §§ 95, 115.]

Appeal from Du Page County Court; Mazzini Slusser, Judge.

Application by the people, on the relation of Frank J. Knight, county treasurer, for judgment and order of sale against the land of S. R. Harris. From a judgment granting the application, defendant appeals. Affirmed.

This was an application by the county collector of Du Page county, made at the June term, 1905, of the county court of that county, for judgment and order of sale against certain property belonging to S. R. Harris, the appellant, located in the village of Lombard, upon which a special tax, levied by authority of the village board of said village, remained due and unpaid. Harris filed a number of objections to the application, which, upon a hearing before the court, were overruled, and on June 17, 1905, judgment was entered against the property for the special tax and costs and a sale ordered to satisfy the same. Harris appeals from the judgment so entered to this court. The special tax purports to have been levied under and by virtue of an ordinance passed by the village of Lombard on September 20, 1904, for the construction of a sidewalk in front of appellant's property, together with other property, in said village. This ordinance was passed under the provisions of an act of the Legislature entitled "An act to provide additional means for the construction of sidewalks in cities, towns and villages," approved April 15, 1875, in force July 1, 1875 (Hurd's Rev. St. 1903, c. 24, § 291), which is commonly known as the "Sidewalk Act of 1875." The ordinance provided that the whole cost of said sidewalk be levied upon the property mentioned in the ordinance in proportion to its frontage on the said sidewalk. A prior ordinance had been passed on July 21, 1904, for the same improvement, and an amendment thereto on August 18, 1904. The ordinance of July 21st did not establish any grade for the sidewalk, but left it to the

engineer in charge of the work to fix such grade. The only provision in the amendment in reference to the grade was, that it should be as established by the engineer in charge or by the president and board of trustees of the village. The ordinance of September 20th specifically establishes a grade for the sidewalk to be constructed thereunder throughout its entire course. Both ordinances contained a provision requiring the village clerk to make a report, in writing, to the county collector on or before March 10, 1905, of all lands upon which the special tax should remain due and unpaid. This report, however, was not filed with the county collector until March 27, 1905. The last section of the ordinance of September 20th provides that all ordinances or parts of ordinances in conflict therewith are thereby repealed. Each of the ordinances gave the owners of the lots fronting upon the proposed sidewalk the right to construct the same within 30 days from the publication thereof. Appellant did not avail himself of this right, and the sidewalk was constructed by the village after the 30 days had expired given by the ordinance of September 20th.

J. F. Snyder, for appellant. H. H. Goodrich, State's Atty., and S. J. Lumbard, for appellee.

SCOTT, J. (after stating the facts). Appellant contends that the ordinance of September 20th did not repeal the ordinance of July 21st, as amended by the ordinance of August 18th, and that the ordinance last above mentioned is therefore the one under which the improvement was made, and that as such amended ordinance neither established any grade nor referred to any grade then established, the improvement was illegally made and the special tax is void. There is no merit in this contention. It is immaterial whether or not the amended ordinance was repealed by the ordinance of September 20th. The amended ordinance did not establish any grade for the proposed sidewalk nor refer to any other ordinance, grade, datum, object, or record by which such grade could be determined, but attempted to delegate the power to establish the grade to the engineer in charge. It was therefore fatally defective. *County of De Witt v. City of Clinton*, 194 Ill. 521, 62 N. E. 780; *Pierson v. People*, 204 Ill. 456, 68 N. E. 388; *McDowell v. People*, 204 Ill. 499, 68 N. E. 379; *Biggins' Estate v. People*, 193 Ill. 601, 61 N. E. 1124; *Craig v. People*, 193 Ill. 199, 61 N. E. 1072. Where two ordinances have been passed for the same improvement, one of which is valid and the other invalid, the law will presume that the improvement was made under the valid ordinance. *Richards v. City of Jerseyville*, 214 Ill. 67, 73 N. E. 370. Moreover, the special tax list prepared by the village clerk

refers exclusively to the ordinance of September 20th, and the report of that officer to the county collector, made in compliance with section 4 of the sidewalk act of 1875 (*Hurd's Rev. St.* 1903, p. 340), makes reference only to the ordinance of September 20th, and that ordinance is the only one attached to said report, while the only fact relied upon by appellant to support his contention that the improvement was made under the amended ordinance is that it was passed at an earlier date than the ordinance of September 20th.

It is further urged by appellant that the ordinance of September 20th violates section 13 of article 4 of the Constitution of this state, which provides that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." In answer to this contention it is sufficient to say that the section of the Constitution relied upon by appellant applies only to acts passed by the Legislature, and has no application to ordinances passed by a city or village. *Chicago Union Traction Co. v. City of Chicago*, 207 Ill. 544, 69 N. E. 849.

The village clerk did not file his report of lands delinquent on account of the special tax with the county collector on March 10, 1905, as directed by the ordinance, but did file it 17 days later. Appellant urges that this delay of the clerk is fatal to the enforcement of the special tax. With this view we cannot concur. The provision in the ordinance requiring the report of the village clerk to be made to the county collector on or before a certain date is not one for the protection or benefit of the owner whose lands are delinquent. Its only purpose is to inform the county collector of the lots or parcels of land that are delinquent, in order that he may apply to the county court for judgment against such property for the special tax remaining due and unpaid. The application cannot be made to the county court in the absence of such report, but in the case at bar the purpose of the ordinance in requiring the report to be filed on March 10th was as fully carried out by filing it on March 27th as though it had been filed on the earlier date, and was therefore a substantial compliance with the ordinance.

The county court overruled appellant's motion for a trial by jury upon the question whether appellant's property had been benefited to the extent of the special tax by the construction of the sidewalk. In this action of the court there was no error. Under the sidewalk act of 1875, the determination by the village board that a sidewalk should be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent

of the special tax. *White v. People*, 94 Ill. 604; *Craw v. Village of Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *City of Sterling v. Galt*, 117 Ill. 11, 7 N. E. 471; *Payne v. Village of South Springfield*, 161 Ill. 285, 44 N. E. 105; *Chicago & Alton Railroad Co. v. City of Joliet*, 153 Ill. 649, 39 N. E. 1077; *Pier-son v. People*, 204 Ill. 456, 68 N. E. 383. This is subject to the qualification, however, that the ordinance shall not be unreasonable or oppressive, the determination of which is a question of law for the court and not a question of fact for a jury. *City of Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791. In accordance with the rule adopted in this state in reference to the determination of benefits in cases of special taxation, it has been uniformly held that the property owner is not entitled to a trial by jury upon the question of such benefits. *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261; *Davis v. City of Litchfield*, 155 Ill. 384, 40 N. E. 354; *Chicago & Alton Railroad Co. v. City of Joliet*, supra; *People v. Yancey*, 167 Ill. 255, 47 N. E. 521.

It is insisted, however, that all of the above cases in reference to the determination of benefits, as well as numerous other decisions of this court in conformity therewith, are overruled by the case of *Job v. City of Alton*, 189 Ill. 256, 59 N. E. 622, 82 Am. St. Rep. 448. In that case Job filed a bill for an injunction against the city of Alton and certain of its officers to enjoin the collection of a special tax for a sidewalk which had been constructed in compliance with an ordinance passed under the sidewalk act of 1875. Job contended that the ordinance there in question and the act under which it was passed were in conflict with the fourteenth amendment to the federal Constitution, which prohibits the state from depriving any person of his property without due process of law and from denying to any person within its jurisdiction the equal protection of the laws, because, under the terms of the ordinance passed in pursuance of the statute, the whole cost of the sidewalk was imposed as a special tax upon the abutting property according to frontage, and was not limited to the amount of benefits, and no provision was made for ascertaining such benefits. The statute of 1875 had been theretofore held to be a valid one by this court in *White v. People*, supra, and *Craw v. Village of Tolono*, supra, and had been subsequently acted upon as a valid statute in other cases before this court; but Job contended that the statute was unconstitutional, as coming within the reasoning of the Supreme Court of the United States in the then recent case of *Village of Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, where that court had decided that the whole cost of opening a street, including the value of the land taken and the cost of condemnation proceedings, could not be assessed back upon the property

abutting on each side of the new street, according to the front foot plan, without regard to the question whether or not the property so assessed was specially benefited to the amount of the assessment, and that such an assessment was void under the fourteenth amendment because it rested upon a basis that excluded any consideration of benefits, and in discussing the case that court used language which apparently included all public improvements within its terms. But this court held in the *Job Case* that the rule laid down in the *Baker Case* did not apply to the construction of sidewalks under the sidewalk act of 1875, and that the ordinance and statute were not in conflict with the fourteenth amendment to the federal Constitution, as construed in the light of the decision of *Village of Norwood v. Baker*, supra. In view of the conclusion reached in *Job v. City of Alton*, supra, any expressions in the opinion in that case questioning the rule that the determination by a village board that a sidewalk should be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent of the special tax, and that the objector is not entitled to a trial by jury on that question, were unnecessary to a decision of the case then before the court, and will not be held to overrule the decisions theretofore rendered by this court.

Finding no error in the record now before us, the judgment of the county court will be affirmed.

Judgment affirmed.

(218 Ill. 445)

FUCHS v. TONE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. EVIDENCE—OPINION EVIDENCE—HYPOTHETICAL QUESTION.

A hypothetical question put by defendant to expert witnesses, in an action by an attorney for fees, as to whether the proceeding instituted by the attorney was necessary to get possession of leased property, is properly excluded, where the evidence that plaintiff's contract of employment covered other matters beside that in relation to the recovery of possession was ignored.

2. SAME.

In an action by an attorney for fees, a question as to what would be a fair and customary charge for certain services is properly excluded, where a considerable portion of the services performed were not included in the question.

Appeal from Appellate Court, First District.

Action by David K. Tone against Albert Fuchs. Judgment for plaintiff was affirmed by the Appellate Court, and defendant appeals. Affirmed.

Stein, Mayer, Stein & Hume, for appellant. Thomas J. Sutherland, for appellee.

BOGGS, J. This was an action in assumpsit commenced in the circuit court of Cook

county to recover money claimed to be due from appellant to appellee for legal services. The declaration consisted of the common counts for money due and unpaid, and a special count alleging a contract for professional services in certain matters, etc. This special count was abandoned by appellee. A hearing was had before the court and a jury which resulted in a verdict and judgment against the appellant in the sum of \$1,400, which judgment was affirmed by the Appellate Court for the First District, and appellant has perfected his further appeal to this court.

The only error relied on by the appellant for reversal of the judgment is that the court refused to admit certain evidence tendered in his behalf. The testimony shows that the appellant was the owner of certain property and premises used in conducting the business of a florist; that in May, 1900, he sold the business and stock to one Walter Retzer for \$30,000, \$10,000 of which was paid in cash; that for the remainder, \$20,000, Retzer gave notes in different sums due at different times, and \$15,000 thereof was guaranteed by one Mrs. Ulrich; that the first note of \$4,000 was paid when due, and a second note for \$2,500 was past due and unpaid; that at the time the business was purchased Retzer took a 99 year lease of the premises, in which the appellant gave to said Retzer an option to buy the buildings on the premises for \$10,000, and also an option to buy the premises, other than buildings, during the continuance of the demised term, for the sum of \$22,500; that during the period prior to the election to purchase the premises the said Retzer was to pay as rental the sum of \$150 per month for the premises, not including the buildings, and \$500 per year for the buildings. This lease, in addition to the covenants to pay the notes, interest, and rents as they fell due, contained the usual clause providing for a forfeiture of said demised premises upon a breach of any of said covenants. In August, 1902, there being a default in the payment of one note, and the accumulated interest and several monthly payments of rent, the appellant, in company with an attorney who had advised him for several years, went to the office of the appellee to employ him as his attorney. The evidence is conflicting as to what the terms of employment were. The appellee insists he was employed to collect the sum of \$28,000 due on the contract of purchase, and enforce the payment of the sum of \$15,000 guaranteed by Mrs. Ulrich; to procure the lease and options for the purchase of the buildings, and of the premises to be canceled; to collect the rents due; and "to stop" said Retzer from selling out the stock and paying out the proceeds to his relatives, etc. The appellant insists, and testified, that he stated the facts and circumstances relative to the dealings with Retzer to the appellee, and told him that one note for \$2,500, being a part of the purchase price of the business, and the interest thereon, were

past due, and that several months' rent was unpaid; that appellee advised him that certain of the provisions in the lease would not stand in court, and that he could not bring any action to take possession of the premises, or it would take two years to secure possession, if he could do so, and that before they could get possession in that way Retzer would have the stock disposed of; and that appellee then advised him (appellant) that a proceeding in bankruptcy was the proper procedure. The appellee, as attorney for appellant, caused proceedings to be instituted to procure Retzer to be declared a bankrupt, and procured an order declaring said Retzer to be a bankrupt, and ordering all of his estate and property of every kind to be sold. He procured the allowance of claims in favor of the appellant against the bankrupt in the sum of \$18,000, and appellant, under the instructions of the appellee as his attorney, appeared at the sale of the property of the bankrupt, and purchased his rights and interests in the lease and the two options aforesaid, and became the owner thereof, and received possession of the premises, including the buildings and fixtures, and appellant received his dividends as a creditor of the bankrupt. In the course of the bankruptcy proceedings there was a great deal of litigation required, which received the care and attention of the appellee as an attorney.

Appellant insisted in the trial court, and so insists here, that what he wanted was to repossess himself of the premises held under the lease and options, and that the appellee proceeded in a circuitous and unnecessarily expensive manner to bring about the desired result, and that he was liable only for such legal services as would have been necessary, had the appellee proceeded in that ordinarily careful and skillful manner required of an attorney according to good practice in his profession. It is therefore complained that the court erred in refusing to allow three expert witnesses to answer the following hypothetical question propounded in behalf of the appellant: "State whether or not, in your opinion, proceedings in the nature of filing a petition in bankruptcy were a necessary and proper proceeding to get possession of the property described and demised by this lease upon covenant broken." A hypothetical question is only proper to be put to expert witnesses when the facts assumed therein stated are fairly within the range of the testimony. *Chicago City Railroad Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28; 8 Ency. of Pl. & Pr. 557. This question as propounded was not and could not be based upon any evidence in the record. There is no evidence in the record to show, or to tend to show, that the appellee was employed solely to recover possession of the premises described in the lease. The testimony of the appellant clearly disclosed that at the time he went to employ the appellee he stated to him the fact of the default in the payment of rents, and the further fact that a

note given for a portion of the purchase price of the business was then due and unpaid, together with the interest thereon, and placed the lease showing the amount of rents due, and also the note and the guaranty of Mrs. Urich in the sum of \$15,000, in the hands of the appellee. The appellant testified that he told appellee that he wanted him to collect the \$15,000 guaranty signed by Mrs. Urich, who was guarantor for a portion of Retzer's indebtedness, and the \$2,500 note, and interest thereon, given as a part of the purchase price of the business, and that under these circumstances the appellee advised the bankruptcy proceedings. There is no evidence tending to show that the appellant asked advice of appellee as to the mode of securing possession of the demised premises. The hypothetical question assumed that the appellee was only employed to recover the possession of the leased premises, and ignored other material facts testified to by the appellant as being a part of the contract of employment. It was proper for the court to require a statement in the hypothetical question of sufficient facts to the witness to enable him or them to give an opinion of some value to the jurors. The question was clearly misleading, and was properly excluded.

It is insisted the court erred in excluding testimony offered by the appellant intended to show "what would be a fair and customary charge in the matter of taking possession under a 99 year lease when the real estate and buildings were of the value of about \$20,000, after conditions broken." This question also ignored a considerable portion of the matters which it is clear the appellee was employed to perform. It was fairly within the discretion of the court to refuse to permit it to be propounded, as it would have been of no aid to the jury, and might have tended to confuse or mislead them.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(218 Ill. 450)

PHILLIPS et al. v. PEOPLE ex rel.
GOEDTNER, County Treasurer.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—NECESSITY OF PETITION.

The absence of petition by property owners for a local improvement does not affect the jurisdiction of the court to confirm an assessment for such improvement, and is no defense to an application for judgment of sale against delinquent property.

2. SAME—CONFIRMATION OF ASSESSMENT—NECESSITY OF NOTICE.

Under the statute requiring notice of an application for judgment of confirmation of an assessment to be mailed to taxpayers, the absence of such notice is fatal to the jurisdiction of the court to enter judgment of confirmation, and may be urged to defeat an application for judgment of sale, provided it appears from the face of the record in condemnation proceedings.

3. SAME—ENFORCEMENT OF ASSESSMENTS—APPEAL—PRESUMPTIONS.

Where it is objected, in opposition to an application for judgment of sale for delinquent special assessments, that no notices of application to confirm the assessment were mailed as required by statute, and the objection is stricken from the files, the Supreme Court cannot presume on appeal that the confirmation proceeding was regular and that the notices were properly mailed, from the fact that the record of the confirmation proceeding is not contained in the record brought before it.

4. DEFENSES.

In opposition to an application for judgment of sale for delinquent special assessments, property owners may show that the improvement constructed was different from that authorized by the ordinance under which the assessment was levied.

5. SAME.

That objectors to an application for judgment of sale in special assessment proceedings were overcharged in the assessment, for the reason that the number of square yards or lineal feet of pavement alleged to have been laid were not actually laid, is not a valid objection to the application.

Appeal from La Salle County Court; W. H. Hinebaugh, Judge.

Application by the people, on the relation of John Goedtner, county treasurer, for judgment and order of sale against the lands of John E. Phillips and others. From a judgment granting the application, defendants appeal. Reversed.

Arthur H. Shay, for appellants. Reeves & Boys and Lloyd Painter (P. J. Lucey, of counsel), for appellee.

CARTWRIGHT, C. J. The county collector of La Salle county applied to the county court of said county for a judgment against the lots of appellants and an order of sale for the first installment of a special assessment for paving East Main street, in Streator. Appellants filed objections in writing to the application, but the court, on motion of the collector, struck the objections from the files. Judgment was thereupon entered against the lots and they were ordered sold to pay said assessment, and from that judgment this appeal was taken.

The objections stricken from the files were five in number. The first one was that the ordinance under which the assessment was levied was void because it was adopted without a petition of the owners of one-half the property abutting on the line of the proposed improvement, as required by law in cities of the population of Streator. The jurisdiction of the county court to confirm the assessment did not depend upon the existence of such petition, and, as the judgment could not be collaterally attacked except for want of jurisdiction, the objection could not be interposed in the proceeding to collect the assessment. *Pipher v. People*, 183 Ill. 436, 56 N. E. 84; *Leitch v. People*, 183 Ill. 569, 56 N. E. 127; *Perisho v. People*, 185 Ill. 334, 56 N. E. 1134; *Conlin v. People*, 190 Ill. 400, 60 N. E. 55; *Sumner v. Village of Milford*, 214 Ill. 388,

73 N. E. 742. The court did not err in striking that objection from the files.

The second objection was that the judgment of confirmation of the assessment sought to be collected was void because no notice of the application for such judgment was mailed to or received by the objectors, or any of them. It alleged that said objectors were, and for three years prior to the proceeding for confirmation had been, and have continued to be, the owners, respectively, of the property for which they objected, and during all that time had been in possession and resided thereon and paid the taxes on the same. That was a valid objection. The statute requires that a notice shall be sent by mail, postpaid, to each of the persons paying the taxes on the respective parcels of property on the assessment roll for the last preceding year during which taxes were paid, and if such notices were not mailed the county court did not acquire jurisdiction to enter the judgment of confirmation. If the fact was as alleged and the want of jurisdiction appeared upon the face of the record of the proceeding to confirm the assessment, appellants had a right to make proof of the fact. The answer of counsel to the assignment of error that the court struck the objection from the files is that the record of the proceeding for confirmation is not contained in the record in this case, and that therefore it will be presumed that the court, in confirming the assessment, proceeded regularly and had jurisdiction, and that all notices required by law were given. What would have been proved by the record of the proceeding for confirmation if the objectors had been permitted to make the proof, of course, does not appear, but the complaint is that the court refused to allow them to show the fact. The collector's report, with proof of publication thereof and notice of application for judgment, made a prima facie case for the collector. *People v. Givens*, 123 Ill. 352, 15 N. E. 23; *Scott v. People*, 142 Ill. 291, 33 N. E. 180. The objectors had a right to meet the prima facie case by showing a want of jurisdiction upon the face of the record of the former proceeding, and when they filed their objection it was their right to have it heard. The court erred in striking the objection from the files.

The third objection was that the improvement described in the ordinance under which the assessment was levied was not constructed, but that in the place of such improvement another and wholly different improvement was made and at a different grade, and it set forth the facts relied upon to sustain the objection. The objectors were entitled to show in defense of the application for judgment that the improvement provided for, and for which the assessment was levied, was a different one from the one actually constructed, which they were asked to pay for. *Young v. People*, 196 Ill. 608, 63 N. E. 1075; *Gage v. People*, 200 Ill. 432, 65 N. E. 1084; *Eustace*

v. People, 218 Ill. 424, 72 N. E. 1089. It is argued that the order of the court was correct, because the local improvement act provides that the board of local improvements shall make a final report to the county court after the improvement is completed; that notice shall be given to the parties in interest, and a hearing can be had on the question whether or not the improvement has been made in substantial compliance with the ordinance, and therefore the objection that the improvement is a different one from the one provided for by the ordinance comes too late. The existence of such a statute does not establish the fact that there was such a report in this case, with an opportunity to the objectors to be heard upon the question raised by the objection. The objection was stricken from the files without a hearing, and whether the identity of the improvement with the one provided for had become res judicata does not appear. The court erred in striking that objection from the files.

The fourth and fifth objections set forth that the appellants were overcharged in the assessment, for the reason that there were not the same number of square yards, or lineal feet of pavement which were alleged to have been laid. It did not appear from these objections that the improvement was not the same one provided for by the ordinance, or that the improvement as constructed had been fully paid for. They were not valid objections to the application, and it was not error to strike them from the files.

For the errors in striking from the files the second and third objections the judgment is reversed, and the cause is remanded to the county court.

Reversed and remanded.

(218 Ill. 577)
PEOPLE ex rel. PRICE, County Treasurer,
v. LYON et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—DEFENSES.

On an application for judgment under a special assessment for a village improvement, defendant may show that the improvement as constructed was not in compliance with the ordinance.

2. SAME—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where the county court has certified that the bill of exceptions contains all the evidence at the time objections to the confirmation of a special assessment were disposed of, and the defense to the confirmation was that the improvement was not in accordance with the ordinance, and the ordinance is not in the record, the judgment for defendant will be reversed, as it could not be shown without such evidence that the improvement was not in accordance therewith.

Appeal from Lake County Court; De Witt L. Jones, Judge.

Action by the people, on the relation of Lewis C. Price, county treasurer, against

Harry A. Lyon and others. Judgment for defendants, and plaintiff appeals. Reversed.

Huff & Cook (Smoot & Eyer, of counsel), for appellant.

HAND, J. This is an appeal from a judgment of the county court of Lake county refusing judgment and order of sale against the property of appellees for the first installment of a special assessment for improving certain streets in the village of Lake Bluff. But one objection was filed, which was to the effect that the improvement constructed was not the improvement provided for in the improvement ordinance, which objection was sustained by the court, and judgment rendered in favor of the objectors. Two reasons are urged as grounds of reversal in this court:

First. That the question of whether the improvement constructed is the improvement provided for in the improvement ordinance cannot be raised on application for judgment and order of sale, as it is said that question can only be raised in the county court under the provisions of section 84 of the local improvement act, as amended in 1903 (Laws 1903, p. 105). The collector's report, with proof of publication thereof and notice of application for judgment, made a prima facie case for the appellant (*People v. Givens*, 123 Ill. 352, 15 N. E. 23; *Scott v. People*, 142 Ill. 291, 33 N. E. 180); and under the repeated decisions of this court (*Pells v. People*, 159 Ill. 580, 42 N. E. 784; *Young v. People*, 196 Ill. 603, 63 N. E. 1075; *Gage v. People*, 200 Ill. 432, 65 N. E. 1064; *Eustace v. People*, 213 Ill. 424, 72 N. E. 1089; *Phillips v. People*, 75 N. E. 1016) on application for judgment and order of sale it may be shown the improvement provided for in the ordinance and for which the assessment was levied was a different improvement from the one actually constructed. The basis of these decisions is that a valid ordinance must lie at the foundation of every assessment, and if the improvement constructed is not the improvement provided for in the ordinance then there is no ordinance in existence providing for the construction of the improvement made, and at the time of confirmation it can not be ascertained that the improvement which will be constructed will not be the improvement provided for in the ordinance. *Pells v. People*, supra; *Young v. People*, supra. In the latter case (on page 605 of 196 Ill., and page 1076 of 63 N. E.) it was said: "The improvement as constructed under the contract, being essentially different and another improvement than that called for in the ordinance, the appellants cannot be compelled to pay for the same by special assessment. This defense arising subsequently to the confirmation of the assessment may be set up when the collector seeks judgment." The question of the effect of section 84 of the local improvement act, as amended in 1903 (Laws 1903, p. 105), does not arise in this case, as

it does not appear from the record that the proceeding provided for in said section had been had in the county court. If the question of whether the improvement made was the improvement provided for in the ordinance had not been settled in a proceeding under that section, such proceeding cannot be held to be res judicata of the question raised here. *Phillips v. People*, supra.

Second. The next reason urged as ground of reversal is that the improvement ordinance was not introduced in evidence on the trial of this case, and that for that reason, it is said, it could not be determined by the trial court, and cannot be determined by this court, that the improvement constructed was not the improvement provided for in the ordinance. This objection is well taken. The improvement ordinance is not found in the record, and as that ordinance is not before us it is manifest we cannot determine whether the improvement made is the improvement provided for in the ordinance or not. The judge of the county court has certified the bill of exceptions found in the record contains all the evidence heard by the trial court at the time the objections to confirmation were disposed of, and, as that court appears to have decided the improvement made was not the improvement provided for in the improvement ordinance without that ordinance having been offered in evidence, it clearly erred.

The judgment of the county court will therefore be reversed.

Judgment reversed.

(218 Ill. 454)

DOUGLAS PARK BLDG. ASS'N v. ROBERTS.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. COURTS—FREEHOLD INVOLVED.

Where a freehold involved in the pleas is not involved in the assignments of error, the appeal should be taken to the Appellate Court.

2. SAME—ISSUES BELOW.

An appeal in trespass quare clausum fregit should be taken to the Appellate Court, though the action grows out of the attempt of a receiver in foreclosure to take possession of the premises, where the title is in no way questioned and the only issue was one of the right of possession.

Appeal from Appellate Court, First District.

Bill by the Douglas Park Building Association against Mary G. Armstrong Roberts. Judgment for plaintiff. From an order of the Appellate Court, dismissing appeal, defendant appeals. Reversed.

The Douglas Park Building Association, one of the appellants, filed its bill in the circuit court of Cook county against appellee to foreclose a mortgage on the premises in question. A decree of foreclosure was entered by default, and upon a report of sale being made a deficiency decree was rendered for \$205. Harry L. Burnette, one of the appel-

lants, was appointed receiver on March 10, 1894, with authority to take possession, collect rents, etc. The property was occupied by appellee, together with her tenants. The receiver visited the premises, and, claiming that the rear door was unlocked, entered and found certain property of appellee in some of the rooms. He put up a notice of his appointment as receiver and took possession. Appellee, upon her return after an absence of a day or two, claims she found the door to her premises locked and was deprived of the possession of the same, together with certain articles of personal property, for about five weeks. The receiver made a contract of sale of the premises, and the purchaser moved in on March 26, 1894. Appellee paid the deficiency judgment and the court ordered the receiver discharged. On November 6, 1895, appellee commenced an action of trespass against appellants for the unlawful invasion of her premises. The first seven counts of the declaration complained of a trespass in May, 1894, by appellants and others, who with force and arms entered a certain dwelling house of the plaintiff and made a great noise and disturbance, and threatened plaintiff and her tenants with eviction and violence, and removed plaintiff and her tenants from the possession of the house, and carried away and converted her chattels, etc. The eighth count complains of a trespass on October 19, 1895, when her tenants were ordered to quit and her trees and shrubs were cut down. The appellants filed six pleas—not guilty; license; liberum tenementum; freehold of Hokens and license from him; a mortgage from appellee to the appellant association, and default, and that it peaceably and without force entered with the other defendants, as they lawfully might; that defendant Burnette was receiver, with authority to take possession and enter with the other appellants, his servants. Replications were filed joining issue upon all the pleas. Upon the trial the jury found all the appellants guilty, except L. C. Bonney, in whose favor a verdict was directed, and damages were assessed in the sum of \$597. Appellee remitted \$400 and judgment was entered upon the verdict, from which an appeal was prosecuted to the Appellate Court. Upon a hearing in that court the appeal was dismissed upon the ground that a freehold was involved and that the appeal should have been prosecuted to this court.

Lyman M. Paine, for appellant. Charles H. Roberts, for appellee.

WILKIN, J. (after stating the facts). The sole question in the case is whether or not the Appellate Court properly held that a freehold was involved and that the case should have come directly to this court. It has been held that a freehold is involved, within the meaning of the Constitution and statute, only in case where the necessary result of the judgment or decree is that one party gains and the oth-

er loses a freehold estate, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue. *Malaer v. Hudgens*, 130 Ill. 225, 22 N. E. 855; *Sanford v. Kane*, 127 Ill. 591, 20 N. E. 810. We have also held that in an action of trespass *quare clausum fregit* to which the plea of *liberum tenementum* was pleaded a freehold was involved, although the only judgment for plaintiff would be one of damages for the trespass, because the plaintiff's right to damages depended upon the success or failure of the defendant in establishing his title to the freehold. *Town of Brushy Mound v. McClinton*, 146 Ill. 643, 35 N. E. 159; *Piper v. Connelly*, 108 Ill. 646. But it is not in every case where a freehold is involved, either in the pleas or in the original decree, that an appeal lies directly to this court. If a freehold is not involved in the points assigned for error, the appeal must be taken to the Appellate Court. *Fields v. Coker*, 161 Ill. 186, 43 N. E. 616; *Franklin v. Loan & Investment Co.*, 152 Ill. 345, 38 N. E. 921; *Prouty v. Moss*, 188 Ill. 84, 53 N. E. 926.

The suit at bar was the indirect result or outgrowth of a foreclosure proceeding commenced against appellee. A bill to foreclose a mortgage does not ordinarily involve a freehold, because the defendant may in such case, by the payment of the money necessary to discharge the lien, prevent the decree from being so executed as to divest him of his freehold, and usually the only question litigated is the existence of the lien; the title itself not being put in issue. *Sanford v. Kane*, 127 Ill. 591, 20 N. E. 810. There was nothing to remove this case out of the operation of the rule. The title was in no way questioned in the foreclosure proceedings, and therefore no freehold was there involved. The receiver, in the exercise of his supposed authority, endeavored to take possession of the premises, and out of his acts grew the present suit. The declaration alleged a trespass *quare clausum fregit* and a plea of *liberum tenementum* was filed; but a careful reading of the record discloses the fact that the question of title was not in any way necessarily involved in the case, nor do we think it was tried upon the theory that the question of title was involved. The sole question was as to who was entitled to the possession of the premises. Appellants claimed the right by reason of the decree of foreclosure and the appointment of the receiver, while appellee claimed that she was entitled to the possession and was unlawfully deprived thereof. The instructions of the court upon both sides of the case were along this line. The right of possession was the only question prominently kept before the jury in all of them, and the invasion of that right was the injury complained of. Neither one of the parties gained nor lost a freehold estate, and the question of title was in no way put in issue in such a way as to necessarily invoke a decision upon that point. The title of defendant did not have to be es-

established in order to properly defend the suit brought against him. His right of possession, if at all, was by virtue of a decree of foreclosure which in no way involved a freehold. The question of a freehold was not involved in any of the assignments of error, and even though the pleadings were sufficient to involve a freehold, yet the determination of the case and the errors assigned were not sufficient to entitle appellants to an appeal directly to this court. To say otherwise would be to hold that in all cases of trespass the appeal must be directly from the trial court to this court, no matter whether a freehold was directly or indirectly involved in the case.

The Appellate Court committed reversible error in dismissing the appeal, and the judgment will be reversed, and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(218 Ill. 458)

SENN et al. v. GREUNDLING.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. COURTS—APPELLATE JURISDICTION—DETERMINATION OF FREEHOLD.

Where it appears from the record in probate proceedings that testator owned real estate which passed under the residuary clause of his will, a freehold is involved, and an appeal to the Supreme Court will lie from an order permitting the will to probate, although the will does not in terms devise real estate.

2. WILLS—PROBATE—REFUSAL—CONCLUSIVENESS OF ADJUDICATION.

Where an appeal from an order of the county court denying probate of a will is dismissed, the judgment of the county court is left in full force; but where proponent, after having appealed to the circuit court, is granted leave by that court to withdraw his petition and dismiss the proceeding, the whole proceeding is at an end, and a new proceeding can be commenced, and is not barred by the original judgment of the county court denying probate.

3. SAME—APPEAL—TRIAL DE NOVO—EVIDENCE.

On appeal to the circuit court from an order of the county court denying probate of a will, proponent may support the will by any evidence which is competent to prove the requisites of a valid will.

4. SAME—VALIDITY OF WILL—REQUISITES.

Requisites of a valid will of a person competent to make a will are that it should be reduced to writing, and signed by the testator or testatrix or some person in his or her presence, and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 249-254.]

5. SAME—ATTESTATION—SIGNING IN TESTATOR'S PRESENCE—SUFFICIENCY OF EVIDENCE.

In a will contest, evidence held sufficient to sustain a finding that the will was signed by testator in the presence of the witnesses.

Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Petition for the probate of a will by Gustav A. Greundling against Rudolph Senn and others. From a judgment of the circuit

court, admitting the will to probate on appeal from the county court, contestants appeal. Affirmed.

George C. Rebhan, for appellants. H. R. Heimberger, guardian ad litem, for unknown heirs. Webb & Webb, for appellee.

OARTWRIGHT, C. J. John Senn, of St. Clair county, died on March 6, 1904, leaving no widow or child, and his heirs at law were his brothers and sisters, nieces and nephews. On March 9, 1904, the appellee, who was named as executor in an instrument purporting to be the last will of John Senn, filed his petition in the county court for the probate of said instrument as such will. Probate was denied, and petitioner appealed to the circuit court. After the evidence was heard in the circuit court, but before judgment, the court, on motion of the petitioner, dismissed the proceeding, and granted leave to withdraw the petition. On November 21, 1904, the public administrator of said county applied for letters of administration, alleging in his petition that the deceased died seised and possessed of a farm in Perry county and personal property, and letters were thereupon issued to the public administrator. On December 16, 1904, appellee filed a new petition and made a second application for the probate of the will. Appellants, who were heirs at law and contestants in the proceeding, moved the court to dismiss the petition, on the ground that the former judgment refusing probate was still in force. The motion does not seem to have been acted upon, and the cause was again heard in the county court, and probate of the will was refused. From that judgment, the petitioner again appealed to the circuit court. In the circuit court the contestants renewed their motion to dismiss the petition, on the ground that the question of probate was res judicata, but the motion was denied. A hearing was had, and the will was admitted to probate. From that judgment, an appeal was taken to this court.

Appellee asks us to dismiss the appeal, on the ground that no freehold is involved. The will does not, in terms, devise real estate, but it sufficiently appears from the record that the decedent owned real estate which was devised by the residuary clause, and that a freehold is involved.

It is first contended by appellants that the circuit court erred in refusing to dismiss the petition, on the ground that the judgment of the probate court was still in force, and the question of the validity of the will was res judicata. Any person interested in the probate of a will may exhibit the same in the county court, and petition the court for the probate thereof, and the person instituting such proceeding becomes the proponent of the will. Any party interested in the alleged will may appear and resist the probate, and he thereby becomes a contestant.

The petitioner has a right to control his own petition, and to dismiss it whenever he chooses. When there is a decision by the county court, any person interested in the will may appeal to the circuit court. The party taking an appeal has a right to control his appeal and to dismiss it at his pleasure, and in that event the judgment of the probate court is left in full force and effect. In *re Storey*, 120 Ill. 244, 11 N. E. 209. The judgment of the county court is superseded by an appeal, and if the petition is dismissed in the circuit court, the whole proceeding is at an end, and there is no bar to a new proceeding. *Thompson v. Owen*, 174 Ill. 229, 51 N. E. 1046, 45 L. R. A. 682. The petitioner has the same right to dismiss the petition in the circuit court as in the county court. In this case the petitioner did not dismiss his appeal, but did dismiss his petition, as he had a right to do. The proceeding was thereby ended, and the circuit court did not err in refusing to dismiss the second petition.

It is next contended that the evidence produced did not warrant the circuit court in admitting the will to probate. The requisites to a valid will of a person competent to make a will are that it shall be reduced to writing and signed by the testator or testatrix, or by some person in his or her presence and by his or her direction, and attested in the presence of the testator or testatrix by two or more credible witnesses. Upon an application to the county court for the probate of a will, these facts must be proved by at least two subscribing witnesses. In case probate of the will is refused by the county court, and an appeal is taken to the circuit court, it is then lawful for the parties seeking the probate of the will to support the same on the hearing by any evidence competent to establish a will in chancery. *Thompson v. Owen*, supra; *Masonic Orphans' Home v. Gracy*, 190 Ill. 95, 60 N. E. 194; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907. Formerly, in England, the only method of establishing a will devising real estate was by a bill in chancery, and in case of an appeal from a judgment of the county court refusing probate, our statute authorizes proof of the necessary facts by the same kind of evidence as though the proceeding were in chancery. The parties seeking probate are not confined to the testimony of the subscribing witnesses, but may establish the will by any evidence which proves the necessary facts above stated. In this case the only question of fact in dispute was whether the testator signed the will in the presence of the witnesses. He wrote the will himself, and signed it at same time. The witnesses signed it in his presence and at his request. His signature was proved to be in his handwriting, and that fact is not disputed. He called in two of his neighbors, Peter Armbruster and Adam Jung, as witnesses, and they were the only parties present at the execution of the will. When

the witnesses came in, the paper was lying on a table. It was in the daytime, and he told them that he wanted them to sign the will as witnesses. He said that it was his will, and one that he had made out. Jung could not read or write. He testified that the will was lying there on a table before the testator and the witnesses; that the testator sat down to write, and said that he was going to write his name, or the will would not be good; that he took a pen and signed the will in the presence of both witnesses. Jung could not read the name, or tell whether it was the testator's name or not, but both witnesses identified the paper, and there is no dispute as to its identity. Both witnesses testified that the testator requested them to sign the will; that Armbruster signed his name at the left-hand side of the paper, opposite where the testator's name appeared when the will was offered for probate; that Jung, being unable to write, requested Armbruster to sign his name, and Armbruster did so. Armbruster testified that the testator had the paper in his hand when the witnesses came in, and read it to them; that he took no notice whether the testator had a pen in his hand afterwards, but that testator's name was not subscribed to the will when he signed it. The petitioner introduced in evidence an affidavit made by Armbruster in the county court, stating that the will was signed by the testator in his presence, and showing a full compliance with all the statutory requirements to constitute a valid will. There was also testimony that the affidavit was filled out and read to the witness, and that he took it and read it, or appeared to do so, and then said it was all right, and signed his name to it. On the controverted question of fact, one of the subscribing witnesses testified that the testator signed the will in the presence of the subscribing witnesses. The other one testified that he did not, but he was contradicted by his own affidavit made in the county court. We cannot say that the court, who saw and heard the witness, erred in concluding that the statement made in the affidavit was true, and that he was mistaken in his testimony on the trial.

The judgment is affirmed.

Judgment affirmed.

(218 Ill. 463)

CHICAGO & E. I. R. CO. v. PEOPLE ex rel. SMITH, County Treasurer.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. TAXATION—SALES OF LAND—APPLICATIONS FOR JUDGMENT OF SALE—OBJECTION.

Under Revenue Act (Hurd's Rev. St. 1903, c. 120) § 191, authorizing any person interested to object to the rendition of judgment and order of sale against land in which he is interested, a railroad may object to an application for judgment of sale against lands taxed in its name, without averring or proving that it is interested in the land.

2. MUNICIPAL CORPORATIONS — TAXATION — LEVY — PURPOSES OF TAX — NECESSITY OF RECITAL.

Where a tax levy ordinance refers to the appropriation ordinance, which specifies in detail the objects for which the tax is levied, the failure of the tax levy ordinance to itself specify the objects of the tax is not fatal.

3. TAXATION—OF RAILROAD PROPERTY.

Land adjoining the right of way of a railroad, which is used by the railroad as a reservoir from which it obtains water for its locomotives and other purposes connected with the operation of the railroad, is properly assessed as "railroad track" by the state board of equalization.

4. SAME—ASSESSMENT BY LOCAL AUTHORITIES.

Where a portion of a tract of land belonging to a railroad and situated adjacent to its track is used for a reservoir, and is consequently assessable by the state board of equalization, and the balance of it is not so used, it is the duty of the local assessor to assess the balance only, and to so describe it as to identify it; and a tax based on his assessment of the entire tract is invalid.

5. COUNTIES—TAXATION—LEVY OF ADDITIONAL TAX—MEETING OF COUNTY BOARD.

Under Hurd's Rev. St. 1903, c. 34, § 27, authorizing the levy of a tax in excess of 75 cents on the \$100 by a vote of the people, and providing that, if a majority of the votes cast are for the additional tax, the county board shall have power to cause such additional tax to be levied and collected in accordance with the terms of the resolution, the county board should, if practicable, act immediately after it has been determined that the proposition for the levy of an additional tax has prevailed, and is not required to delay the tax levy until its following September meeting.

6. SAME—RECORD OF COUNTY BOARD.

In such case the record of the county board should show that the resolution for the additional tax was "adopted," and it is not sufficient for it to show that such resolution was "offered."

Appeal from Marion County Court; Charles H. Holt, Judge.

Application by the people, on the relation of Samuel J. Smith, county treasurer, for judgment and order of sale against the lands of the Chicago & Eastern Illinois Railroad Company. From a judgment granting the application, defendant appeals. Reversed in part.

H. T. Dick and L. M. Kagy (W. H. Lyford and E. H. Seneff, of counsel), for appellant. June C. Smith, for appellee.

HAND, J. This is an appeal from a judgment and order of sale of the county court of Marion county against certain lands in said county, taxed in the name of the appellant, for the taxes levied thereon for the year 1904.

First. The contention is made by appellee that the objections of appellant were rightfully overruled, as it is said the objections filed did not show the appellant was interested in the lands sought to be taxed. The lands were taxed in the name of appellant, or in the name of appellant and that of the Chicago, Paducah & Memphis Railroad Company, jointly. Section 191 of the revenue act (Hurd's Rev. St. 1903, c. 120) provides that any person interested therein may object,

specifying the cause of objection in writing, to the rendition of judgment and order of sale against any land in which he is interested. The lands in question having been taxed in the name of appellant, it was not necessary it aver or prove it was interested in said lands. *Cincinnati, Indianapolis & Western Railway Co. v. People*, 205 Ill. 538, 69 N. E. 40. The court properly held the appellant had the right to object to the rendition of judgment and order of sale against said lands.

Second. The first tax objected to is a tax of \$108.58 in favor of the city of Kinmundy. This tax was levied in pursuance of a tax-levying ordinance which did not specify in detail the objects and purposes for which the tax was levied. It, however, referred to the appropriation ordinance, which did specify in detail the amount appropriated for each object and purpose. The tax-levying ordinance should have specified in detail each object and purpose for which the tax was levied. As, however, it in express terms referred to the appropriation ordinance, which ordinance contained such information in detail, the tax levy was not void by reason of such omission in the tax-levying ordinance, as the omission from the tax-levying ordinance of such detailed information did not affect the substantial justice of the tax, and the defect was cured by section 191 of the revenue act. The question presented here was raised and passed upon adversely to the contention of appellant in the case of *Spring Valley Coal Co. v. People*, 157 Ill. 543, 41 N. E. 874. That case is conclusive of the question raised here, and the court did not err in overruling the objections of the appellant to the rendition of judgment and order of sale for said city tax.

Third. The next tax objected to is a tax of \$8.12, sought to be collected from appellant upon 25.24 acres of land adjoining its right of way, about one-half of which land is used by appellant as a reservoir from which it obtains water for its locomotives and for other purposes connected with the operation of its railroad. Said land was assessed for the year 1904 by the state board of equalization as "railroad track," and we think it clear, under the repeated decisions of this court (*Chicago & Alton Railroad Co. v. People*, 98 Ill. 350; *Peoria, Decatur & Evansville Railway Co. v. Goar*, 118 Ill. 134, 8 N. E. 682; *Chicago & Alton Railroad Co. v. People*, 129 Ill. 571, 22 N. E. 864, 25 N. E. 5; *People v. State Board of Equalization*, 205 Ill. 296, 68 N. E. 943; *People v. Atchison, Topeka & Santa Fé Railway Co.*, 206 Ill. 252, 68 N. E. 1059; *People v. Illinois Central Railroad Co.*, 215 Ill. 177, 74 N. E. 116), that the portion of said land used by appellant as a reservoir, within the meaning of the law, is "railroad track," and was taxable as such. If the portion of said land not used as a reservoir was not properly assessed as "railroad track," it was the duty of the local as-

essor to assess it separately from the portion thereof used as a reservoir, and to so describe the same that the portion assessed by him could be identified. This he did not do, but assessed the entire tract. The result of such assessment would be to lead to double taxation, which is not permissible. *Chicago & Alton Railroad Co. v. People*, 99 Ill. 464; *Wabash Railroad Co. v. People*, 196 Ill. 606, 63 N. E. 1084. The objection of appellant, for the reasons suggested, should have been sustained as to the tax levied upon said 25.24 acres of land.

Fourth. The next tax objected to is an additional county tax of \$444.68 attempted to be levied by the county board in excess of the 75 cents on the \$100 permitted to be levied by said county board for county purposes, and was sought to be levied by virtue of a vote of the people in accordance with the provisions of section 27 of chapter 34 of Hurd's Revised Statutes of 1903. It is first contended this tax was not levied by the county board at the proper time—that is, it was levied in January, 1905, when it should have been levied in September, 1905; and, secondly, that there is no evidence of a tax levy covering this tax made at any time by the county board, found in this record.

As to the first objection, it appears that the county of Marion was, by reason of its outstanding indebtedness, in need of more money than 75 cents on the \$100 would produce, and the county board at its September meeting, 1904, authorized the county clerk to call a special election to vote upon the proposition of an increased levy of 42 cents on the \$100. The election was called, and after a contest it was held the proposition to levy said additional tax of 42 cents on the \$100 had been adopted by the electors of said county. Thereupon the county clerk, upon the petition of seven supervisors, called a special meeting of the county board, which convened on the 7th of January, 1905, for the purpose of making said additional tax levy of 42 cents on the \$100, in accordance with the resolution passed by said board at its September meeting and the vote of the electors of the county, and that subsequent to the January meeting of said county board the county clerk of Marion county extended the said tax upon the books of the county. The section above referred to (section 27, c. 34, Hurd's Rev. St. 1903) provides: "If a majority of the votes cast upon the question are 'For additional tax,' then the county board shall have power to cause such additional tax to be levied and collected in accordance with the terms of such resolution"—i. e., the resolution of the county board fixing the amount of the additional tax required and the purpose for which the same is required, which resolution in this case was passed by the county board at its September meeting, 1904. We think it clear that said section contemplates that the county

board, if practicable, will act immediately after it has been determined that the proposition for the levy of an additional tax has prevailed, and that the county board, as is contended by appellant, is not required to delay such tax levy until its following September meeting, and are therefore of the opinion the county board had power, on the 7th of January, 1905, to make said additional tax levy in accordance with the resolution of the board adopted at its preceding September meeting.

This brings us to a consideration of appellant's second objection to this tax. It appears from the record that the county board met in special session on the 7th of January, 1905, and that at its meeting on that day "the following proceedings were had, to wit: The following resolution was offered." Then follows a copy of the resolution relied upon by the appellee as an extension of the additional tax levy of 42 cents on the \$100 upon the taxable property of said county, which resolution refers to the preceding resolution of the county board passed at its September meeting, recites that the proposition for the additional tax levy had been carried at the election, and directs a tax levy of 42 cents on the \$100, in accordance with the resolution of the board passed at its preceding September meeting. The record, however, fails to show that said resolution was adopted by the county board. It shows only that it was "offered." The validity of said additional tax levy rests entirely upon the supposed action of the county board at said special January, 1905, meeting. If the county board at that time failed to adopt said resolution, then no tax levy for said additional tax was made. The appellee contends the resolution was adopted. This, perhaps, is true. The answer to this contention is, however, that the record does not show that fact, and we are bound by the record; and, as it does not appear the resolution "offered" was adopted by the county board, we are forced to hold the additional tax levy of 42 cents on the \$100 was never made, and for that reason the additional tax was illegal, and the county court erred in overruling the appellant's objection to said tax.

The judgment of the county court will therefore be reversed as to said tax for \$8.12 assessed against said 25.24 acres of land, and also as to said additional county tax for \$444.68, and affirmed as to the \$108.58 tax in favor of the city of Kimmunity, and judgment will be entered in this court against the appellant for said city tax, and the amount of that tax will be deducted from the deposit of the appellant in the hands of the county collector of Marion county, in accordance with the provisions of section 192 of the revenue act (Hurd's Rev. St. 1903, c. 120).

Reversed in part, and remanded.

(218 Ill. 496)

STEVENS v. HENRY COUNTY et al.
(Supreme Court of Illinois. Dec. 20, 1905.)

1. COUNTIES—INJUNCTION—GROUNDS—VOID CONTRACTS—TAXPAYERS' SUIT.

Where a void contract made by a county or municipality will generally affect the rights of the taxpayers therein, any citizen and taxpayer of such county or municipality may sue to enjoin the enforcement of the contract.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Counties, § 808; vol. 27, Cent. Dig. Injunction, §§ 207, 208.]

2. SAME—TAXATION—POWERS OF COUNTY BOARD—EMPLOYMENT OF TAX FERRER.

Hurd's Rev. St. 1903, c. 84, §§ 22-26, define the powers and duties of counties and county boards, and empower them to make contracts in relation to the property and concerns of the county, to manage the county funds, and examine and settle accounts against the county. Section 33 of the same chapter requires county boards to take suitable measures in prosecuting and defending suits by or against the county, and to enforce the collection of taxes charged on the state assessment. Chapter 120, par. 329, requires the board of review to assess property subject to assessment which shall not have been assessed by the assessors. *Held*, that the power of assessing for taxation property omitted in former years rests exclusively with the board of review, and the county board has no power to employ a tax ferret to search for omitted property.

3. SAME—POWERS OF TREASURER.

A county treasurer, who is as such supervisor of assessments of the county, has no supervision over the board of review, and has nothing to do with assessing omitted property either personally or through his deputies.

Appeal from Appellate Court, Second District.

Bill by Charles F. Stevens against the county of Henry and others. From a judgment of the Appellate Court, reversing a decree in favor of complainant, complainant appeals. Reversed.

Henry county is under township organization. It has a population of less than 125,000. On January 6, 1904, said Henry county, by its board of supervisors, by resolution duly entered of record, contracted with George H. Manlove "to make diligent and careful search in this and other counties and states for such omitted and unassessed taxable property the taxes upon which are lawfully in this county, and upon the discovery thereof to report same to the proper officials, who shall proceed, as directed by the statute of the state of Illinois, to place same on tax rolls, and to collect taxes therefrom, and also to make diligent and careful search for money due from other sources." Said Manlove was to receive as compensation for such services "a sum equal to twenty per cent. of all money collected as a result of such services, but in no event to exceed the county's share of the amount so collected," and "to have one year, or such time as may be necessary, to complete such services," and was to furnish bond to keep safe and harmless the county from all costs, expenses, and damages which may arise by reason of his doing anything under such

agreement. By the order of employment it is also provided: "The county clerk is ordered to issue a warrant to the said George H. Manlove for any sums of money due him, on proper verified accounts to be filed with him." Appellant, a citizen, resident, and taxpayer of said county, in March, 1904, exhibited his bill in the circuit court of said county for an injunction to restrain said county, the county clerk, the county treasurer, and said Manlove, the appellees herein, from executing said contract. On notice to appellees, a temporary or interlocutory injunction was issued March 7, 1904. The bill alleged the making of the contract, and that appellee Manlove had executed the indemnity bond to the county in compliance with the order of employment, and that said Manlove and the county were about to enter upon the execution of the contract; that said contract is unlawful, null, void, ultra vires, contrary to law and public policy, and if permitted to be executed the moneys of the county would be unlawfully wasted and misappropriated, to the injury of the taxpayers. In his bill appellant stated that he is not advised whether there is any omitted or unassessed taxable property in the county upon which taxes are due, but, if there is any such property, it is the duty of the township officers and supervisor of assessments and board of review to place the same upon the tax books of the county, and, in event of the unlawful failure or refusal, there is a remedy to compel them so to do. In August, 1904, appellees filed there joint and several answer, in which they admitted the making of the contract between said Henry county and said Manlove, and admitted that said Manlove had filed his bond conditioned in pursuance of said contract, and that appellees were ready and intended to carry out and execute said contract. Appellees, further answering, say that John S. Smith, the supervisor of assessments, intended and expected to appoint said Manlove deputy supervisor of assessments for said county for the ensuing year after date of such contract, and that said Manlove was to receive and accept such appointment, to make careful and diligent search for property omitted from assessment of taxes due said county and its subordinate municipalities, and to make report of the same to proper officials of the county for assessment and taxation; and that the board of supervisors for the county expected to approve and consent to such appointment and that when they made the contract mentioned in the bill they intended to advise such appointment of Manlove by the supervisor of assessments, and said board expected to ratify the appointment, and fix his compensation as the same was fixed by said contract. They further state in their answer that they are informed and believe it to be true that a large amount of personal property, representing hundreds of thousands

of dollars of various kinds of securities that should be listed in said county, is unlawfully and corruptly secreted, and held from the assessment roll; that many of said securities are of record in other counties of this state and in other states, and that, unless some one is employed to make diligent search for such property, the taxes thereon will be wholly lost. Appellant excepted to so much of the answer as set up the intention of the supervisor of assessments to appoint Manlove his deputy, and of the county board to approve the appointment and fix the salary the same as it was fixed in the contract, and the court sustained the exception. The case was heard at the September term, 1904, on the bill and answer, and a decree was entered perpetually enjoining the execution of the contract. An appeal was prosecuted to the Appellate Court for the Second District, where the decree of the circuit court was reversed, and the cause remanded, with directions to the circuit court to dissolve the injunction and dismiss the bill. From the judgment of the Appellate Court, this appeal is prosecuted.

N. F. Anderson and Henry Waterman, for appellant. Charles E. Sturtz, State Atty., and Searle & Marshall, for appellees.

RICKS, J. (after stating the facts). The appellees, to sustain the judgment of the Appellate Court, question the right of appellant, as a private citizen and taxpayer, to prosecute the bill in question, and, among other things, urge that because appellant stated in his bill that he was not advised whether there was property that had been omitted from taxation, therefore he did not show that he would be injured. We have no doubt of the right of a private citizen and taxpayer to enjoin the enforcement or execution of a void contract, made by a county or any municipality in which he resides and pays taxes, that would affect the rights generally of the taxpayers. Under the contract in question, there remained nothing to be done except that appellee Manlove should enter upon the performance of it, and when he performed in whole or in part and rendered an account to the county clerk, the latter is directed by the contract and order of employment to issue to Manlove an order for the payment of the money. The contract did not contemplate any further action by the county board. In its order of employment, the county, by its board of supervisors, recited that a public necessity existed for the employment of experienced and competent persons to make diligent search for omitted, unassessed, taxable property. We do not feel it necessary to enter into a further discussion of this phase of the case, as, if we shall conclude that this contract was void, then we are not uncertain as to appellant's right to maintain his bill, or the sufficiency of the allegations thereof.

We quite agree with appellees that the correct rule as to the powers of a county is announced in *Wheeler v. County of Wayne*, 132 Ill. 599, 24 N. E. 625, where it is thus stated (page 604 of 132 Ill., page 626 of 24 N. E.): "Counties can only exercise such powers, first, as are granted by express words; second, those necessarily or fairly implied in, or incident to, the powers expressed; and, third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. * * * Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability not authorized thereby." The powers and duties of counties and county boards are declared and found in sections 22-26, c. 34, Hurd's Rev. St. 1903. There a county is declared to be a body corporate, and that the powers of the county as a body corporate shall be exercised by the board of supervisors. By paragraph 3 of section 24 it is provided that counties shall have power "to make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers." By paragraph 2 of section 25 it is provided that county boards shall have power "to manage the county funds and county business, except as otherwise specifically provided," and by paragraph 3, "to examine and settle all accounts against the county and all accounts concerning the receipts and expenditures of the county." These powers are pointed out and relied upon by appellees as authority for a county entering into the contract here complained of. It has not been pointed out, nor do we think it can be, that the assessment of property for taxation, either omitted or otherwise, is the business or concern of a county, as such. In counties under township organization, the primary assessment is made by the local assessors elected by the people of the township. Their work is supervised by the county treasurer, who by law is made supervisor of assessments. When the books are returned by the local assessors, they pass into the hands of the board of review, which in counties of the kind and class of Henry consists of the chairman of the board of supervisors and two citizens of the county to be appointed by the county judge. The duties of the board of review are prescribed by statute, and the first duty enjoined upon the board is to "assess all property subject to assessment which shall not have been assessed by the assessors." Hurd's Rev. St. 1903, c. 120, par. 329. That provision has been examined and passed upon by this court, and we have held that since the act of 1898 the power to list and assess omitted property is confined by law exclusively to the board of review. *People ex rel. v. Sel-*

lars, 179 Ill. 170, 53 N. E. 545. When the board of review has finished its work, the books are returned to the county clerk, who extends the taxes, and the only authority vested in the county board is to levy taxes for county purposes, based on the assessment already made, and supervise the levies made by certain inferior bodies, and order the same extended on the tax books against the assessment. It has not even been suggested that the selection of the chairman of the county board and his designation as a member of the board of review by the Legislature did in the most remote degree give the board of supervisors authority over the matter of assessments; and his selection was no recognition of the authority of the board of supervisors over such matters. The broad contention is that the matter of taxation is a county concern, and in that connection it is pointed out that section 33 of chapter 34 provides that "it shall be the duty of the county boards of each of the counties of this state to take and order suitable and proper measures for the prosecuting and defending of all suits to be brought by or against their respective counties, and all suits which it may become necessary to prosecute or defend to enforce the collection of all taxes charged on the state assessment." The last provision of that section would seem to refute, rather than support, the contention of appellees. If it can have any significance, it is a clear recognition, if not declaration, on the part of the Legislature that the county is not concerned in the matter of taxes until they are charged on the state assessment. It will readily be conceded that there is a wide distinction between taxes charged on an assessment and the making of an assessment itself, and while it is true that unpaid taxes are an asset of the county, the taxes that are to arise upon an assessment not made cannot be said to be an asset of any sort, and, unless it can be said that the matter of assessment is a concern of the county, it is manifest that the contract under consideration cannot be sustained.

It is conceded by the appellees that the question now under consideration has not before been passed upon by this court, and *Gillet v. Logan County*, 67 Ill. 256; *County of Franklin v. Layman*, 145 Ill. 138, 33 N. E. 1094; *Ottawa Gaslight Co. v. People*, 138 Ill. 336, 27 N. E. 924, and *Barnard & Co. v. County of Sangamon*, 190 Ill. 116, 60 N. E. 109—are cited and relied upon by appellees as being analogous to the case before us. We are unable to say that any of them have any application. The power to sue and be sued is conferred upon counties, and *Gillet v. Logan County*, supra, simply holds that a county may employ counsel to procure evidence in defense of a contemplated suit against the county in relation to its bonds. *County of Franklin v. Layman*, supra, sus-

tains the employment of counsel in a case involving the validity of the bonds of the county. The action against the Ottawa Gaslight Company was to collect a delinquent tax that had been charged on an assessment, and *Barnard & Co. v. County of Sangamon*, supra, simply involves the authority of the board to furnish books and blanks to the county clerk's office under paragraph 3, § 26, c. 34, Hurd's Rev. St. 1903, above referred to. In fact, each of these cases has its foundation in the powers expressly granted by the statute.

Appellees cite four cases from Indiana which do, in a general way, sustain their contention. The cases so relied upon are *Fleener v. Litsey* (Ind. App.) 66 N. E. 82, *Garrigus v. Board of Commissioners* (Ind. Sup.) 60 N. E. 948, *City of Richmond v. Dickenson* (Ind. Sup.) 58 N. E. 260, and *Board of Commissioners v. Dickinson* (Ind. Sup.) 53 N. E. 929. These cases arise upon a peculiar statute of that state, which reads: "The board of commissioners shall, unless in cases of indispensable public necessity to be found and entered of record as part of its orders, make no allowance not specifically required by law to any county auditor, clerk, assessor, sheriff or treasurer, either directly or indirectly, or to any clerk, deputy, bailiff or any employé of such officer; nor shall they, except in cases above provided, employ any person to perform any duty required by law of any officer or for any duty to be paid by commission or percentage. * * * If it be found necessary, and so entered of record, to employ any person to render any service, as contemplated in this section, as a public necessity, the contract for such employment shall be spread of record in said court, and for such service rendered the claimant shall file his account in said court ten days before the beginning of the term, and any taxpayer shall have the right to contest the claim." Under this statute, the commissioners of Park county employed *Fleener* and another, and made a contract somewhat similar to the one before us. When the bill was presented for the services, *Litsey*, as a taxpayer, objected. The court held that the duty to search for omitted property was not cast upon any officer, and that under the provisions of the above statute the county commissioners were authorized to employ a person by making the declaration of record that an indispensable public necessity required it. The *Fleener* Case, the *Garrigus* Case and *Board of Commissioners v. Dickinson* are each predicated upon that statute. *City of Richmond v. Dickenson* holds that, under the law relating to the powers of cities and villages, the city of Richmond had power to make a similar contract for a similar purpose. This last case illustrates what seems to us a very serious objection to admitting the contention of appellees in the present case. There is just as much authority under our law for every

city, school district, township, and other minor municipality in a county to employ a "tax ferret," as those persons who engage in that business are termed, as there is for a county to do so; and Indiana has practically gone to that extent. It is sufficient to say that we have read the Indiana cases, and do not agree with the reasoning further than as it is applied to the powers under their statute, and that the case is wholly inapplicable to the case before us. In this state, by our statute, the board of review is expressly and by mandatory language required to assess property that has not been assessed by the local assessors. We have held in *People v. Sellars*, supra, the language there used refers to and means omitted property, and that the duty to assess such property is cast upon the board of review, and that local or township assessors no longer have that authority. Appellee Smith was the county treasurer, and, as such, was the supervisor of assessments of the county; but his supervision was wholly confined to the township assessors. He had no supervision over the board of review, and so much of the answer as stated that it was his intention to appoint appellee Manlove his deputy, and the intention of the county board to confirm the appointment, and fix the salary as agreed upon in the contract here in controversy, was properly stricken, because as supervisor of assessments Smith had nothing to do with the question of omitted property, nor could any one acting as his deputy be given greater power or authority than had the chief officer, the supervisor.

We do not yield our consent to the proposition or contention that no officer or body of officers is charged with the duty of hunting and assessing omitted property, but take the view that that duty is cast upon the board of review; and if its members refuse to perform it, they could be compelled to do so by action at law, and would be guilty of misfeasance in office if they had knowledge and failed to do so. The statute having designated the proper officers for the discharge of this duty, and having charged them therewith, and provided for the compensation they shall receive, we do not think the county, in the absence of any specific grant, had power to enter into the contract with Manlove. If it should be conceded that the statute does not require the board of review to hunt for and endeavor to discover secreted omitted property for taxation, we would still adhere to our position that the county, in the absence of a grant of power to do so, would have no authority to make the contract in question. Such situation might well be deplored, and the necessity be apparent for a law charging some person or persons specifically with the duty, or authorizing the county board or some competent authority to employ persons capable of such work; but, if such should be the case, it would be a suitable matter to call

to the attention of the legislative department, and cannot be reached by the unauthorized action of county boards or other local governmental bodies, who have no such powers granted them. This question has been before the courts of Minnesota (*Grannis v. Board of Commissioners*, 83 N. W. 495), North Dakota (*Storey v. Murphy*, 81 N. W. 23), California (*House v. Los Angeles County*, 37 Pac. 796), and Nebraska (*Platte County v. Gerrard*, 11 N. W. 298), and in each instance the court has held against the power of a county board or county commissioners to make such a contract. We regard the case of *Grannis v. Board of Commissioners*, supra, as being on all-fours with the case at bar, for the reason that the language of the statute of Minnesota giving power to the board of commissioners seems to be identical with the language of our statute granting powers to the board of supervisors, viz., "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to its corporate powers." That section was invoked there as here, and held to have no application. In that case, after announcing the principle that counties can only exercise such powers as are expressly granted them by the Legislature, or fairly implied as necessary to the exercise of the powers expressly granted, the court proceeds (page 496): "The power of taxation belongs exclusively to the state. And with respect to the levy, assessment, and collection of taxes, counties, as such, or their agents, the board of commissioners, have no authority whatever. The Legislature has provided officers whose duty it is to levy all taxes, officers to cause all property to be properly assessed and placed upon the tax rolls, and officers for the collection of such taxes. The county commissioners, as agents and officers of the county, have no authority or control over any of those officials with respect to the performance of their duties. They act independently of such commissioners, and are responsible to the state for the faithful discharge of their duties. It is true that the county is interested and concerned in the matter of the collection of taxes. Its revenues are chiefly derived therefrom, and it is important to it, and to the state as well, that all property properly taxable pay its just share and proportion of the public burdens. But the county is not charged with the duty of seeing after it that all such property is assessed and placed upon the tax rolls. Other officials, acting independently of the county, are charged with the performance of such duties, and they alone are responsible therefor. The matter of unearthing and discovering property which has escaped taxation is not only not necessary to the exercise of the corporate powers of a county, but is beyond its express or implied authority. The doctrine of *ultra vires* is held and applied more strictly to the acts

of municipal bodies than to a private corporation."

We think the decree of the circuit court was right, and that the Appellate Court erred in reversing it. The judgment of the Appellate Court is reversed, and the decree of the circuit court is affirmed.

Judgment reversed.

(218 Ill. 481)

KLAWANSKI et al. v. PEOPLE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. CRIMINAL LAW—OBJECTIONS TO INDICTMENT—WAIVER.

Where an indictment charges no criminal offense, or is otherwise fatally defective, it may be attacked on writ of error, though accused pleaded guilty thereto.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2627.]

2. FORGERY—THEATER PASS—INDICTMENT.

An indictment under Cr. Code, § 105 (Hurd's Rev. St. 1903, p. 635, c. 38), making it an offense to forge a theater pass, must allege that on the date for which the pass was given there was an entertainment for which a "consideration was required," in accordance with the statute.

3. SAME.

An indictment under Cr. Code, § 105 (Hurd's Rev. St. 1903, p. 635, c. 38), for forging a theater pass, must allege that the person whose name was forged had authority to issue such pass, and also allege who would be defrauded by such issuance, and it is insufficient that the name of the party to be defrauded appears in the copy of the pass set out in the indictment, with the words "Sole Prop.," and that the name of the person issuing it appears in such copy preceded by the words "Adv. Agent."

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Forgery, §§ 77-81.]

Wilkin, Boggs, and Hand, JJ., dissenting.

Error to Criminal Court, Cook County; W. M. McEwen, Judge.

James Klawanski and Walter Council were convicted of forgery, and bring error. Reversed.

Cantwell & Erbstein and Charles P. R. Macaulay, for plaintiffs in error. William H. Stead, Atty. Gen., and John J. Healy, State's Atty., for the People.

RICKS, J. Plaintiffs in error, James Klawanski and Walter Council, were indicted in the criminal court of Cook county for forging and uttering as true and genuine a certain false and counterfeited complimentary theater pass, with intent to defraud, etc. Upon being arraigned they pleaded guilty and were each sentenced to the penitentiary. After sentence they moved in arrest of judgment, and the court overruled the same. This writ of error is sued out to review the record of that proceeding.

But two questions are raised: First, as to the sufficiency of the indictment; second, whether the sufficiency of the indictment can be urged for the first time after plea

of guilty. Both counts of the indictment are substantially the same, and charge, in substance, as follows:

"The grand jurors * * * present that one James Klawanski and one Walter Council * * * on December 21, 1904, in said county of Cook, in the state of Illinois, did feloniously, fraudulently and falsely make, forge and counterfeit a certain complimentary theater pass, which said false, forged and counterfeit complimentary theater pass is in the words and figures following, to wit:

"McVicker's Theatre
"Jacob Litt, Sole Prop. Sol. Litt, Bus. Mgr.
"Admit Two—Date Dec. 21 1904.

Order No. 344.

"On Account.

"Notice. This is a complimentary pass, given in consideration for displaying our advertisement at the above number, and the management reserves the right to refuse admission if presented by any objectionable person, and positively not good if bought or sold or misused in any manner."

"Adv. Agent, James Battles."

—with intent then and there to prejudice, damage and defraud Jacob Litt; and the grand jurors aforesaid, upon their oaths aforesaid, do say that by reason of the premises aforesaid the said James Klawanski and the said Walter Council are deemed guilty of forgery contrary to the statute and against the peace and dignity of the same people of the state of Illinois."

The statute governing the offense charged in section 105 of the Criminal Code (Hurd's Rev. St. 1903, p. 635, c. 38), which, so far as is material to this case, is as follows: "Every person who shall falsely make, alter, forge or counterfeit any * * * ticket or pass * * * for the admission of any person to any entertainment for which a consideration is required, * * * shall be imprisoned in the penitentiary not less than one year nor more than fourteen years." The complimentary ticket was good only for December 21, 1904. The statute reads, "to any entertainment for which a consideration is required." Certainly a court could not take judicial notice of the fact that a consideration was required for the admittance of persons on the night of December 21, 1904, for an entertainment. Managers and owners of theaters have various kinds of entertainments for which tickets are issued, where no fee is charged for admittance. Frequently theaters are used for the purpose of political and religious meetings, for which no fee is charged for admittance, and yet the parties managing the entertainment, whatever it may be, might issue tickets, and no person would be allowed to enter the hall without first presenting a ticket issued by the managers or persons in charge. Nor is any averment made in the indictment with reference to Jacob Litt or James Battles, as to who they are. It is not shown by any averment in the indictment, except that Jacob Litt's name appears as sole

proprietor on the McVicker stationery, upon which the pass was written. This is not sufficient to inform a person as to who Jacob Litt is or in what capacity he was acting. He might have been the sole proprietor of the theater and yet not be the person in charge and managing the theater and who would actually be defrauded. Nor is there any averment that James Batles had authority to issue complimentary tickets for entertainments at the theater, and unless he had authority to issue such complimentary tickets it certainly would not be forgery to attach his name to the supposed pass. Without such averments we are unable to see how the indictment could be held to be good.

As to the second proposition, that the sufficiency of the indictment cannot be urged after a plea of guilty, we see no good reason why advantage cannot be taken of a bad indictment upon writ of error after judgment of the court, the same as could advantage be taken of a bad declaration or faulty bill in equity; and, while in suits at law a verdict will aid a defective statement of a good cause of action, yet the verdict will not aid a statement of a defective cause of action. *Chicago & Alton Railroad Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680. And judgments at law or decrees in equity can be taken advantage of after a judgment or decree, if a defective cause of action is stated and is not sufficient to sustain a judgment or decree. The indictment is the foundation for the judgment of the court in a criminal proceeding, the same as a declaration or bill in equity in a civil action. Besides, as is said in 1 Bishop's New Criminal Procedure, § 795: "The effect of a plea of guilty is a record admission of whatever is well alleged in the indictment. If the latter is insufficient it confesses nothing." By a plea of guilty the accused simply confesses that he is guilty in manner and form as charged in the indictment, if the indictment charges no criminal offense, or is otherwise fatally defective, it may be subsequently attacked on that ground. 12 Cyc. 353.

We are of the opinion that without the allegation in the indictment "to any entertainment for which a consideration is required," or its equivalent, the indictment did not state a cause of action against the plaintiffs in error, and being of the opinion that the indictment is otherwise faulty as above stated, it was not sufficient upon which to enter a judgment. And as we are of the opinion that advantage can be taken of a bad indictment after a plea of guilty, the judgment of the lower court must necessarily be reversed and remanded, with instructions to discharge the plaintiff in error.

Reversed and remanded.

WILKIN, BOGGS, and HAND, JJ., dissent.

(213 Ill. 485)

STARR v. WILLOUGHBY et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. WILLS — CONSTRUCTION. — INTENTION OF TESTATOR.

Although the law favors the vesting of estates, yet where the entire will clearly shows an intention on the part of testator to postpone the vesting of his estate until the period of distribution, such intention will be effectuated.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1461-1463.]

2. SAME—VESTING OF ESTATES—TIME OF DISTRIBUTION.

Where a will provides for the sale of testator's real estate as soon as practicable, and the division of the proceeds among such children "as may be living at that time," the children take no vested interest of the proceeds of sale until the time of distribution.

3. CONVERSION—DIRECTIONS IN WILL.

Where a will provides for the sale of real estate and the distribution of the proceeds, the real estate will be deemed as converted into money.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, § 80.]

4. SAME—RECONVERSION.

Where a will provides for a conversion of testator's land into money for the distribution of proceeds among devisees, all the devisees must concur, in order to effect a reconversion of the money into land, by electing to take the land instead of the money.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Conversion, §§ 67, 70.]

5. EXECUTORS—POWER OF SALE—REVOCATION.

An order settling an estate and discharging the executor does not revoke a power, vested in the executor by the will, to sell testator's land as soon as practicable, and distribute the proceeds.

6. SAME—DISCHARGE OF EXECUTOR—EFFECT.

An order settling an estate, discharging the executor, and approving his report closes the executor's account only up to the time the report is approved, and is void as to unsettled matters.

Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Bill by James A. Willoughby and others against Charles A. Starr and others. From the decree rendered, defendant Charles A. Starr appeals. Affirmed.

Keefe & Sullivan, for appellant. R. W. Ropiequet (James M. Dill, guardian ad litem), for appellees.

HAND, J. William E. Willoughby died testate on the 18th day of July, 1897, leaving, him surviving, James A. Willoughby, William H. Willoughby, Mary J. Willoughby, and Ida May Willoughby as his children and sole heirs at law. By the first paragraph of his will he devised certain lands to his wife, Jane Willoughby, during her natural life; by the second paragraph he devised certain other lands to James A. Willoughby and his children, and the remaining paragraphs of the will read as follows:

"Third—As soon as practicable after my decease I direct that all other real estate owned by me not mentioned in the first and second clauses of this will be sold by my

executors hereinafter named, and the proceeds thereof, together with the proceeds of any personal property that I may have, and any money, right and credit to me belonging, disposed of as follows: First, a sum not to exceed \$1500 to be invested in the purchase of a residence in Lebanon, Illinois, for the use of my wife, Jane Willoughby, so long as she lives and remains my widow; second, the balance to be divided among such of my children as may be living at that time, and surviving descendants of children, in case any of my children may have died leaving children or descendants of children then surviving and living at that time, the descendants of children to take per stirpes; but in the distribution under this clause I charge my son William H. Willoughby with \$5546, he to get nothing under this clause except in the excess after the three other shares have reached the sum with which I herein charge him.

"Fourth—During the continuance of the estate of my wife, Jane Willoughby, in the lands described in the first clause of this will and in the house directed to be purchased for her in the third clause of this will, I direct that she pay the taxes thereon and repairs on said house.

"Fifth—On the re-marriage or death of my wife, Jane Willoughby, the lands described in the first clause of this will and the house directed in the third clause of this will to be purchased for her use so long as she lives and remains my widow, shall be sold by my executor hereinafter named and the proceeds thereof distributed in the manner provided for the distribution under the third clause of this will, and in this distribution my said son William H. Willoughby will be charged with any deficiency of said \$5546 that his share of said distribution under the third clause of this will fails to meet.

"Sixth and lastly—I hereby nominate and appoint my son James A. Willoughby and my daughter Ida May Willoughby, my only children residing in this county, executor and executrix of this my last will and testament, directing that they shall not be required to give bond, revoking any former wills by me made and ratifying and confirming this and none other to be my last will and testament."

James A. Willoughby and Ida May Willoughby qualified as executor and executrix and subsequently Ida May Willoughby intermarried with Charles A. Starr, by whom she had two children, Ida Mary and Ora Adelia, who were minors, and who were represented in this litigation by James M. Dill, their guardian ad litem. Ida May Starr died testate on September 20, 1904, leaving, her surviving, her husband, Charles A. Starr, and said children, Ida Mary and Ora Adelia. By her will she devised to her husband, Charles A. Starr, her entire estate. At the date of the death of Ida May Starr, the lands of William E. Willoughby mentioned in paragraph 3 of his will remained unsold, and the question having been raised as to the power of

James A. Willoughby to sell and convey said lands as surviving executor, and as to whom the proceeds arising from a sale of the lands should go in case of a sale by the executor, James A. Willoughby, personally, and as executor of William E. Willoughby, deceased, William H. Willoughby and Mary J. Keith, formerly Mary J. Willoughby, filed a bill in chancery in the circuit court of St. Clair county for the construction of the will of William E. Willoughby, deceased, and to obtain a sale of the premises mentioned in paragraph 3 of the will. All of the parties in interest other than the complainants were made parties defendant. Answers and replications were filed, and the court entered a decree directing James A. Willoughby, as sole surviving executor, to sell said premises, and decreed that Charles A. Starr took no interest in the proceeds of said sale under the will of his deceased wife, Ida May Starr, but decreed that the interest represented by Ida May Starr in her father's estate, and which would have gone to her had she survived the date of sale of said premises and the distribution of the proceeds of such sale, be paid to said Ida Mary and Ora Adelia, her children, and Charles A. Starr has prosecuted an appeal to this court to reverse said decree.

Three principal contentions are made in this case as grounds of reversal:

First. It is contended that under the will of William E. Willoughby, deceased, Ida May Starr took a vested interest in the premises, or the proceeds arising from a sale thereof, mentioned in paragraph 3 of said will, and that said interest passed to Charles A. Starr as her sole devisee. This contention involves a consideration of paragraphs 3 and 5 of the will of William E. Willoughby, deceased. We think it clear from the language used in these paragraphs that the testator intended his executors should hold said lands in trust for the benefit of his children until said lands should be converted into money by the executors by a sale, and that he intended that neither of his children should take any interest in said lands prior to a sale. Such being the manifest intention of the testator, and the lands not having been sold prior to the death of Ida May Starr, she had no interest in said lands at the date of her death, and hence her husband, Charles A. Starr, took no interest therein through her will, but the interest in said lands represented by Ida May Starr, upon the sale of the premises under the will of William E. Willoughby, deceased, will pass to the children of Ida May Starr, deceased. The first clause of paragraph 3 provides, as soon as practicable after the death of William E. Willoughby, the real estate in question shall be sold by his executors, and the proceeds thereof disposed of in the following manner: The sum of \$1,500 was to be invested in a home for Mrs. Jane Willoughby, and the balance was to be divided among such of his children "as may be living at that time, and surviving descendants of children, in case

any of my children may have died leaving children or descendants of children then surviving and living at that time." It is clear the words "living at that time" refer to the time of sale, and not to the time of the death of the testator. While it is true that the law favors the vesting of estates, still where it is clear, from a reading of the entire will, that the testator intended to postpone the vesting of an estate until the period of distribution has arrived, that intention will be carried out. *Johnson v. Askey*, 190 Ill. 58, 60 N. E. 76. In *People v. Jennings*, 44 Ill. 488, the testator provided his real estate should be sold by his executor as soon after his death as convenient, and the proceeds thereof, after the payment of his debts, funeral expenses, etc., should be equally divided among his four children, and in case of the death of a child, the child or children of the deceased child should take the share of the parent. One of the children died before the land was converted into money, leaving a widow and children, and it was held that the deceased child took no vested interest in the parent's estate, and that the interest which it represented in its parent's estate upon the sale of the land went to the children of the deceased child, and that the widow of the deceased child took no interest therein. In *Banta v. Boyd*, 118 Ill. 186, 8 N. E. 671, the testator directed his estate, both real and personal, to be converted into money by his executors, and devised the same to certain of his relatives, but provided in the event of the death of either of said relatives the share of the deceased relative should be paid to his or her offspring. It was there held the property was not devised, but only its proceeds when converted into money, and that the relatives named in the will took no vested interest in his estate before the arrival of the period of distribution, and that in case of the death of a relative named in the will before the period of distribution arrived, the share represented by the deceased relative went to his or her children, if any, and if such relative left no child or children the legacy lapsed. To the same effect is *Ebey v. Adams*, 135 Ill. 80, 25 N. E. 1013, 10 L. R. A. 162. The testator did not intend to devise to either of his children directly any portion of his estate mentioned in paragraph 3 of his will, but intended his executors should convert said real estate into money, and distribute the proceeds arising therefrom among his four children in equal parts (taking into consideration the amount he had already advanced to William H. Willoughby), should they be living at the time the period of distribution arrived; and that, in case of the death of a child, the share which it represented should go to such deceased child's child or children. It was not the intention of the testator to devise the land to his children, but to give them the proceeds thereof. As Ida May Starr died before the period of distribution had arrived, and she had no vested interest in the estate at the

time of her death, the court correctly held that the share represented by her went to her children, and not to her husband, as devisee under her will.

Second. It is next contended that the children of William E. Willoughby, deceased, so treated said real estate as to reconvert the same into land, and that it, for the purposes of this suit, should not be considered as money but land. In *Baker v. Copenbarger*, 15 Ill. 103, 58 Am. Dec. 600, it was held, where real estate by the terms of a will is to be converted into money, and the money distributed, that the devise should be treated as a devise of money and not of land, and that in such case, by concurrence of all the devisees, they may elect to take the land and not the money, in which event there is a reconversion of the money into land; but that in order that a reconversion take place, all the devisees or beneficiaries named in the will must consent to a reconversion—that is, to take the land instead of the money. William H. Willoughby in no way consented to a reconversion of this land. The court therefore properly held, by the terms of the will, the land should be treated as money and so distributed. *Jennings v. Smith*, 29 Ill. 116; *Ridgeway v. Underwood*, 67 Ill. 419; *Ebey v. Adams*, supra; *Robison v. Botkin*, 181 Ill. 182, 54 N. E. 915.

Third. The bill prayed that the court would determine whether James A. Willoughby had the right, as sole surviving executor, to sell said real estate, notwithstanding he had filed his final report as executor of the estate of William E. Willoughby, deceased, and had been discharged, and asked, if he did not have such power of sale, that a trustee be appointed by the court to make the sale. The court held that James A. Willoughby had power to make the sale as executor, and decreed that he sell the property, and bring the money into court for distribution. By the terms of the will of William E. Willoughby, deceased, James A. Willoughby and Ida May Willoughby were named as executor and executrix without bond. They qualified as such, and on the 25th of April, 1900, filed a final report as executors, which showed their receipts and disbursements, and that there was due them as executors \$325.79, which amount they subsequently acknowledged as having been paid to them, and the court entered an order approving said report, and that they, as executors, be discharged. While the county court appears to have discharged the executors, the duties of the executors, as a matter of fact, were not completed, but by the terms of the will they were to sell the real estate of the deceased, and distribute the proceeds thereof among the beneficiaries named in the will, in accordance with the terms of the will. Upon the death of Ida May Starr, the power of sale devolved upon James A. Willoughby alone (1 Starr & C. Ann. St. 1896, c. 3, § 97, p. 321), and unless the order of discharge entered by the county court deprived him

of the power conferred upon him by the will to make said sale, he still possessed such power, as the power remained unexecuted by the sale of the lands of the deceased. When an executor resigns or is removed, his power as trustee, which devolves upon him by virtue of his executorship only, and not by express appointment as trustee to sell real estate, is revoked. *Mullanny v. Nangle*, 212 Ill. 247, 72 N. E. 385. We do not think, however, that an order of the county court declaring an estate settled, and discharging the executor, has the effect to revoke a power of sale in the executor, where the will directs the executor to sell real estate for the purposes of distributing the proceeds thereof among the beneficiaries named in the will, where such power has not been executed by the executor at the time the order of discharge is entered by the county court. In *Diversey v. Johnson*, 93 Ill. 547, quoting from *Redfield on Wills*, it is said: "It is not competent for the court of probate to decree the account of the personal representative passed upon by it to be final, so as effectually to discharge him from any future liability to be called upon to answer for matters not embraced in the former account." *Woerner* in his work on the American Law of Administration (vol. 2, p. 1254) says: "That which has not been tried cannot have been adjudicated. The final settlement of an executor or administrator can therefore be conclusive or binding upon nothing which was not either directly before the court, or necessarily involved in that which was before the court and adjudicated. That which is not within the scope of the issues presented cannot be concluded by the judgment." And again, on page 1255: "If, therefore, property of the deceased is discovered after the final settlement, the existence of which was then unknown, and could not for that reason be administered, the administrator and his sureties will be liable therefor, and subject to the same proceedings against them as in respect of the property coming originally to the hands of the administrator. So their functions in other respects remain unextinguished after final settlement, and an order of discharge made by the probate court can be regarded as a discharge only so far as the particular matters appearing upon the face of the account are concerned. This feature of the functions of executors and administrators is stated by *Surrogate Bradford* in the following language: 'The formal discharge contained in a decree on final accounting operates only as to the accounts of the parties up to that period. The trust is an enduring one. Other assets may be realized, new liabilities incurred, involving a continuance of duty and responsibility. A decree on final accounting does not destroy the relation of an executor, but only discharges him from liability for the past. * * * Even after a final accounting and distribution, an executor continues to be a trustee.' And in *Scholl v.*

Olmstead, 84 Ga. 698, 11 S. E. 541, it was held that executors to whom land is devised in trust for certain purposes, with power of sale and investments of proceeds upon trusts, the duties of which extend beyond the period of administration, have power to make a sale after their discharge as executors and the assumption of title as trustees; and it has been repeatedly held by this court that an order of the county court discharging an administrator or executor on a final accounting, when the estate is not fully settled, as to the unsettled portion of the estate is void. *Blanchard v. Williamson*, 70 Ill. 647; *Cutright v. Stanford*, 81 Ill. 240; *Sutherland v. Harrison*, 86 Ill. 363; *Diversey v. Johnson*, supra.

We think it clear that the order of the county court approving the final reports of the executors and discharging them only had the effect of closing their accounts as executors up to the time of the approval of such final report, and did not have the effect of depriving *James A. Willoughby*, as sole surviving executor, of the power conferred upon him by the will to sell the real estate in question, and that the court did not err in holding that he, as surviving executor, had power to sell said real estate.

Finding no reversible error in this record, the decree of the circuit court is affirmed. Decree affirmed.

(218 Ill. 494.)

JACKSON v. GROSSER.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. JUDGMENTS—CONCLUSIVENESS OF ADJUDICATION—COLLATERAL ATTACK.

A foreclosure decree, pronounced by a court which has acquired jurisdiction over the persons and the subject-matter, whether erroneous or not, cannot be collaterally attacked.

2. MORTGAGES—REDEMPTION—RIGHTS OF REDEMPTIONER.

A creditor who redeems property from a foreclosure sale is charged with notice of the terms of the foreclosure decree and sale as disclosed by the record, and acquires merely such rights as the purchaser at the sale.

3. SAME—LIENS SECURED—PRIORITIES.

Where one deed of trust secures two notes, an agreement between a purchaser of one of the notes that the lien of his note shall be subordinate to the lien of the other is valid, and he may, on foreclosing the trust deed to satisfy his note, procure a decree and sale of the property, subject to the continuing lien of the deed to secure the other note, as long as third persons are not injuriously affected thereby.

4. SAME—APPEAL—RECORD—MATTERS NOT IN ABSTRACT.

The Supreme Court cannot determine what the provisions of a trust deed with relation to solicitor's fees were, where such provision is not shown in the abstract of the record.

5. SAME — FORECLOSURE — PREMATURE COMMENCEMENT.

Where a note securing a trust deed is due on its face, and an agreement indorsed upon the back, extending the time of payment, has been erased, without anything to show when or by whom the erasure was made, a foreclosure suit, brought after the date when the note appears on its face to be due, but before

the time of payment stipulated in the erased agreement, is not premature.

Appeal from Appellate Court, First District.

Bill by Gustav A. Grosser and another against Augusta Jackson and others. From a judgment of the Appellate Court, affirming a decree in favor of complainants, defendant named appeals. Affirmed.

William Schulze, for appellant. Wells & Blakeley, for appellee.

CARTWRIGHT, C. J. The facts necessary to an understanding of the questions involved in this case are as follows: On April 8, 1895, Robert Grosser and wife executed a trust deed on a lot in Chicago to Helge A. Haugan to secure two notes given for money borrowed of the State Bank of Chicago, one for \$2,500, due in five years, and one for \$500, due in one year, and both drawing interest. August Grosser purchased of the bank the note for \$500, with an agreement that the lien as to the \$2,500 note should be prior and superior to the lien as to the \$500 note. On May 28, 1900, August Grosser filed his bill in the circuit court of Cook county to foreclose the trust deed as to the \$500 note, which was then due, alleging that he did not own the \$2,500 note and had no interest in it or control over it, and praying that any decree of sale of the premises should be made subject to the lien of the trust deed for the indebtedness secured thereby, except as to the amount that might be found due him on the \$500 note. He also alleged that he owned a note secured by a second trust deed executed by Robert Grosser and wife on April 20, 1896, upon the same lot to him, as trustee, for \$1,004, payable five years after date, with interest at 6 per cent. He made Haugan, the trustee in the first trust deed, and his successor in trust, and himself, trustee in the second trust deed, and other parties, defendants. A decree was entered finding that there was due August Grosser \$605.91, and \$100 for solicitor's fees, and it was ordered that the mortgaged premises be sold, and that the sale should be made subject to the continuing lien of the trust deed for the payment of the \$2,500 note secured thereby, and any other amount that might be due or thereafter accrue on the said trust deed in addition to the amount thereby found due the complainant, August Grosser. It was ordered that the master, after payment of costs and expenses, should pay the complainant the amount so found due him, and, if there was any surplus, should pay the complainant \$1,255, with interest from June 23, 1900, the amount due on the note secured by the second trust deed. A sale was made pursuant to the decree and according to its terms, subject to the continuing lien of the first trust deed as to the \$2,500 note. The amount realized was not

sufficient to pay the amount found due on the \$500 note. August Grosser was the purchaser, and a master's certificate of sale was made and delivered to him. After executing the trust deeds Robert Grosser sold and conveyed the lot, and it passed by subsequent conveyances to Arcadius Budda on October 30, 1900. Augusta Jackson, appellant, was a judgment creditor of Arcadius Budda, and, no redemption having been made by any of the defendants within 12 months after the sale, she paid to the sheriff on November 4, 1901, \$740.67, the amount necessary to redeem from the sale. An execution on her judgment was levied on the lot, and on December 3, 1901, it was sold to her by the sheriff for the amount of the redemption money, interest, and costs, and the sheriff conveyed the lot to her in accordance with the statute. On December 2, 1901, Gustav A. Grosser, the appellee, and Helge A. Haugan, trustee, filed their bill in this case in the circuit court to foreclose the trust deed as to the \$2,500 note, alleging that appellee was the legal holder and owner of the note, that the previous foreclosure proceeding as to the \$500 note by August Grosser was had, and that the decree and sale were subject to the continuing lien of the trust deed as to the \$2,500 note. It was also alleged that appellant had redeemed the lot from the previous sale, and she was made one of the defendants. She answered, denying that her title to the property was subject or subordinate to the rights of the appellee or subject to the lien of the trust deed to secure the payment of the \$2,500 note. The cause was referred to a master in chancery, who took the evidence and reported his conclusions that appellee had a valid lien on the premises to the amount of \$2,500 and the unpaid interest thereon, that the rights of appellant were subject to the continuing lien of the trust deed for the payment of the same, but that the bill was prematurely filed for the reason that there had been no default in the payment of said note. The cause was heard on exceptions of both parties, and a decree was entered foreclosing the trust deed and ordering a sale for the amount due appellee on his note, with a solicitor's fee of \$100 and costs, and providing that, if a surplus should remain, the master should bring it into court, and reserving all question of the rights and liens of August Grosser and appellant, as between themselves, for the further consideration of the court. The Appellate Court for the First District affirmed the decree.

Appellant's claims are that it was error for the court, in the first foreclosure suit of August Grosser, to decree that the sale for the payment of the \$500 note should be made subject to the lien of the trust deed as to the \$2,500 note; that priority of lien as between the two notes secured by the trust deed was determined by the order in which they became due and payable; and

that by a foreclosure of a trust deed for part of the mortgage debt the part of the debt not included in the foreclosure is released by law. If the part of the debt not included in the first foreclosure would have been released by operation of law if it had not been otherwise provided in the decree, it was not released when the court having jurisdiction of the parties and the subject-matter decreed that it should not be, and that the foreclosure should be subject to the continuing lien of the trust deed as to the \$2,500 note not included in the foreclosure. This proceeding is a collateral one, and the claims now made constitute a collateral attack upon the decree of the court in the first foreclosure suit. The jurisdiction of the court over the persons and the subject-matter was complete, and, whether the decree was erroneous or not, it was in full force and unreversed and binding upon all parties and all persons claiming through and under them. The court had no power in this suit to revise the decree in the former one, or to determine whether it was erroneous or not. The decree, pronounced by a court of competent jurisdiction, was binding, and could not be attacked in any manner in this suit. *Cody v. Hough*, 20 Ill. 43. The sale under the foreclosure was made subject to the continuing lien of the trust deed to secure the payment of the \$2,500 note, and when appellant redeemed from that sale she acquired the rights of the purchaser under the sale, and no more. She was chargeable with notice of the decree and terms of sale as shown by the record, and it is immaterial that the holder of the \$2,500 note was not a party to the first foreclosure. The complainant in that suit alleged in his bill, in accordance with his agreement, that his lien was subject to a prior lien to secure the \$2,500 note, and he took a decree subject to such prior lien, as he had an unquestionable right to do. By the sale and redemption therefrom appellant acquired all the rights and titles of the different parties to the suit, subject only to the lien reserved in the decree. The sale from which she redeemed was made under the first trust deed, which was superior to the lien of the second one, and there was no redemption by the holder of the second trust deed, so that the liens of all parties to the suit were cut off and the second trust deed ceased to be a lien on the premises. If there had been error in the first decree, the court would have had no right to correct it in this suit; but there was no error, and it was competent for the parties, upon the sale by the State Bank, to enter into the agreement as to the priority of liens. *Walker v. Dement*, 42 Ill. 272; *Romberg v. McCormick*, 194 Ill. 205, 62 N. E. 537. No right of any person was injuriously affected by the agreement; and the court did not err in carrying it out.

It is urged that the court erred in this suit in allowing a solicitor's fee of \$100, and the

argument is that the provision of the trust deed for a solicitor's fee, and the power of the court to allow such fee, were exhausted by the allowance in the first foreclosure. Whether that is so depends upon the provision of the trust deed relating to solicitor's fees, and we do not find that provision in the abstract. Whether a fixed sum was agreed upon, which, when once allowed, could not be allowed again, or whether reasonable fees upon any foreclosure under the trust deed were to be allowed, does not appear by the abstract.

It is also insisted that the court erred in not finding that the suit was prematurely brought. When the \$2,500 note was offered in evidence, there appeared indorsed upon the back an agreement for the extension of the time of payment beyond the time when the suit was commenced, but that agreement had been erased. There was no evidence when or by whom it was erased, and as the note then appeared it was due, and the suit was not premature. There was no evidence of a valid extension of the time of payment until after the commencement of the suit.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

(218 Ill. 500)

JACOBS v. PEOPLE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. JURY—RIGHT TO TRIAL BY JURY—WAIVER.

Where accused, charged with a misdemeanor, and the prosecuting attorney, orally agree to waive a jury, the waiver is valid; but the accused cannot, under *Hurd's Rev. St. 1903*, c. 110, § 102, be imprisoned for nonpayment of the fine, unless the waiver of the jury also be in writing.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 199.]

2. CRIMINAL LAW—TRIAL BY COURT—PROPOSITIONS OF LAW.

Prac. Act (*Hurd's Rev. St. 1903*, c. 110) § 42, providing for submission of propositions of law to the court, where the case is tried without a jury, does not apply to a criminal case.

Error to Appellate Court, First District.

J. J. Jacobs was convicted of promoting a lottery. From a judgment of the Appellate Court (117 Ill. App. 195), affirming the conviction, he brings error. Affirmed.

J. J. Jacobs, the plaintiff in error, was found guilty by the criminal court of Cook county of the crime of unlawfully setting up and promoting a lottery for money, and was sentenced to pay a fine of \$1,475. The indictment upon which he was tried consisted of eight counts, the first of which charged him with unlawfully setting up a lottery, called the Montana Mining, Loan & Investment Company, for money. The fourth count is substantially the same as the first. The second, third, and eighth counts charge the defendant with selling lottery tickets, and

the fifth and sixth counts charge him with having lottery tickets in his possession with intent to sell the same. A nolle prosequi was entered in the criminal court to the seventh count. The case was tried without a jury, in accordance with an oral agreement of the parties made in open court. The court having found the defendant guilty of setting up a lottery, a motion for a new trial and a motion in arrest of judgment were respectively made and overruled, and judgment was pronounced upon the finding. The case was taken to the Appellate Court for the First District, where the judgment of the criminal court was affirmed, and the record was brought to this court by writ of error.

E. H. Morris, for plaintiff in error. William H. Stead, Atty. Gen., John J. Healy, State's Atty., and F. L. Barnett, for the People.

SCOTT, J. (after stating the facts). It is first urged that the court was without jurisdiction to try this cause without a jury, for the reason that there was no waiver, in writing, of a jury trial. Upon a conviction under the indictment in this case the plaintiff in error could be punished only by a fine. Where tried for a misdemeanor punishable only in that way, the accused has the right, the prosecutor agreeing, to submit his cause to trial without the intervention of a jury, irrespective of the statute, which provides for a formal waiver in writing of a jury trial. *Paulsen v. People*, 195 Ill. 507, 63 N. E. 144. The statute to which we have just referred is section 102, c. 110, *Hurd's Rev. St. 1903*, and reads as follows: "Be it enacted by the people of the state of Illinois, represented in the General Assembly, that no person shall be imprisoned for nonpayment of a fine or a judgment in any civil, criminal, quasi criminal, or qui tam action, except upon conviction by jury: Provided, that the defendant or defendants, in any such action may waive a jury trial by executing a formal waiver in writing: And provided further, that this provision shall not be construed to apply to fines inflicted for contempt of court: And provided further, that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by a jury." The only effect of that statute in cases of this character is to prohibit the imprisonment of the defendant, upon conviction, for nonpayment of a fine unless he has been found guilty by a jury, or has executed a formal waiver in writing of a trial by jury, and has been found guilty by the court. That statute did not take away from a person charged with the commission of a misdemeanor, punishable by fine only, the right to submit his cause to the court without the intervention of a jury and without any written waiver of a jury trial where the defendant and the prosecutor orally agreed to dispense with the jury. That right exists since the passage of the statute precisely as it did be-

fore, and the court in such a case, without the intervention of a jury, has jurisdiction to try the defendant and render judgment, upon such an oral agreement being entered into by the parties.

Plaintiff in error submitted certain propositions of law. The abstract recites that the court "rejected said propositions of law, and refused to hold said propositions as the law of the case." This was not error, as we have heretofore held that section 42 of the practice act, which provides for the submission of propositions of law to the court where the case is tried without a jury, does not apply to the trial of a criminal case. *Chicago, Wilmington & Vermilion Coal Co. v. People*, 214 Ill. 421, 73 N. E. 770.

The third and last point made by plaintiff in error is thus stated in his brief: "The name of the game being alleged, the proof must correspond." No variance between the indictment and the proof is pointed out, and we therefore dismiss this contention without discussion.

The judgment of the criminal court of Cook county will be affirmed.

Judgment affirmed.

(218 Ill. 503)

BIRGE v. CITY OF CENTRALIA.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. EJECTMENT—TITLE OF PLAINTIFF—SUFFICIENCY OF SHOWING.

Where plaintiff in ejectment shows title in himself from the common source of title under which both he and defendant claim, he is entitled to recover, in the absence of rebutting testimony.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 59, 60.]

2. DEDICATION—STATUTORY DEDICATIONS—ACKNOWLEDGED PLAT.

A plat acknowledged before an Illinois commissioner of deeds in the state of New York is not a good statutory plat, and does not convey to the city the title to the streets, alleys, and other public grounds shown upon the plat.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 57, 58.]

3. SAME—BLANKS ON PLATS.

Leaving a blank space on a plat, without designating such space as a street, alley, or other public ground, does not constitute a dedication of the tract of land represented by such space, nor show a common-law dedication, in the absence of evidence of an intention by the grantor to make such dedication and an acceptance thereof by the public.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, §§ 42, 43.]

4. SAME—WITHDRAWAL OF OFFER.

A conveyance by a proprietor of platted land on a tract represented by a blank space on the plat, before any acceptance by the city of such tract of land, constitutes a withdrawal of any offer of dedication implied in leaving the space on the plat blank, and the city acquires no title by a subsequent acceptance of the dedication.

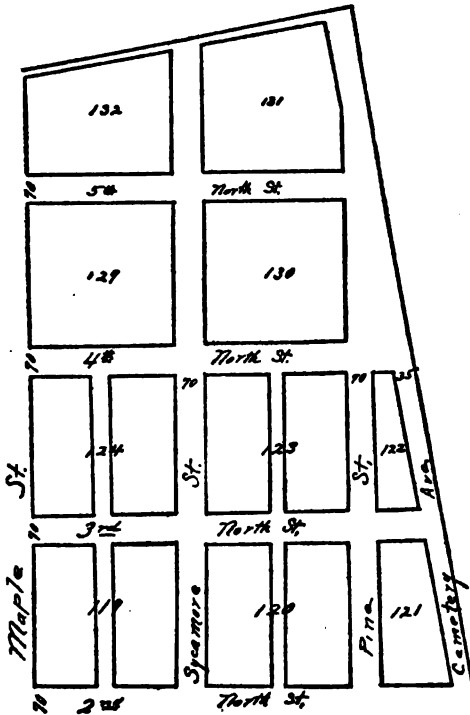
[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Dedication, § 79.]

Appeal from Circuit Court, Marion County; Truman E. Ames, Judge.

Action by R. J. Birge against the city of Centralia. From a judgment in favor of defendant, plaintiff appeals. Reversed.

W. F. Bundy, for appellant. Charles F. Dew and J. J. Bundy, for appellee.

HAND, J. This was an action of ejectment, brought in the circuit court of Marion county, by R. J. Birge against the city of Centralia to recover a triangular piece of land situated in Railroad addition to Centralia, which is bounded on the south by the north line of Fourth North street, on the west by the east line of Pine street, and on the east by the west line of Cemetery avenue. The tract is something like 70 feet wide at the north line of Fourth North street, and runs north to a point where Pine street and Cemetery avenue come together near Fifth North street. The following diagram indicates the situation of the premises and the streets, blocks, and alleys which immediately surround it:



The plea of not guilty was filed, and a jury was waived and a trial was had before the court, which resulted in a finding and judgment in favor of the city, and the plaintiff has prosecuted an appeal to this court.

Plaintiff, on the trial, filed an affidavit that he claimed title to the premises through a common source with the defendant, viz., the Illinois Central Railroad Company, and to show title in himself introduced in evidence a deed from the Illinois Central Railroad Company to A. A. Hubbard, bearing date

May 10, 1904, purporting to convey said premises to Hubbard, and a deed from A. A. Hubbard and wife to R. J. Birge, bearing date March 16, 1905, purporting to convey said premises to himself, and rested. Whereupon the defendant, to show title in the city, offered in evidence the plat, and certificates attached thereto, of Railroad addition to Centralia, which addition was platted by the Illinois Central Railroad Company in the year 1859, and the plat recorded; also certain deeds from the Illinois Central Railroad Company to various grantees, showing the conveyance by said railroad company, shortly after the land was platted and the plat filed for record, of blocks 122, 123, 130, and 131; also proof that the city had improved Fourth North street, Pine street, and Cemetery avenue, adjoining said premises, and that said streets in the vicinity of said premises were lighted by the city. It further appeared that the property in question, for many years after the land was platted, was vacant and was used by the public as a cow pasture; that it was subsequently occupied for a number of years by a colored man by the name of Jackson, who had a small house situated thereon, in which he lived; and that thereafter it was used by a man by the name of Nichols, who had it in cultivation. It seems to have been conceded the city was in possession, but the record is silent as to the date when it took possession, or what use it had made or was making of the premises at the commencement of the suit or at the date of the trial.

The plaintiff and the defendant claimed title to the said premises from a common source; and, plaintiff having shown title in himself from that common source, he was entitled to judgment, unless the defendant overcame the prima facie case made by the plaintiff by competent proof. *Dean v. Gorton*, 177 Ill. 624, 52 N. E. 880. This was sought to be done by proof that the premises in question had been dedicated to the city by the Illinois Central Railroad Company. The plat offered in evidence was acknowledged before a commissioner of deeds of the state of Illinois in the state of New York, and the plat was not, for that reason, a good statutory plat (*Gould v. Howe*, 131 Ill. 490, 23 N. E. 602), and did not have the effect to convey to the city the title to the streets, alleys, and other public grounds shown upon the plat. If, therefore, a dedication exists in this case, it must be by virtue of the common law, and not by virtue of the statute. The question therefore is presented for decision, was there shown here a good common-law dedication of said premises by the Illinois Central Railroad Company to the city of Centralia?

The space upon the plat where the premises in question are located is blank; that is, said premises are not platted as a street, alley, or as public grounds. Neither are they platted as a block or lots. Although a plat, by reason of its defective acknowledgment

ment, may not be good as a statutory plat, still, if a landowner plat ground as an addition to a village or city and place the plat of record, and he indicate thereon, by proper name and description, the streets, alleys, and public grounds in said addition, or by any proper designation clearly indicates upon said plat that portions thereof are set aside and intended for a specific public use, such plat, though not in conformity with the statute, will be deemed an offer on the owner's part to dedicate to public use the portions shown on the plat to have been set aside for the use of the public. Trustees of First Evangelical Church v. Walsh, 57 Ill. 363, 11 Am. Rep. 21; Gould v. Howe, supra. If, however, all that appears upon the face of the plat is a blank space, and there is nothing to show that the land covered by said blank space has been devoted to a public use, it cannot be held, from the face of the plat alone, that the owner intended, by the making and recording of the plat, to devote the premises represented by the blank space upon the plat to a public use. In Village of Princeville v. Auten, 77 Ill. 325, the proprietor, in laying out and platting the village of Princeville, left a square blank upon the plat without any designation of its purpose, unless that purpose was indicated by the fact that the block was not subdivided into lots. It was there held that the plat, without proof of the intention of the proprietor in laying out said block, did not show an intention on his part to dedicate the premises represented by said block to the village for a public use. And in City of Chicago v. Drexel, 141 Ill. 89, 30 N. E. 774, certain premises were platted along the lake shore, in the town of Lake View, as an addition to said town. On the plat a strip was left between the platted blocks and the shore line of Lake Michigan. Nothing was placed upon the plat to indicate an intention to devote said space to a public use, and it was held that said plat did not amount to an offer to dedicate said strip to the town of Lake View as a public street. In the article on "Dedication" found in volume 9 of the American and English Encyclopedia of Law (page 60) the author says: "To show a dedication, it should clearly appear that the owner intended to give the land to the public. It is not sufficient that some private use is not shown; and no presumption that the owner intended to deprive himself of his land can be relied upon to explain any ambiguities or uncertainties. The particular use for which the land was intended must plainly appear." This statement is well supported by authority, and we think is a correct declaration of the law upon the subject.

To prove a common-law dedication, both an intention on the part of the owner of the land to make it and an acceptance of such dedication by the proper authorities must be shown, and the proof as to those facts must be clear and unequivocal. Grube v.

Nichols, 36 Ill. 92; City of Chicago v. Chicago, Rock Island & Pacific Railway Co., 152 Ill. 561, 38 N. E. 768; Town of Wheatfield v. Grundmann, 164 Ill. 250, 45 N. E. 164. It is also held that a dedication of land to a public use must result from an active, and not a passive, state of the owner's mind, and that a mere nonassertion of a right will not establish a dedication, unless the circumstances are such as to show a purpose to dedicate the land to a public use. City of Chicago v. Chicago, Rock Island & Pacific Railway Co., supra. The plat found in this record does not designate the premises in question as having been set aside as a street, square, or common, or devoted to other public use, and, in view of the foregoing authorities, the plat not having been supplemented by proof as to the intention of the proprietor at the time he made the plat, as it was in Village of Princeville v. Auten, supra, we are unable to reach the conclusion, from an inspection of the plat alone, that there is shown upon its face any intention on the part of the Illinois Central Railroad Company, by virtue of the plat, to dedicate the premises in question to the city for a public use. In a note following the quotation from the American and English Encyclopedia of Law heretofore made it is said: "That a space is left blank on a plat, with no designation of its purpose, does not show a dedication. The purposes for which it is dedicated should be clearly apparent." Does the purpose clearly appear here? If it is said the purpose was to widen the street at the point where said premises are located, then the dedication must fail, for the premises have never been used as a street, and there has never been an acceptance by the city for that purpose. If it is said it was for some other public purpose, the question arises, what public purpose? There is no proof that there has been any acceptance for any purpose. If the railroad company intended to dedicate said premises to the city for a specific public purpose, although the plat was silent as to the purpose, and other evidence in connection with the plat showed that purpose and that the city had accepted the premises for that purpose, then, under the authority of Village of Princeville v. Auten, supra, the dedication would be complete and the city entitled to hold the premises; but, as the plat does not specify any purpose for which the premises were dedicated, and there is no proof to show any intention to dedicate the same to a specific public use by the original proprietor or an acceptance for any specific public use by the city, under the authority of City of Chicago v. Drexel, supra, there was no dedication. If it were conceded there was an offer to dedicate, if, however, before the offer was accepted it appeared it was withdrawn by the original proprietor, after such withdrawal a subsequent acceptance would be fruitless to complete the dedication. In the Drexel Case it was held that a conveyance by the original proprietor be

fore an acceptance by the city was a withdrawal of the offer to dedicate.

We are of the opinion the *prima facie* case made by the plaintiff was not overcome by the proof offered by the defendant. The judgment of the trial court will therefore be reversed, and the cause remanded for a new trial.

Reversed and remanded.

(218 Ill. 509)

PEOPLE v. KELLEY et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. TAXATION—INHERITANCE TAX—PROPERTY SUBJECT.

A trust deed, not made in contemplation of death, took effect on delivery for the benefit of the beneficiaries, except that the grantors reserved to themselves out of the income of the fund \$2,400 annually for life. *Held*, that so much of the estate conveyed as was necessary to produce the income provided for was subject to the inheritance tax.

2. SAME—GIFTS BY PARENT.

The object of the inheritance tax is not to prevent a parent from giving the whole or any portion of his property to his children during lifetime, if he so desires, but only to subject such property to an inheritance tax, if the gift is made in contemplation of the death of the donor.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, § 1702.]

Appeal from Cook County Court; Orrin N. Carter, Judge.

Action by the people against Addison D. Kelley and others. From a judgment for defendants, the people appeal. Affirmed.

W. H. Stead, Atty. Gen. (Merritt W. Pinckney, of counsel), for the People. Defrees, Brace & Ritter (John G. Campbell, of counsel), for appellees.

HAND, J. This was an appeal from a judgment of the county court of Cook county refusing judgment for an inheritance tax against a portion of the estate of David Kelley, deceased. It appears from the record that on March 1, 1900, David Kelley and Sarah J. Kelley, his wife, executed to the Illinois Trust & Savings Bank, an Illinois corporation, a trust deed, conveying to said trust and savings bank, as trustee, improved real estate situated in the city of Chicago of the value of \$260,000, and which yielded an annual income of \$14,500. By the terms of the trust deed the net annual income of the premises was to be paid quarterly in equal sums to Addison D. Kelley and Paul D. Kelley, the two sons of the grantors, and their heirs, with the exception of \$200 per month, which was to be held by the trustee until the end of each year, when the same was to be paid to the grantors, or the survivor of them, during their natural lives, if they requested in writing said trust and savings bank to pay the same to them or either of them. The trust deed was delivered on March 13, 1900, and at that time the trust and savings bank was requested by the

grantors and the cestuis que trust not to file the trust deed for record during the lifetime of David Kelley, unless requested so to do by the grantors and cestuis que trust. On the delivery of the deed the trust and savings bank took possession of the property and has paid the net income therefrom to said sons, with the exception of \$200 per month, which has, since the death of David Kelley, been paid to Sarah J. Kelley, his widow, upon her written request. David Kelley made his will on June 20, 1900, by the terms of which he gave to Sarah J. Kelley, his widow, the balance of his estate, consisting of real and personal property, which amounted in value to about \$350,000. Mr. Kelley was 69 years of age at the time of his death, and had been engaged in business in the city of Chicago for many years, where he had accumulated his fortune. He had been troubled with valvular disease of the heart for many years, and was confined to his house from an attack of heart disease at the time he executed said trust deed. His family physician, Dr. Billings, testified Mr. Kelley was subject to such attacks, that they were brought on by overexertion, that he had theretofore recovered from the same, and that there was no apprehension of Mr. Kelley's immediate death at the time the deed was executed. Mr. Kelly recovered his usual health shortly after the deed was executed, and remained in that condition until the following September, when he was again taken sick, and died on October 25, 1900. Mr. Defrees, who was Mr. Kelley's personal friend and legal adviser, and who had known him intimately since 1888, testified that Mr. Kelley had but two children, viz., Addison D. and Paul D. Kelley, both of whom were adults and engaged in business in the city of Chicago; that prior to the execution of the trust deed Mr. Kelley said to him his sons were not making as much money in their business as their station in life required them to use, and he desired to make some permanent provision for them, so that they would be supplied with ample means; that he suggested to Mr. Kelley that he convey the property in question to a trustee for their use; and that in accordance with his suggestion the trust deed was made. He also testified the sons were fully advised as to the intention of their father, and that one of the sons, at the time the trust deed was delivered, suggested that the trust feature of the conveyance would be somewhat embarrassing to himself and brother, and asked if the trust deed could not be withheld from record during his father's lifetime; that he advised Mr. Kelley there were no legal objections to withholding the deed from record after it had been delivered and the possession of the property turned over to the trustee, and that for the reason suggested by the son and his advice to Mr. Kelley the trust deed was withheld from the record. The trust deed reserved to the gran-

tors and the cestuis que trust, acting jointly, the right to change the terms of the trusts created by the deed, but it provided in express terms that such change should not divest the absolute title conveyed to the trustee. Propositions of law were submitted to the county court, and upon final hearing that court held that said real estate conveyed to the trust and savings bank was not subject to the payment of an inheritance tax, except so far as was necessary to produce an annual income of \$2,400, which portion the court fixed, upon stipulation of the parties, at \$48,000, and found that the beneficial interest of Sarah J. Kelley therein was \$24,196.80, that of Addison D. Kelley \$6,912, and that of Paul D. Kelley \$11,891.20, and that, after allowing to each son an exemption of \$20,000, said real estate as to them was not subject to an inheritance tax; that said trust deed was not made by David Kelley in contemplation of his death; and that he did not intend said conveyance to take effect in possession or enjoyment after his death, except as to the amount thereof necessary to produce said annual income of \$2,400 per year—and entered judgment to that effect, and an appeal has been prosecuted to this court to reverse the said findings and judgment of the county court.

The first contention made by appellant is that the court erred in refusing to hold that said trust deed was intended to take effect in possession or enjoyment after the death of David Kelley. The court held that such was the effect of the trust deed as to \$43,000 of the property, or the portion necessary to produce an annual income of \$2,400, but refused so to hold as to \$217,000 in value thereof. While it is conceded as to that portion—that is, \$217,000—of the property the enjoyment and possession passed from David Kelley to the trustee upon the delivery of the trust deed and immediately through the trustee vested in the cestuis que trust, it is urged that the court could not separate the part that vested in present from the part that was to vest in futuro, and that, as it appeared a portion of the subject matter of the conveyance was to take effect after the death of David Kelley, it is said the court should have held that it was the intention of the grantors in the trust deed that the entire subject-matter of the conveyance was to take effect in possession and enjoyment after the death of David Kelley. We do not agree with this contention. In *People v. Moir*, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205, Robert Moir conveyed absolutely to his three sons, by deed, lands situated in this state of the value of \$105,200, and on the same day gave to each of them personal property of the value of \$200,000, and at the same time he and his three sons entered into articles of copartnership whereby each partner contributed to the partnership fund \$200,000, and Robert Moir was to receive one-half of the profits of the partnership business, and

the other half was to be equally divided among his three sons. While it appeared the lands conveyed to the sons were not treated as a partnership estate, the income of the lands was so treated and was carried into the profits of the partnership and divided between Mr. Moir and his three sons; he receiving one-half of said income, and the remainder being divided among his three sons. It was there held that the one-half of the income of the lands was reserved to Mr. Moir's own use during his life, and that as to that portion of the land the possession and enjoyment thereof were postponed as to the sons until the death of Robert Moir, and that one-half of the lands was subject to an inheritance tax by reason of such reservation. We are of the opinion that case is decisive of the question raised here. The income on \$43,000 of the land conveyed to the trust and savings bank was reserved to the grantee and his wife and the survivor of them. As to that amount the possession and enjoyment were postponed until after the death of David Kelley, and was, we think, clearly subject to an inheritance tax. As to the remainder of the value of the land, the possession and enjoyment vested immediately in the two sons through the trustee, and that portion of the land was not subject to an inheritance tax.

The next contention made is that the conveyance to the trust and savings bank was made by David Kelley in contemplation of his death. That contention raises a question of fact. Dr. Billings testified that David Kelley was not in immediate danger of death at the time the trust deed was executed and delivered, and Mr. Defrees testified that the conveyance was made as a provision for the grantor's two sons, and that the deed was withheld from record by mutual arrangement between the parties, but that the same was fully delivered to the trustee and possession of the premises turned over to the trustee at the time of the delivery of the trust deed. We have examined this record with care, and have been unable to discover any evidence therein which tends even remotely to show that David Kelley thought he was about to die at the time he executed said trust deed, or that he made said trust deed in contemplation of his death. It is not the object of the statute to prevent a parent from giving the whole or any portion of his property to his children during his lifetime, if he so desire. The only effect of the statute as a revenue measure is to subject said property to an inheritance tax if the gift is made in contemplation of the death of the donor. In *Rosenthal v. People*, 211 Ill. 306, 71 N. E. 1121, and *Merrifield v. People*, 212 Ill. 400, 72 N. E. 446, the evidence showed clearly that both *Rosenthal* and *Merrifield* were about to die at the time they made the transfers there considered, and that transfers of the bulk of their estates were made to their immediate descendants as a disposition of their respective estates in contempla-

tion of death, which they each knew was almost immediately likely to follow, and which did follow the making of the transfers within a few days. The facts in those cases are so far different from the facts in the case at bar as to clearly distinguish those cases from this case.

We are of the opinion the county court properly held that said trust deed took effect absolutely as to said real estate, except as to such portion thereof as would produce an annual income of \$2,400, upon the delivery thereof, and that said trust deed was not made by David Kelley in contemplation of death. The judgment of the county court will therefore be affirmed.

Judgment affirmed.

(218 Ill. 516)

VILLAGE OF GRANT PARK v. TRAH.

(Supreme Court of Illinois. Dec. 20, 1905.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—DAMAGES.

The determination of a village, under the sidewalk act of 1875, to construct a sidewalk by special taxation, is not a determination of the question of damages to abutting property from changing the grade of the walk, and the owner of such property can have such damages assessed by a jury in an action at law.

Appeal from Appellate Court, Second District.

Action by Joseph Trah against the village of Grant Park. Judgment for plaintiff was affirmed by the Appellate Court (115 Ill. App. 291), and defendant appeals. Affirmed.

This was an action on the case, brought in the circuit court of Kankakee county by Joseph Trah, the appellee, against the village of Grant Park, the appellant, to recover damages occasioned to appellee's lots by the construction of a cement sidewalk by appellant in front and along the side of said lots. The village filed the general issue. A trial before a jury resulted in a verdict for \$1,260 in favor of the plaintiff. A motion by the village for a new trial was overruled, and judgment was rendered upon the verdict. The village appealed to the Appellate Court for the Second District, and that court having affirmed the judgment of the circuit court, appellant now brings the record here for review. In 1884 appellee purchased lots 9 and 10 of block 18 in the original town of Grant Park. These lots fronted east on Main street, and the south side of lot 10 was on Taylor street. During the same year the lots were purchased Trah erected a building at the corner of Main and Taylor streets and another immediately north of the corner building. Both buildings were of brick and rested on stone foundations. The top of the foundations and the lower ends of the door sills were about two feet above the ground. Shortly after these buildings were erected a board sidewalk was laid on Main street in front of the lots and on Taylor street on the south side of lot 10.

Part of this walk was laid by appellee alone and part by appellee and the village jointly. The grade for the board walk was furnished by an engineer employed by the village of Grant Park. During the years 1889, 1890, and 1896 other brick buildings were erected by appellee, on stone foundations, with reference to the grade of the board sidewalk; the bottom of the door sills of each building being several inches higher than the board sidewalk. On April 5, 1902, the village of Grant Park passed an ordinance for the construction of a cement sidewalk in front of these two lots on Main street and along the south side of lot 10 on Taylor street. The ordinance particularly specified the grade of the walk to be laid, and required the owner of the lots to construct the same within 30 days, and that in default thereof the walk should be laid by the village and one-half the cost should be collected by special taxation of the lots. The owner having failed to construct the walk within the time specified in the ordinance, the village laid the same in accordance with the specifications and grade contained in the ordinance. This grade was considerably above that of the board sidewalk previously laid, and the cement walk, as constructed, is from 3½ inches to 12¼ inches above the thresholds of the doors of the several buildings on the lots. There is abundance of evidence to support a finding that the construction of the sidewalk at the grade above the thresholds of the doors of the buildings above stated has caused a depreciation in the value of the real estate of at least \$1,260. It was stipulated on the trial of the cause that the ordinance under which the walk was built was legally passed and published, and that the amount charged up against appellee's lots for building the walk was \$196.75, which was one-half the cost of the walk, and that the other half was paid by the village. Appellee has not paid this \$196.75, or any part thereof, and no judgment has been rendered by the county court against the lots for the special tax. At the close of all the evidence the village requested the court to give to the jury an instruction in writing directing the jury to find a verdict for the defendant. The court refused this instruction. The only assignments of error in this court are the refusal to give the peremptory instruction, the refusal of two instructions offered by appellant with its series of instructions, and the giving of one of appellee's instructions.

Charles B. Campbell, for appellant. W. R. Hunter and A. L. Granger, for appellee.

SCOTT, J. (after stating the facts). Appellant first contends that the peremptory instruction offered at the close of all the evidence should have been given, because the law, as heretofore announced by this court, does not permit the plaintiff to show that his property was damaged by the construction of

the sidewalk. In this connection numerous decisions of this court are called to our attention where it has been held that the determination by a village board or city council that a sidewalk shall be constructed by special taxation is a determination that the property so specially taxed is benefited to the extent of such tax, and that the question whether the decision of the village board is correct cannot be inquired into by the courts; and appellant urges that it necessarily follows from those decisions that such determination by the village board is also a finding that the property has not been damaged, and that the courts are concluded from investigating that question, except in cases where the ordinance under which the improvement is made is unreasonable or oppressive. The decisions referred to by appellant were rendered in cases which arose upon application for judgment for delinquent taxes levied under the sidewalk act of 1875 or under other statutes providing for the making of local improvements by special taxation. They are not applicable to a case brought by a property owner to recover damages occasioned by a change of grade, even though such change of grade is made while constructing a sidewalk or other local improvements, for reasons which are apparent upon a consideration of the question. In the case at bar, the sidewalk, without taking into consideration the change of grade, was a benefit to the property, while the change of grade, without taking into consideration the sidewalk, was a damage to that property. The village board had authority to determine the extent of such benefit (*White v. People*, 94 Ill. 604; *Piereson v. People*, 204 Ill. 456, 68 N. E. 388); but it had no power to determine the extent of such damages, because the change of grade was a damage to private property within the meaning of section 13 of article 2 of the Constitution of 1870, which provides that "private property shall not be taken or damaged for public use without just compensation," and which guarantees appellee the right to have his damages ascertained by a jury (*City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1012, 1135). The separate consideration of the benefits derived from an improvement and the damages caused to the property from making such improvement has been recognized by this court in *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Harwood v. City of Bloomington*, 124 Ill. 48, 16 N. E. 91; *Osgood v. City of Chicago*, 154 Ill. 194, 41 N. E. 40; *Lake Shore & Michigan Southern Railway Co. v. Baltimore & Ohio & Chicago Railroad Co.*, 149 Ill. 272, 37 N. E. 91; and *City of Chicago v. Lonergan*, 196 Ill. 518, 63 N. E. 1018. No provision is contained in the sidewalk act of 1875 for ascertaining the just compensation to be made for damages caused to private property by reason of changing the grade in the construction of the sidewalk, and it necessarily follows that appellee is entitled to have such damages ascertained in

this suit. The peremptory instruction was therefore properly refused.

Appellant also complains of the refusal of the following instruction: "The court instructs the jury that it is conclusively presumed in this case that the sidewalk in question has benefited the plaintiff's property to the extent, at least, of that part of the cost of said sidewalk which the ordinance in this case provides that plaintiff shall pay." It was not error to refuse this instruction, for the reason that it stated an abstract proposition of law which was apt to mislead the jury without a further statement in the instruction telling the jury what application they should make of the principle of law announced by the instruction.

The court gave to the jury, on behalf of appellee, an instruction stating that before making any deduction of benefits from damages they should first subtract from the benefits the amount of the special tax which had been charged against plaintiff's property. This instruction is objected to on the ground that there was no evidence that appellee had paid the tax or that the county court had rendered judgment against the property therefor. This point is without merit. The plaintiff was liable to pay the special tax mentioned in the instruction to the collector holding the warrant for the collection thereof, and, in default of such payment, to have his property returned delinquent and sold to satisfy the tax. This case was tried on the theory that the ordinance under which the sidewalk was built was valid. A stipulation was made in the trial court between the parties hereto that the ordinance was legally passed and published. Plaintiff would therefore be estopped from urging that the ordinance was invalid upon application for judgment and sale of his property for the satisfaction of this tax. We think it is immaterial whether the tax had been paid or whether judgment had been rendered for it, if the plaintiff is liable to pay the tax, and this is the only difference between this instruction and one which was approved in *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146. For the same reason it was not error to refuse the instruction offered by appellant to the effect that the jury should not take into consideration the special tax in estimating the damages to be awarded to plaintiff.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(218 Ill. 521)
CUMMINS, County Collector v. WEBBER.
(Supreme Court of Illinois. Dec. 20, 1905.)

1. TAXATION—EXCESSIVE ASSESSMENT—EQUITABLE RELIEF.

Equity will not grant relief against an increased assessment, on the ground that it is excessive or results in double taxation, where the taxpayer, after notice to appear before the board of review and show why his assessment should not be increased, fails to do so.

2. SAME—ASSESSMENT SCHEDULE—FAILURE TO SIGN.

Where a taxpayer fails to sign and make oath to his assessment schedule, as provided by Hurd's Rev. St. 1903, c. 120, § 811, it is the duty of the board of review to list the property according to its best knowledge at its fair cash value, and add, under paragraph 813, to the valuation of such list an amount equal to 50 per cent. on that valuation, and fix the amount of his assessment accordingly.

Appeal from Circuit Court, Saline County;
A. K. Vickers, Judge.

Bill by A. J. Webber against O. O. Cummins, county collector. Decree for plaintiff, and defendant appeals. Reversed.

The appellee, A. J. Webber, filed a bill for an injunction in the circuit court of Saline county, to the April term, 1904, to restrain the county collector of Saline county from collecting certain personal taxes assessed against appellee for the year 1903. The bill alleged that the complainant was on April 1, 1903, a resident of the town of Galatia, in said county, and engaged in a private banking business in said town; that on May 27, 1903, he made and delivered to the assessor for the town of Galatia a schedule showing the condition of his bank on April 1st of that year, in which appeared an item of \$143,217.90 as bills receivable, etc., and also the amount of all deposits made with him by other parties, and the amount of all accounts payable other than current deposit accounts, together with the other items required by law to be given in such schedule, from which schedule the assessor deduced the items to be listed for taxation and placed them on complainant's general schedule, showing the total taxable property of complainant as banker to be of the value of \$70,980; that he also made and delivered to the assessor a schedule of his other personal property, amounting to \$14,070, making the total fair cash value of all of complainant's personal property, as listed for taxation, \$85,000; that the assessor accepted the schedules as correct, and fixed the full fair cash value of complainant's personal property at \$85,000 and the assessed value at \$17,000, and so returned it to the supervisor of assessments of Saline county, who placed it upon the assessor's book for the year 1903 without making any change therein; that the board of review of said county, on August 29, 1903, fraudulently, arbitrarily, and without authority of law added to said assessment the additional sum of \$93,980, and so placed it on the assessor's book for that year, as credits other than of bank, banker, etc., and fixed the assessed value of the additional sum at \$18,796, and added the latter amount to the said \$17,000, making a total of \$35,796 as the final assessed valuation of complainant's personal property for the year 1903, as fixed by the board of review, upon which sum the county clerk has extended complainant's personal taxes at \$2,547.26; that no notice

of the acts of the board of review was given him, and that he did not know that the sum of \$93,980 had been added to his schedule until a tax warrant was issued by the county clerk and placed in the collector's hands for collection. The bill further avers that on April 1, 1903, there was a large number of mortgages of record in complainant's name, and that he is informed and believes that the board of review had a list of them made and found them to amount to \$93,980, and assessed them to him as above stated; that all such mortgages were held as banker and were included in his assessment as such under the item of bills receivable, and that if he is compelled to pay the tax thereon it will be double taxation and unjust and inequitable; that he has paid the taxes extended against the said sum of \$85,000, full value, amounting to \$1,212.40, and that there still remains on the collector's books charged against him the further sum of \$1,834.86, being the taxes upon the said sum of \$93,980, and that a tax warrant for the collection thereof is now in the hands of the county collector, who is threatening to levy upon and sell the property of complainant to pay said taxes. The answer of the defendant admits that the complainant made and delivered to the assessor a schedule purporting to show the condition of his bank, as set forth in the bill, but denies that the schedule was true and correct or legal, for the reason that it has never been signed or sworn to by the complainant, or any one for him, and was not a full and complete schedule of all of his property, and denies that \$85,000 was a full fair cash value of the personal property of the complainant on April 1, 1903. The answer denies that the board of review fraudulently, arbitrarily or without authority of law added to the assessment the additional sum of \$93,980, and avers that such board found real estate mortgages in complainant's name to the amount of \$93,980, unsatisfied of record, in addition to the property already assessed to the complainant; that complainant was notified of this fact, and was given a list of such mortgages to revise and strike out all that had been paid, transferred or that were included in his list as a banker; that the complainant took said list with him, and afterwards returned it to the board without denying that such mortgages were his individual property. The answer also denies that complainant had no notice of the acts of said board, and denies that the sum of \$93,980 which was added to the complainant's assessment had theretofore been listed by him as a banker, and avers that such sum was additional property which was not listed by complainant for taxation for the year 1903. A general replication was filed to the answer. A decree was rendered by the court below, finding generally that the averments of the bill were true and those of the answer not true, and making the temporary

injunction theretofore granted perpetual. The county collector of Saline county brings the cause to this court by appeal.

The evidence shows that the cashier of appellee's bank, in the presence of appellee and the assessor, made out the schedule showing the condition of the bank, and also the schedule of appellee's other personal property; that he placed in the bank schedule, under the item of bills receivable, etc., the sum of \$143,217.90; that the general schedule made by appellee showed personal property owned by him other than a banker of the value of \$14,070; that neither schedule was sworn to by any one, and both were received by the assessor in that form, and that he returned them to the supervisor of assessments, who placed them upon the assessment book; that when the assessment book and schedules were turned over to the board of review that board gave appellee notice to appear before it and show cause why his assessment should not be increased; that the board had obtained a list of mortgages amounting to \$128,380, standing unsatisfied of record in four different counties, in appellee's name, and gave appellee this list; that he took the list and checked off all but \$93,980 thereof, and returned it to the board of review; that he was requested and directed to make out sworn schedules of his property and deductions claimed by him, as required by law, but refused to do so, and that he at all times refused to take the oath required by law. The evidence does not show that the appellee claimed before the board of review that the \$93,980 was included in the \$143,217.90 listed in his schedule as banker under the item bills receivable, etc., but the evidence produced in the circuit court does show that the first-mentioned sum was included in the latter, and that the mortgages found by the board of review were contained in the item of bills receivable, etc. The board of review thereupon added to appellee's assessment the said sum of \$93,980, full value, and taxes were extended upon the one-fifth value thereof, the collection of which was enjoined by the decree of the court below.

It is contended by appellant that the appellee, by his refusal to swear to his schedule, is in fault, and cannot obtain relief in a court of equity; that appellee had a legal remedy before the board of review, and, having failed and refused to pursue that remedy, is not entitled to equitable relief; and that appellee, having refused to offer any testimony in his behalf before the board of review, and that board having acted in good faith upon the best information that it could obtain as to the extent of appellee's property, its action in adding the value of the mortgages to appellee's assessment cannot be reviewed in this proceeding. Appellee insists that the issue made by the pleadings was whether or not the sum of \$93,980 was included in the \$143,217.90 which had been listed by him in his bank statement, and

that issue being established by the evidence and the decree of the court in his favor, to permit the collection of the taxes extended on the sum added by the board of review would be double taxation, and that a court of equity has jurisdiction, in such cases, to enjoin the collection of such tax, and should exercise that jurisdiction where it appears, as in this case, that a person has been assessed twice on the same property.

W. H. Stead, Atty. Gen., A. W. Lewis, State Atty., and Choisser, Choisser & Kane, for appellant. W. F. Scott, for appellee.

SCOTT, J. (after stating the facts). Webber's schedules returned by the local assessor were not sworn to. Webber was given notice to appear before the board of review and show cause why his assessment should not be increased. Pursuant to that notice he came before the board but made no showing whatever. He was furnished by the board with the necessary blanks and requested to list his personal property and swear to the lists, as required by statute. This he refused to do, saying, in substance, that he never had made, and never would make, the statutory affidavits. Thereupon the board of review increased his assessment by adding to the schedule an assessment of \$93,980 upon credits, and appellee contends that the result is a double assessment against him to the amount so added to his assessment.

Where a taxpayer is notified to appear before the board of review and show cause why his assessment should not be increased, and he fails to improve the opportunity so afforded him to avail of his remedy at law by showing cause against an increase, equity will not interfere to relieve him from an increased assessment on the ground, alone, that such increased assessment is excessive in amount or results in double taxation. *Coxe Bros. & Co. v. Salomon*, 188 Ill. 571, 59 N. E. 422; *Standard Oil Co. v. Magee*, 191 Ill. 84, 60 N. E. 802. Appellee relies in this regard principally upon the cases of *Condit v. Widmayer*, 196 Ill. 623, 63 N. E. 1078; *Weber v. Baird*, 208 Ill. 209, 70 N. E. 231; and *Carney v. People*, 210 Ill. 434, 71 N. E. 865. Each of these cases is plainly distinguishable from the one at bar. In the first of these cases the taxpayer had exhausted his remedy, so far as the board of review was concerned, by appearing before that board and being fully heard; in the second of these cases the taxpayer appeared before the board of review and endeavored to obtain a hearing, and his statement was taken by one member of the board; while in the third of these cases the taxpayer never had an opportunity of appearing before the reviewing officers, as no notice was given him of a proposed review or increase of his assessment. In the case before us the taxpayer, though notice was given him, entirely failed to avail himself of his remedy at law

by showing cause before the board of review.

It is contended, however, that the issue made by the pleadings is whether or not the assessment was, in fact, excessive; that no other question arises upon the pleadings, and that as the evidence establishes the fact that the assessment was excessive the decree should be affirmed. This contention is without merit, as an examination of the answer discloses that appellant thereby averred, in substance, that Webber did not make any showing against the increase in his assessment. The law required appellee to sign and make oath to his assessment schedule. Hurd's Rev. St. 1903, c. 120, § 311. Upon his failure to do so it became the duty of the board of review in this case to list the property, according to its best knowledge, information, and judgment, at its fair cash value, and add to the valuation of such list an amount equal to 50 per cent. of that valuation (paragraph 313, c. 120, supra), and fix the amount of his assessment accordingly.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions to enter a decree dissolving the temporary injunction and dismissing the bill for want of equity.

Reversed and remanded, with directions.

(218 Ill. 523.)

CITY OF CHICAGO et al. v. BREDE.
(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS—MODES OF PAYMENT.

Const. art. 9, § 9, empowering the Legislature to invest cities, villages, and towns with the right to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise, permits the authorization of municipalities to make local improvements by special assessments, special taxation, or general taxation.

2. SAME.

Const. art. 9, § 9, authorizes the Legislature to empower cities to make local improvements by special assessment or by special taxation or otherwise. Local Improvement Act, § 1, as amended in 1897 (Hurd's Rev. St. 1903, p. 390), empowers cities and villages to make local improvements by special assessments, by special taxation, by general taxation, or otherwise, as the city or village may by ordinance prescribe. *Held*, that where an ordinance provides that a local improvement shall be paid for by special assessment, and the assessment is levied and the work completed, and bonds are issued, the city may not afterwards pay for a portion of the improvement by a general fund raised by general taxation.

3. SAME—PURCHASE OF BONDS BY CITY.

Local Improvement Act, § 73 (Hurd's Rev. St. 1903, p. 408), provides that a municipality shall not be liable to the contractor in case of failure to collect an assessment, but it shall with reasonable diligence cause a valid assessment to be levied. Section 90 (Hurd's Rev. St. 1903, p. 413) provides that no person accepting vouchers or bonds shall have any claim or lien upon the city for the payment thereof or the interest thereon, except from the collection of the assessment against which the voucher or bonds are issued, and the city shall nevertheless be in no way liable to the holders

of such vouchers or bonds in case of failure to collect the same. *Held*, that City & Village Act, § 62, par. 2 (Hurd's Rev. St. 1903, p. 291, c. 24, art. 5), authorizing a city council to appropriate money for corporate purposes only, and to provide for the payment of debts and expenses of the corporation, does not empower the city to purchase special assessment or improvement bonds, coupons, or vouchers out of moneys derived from miscellaneous sources, where there is a delay in the collection of the corresponding special assessment fund, and reimburse itself out of the special assessment fund when collected.

Appeal from Appellate Court, First District.

Suit by Max L. Brede against the city of Chicago and others. From a judgment of the Appellate Court, affirming a decree in favor of complainant, defendants appeal. Affirmed.

The appellee filed his bill in the circuit court of Cook county against appellants to enjoin the expenditure of \$150,000 for the year 1905 by the board of local improvements for the purchase of improvement bonds issued upon special assessments. The bill alleged that pursuant to the local improvement act of 1897 the city of Chicago made many local improvements and issued bonds from time to time for the purpose of paying therefor, amounting to many hundreds of thousands of dollars, which are known as "special assessment or improvement bonds," and which state upon their face that they are payable solely out of the funds collected by special assessment. On April 9, 1903, an ordinance was passed authorizing the creation of a special fund, to be known as the "improvement bond fund," to be used for the purchase of improvement bonds, coupons, and vouchers issued since July 1, 1897, when the respective funds against which the bonds had been issued had been exhausted and deficiencies existed on account of delays in the collection of the special assessment. The bonds thus purchased were to be deposited with the comptroller as a part of the fund, to be reimbursed by the payment of the bonds and interest when the corresponding special assessment had been collected and the deficiency made good. During the years 1903 and 1904 appropriations to the amount of \$50,000 for each year were made from miscellaneous receipts, and in the year 1905 \$150,000 was appropriated for the same purpose. The bill alleges that the payment of said bonds by the said city was an illegal diversion of the funds belonging to the city, raised by taxation, and would diminish the funds in the city treasury applicable to the future legitimate expenses and appropriations of said city for permanent improvements. The prayer was for an injunction to restrain such expenditures. The answer of appellants alleged that the finance committee of the city council, after a thorough investigation of the outstanding special assessment accounts, found that \$150,000 would be sufficient to purchase special assessment bonds and coupons liable to be temporarily defaulted by

reason of delay in the collection of assessments, and that the ultimate loss would not exceed one-half of 1 per cent. thereof; that the fund provided by ordinance was not used for the payment of said local improvement bonds, coupons, and interest, but that it was merely used to purchase such of said paper as was in danger of being defaulted, and that such purchased paper was placed in the fund in lieu of the money, and the fund was reimbursed when the special assessment had been collected; that the city of Chicago is interested in maintaining the commercial integrity of the bonds, and may, as a matter of policy, in its discretion, in order to preserve its credit, purchase the bonds from its general fund or from moneys derived from other sources than taxation and hold the same until the special assessment is collected, and may then pay the bonds out of the special assessment fund when the same is so replenished. The circuit court granted an injunction according to the prayer of the bill and by agreement the hearing upon that motion was taken as a final hearing of the cause, and a final decree entered finding the equities in favor of the complainant and making the injunction perpetual. The Appellate Court has affirmed the decree of the circuit court, and a further appeal has been prosecuted to this court.

Robert Redfield and Frank Johnston, Jr. (James Hamilton Lewis, Corp. Counsel, of counsel), for appellants. Stein, Mayer, Stein & Hume (Philip Stein, of counsel), for appellee.

WILKIN, J. (after stating the facts). The one question for determination is whether the city of Chicago possesses the power to pay or purchase improvement bonds, coupons, and vouchers issued in payment of local improvements constructed by special assessment, where the ordinance authorizing the local improvement provides that it shall be paid for by special assessment.

It is insisted by appellants that, pursuant to section 9 of article 9 of the Constitution of 1870, the Legislature passed the local improvement act of 1897 (Hurd's Rev. St. 1903, p. 390), section 1 of which authorizes cities, villages, and towns to make local improvements by special assessment, special taxation, general taxation, or otherwise; that under this section, and the construction placed upon it by this court, the city possesses the discretionary power to prescribe in the original ordinance that the improvement shall be paid for entirely out of the general fund or entirely by special assessment, or partly by special assessment, and partly out of the general fund, and that after naming a mode of payment in the ordinance the city is not precluded thereafter from paying for the improvement in any manner than the one prescribed, but may pass another ordinance of equal dignity and standing with the original and prescribe therein another meth-

od of payment. Section 9 of article 9 of the Constitution of 1870 empowers the Legislature to vest cities, villages, and towns with the right to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. In the case of *Wilson v. Board of Trustees*, 133 Ill. 443, 27 N. E. 208, we held that this section was adopted for the purpose of removing restrictions which had been placed upon the Legislature by the Constitution of 1848, and to authorize the making of local improvements by the levy of assessments on contiguous property according to frontage, and that the words "or otherwise" were used in the section for the purpose of excluding the possibility of misapprehension that because only cities, towns, and villages could be authorized to make local improvements by special assessment or special taxation, they could not be authorized to make them by general taxation. Prior to 1897, section 1 of the local improvement act passed under the above section of the Constitution vested cities with authority to make local improvements by special assessment or by special taxation, or both, or by general taxation, or otherwise, as might be prescribed by ordinance. Hurd's Rev. St. 1898, p. 268, c. 24, § 116. In the case of *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774, we held that the language of the above section was not directed to the mode of making a single improvement, but to the making of improvements in the plural, and that its purpose was to vest in the corporate authorities power to make improvements, both by special assessment and special taxation; but that in case of a single improvement, the city or village must decide by ordinance which of the modes it would pursue, and that the words "or both" did not authorize a city or village to combine the two modes in a single assessment, but that they might combine general taxation with special assessment or with special taxation in the same proceeding. On July 1, 1897, an amendment to section 1 of the local improvement act went into effect, conferring power on cities and villages to make local improvements by special assessment or special taxation of contiguous property, or by general taxation or otherwise, as the city or village by ordinance might prescribe. This act was substantially the same as the one in effect prior to July 1, 1897, except that the words "or both" were omitted. Thus it will be seen that the omission of these words limited the application of the statute, and in no way could it be implied under this provision that an assessment might be made by special taxation and special assessment in the same ordinance. Outside of the sections above referred to, no provision of the statute has been called to our attention authorizing the two systems to be adopted in the same ordinance. In the *Kuehner Case*, supra, we held that the provision of section 9 of article

9 of the Constitution, being an exception to the general rule and policy of the state and the dominant principle of the Constitution, should not be extended beyond the clear import of the language employed. That rule may also apply to the statutes passed under that section of the Constitution. Those statutes should receive no more liberal interpretation than the provisions of the Constitution, upon which they are based.

The appellants contend that, notwithstanding the above provision, they may by ordinance prescribe that a certain local improvement may be paid for by special assessment, and then afterwards pay a portion of the same out of a general fund raised by general taxation. This method might open a way to great injustice. If the special assessment had been levied and paid by a portion of the property owners, and the city were permitted to purchase outstanding improvement bonds and afterwards a portion of those bonds should not be paid, some method would have to be devised which would equalize the payments, so that the tax would be just and uniform, otherwise one property owner would have to pay his full share of the assessment as levied against him, while another might be required to pay only a part or escape entirely. The city council, by its original ordinance, may provide that an improvement is to be paid for in part out of the general fund and in part by special taxation, but after that ordinance has been passed and the assessment levied and the work completed and the bonds issued, there is no statutory provision which has been called to our attention authorizing the city council to change the method of payment, and we do not think the city council has any discretion outside of express statutory provisions.

It is next contended that the city has the power to purchase special assessment or improvement bonds, coupons, and vouchers out of moneys derived from miscellaneous sources, where there is a delay in the collection of assessments in the corresponding special assessment fund, and reimburse itself by paying such bonds out of the special assessment when collected. In support of this contention it is insisted that paragraph 2, § 62, art. 5, c. 24, of the statute (Hurd's Rev. St. 1903, p. 291), authorizes the city council to appropriate money for corporate purposes only, and provides for the payment of debts and expenses of the corporation, and that under this section the city has power to authorize the purchase of the bonds in the manner above described, on the ground that such purchase is a corporate purpose. The sections of the statute providing for the making of local improvements are complete in themselves. They provide the manner in which the assessment shall be originated, how the contract shall be let, how the work shall be done, how the bonds shall be issued and how the collections shall be made. As we

have already said, this method of levying a special assessment is contrary to the dominant policy of the state, and should not be construed beyond the clear import of the language used. Section 73 of the local improvement act (Hurd's Rev. St. 1903, p. 406) provides that in case it shall appear that the assessment cannot be collected, the municipality shall nevertheless not be in any way liable to the contractor in case of failure to collect the same, but it shall, so far as it can legally do so, with all reasonable diligence cause a valid assessment to be levied to defray the cost of the work until the contractor shall be fully paid. Section 90 of the same chapter (Hurd's Rev. St. 1903, p. 413) provides that no person or persons accepting vouchers or bonds shall have any claim or lien upon the city for the payment of such voucher or bonds, or the interest thereon, except from the collection of the assessment against which the voucher or bonds are issued, and the municipality shall nevertheless be in no way liable to the holders of said voucher or bonds in case of failure to collect the same, but the city shall use reasonable diligence to cause the assessment to be made and collected and the bonds and vouchers to be fully paid. It will be seen from these provisions of the statute that it was the evident purpose and intention of the Legislature to in no way hold the city responsible or liable for the vouchers, bonds or interest. This is a positive statutory provision, which would have priority over paragraph 3 of section 62, art. 5, c. 24, as quoted by appellants. The city is powerless by any ordinance which it might pass to make itself liable in the face of the express provisions of the statute. While it might be of advantage to the city, and save money to the property owners and taxpayers, for the city to assume responsibility for the bonds thus issued, yet, in the absence of legislative authority, it is powerless so to do.

We find no reversible error, and the decree of the circuit court and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

(218 Ill. 537)

VERBLE et ux. v. DILLOW.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

An objection that an amended bill raises a new issue cannot be first made on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1221.]

2. SAME—ASSIGNMENT OF ERRORS.

An assignment of error should call the attention of the court to the specific respects in which the judgment is erroneous.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3025.]

3. TRUST—FOLLOWING FUND.

A conservator of the money of an incompetent, who invests the money in land and takes title in himself, creates a trust in

favor of his ward, who may follow the money into the land.

Error to Circuit Court, Union County; A. K. Vickers, Judge.

Bill by Monroe Dillow against Peter Verble and Esther D. Verble. Decree for plaintiff, and defendants bring error. Affirmed.

On April 15, 1903, the defendant in error, Monroe Dillow, as conservator of Hiram Verble, an insane person, filed his bill in the circuit court of Union county against the plaintiffs in error, Peter Verble and Esther D. Verble, his wife, in which he alleged that on February 15, 1892, Peter Verble was duly appointed and qualified as conservator of Hiram Verble, an insane person, and that he acted as such until May 17, 1897, upon which date he resigned, and plaintiff was duly appointed and qualified as his successor; that there came to the hands of Peter Verble, as such conservator, the sum of \$2,000, \$1,612.36 of which amount remained in his hands at the time of his resignation; that of that sum he had turned over to plaintiff \$1,050, together with \$75 interest thereon; that on December 17, 1892, Peter Verble converted to his own use the balance of the money of his ward, and with it bought 20 acres of land and took the deed to the same in his own name, and managed and controlled it until April, 1903, when he conveyed it to his wife, Esther D. Verble; that said land is all of the land owned by Peter Verble and his wife, and that each of them is insolvent, and they are about to remove from the state, and there is danger of the land being sold or mortgaged; that by reason of the investing of the money in the land it was held in trust by Peter Verble for his ward, and Esther D. Verble took her title with notice of the trust. The prayer of the bill was for an accounting, and that the title be declared to be held in trust for said ward and the land sold to pay the amount due. An answer was filed by plaintiffs in error, and upon a hearing a decree was entered which found that Peter Verble was indebted in the sum of \$684.56, which he was ordered to pay within 20 days, and upon default the lands were to be sold and the proceeds applied, as far as necessary, to the payment of the amount due. From this decree a writ of error has been prosecuted to this court.

Taylor Dodd, for plaintiffs in error.
James Lingle, for defendant in error.

WILKIN, J. (after stating the facts). At the close of the evidence, and before the entry of the decree, defendant in error asked leave to file an amended bill, which the court permitted to be done. Plaintiffs in error insist that the amended bill tendered a new issue, which the court proceeded to adjudicate without requiring plaintiffs in error

to answer the same. The original bill alleged that the title to the land was in Peter Verble. Shortly before the commencement of the suit he conveyed it to his wife, and the bill was amended so as to show title in her. She and her husband were parties to the original bill and filed their answer. This answer was ordered to stand as the answer to the amended bill. All of the evidence had been taken, and we do not see how any new issue was tendered by the amendment. If a new issue had been formed by the amendment and the plaintiffs in error were in any way surprised, they should have made this fact known to the court and asked for time to take additional evidence. No such application was made, and there is nothing in the record which shows that they in any way called this fact to the attention of the court. It certainly cannot be claimed that this point can be raised for the first time in this court so as to require a reversal of the decree.

It is also claimed that the defendant in error cannot maintain the suit in the manner in which he describes himself in the bill, and that the allegations of the bill are not sustained by the evidence. At the time of the resignation of Peter Verble he made his report to the court showing that he had in his hands a balance of \$1,612.36 belonging to his ward. Of this amount he paid \$1,050, together with some interest. He in no way accounted for the balance. Several witnesses testified to certain conversations which they had with him, in which he stated that the 20 acres had been purchased with the funds of his ward. While these conversations were denied by him; yet the chancellor saw the witnesses and heard them testify, and was therefore better able to judge of their credibility than we are. We cannot say that there is not sufficient evidence to sustain the decree. We have held in a great many cases that, where money of a ward is invested in lands and the guardian or conservator takes the title in himself, a trust arises by implication in favor of the beneficiary, who may follow the money into the land and hold the land as a trust estate. *Rice v. Rice*, 108 Ill. 199; *First Nat. Bank v. Leech*, 207 Ill. 215, 69 N. E. 890.

The plaintiffs in error in their brief and argument have assigned many errors, yet they have not seen fit to point out specifically the reasons why the decree should be reversed. The burden is upon the one assigning errors to direct the attention of the court to the specific respects in which the decree is erroneous. We are under no obligations to search the record for errors which might have been committed; but, notwithstanding this fact, we have made such an investigation as convinces us that the decree of the circuit court is correct, and it will therefore be affirmed.

Decree affirmed.

(218 Ill. 540)

THOMPSON et al. v. TRUSTEES OF SCHOOLS FOR RIO TP.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. EMINENT DOMAIN—RIGHT TO INSTITUTE PROCEEDINGS—HIGH SCHOOL DIRECTORS—STATUTORY POWERS.

3 Starr & C. Ann. St. 1896, p. 3661, c. 122, art. 3, § 41, empowers boards of education of township high schools to discharge the duties of directors of schools for school districts, and consequently they are authorized, by sections 31 and 32 of the school law, which empower boards of directors to acquire a site for a schoolhouse by condemnation of land, to condemn land for a township high school.

2. SCHOOLS AND SCHOOL DISTRICTS—LOCATION OF SCHOOLHOUSES—ELECTION—REQUIREMENTS OF NOTICE.

School Law (3 Starr & C. Ann. St. 1896, p. 3689, c. 122) art. 5, § 31, prohibiting board of school districts to purchase or locate a schoolhouse site without a vote of the people at an election called and conducted as required by article 9, § 4, of the act, does not require the notices calling the election to specify the site of the proposed schoolhouse, and the voters may in their ballots express their choice of a site, whether it is specified in the notice or not.

3. SAME.

Under School Law (3 Starr & C. Ann. St. 1896, p. 3689, c. 122) art. 5, § 31, prohibiting a board of school directors to purchase or locate a schoolhouse site without a vote of the people at an election called and conducted as required by article 9, § 4, of the act, and section 32, providing that, in case the compensation to be paid for the schoolhouse site cannot be agreed upon between the school directors and the owner of the land, it shall be the duty of the directors to institute condemnation proceedings, the determination of the amount to be expended in the purchase of a site and the construction of the building is committed to the judgment and discretion of the board, and the notice of election need not call for an expression of the voters as to the amount to be expended for such purposes.

4. EMINENT DOMAIN—RIGHT TO INSTITUTE PROCEEDINGS—SCHOOL OFFICERS—AUTHORIZATION.

Under School Law (3 Starr & C. Ann. St. 1896, p. 3689, c. 122) art. 5, § 31, prohibiting the board of school directors to purchase or locate a schoolhouse site without a vote of the people, and providing that the district may take the same for the purpose of a schoolhouse site, either with or without the owner's consent, by condemnation or otherwise, and section 32, providing for the institution of condemnation proceedings in case the consent of the owner of the site cannot be obtained, an affirmative vote of electors selecting the site for a schoolhouse authorizes the board of education to acquire the site either by purchase or condemnation.

Appeal from Knox County Court; J. D. Welsh, Judge.

Petition by the trustees of schools for Rio township, Knox county, for the condemnation of a tract of land owned by Jephtha C. Thompson and others. From a judgment of condemnation, defendants appeal. Affirmed.

Williams, Lawrence & Green, for appellants. Carney, Carney & Frank, for appellees.

BOGGS, J. This was a petition filed by the appellees, trustees of schools for Rio

township, Knox county, praying for the condemnation of a certain tract of land described therein by metes and bounds, and for convenience herein spoken of as "the Thompson site," to be used as a site for the location of a township high school. The petition was filed in pursuance of a resolution adopted by the board of education of Rio township high school asking that such action be taken by the school trustees. The appellants, owners of the tract of land sought to be condemned, entered a motion to dismiss the petition on the ground the trustees were lacking in power to exercise the right of eminent domain as to this tract of land. The motion was denied, and after a hearing judgment of condemnation was entered as prayed, and this appeal has been perfected to reverse the judgment.

The motion raised the question of the power of the board of trustees to take the property of the appellants without their consent by the exercise of the right of eminent domain. This power, if it exists, is conferred by the statute. Boards of education of township high schools are empowered to discharge the duties of directors of schools for school districts. 3 Starr & C. Ann. St. 1896, p. 3661, c. 122, art. 3, § 41. The authority of boards of directors to acquire a site for a schoolhouse by condemnation of the land necessary for such site is to be found in sections 31 and 32 of the school law. 3 Starr & C. Ann. St. 1896, p. 3689, c. 122, art. 5. These sections are as follows:

"Sec. 31. It shall not be lawful for a board of directors to purchase or locate a schoolhouse site, or to purchase, build or move a schoolhouse, or to levy a tax to extend schools beyond nine months, without a vote of the people at an election called and conducted as required by section 4 of article 9 of this act. A majority of the votes cast shall be necessary to authorize the directors to act: Provided, that if no one locality shall receive a majority of all the votes cast at such election, the directors may, if in their judgment the public interest requires it, proceed to select a suitable schoolhouse site; and the site so chosen by them shall in such case, be legal and valid, the same as if it had been determined by a majority of the votes cast; and the site so selected by either of the methods above provided shall be the schoolhouse site for such district; and said district shall have the right to take the same for the purpose of a schoolhouse site either with or without the owner's consent by condemnation or otherwise.

"Sec. 32. In case the compensation to be paid for the schoolhouse site mentioned in the preceding section cannot for any reason be agreed upon or determined between the school directors and the parties interested in the land taken for such site, then it shall be the duty of the directors of such district to proceed to have such compensation determin-

ed in the manner which may be at the time provided by law for the exercise of the right of eminent domain: Provided, that no tract of land lying outside of the limits of any incorporated city or village, and lying within forty rods of the dwelling house of the owner of the land, shall be taken for a school site without the owner's consent."

In the case at bar it was proven that the board of education in and for the high school district caused to be submitted to the electors of that district, at an election called and conducted as required by section 4 of article 9 of the school law, a proposition to build a township high school in Rio township, and also propositions for the selection of either of two designated sites on which to locate the schoolhouse; that the proposition to build a township high school building received a majority of the votes cast at such election; that no votes were cast for the selection of either of the sites designated in the call for the election, but that a majority of the voters expressed upon the tickets voted by them their choice of the premises here sought to be condemned as for the site of the proposed new high school building. The statute does not require that the sites for the schoolhouse shall be specified in the notices calling the election, and the specification of two sites in the notice was surplusage. *People v. Sisson*, 98 Ill. 335. It is within the province of the voters to select the site for the schoolhouse, and this right is not to be abridged by the directors in framing the notice or call for the election. It was entirely lawful for the voters at the election to cast their ballots expressing their choice of a site, though the site so chosen was neither of those specified in the call or notice for the election. It was not essential that an expression of the will of the voters as to the amount which should be expended in the purchase of the site or in the construction of the building, or as to the area of the plat of ground to constitute a site for the building, should have been called for in the notice for the election or given by the electors at the election. These matters are committed to the judgment and discretion of the board of education, subject to the limitations found in the statute as to the power of the board to levy and collect taxes. Such is, in principle, decided in *People v. Chicago & Northwestern Railway Co.*, 186 Ill. 139, 57 N. E. 838, and *People v. Peoria & Eastern Railroad Co.*, 216 Ill. 221, 74 N. E. 734. The election in the case at bar, then, had the legal effect to authorize the board of education to locate the site for the schoolhouse on the premises selected by the electors, being the premises here sought to be condemned, and to build a high school building for the district thereon.

But it is argued that said section 31 in express terms declares it to be unlawful for the board of education to purchase a site

for a schoolhouse unless the authority to purchase has been submitted to the voters at the election and has received a majority of the votes cast at that election conferring authority on the board of education to so purchase a site. A superficial reading of section 31 would induce the conclusion that this contention is well grounded, but, when the proviso to the section and section 32 are read and given meaning and effect, it clearly appears that an affirmative vote of the electors selecting premises as the site for the schoolhouse invests the board of education with power to acquire that site, either by purchase or by the exercise of the right of eminent domain. The proviso to section 31 provides that, if no one locality shall receive a majority of all the votes cast at such election as the choice of the electors for the site of the school building, the board of education may proceed to select a suitable site for the school building, and the proviso declares that the site so chosen by the board of education shall be a legal and valid location for the schoolhouse, the same as if it had been determined by a majority of the votes cast, and that the site selected by either of the methods above provided that is, by a majority of the electors or by the school authorities shall be the schoolhouse site, and the district "shall have the right to take the same for the purposes of a schoolhouse site, either with or without the owner's consent by condemnation or otherwise." Power to take with the owner's consent means power to purchase, and that power is, by the terms of the proviso, clearly conferred on the directors of the board of education by the action of a majority of the voters in selecting premises on which it is their will a schoolhouse for the district shall be built. Section 32 is also consistent only with the views that the selection, by the voters, of a site for a schoolhouse, empowers the board of education to enter into negotiations with the owner of the premises so selected for the purchase thereof, and to acquire the same by condemnation, if the compensation to be paid such owners cannot be agreed upon.

The judgment of the county court must be, and is, affirmed.

Judgment affirmed.

(213 Ill. 546.)

KOCH v. STREUTER.

(Supreme Court of Illinois. Dec. 20, 1906.)

1. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—PROVISIONS FOR LIQUIDATED DAMAGES—EFFECT.

A contract for the exchange of land may be specifically enforced, although it contains a provision for liquidated damages in case of a breach of the contract, where such provision is intended merely to secure performance, and not to give an option either to perform or to pay damages.

[Ed. Note.—For cases in point, see vol. 44 Cent. Dig. Specific Performance, §§ 179, 180.]

2. REFORMATION OF INSTRUMENTS—MISTAKE—PLEADING.

Where a bill to reform and specifically enforce a contract alleges that the same arose from error or mistake in drawing a contract, and shows wherein the alleged mistake consisted, it is good against demurrer, although it does not specifically allege that the mistake was mutual.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 144.]

3. SPECIFIC PERFORMANCE—CONTRACTS ENFORCEABLE—DESCRIPTION OF PROPERTY—SUFFICIENCY.

A contract for an exchange of tracts of land, describing one of the tracts embraced by the contract as "a certain fruit farm, known as the 'I. Fruit Farm,' and containing about 199½ acres, situated about one and a quarter miles northwest of" a certain town, is *prima facie* susceptible of specific performance.

Appeal from Circuit Court, Morgan County; O. P. Thompson, Judge.

Bill by George Koch against Henry Streuter. From a decree of dismissal, complainant appeals. Reversed.

This is a bill filed by the appellant against the appellee to reform a contract for the sale or exchange of certain lands, and for a specific performance of the contract when so reformed. The appellee here, defendant below, demurred to the bill. The demurrer was sustained, and the appellant, complainant below, elected to stand by his bill. Thereupon a decree or order was entered dismissing the bill. The present appeal is prosecuted from such order or decree of dismissal.

The bill alleges that the appellant was the owner of certain lands in La Salle county, amounting to 341.98 acres, and, being desirous of selling or trading such premises, and the appellee being minded to purchase or trade for the same, appellant and appellee on September 17, 1904, entered into an agreement in writing respecting the sale or trade of the said premises for a certain fruit farm, known as the "Ideal Fruit Farm," owned by the appellee, and containing about 199½ acres, situated about one and a quarter miles northwest of West Salem, in Edwards county, Ill. By the terms of the contract the appellee was to take the land of appellant subject to a mortgage of \$8,750, which he was to assume, with interest thereon after March 1, 1905. Appellant agreed also to secure for appellee on or before March 1, 1905, a loan of \$8,500. In case said loan was made, the difference of \$250 between the amount of the existing mortgage and the new mortgage was to be paid appellant at the execution of the loan. Each of the parties was to furnish an abstract showing a good and merchantable title to the premises to be conveyed, and each was to convey his respective premises to the other by warranty deed, except that the appellant was to convey to the appellee a piece of land containing 2.87 acres, south of the Illinois river; a portion of the land to be conveyed by him by quitclaim deed. The contract further provided that appellant was to have an opportunity to inspect appellee's property, and was to notify appellee of his satisfaction

or rejection of the same on or before September 22, 1904, which, the bill alleges, was done. The contract further provided that, if either party failed to keep or perform the covenants thereof, the party defaulting should forfeit to the other the sum of \$1,000, such sum being the agreed liquidated damages. The contract also provided that the deeds of conveyance should be deposited in escrow, and the sale consummated at the National City Bank of Ottawa, Ill., on or before March 1, 1905, and that said deeds were to be made and deposited in said bank as soon as the abstracts were accepted, and that, when the sale was consummated, appellee was to pay appellant the sum of \$250 commission. The bill also alleges that the appellant obtained a new loan for appellee for the sum of \$8,500, as provided in the contract; that the sum of \$250, as provided therein, has not been paid to appellant; that appellant furnished an abstract of title showing good and merchantable title to the premises to be conveyed by him, except as to the 2.87 acres lying south of the Illinois river, and as to that appellant was to furnish an abstract showing such title as he had in said premises, but, by an error in drawing said contract, the same provided that appellant was to tender to appellee an abstract showing good and merchantable title in him to all the premises to be conveyed by him to appellee, and that said appellee had failed to tender or furnish to appellant any abstract to the premises owned by him. The bill also alleges that appellant complied with the contract as to making and depositing his deeds in the National City Bank of Ottawa, and that appellant was at the time of filing the bill, and always has been, ready and willing to perform his part of the agreement, but that appellee has failed and refused to carry out his part of the same. The prayer of the bill is that the amount of money provided in said contract should be paid appellant by appellee; that the said agreement should be reformed as to the kind of abstract that appellant was to furnish the appellee as to the 2.87 acres lying south of the Illinois river; and that the appellee should convey his said premises to appellant, and, upon such conveyance, the appellant would convey the premises to appellee provided in said agreement to be conveyed to him; and there was also a general prayer for relief.

John A. Belatti and Welty, Sterling & Whitmore, for appellant. Worthington & Reeve, for appellee.

MAGRUDER, J. (after stating the facts). The only question in this case is whether the court below properly sustained the demurrer to the bill. The appellee urges three reasons why the bill was demurrable: First, that no specific performance would lie, because the contract provided for liquidated damages in case of failure of either party to perform his part of said contract, and this

was the only remedy appellant was entitled to; second, that the appellant was not entitled to have the contract reformed as to the kind of abstract that was to be furnished as to the 2.87 acres lying south of the Illinois river; and, third, that the appellee's land was insufficiently described.

First. The written contract between appellant and appellee contained the following provision: "It is further agreed that, if either party hereto fails to keep or perform the covenants hereinabove specified, said party so defaulting shall forfeit to the other the sum of \$1,000, said sum being the agreed liquidated damages." The contention of the appellee upon this branch of the case is that, where the contract itself has assessed the damages which the party is to pay upon his doing or omitting to do a particular act which he has covenanted to abstain from or to perform, equity will not interfere, either to prevent or to enforce the act in question, or to restrain the recovery of damages; in other words, the rule is invoked that, when the parties have agreed upon the compensation of the breach, or, what is the same thing in principle, provided the means by which it may be obtained, the necessity of the interference of a court of chancery no longer exists, and the jurisdiction of such court falls to the ground. *Bodine v. Gladling*, 21 Pa. 50, 59 Am. Dec. 749. As a result of this principle, it is said that in this case the appellant has his remedy at law to recover the sum of \$1,000, agreed upon as liquidated damages, and that a court of equity will not entertain this bill for a specific performance.

Whether the rule thus announced applies in the case at bar depends upon the question whether or not the sum of \$1,000, being the agreed liquidated damages, is a penalty to be regarded as a mere security for the performance of the contract. Where a suit at law is brought on such a contract as is here under consideration, the question often arises whether the sum to be forfeited is a penalty or liquidated damages, and whether the party seeking a recovery is entitled to the actual damages suffered, or to the damages mentioned in the provision. In a court of chancery, however, the question is whether one certain act shall be done, or whether one of two things shall be done at the election of the party who is to perform the contract. *Pomeroy*, in his work on *Equity Jurisprudence* (volume 1, § 447), says: "Where, however, the parties to an agreement have added a provision for the payment, in case of a breach, of a certain sum, which is truly liquidated damages, and not a penalty—in other words, where the contract stipulates for one of two things in the alternative, the doing of certain acts, or the payment of a certain amount of money in lieu thereof—equity will not interfere to decree a specific performance of the first alternative, but will leave the injured party to his remedy of

damages at law." In *Lyman v. Gedney*, 114 Ill. 388, 29 N. E. 282, 55 Am. Rep. 871, it was contended for the appellant that a certain clause written in an instrument, whereby each party bound himself to the other in the sum of \$1,000 liquidated damages, limited the rights of the parties upon a breach of the contract, in equity as well as at law, and that the only remedy was through an action at law for that sum; but this court there said (page 398 of 114 Ill., page 283 of 29 N. E. [55 Am. Rep. 871]): "The mere fact that a contract stipulates for the payment of liquidated damages in case of failure to perform does not prevent a court of equity from decreeing specific performance. *Fry on Specific Performance*, § 67 et seq.; *Waterman on Specific Performance*, § 22; *Pomeroy on Contracts*, § 50. It is only where the contract stipulates for one of two things in the alternative—the performance of certain acts, or the payment of a certain amount of money in lieu thereof—that equity will not decree a specific performance of the first alternative." In *Barrett v. Gelsinger*, 179 Ill. 240, 53 N. E. 576, it was held that specific performance of a contract to make a will in a particular manner cannot be enforced where the contract is in the alternative, either to make the will, or pay a sum of money. And this court there quoted from *Fry on Specific Performance* and *Waterman on Specific Performance*, and from the case of *Lyman v. Gedney*, supra, and said that equity will not interfere to enforce specific performance where the agreement, looked at as a whole, gives to the party the option to do the act or pay a certain sum; but it was there held that where one certain act is to be done with a sum annexed, whether by way of penalty or damages, to secure the performance of the act, the fact that a penal or other like sum is annexed will not prevent the court from enforcing the performance of the very act, and thus carrying into execution the intention of the parties. In other words, where the sum annexed, whether by way of penalty or damages, is so annexed for the purpose of securing the performance of the contract, equity will decree a specific performance; but where the contract stipulates for one of two things in the alternative—that is, where the party has the right either to perform certain acts, or to pay a certain amount of money in lieu thereof—then equity will not decree a specific performance of the first alternative.

If these principles be applied to the contract in question, we see no reason why a court of equity will not specifically enforce it. There is nothing in the terms of the contract which indicates that either party has the option or election to do the things provided for in the contract, or to pay the sum of \$1,000 as liquidated damages. The contract provides that the appellee agrees to sell and convey by warranty deed a farm,

and the appellant, in consideration thereof, agrees to convey to appellee by warranty deed 341.98 acres. The land to be conveyed by appellant was subject to a mortgage, and there are certain provisions in relation to the assumption of this mortgage and the execution of another mortgage upon the property. By the terms of the contract each party is to pay the respective taxes and assessments, which were then liens for the year 1904 upon the farm and the 341.98 acres. By the terms of the agreement each party was to tender to the other an abstract of title, and appellant was to have the right to examine the premises, and notify appellee whether they were satisfactory or not. It was also agreed that the conveyances should be made at any time not later than March 1, 1905. By the terms of the agreement, also, the deeds were to be deposited in escrow on or before March 1, 1905, in a certain bank in Ottawa, Ill., and the bank was to deliver the deeds to the grantees upon the performance of the covenants contained in the contract, and appellee was to pay appellant the sum of \$250 commissions. We have thus referred to the main provisions of the contract for the purpose of showing that the provision in regard to the forfeiture of \$1,000 as agreed liquidated damages was merely a security for the performance of the contract, and that there is nothing in the terms of the contract to justify the conclusion that either party had a right to perform the contract, or, in lieu thereof, to pay the sum of \$1,000. As the contract, therefore, is not alternative in its nature, a court of equity is not ousted of its jurisdiction to decree a specific performance by reason of the provision contained in the contract in reference to the forfeiture of \$1,000 as agreed liquidated damages.

Second. The contract provides that "each party shall tender the other an abstract or abstracts showing good and merchantable title to the premises conveyed by said party." It is alleged in the bill that the agreement between the parties was that appellant was to furnish appellee with an abstract showing good and merchantable title to all of the 341.98 acres to be conveyed by appellant, except 2.87 acres south of the Illinois river, as to which appellant was only to furnish an abstract showing such title as he had to such 2.87 acres. The bill seeks to reform the contract, so as to show that good and merchantable title was only to be shown to the land to be conveyed, except the 2.87 acres in question, and not as to the latter. The allegation of the bill is, in substance, that the provisions of the contract requiring an abstract showing good and merchantable title to all of the 341.98 acres was a mistake. It is insisted by the appellee that the bill was demurrable, so far as its allegations relate to this subject, because the bill does not allege that the misstatement of the contract was the result of mutual mistake.

The allegation of the bill in relation to this matter is as follows: "And the complainant was to furnish to the said Henry Streuter an abstract or abstracts showing good and merchantable title to the said premises in him, said George Koch, except as to the land south of the Illinois river in the southwest quarter of said section 22, containing 2.87 acres, and as to the said 2.87 acres complainant was to furnish an abstract showing such title as the complainant had in and to said premises, but, by an error in drawing said contract, the same provided that the complainant was to tender the said Henry Streuter an abstract showing good and merchantable title in him to all the premises to be conveyed by him to the said Henry Streuter. Complainant alleges that he has furnished such abstract, as required by said contract, to the said Henry Streuter for his examination," etc. The bill thus, in substance, states that there was an error or mistake in the drawing of the contract as to what land should be shown by the abstract to have a good and merchantable title. It is true, as contended by counsel for appellee, that a contract can only be reformed on the ground of mistake when such mistake is mutual. We have held that, to justify the reformation of a written instrument upon the ground of mistake, three things are necessary: First, that the mistake should be one of fact, and not of law; second, that the mistake should be proved by clear and convincing evidence; and, third, that the mistake should be mutual, and common to both parties to the instrument. *Kelly v. Galbraith*, 186 Ill. 593, 58 N. E. 481, and cases there referred to. Where such a mistake, as is above indicated, exists, a court of chancery will first reform the contract, and after its reformation decree a specific performance. *Hunter v. Bilyeu*, 30 Ill. 228. In *Kelly v. Trumble*, 74 Ill. 428, this court said: "Where mistake in the execution of an instrument is charged, parol evidence may be resorted to for the purpose of proving what was the real contract of the parties; and a court of equity may reform a contract according to the evidence of the intention of the parties, and decree its specific performance at the same time." But while it is true that the mistake must be mutual and common to both parties to the instrument (*Sutherland v. Sutherland*, 69 Ill. 481), we have been referred to no authority which holds that in such cases the bill must allege that the mistake was mutual and common to both parties. If the bill alleges that there was a mistake, the word "mistake" is broad enough to include a mistake which is mutual and common to both parties. We see no reason why, under an allegation that there was a mistake, proof could not be introduced that the mistake was mutual. In the case at bar the bill does charge, in substance, that there was a mistake or error in drawing the contract, and we are of the

opinion that the bill is not demurrable because it did not go further and allege that the mistake was mutual. Of course, if the proof introduced by the complainant in the bill alleging such a mistake does not show it to have been mutual and common to both parties, the court would be justified in refusing a reformation of the contract and a specific performance of it. But the allegation in the bill upon this subject, as above quoted, is sufficient, and does not justify the holding that the bill was demurrable on that account.

Third. It is furthermore charged on the part of the appellee that the description of the property to be conveyed by the appellee in the contract is so uncertain and indefinite that specific performance of it cannot be enforced. The property to be conveyed by appellee is described in the contract as follows: "A certain fruit farm, known as the 'Ideal Fruit Farm,' and containing about 199½ acres, situated about one and a quarter miles northwest of West Salem, Edwards county, Illinois." It has been said that "a deed or other written contract is not void for uncertainty in the description of the land sold or conveyed if from the words employed the description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred to in the deed." *Hayes v. O'Brien*, 149 Ill. 408, 37 N. E. 73, 23 L. R. A. 555. In *Hamilton v. Harvey*, 121 Ill. 469, 13 N. E. 210, 2 Am. St. Rep. 118, it was said that a certain description of five acres of land was indefinite and uncertain, and the following language was there used: "It is not stated that they are owned by Harvey, the vendor. Their direction from the 'works,' whether north, south, east, or west, is not indicated." In *Guyer v. Warren*, 175 Ill. 328, 51 N. E. 580, the description was "our farm in LeClaire's reserve, Rock Island county, and consisting of 83.31 acres, more or less," and we there said: "The word 'our' indicates that the farm referred to was a farm owned by the vendors in the contract. The balance of the description showed that the farm was located in Le Claire's reserve in Rock Island county. It can be shown with certainty what lands the appellees owned within the reserve and county named. The maxim is, 'Id certum est quod certum reddi potest.'" It is not stated in express words that the "Ideal Fruit Farm" to be conveyed by the appellee was owned by the appellee, but there is the following provision in the written contract, to wit: "It is further agreed that each party to this agreement pays the taxes and assessments now a lien upon their respective premises for the year 1904." The words "their respective premises" refer back to the "Ideal Fruit Farm" of appellee, and to the 341.98 acres of appellant. This provision in the contract is substantially a statement that the premises

to be conveyed by the parties belong to them respectively. The "Ideal Fruit Farm" is spoken of as appellee's premises, which can mean nothing else than the premises owned by appellee, as, by the terms of the contract, appellee agreed to convey the fruit farm and to execute a deed for it. It is stated that the fruit farm is known as the "Ideal Fruit Farm." The number of acres is stated as 199½. The direction of the fruit farm from West Salem is stated, and also its distance from West Salem. From this description the fruit farm could be easily identified, and it could be shown with certainty what land was intended to be described in the contract. From the words used the description of the land can be made certain. The bill avers that, under the contract, appellant had the privilege of examining the fruit farm to be conveyed by appellee, and that he did examine the same, and that the farm was satisfactory to him, and that he notified appellee of his satisfaction therewith. The bill thus substantially alleges that the description was sufficiently definite to enable appellant to find the farm, and examine it to his satisfaction. The demurrer to the bill admits this allegation to be true. For this reason, we are of the opinion that the bill is not demurrable because of uncertainty and indefiniteness in the description of the land.

We have thus considered the three grounds upon which the appellee charges that the bill was justly subject to demurrer, and we are of the opinion that the bill is not defective for any of the reasons stated.

Accordingly, the decree of the circuit court sustaining the demurrer to the bill and dismissing it for want of equity is reversed, and the cause is remanded to that court for further proceedings, in accordance with the views herein expressed.

Reversed and remanded.

(213 Ill. 559)

SIEGEL, COOPER & CO. v. TRUCKA.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Where two servants were riding in their employer's elevator, and one of them threw the other down, so as to cause his foot to project over the floor of the elevator, so that it was crushed as the elevator passed a newly constructed entrance, the master was liable for the injury, if it would not have happened, had he not been negligent in the construction of the entrance.

2. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé 14 years old, who rode on an elevator having a defectively constructed entrance was guilty of contributory negligence, was a question of fact for the jury, in the absence of evidence that he knew of the defective construction, or had been notified thereof and told how to avoid the danger.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089, 1132.]

3. SAME — ASSUMPTION OF RISK — QUESTION FOR JURY.

Whether the servant assumed the risk was a question for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1068-1088.]

4. EVIDENCE—EXPERT TESTIMONY.

Expert testimony was inadmissible on the issue as to whether placing the door of the entrance to an elevator shaft on the line of the wall furthest from the shaft, thus leaving a space of some 10 inches between the door and a passing elevator, is as safe as though the door had been placed on the line of the wall next to the shaft, and as to whether the construction adopted is proper.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2317, 2318.]

Appeal from Appellate Court, First District.

Action by Frank Trcka against Slegel, Cooper & Co. From a judgment of the Appellate Court (115 Ill. App. 56), affirming a judgment for plaintiff, defendant appeals. Affirmed.

Charles E. Pain and Frank M. Cox, for appellant. A. M. Johnson, Charles Veseley, and Beach & Beach, for appellee.

RICKS, C. J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of appellee for \$1,500 for injuries received by appellee on October 25, 1901, while in the employ of appellant, and while riding upon an elevator in the building occupied by it.

The appellee, at the time of his injury, was 14 years of age, and had been in the employ of appellant about two months. The appellant conducted a department store in Chicago, occupying an eight-story building, in which elevators were maintained and operated for the use of the employes in ascending and descending to and from the various floors in the discharge of their duties. Appellee was engaged in the window-shade department on the seventh floor, and in the performance of his duties was required to use the elevators of the building. On the day in question, and in the performance of his duties he got upon the elevator in question at the fourth floor to ascend to the seventh. The first count of the declaration charges that this elevator "was negligently and carelessly constructed and maintained, in that at the entrance on the fourth story of said building to the shaft through which said elevator ran, there was a doorway through the wall or partition (said wall or partition being of the thickness of, to wit, ten inches,) about seven feet in height and about five feet in width, and the door or doors at said entrance, leading to said elevator shaft, were negligently, carelessly and without due regard to the safety of persons using said elevator, placed on the side of said doorway most remote from the platform of the elevator car as it passed through the shaft in going from the fourth to the upper stories of the building. Said door or doors were

thereby so separated from the elevator car that an open space of, to wit, ten inches, intervened between the outer edge of the platform of the car and the adjoining floor, which open space, when the car arrived on a level with the floor of the fourth story, was of the height of, to wit, seven feet, and the breadth of, to wit, five feet, and depth of, to wit, 10 inches, the top of said doorway being closed by a solid wood or iron casing of the width of the doorway and the thickness of the wall or partition, by reason whereof a passenger on said elevator, without any fault on his part, might sustain great and serious injury, all of which things the defendant knew or in the exercise of reasonable care might have known. On said day, after the plaintiff had executed the defendant's instructions, it became necessary and proper for him, in returning from the fourth story to the seventh story of the building, to take the elevator at the fourth story for the purpose of ascending to the seventh story. When the elevator, in ascending, arrived at the fourth floor the plaintiff entered it, and was received therein by the defendant's agent who was operating it, for the purpose of being transported to the seventh floor. While the elevator was ascending from the fourth floor, and before it reached the top of the said doorway, and while he was in the exercise of due care and caution for his own safety, another passenger, also an employe in said store, who was riding on said car, negligently, carelessly, wrongfully, and wantonly seized the plaintiff, who was without fault or negligence, and pushed, pulled, and threw him upon the floor of the car, causing his right foot and part of his right leg to extend over and beyond the platform of the car and to extend into the said open space. By reason of the negligent and careless conduct of the defendant in operating and maintaining the elevator with the entrance and door so constructed, said right foot and part of the right leg struck against the upper casing of the doorway with great violence and were caught therein as the elevator was ascending from the fourth floor, and said right foot was crushed, and the flesh pulled and scraped from the right leg and foot, and the muscles and tendons thereof were lacerated, torn, and injured, and he became sick, sore, lame, and disordered," etc. Three additional counts were filed, each differing but slightly from the first, and the defendant pleaded the general issue.

Appellant complains that the court refused to direct a verdict in its behalf at the close of all the evidence: We have examined the evidence with care, and are satisfied that there is ample evidence in the record tending to show that appellant was guilty of negligence. It is conceded that appellee was but 14 years of age, and had worked in the store but about two months, and that his work had nothing to do with the elevator in question, except that he was, in the discharge of his duties, required, occasionally, to ride on it while being operated by the man regularly in

charge thereof. In view of appellee's age, and the rules of law governing the questions of contributory negligence and assumption of risk in case of minors, it was proper that these questions should be submitted to the jury for its determination. In support of appellant's contention with reference to this motion, many questions are argued and much space consumed, cases from this court upon the subject of assumed risk, fellow servant, and contributory negligence being printed in the brief in extenso. Such of these as seem to require notice or consideration will be briefly considered.

It is first contended that appellant is not liable in this action because the proximate cause of the injury was the negligent act of the boy who threw appellee upon the floor of the elevator. If, however, appellant was guilty of the negligence charged in the declaration, and without which the injury in question would not have occurred, then it would make no difference, as to its liability, that some act or agency of some other person or thing also contributed to bring about the result for which damages are claimed. Both or either of the contributing agencies were liable for the injury occasioned by their negligence, appellee being without fault and not held to have assumed the risk involved in the improper construction. In the case of *McGregor v. Reid, Murdoch & Co.*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332, which also grew out of an elevator accident, we said (page 470 of 178 Ill., page 325 of 53 N. E. [69 Am. St. Rep. 332]): "Appellee insists that the pulling out of the cable ends from their fastenings was the proximate cause of the injury, and that no recovery can be had for what is supposed to be the remote cause of the accident, the defective condition of the safety device. But this position is clearly untenable. The two causes operated together, and neither, alone, would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable, for both causes, operating proximately at the same time, caused the injury." And in *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091, which grew out of an injury occasioned by the combination of negligence from two different sources, we also said (page 476 of 138 Ill., page 1093 of 28 N. E.): "In legal contemplation the case is one where the injury was inflicted by the co-operating negligence of the bridge company and the persons in charge of the mules, and the rule is well settled that a person contributing to a tort, whether his fellow contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help." And to the same effect is the case of *Village of Carterville v. Cook*, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248, in which it is stated:

"Where a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately." This latter case appellant argues has no application to the case at bar, but in principle we see no difference, so far as relates to that phase of the case with reference to liability for damage occasioned by two contributing causes. *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037, is also in point.

Counsel for appellant, however, insist that the appellant could not foresee such a combination of circumstances as led to the injury in this case, and therefore cannot be held to have been negligent, citing *Armour v. Golkowska*, supra. Whether this particular set of circumstances might have been foreseen or not, the fact of the accident proves the conditions to have been dangerous, and if the jury were of the opinion, as we think, under the evidence, they might well have been, that reasonable prudence and care would have required a different construction, then appellant is chargeable with negligence for permitting the conditions to exist as they were. The case above noted, cited by counsel for appellant, is directly adverse to their contention. In that case a barrel fell on appellee and injured her. She sued and obtained damages, and on appeal to the Appellate Court, and then to this court, the judgment of the lower court was sustained, and in that case the rule as announced in 21 *American & English Encyclopedia of Law* (2d Ed.) 509, was quoted as follows: "The question whether, from the act or omission complained of, the likelihood of injurious consequences should reasonably have been foreseen is also for the jury." And in discussing the facts of that case the court said (page 147 of 202 Ill., page 1038 of 66 N. E.): "Whether an ordinarily thoughtful and prudent man would have foreseen that it was reasonably necessary to the safety of persons working on the floor beneath the edges of the platform that a railing or barrier of some sort should be placed upon the platform was not a question of law for the court, but of fact for the jury." Counsel for appellant next insist that appellee assumed the risk involved in the particular construction of the elevator, and entrance thereto, by reason of his continued employment and the open, visible condition of the construction complained of. We do not agree that appellee is precluded from recovery in this case by reason of the doctrine of assumed risk. He was a child of about 14 years of age, and, under the conditions here presented, the rule to be applied and the doctrine universally followed in such cases is well stated in 7 *American & English Encyclopedia of Law* (2d Ed.) p. 408, as follows: "As the standard of care thus varies with the age, capacity and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether the child exercised the ordinary care and prudence of a child similar

ly situated; and if such care was exercised a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law erects for determining what is ordinary care in person of full age and capacity." There is no question in this case but what appellee did exercise reasonable care, unless it be said that he should have comprehended the danger involved in the construction complained of and refused to subject himself to the risk occasioned by it. There is no evidence that his attention was ever especially directed to this, and the evidence shows he was expected and directed by his superiors to use the elevator in question in the regular line of his duties. Obedience to those in authority, in a child of immature years, should be expected and commended, and that appellee should not question the security of his surroundings with the same discriminating judgment as would a person of mature years and ripe experience is not to be wondered at, and is a circumstance which a jury might well consider in passing upon the question of assumed risk.

In speaking of the difference to be observed in the application of the rule of assumed risk as between minors and adults, this court, in *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, at page 338, 29 N. E. 1106, at page 1107 (33 Am. St. Rep. 249), said: "But the rule is modified in the case of young persons of inexperience and immature judgment, who are not capable of fully understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries which result from such perils unless they have been instructed how to avoid them." And in discussing this subject in *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944, with reference to the general rule applicable to adults and its limitations when applied to minors, we said (page 334 of 145 Ill., page 945 of 33 N. E.): "That this general rule does not apply to employes who from youth or want of the natural faculties are unable to appreciate the danger incident to the employment or which may result from the continued use of defective machinery or tools is equally well settled." Under the circumstances shown in this case, whether appellee should have appreciated the danger to which he was subjected by reason of the construction complained of was a question of fact for the jury. The jury, in returning a verdict for appellee, under proper instructions, found that he did not appreciate this danger, and that finding has been concurred in by the Appellate Court, since it sustained the judgment of the lower court, consequently the question is not now open to our consideration.

It is next insisted by counsel for appellant that the trial court erred in not permitting certain expert witnesses, offered by appellant, to testify whether it was as safe to have the doorway in question on the outside as the inside of the entrance; and also in not permitting certain witnesses to express their opinions whether appellee would not have lost his foot if an iron grillwork and gate had been maintained, and to state whether the construction of the doorway was the usual and customary one as to such places. We do not think error was committed in the regard mentioned. This question of construction was not so intricate but what the jury could understand the situation, and it was their province to say whether appellant was at fault in maintaining the arrangement adopted by it. In *Beldler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086, it was expressly held that evidence as to the usual and customary manner of the construction of elevators was not admissible in determining whether a defendant was negligent in maintaining an elevator shaft in a particular manner.

It is insisted by counsel for appellant that the trial court erred in refusing an instruction offered by appellant relative to the doctrine of fellow servant. It was not error to refuse this instruction because the doctrine of fellow servant was not involved. The charge against appellant was for negligence in maintaining an improper construction, and if the appellant was guilty in this regard the jury were justified in finding the issues for appellee. And even if a fellow servant did contribute to the injury sustained by appellee, as we have already stated, if appellant contributed also to the injury by the maintenance of an improper construction and without which the injury would not have been occasioned, appellant would be liable. As said in *Armour v. Golkowska*, supra: "If an injury result from the negligence of the master combined with that of a fellow servant, and the injury would not have happened had the master observed due care for the safety of the injured servant, the master is liable"—citing *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. E. A. 215, and 12 Am. & Eng. Ency. of Law (2d Ed.) 905.

Other objections are urged by counsel for appellant, but we think it unnecessary to discuss them seriatim, for, as we understand them, they are all included in the objections already considered, and according to the views we have already expressed, they must be held to be untenable.

We find no material errors to have been committed in the trial of this case, and the judgment of the Appellate Court is affirmed.
Judgment affirmed.

(218 Ill. 568)

PEOPLE ex rel. PRICE, County Treasurer,
v. BRIDGEMAN.

(Supreme Court of Illinois. Dec. 20, 1905.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—COMPLIANCE WITH ORDINANCE.

Where an ordinance for the improvement of a roadbed provided that the cobblestones should be uniform in quality and broken so as to pass through a ring of four inches internal diameter, a variation from the terms of the ordinance as to the size of some of the cobblestones did not make the improvement a different one from that provided for by the ordinance, so as to be an available objection on application for judgment of sale for delinquency.

Appeal from Lake County Court; De Witt L. Jones, Judge.

Action by the people, on the relation of Lewis C. Price, county treasurer, against J. W. Bridgeman. Judgment for defendant, and plaintiff appeals. Reversed.

Huff & Cook (Smoot & Eyer, of counsel), for appellant.

RICKS, J. The county court of Lake county denied a judgment and order of sale on the application of the appellant against the property of appellee for the delinquent first installment of a special assessment for grading and paving Scranton avenue and other streets in the village of Lake Bluff, and this appeal is prosecuted from that judgment.

The ordinance required that there should be a roadbed prepared; that it should be rolled and covered with a layer of cobblestones of the depth of nine inches at the center of the roadway and slope to the sides, where it should be six inches deep, and be rolled with a 10-ton roller; that the cobblestones should be uniform in quality and as near cubical in form as possible, and broken so as to pass through a ring of four inches internal diameter, all the larger pieces, as far as practicable, to be placed at the bottom of the layer; that upon this was to be placed a layer of bonding gravel, which should be flooded and rolled, and upon this a layer of medium size cobble, to be crushed so as to pass through a ring of three-fourths of an inch internal diameter, to be of the depth of four inches at the center of the roadway and sloping to three inches at the sides, which was to be rolled, and thereon another layer of bonding gravel was to be laid in such quantity as, when flooded and rolled, would fill the interstices of the stone. The road so made was to be flooded and rolled with a 10-ton roller. The assessment was payable in 10 installments. There is no objection to the formal proof or any of the proceedings had from the time of the origin of the improvement to the time of the hearing in the county court.

Appellee filed three objections, the second and third of which only were urged or relied upon. The second objection was that the improvement was not completed in accordance with the ordinance, and the third objection was that the improvement was a

new and distinct improvement from the one contemplated in the ordinance. Over the objections of appellant the court permitted the appellee to testify that the cobblestones were not over half crushed, that the size of the stones ran from the size of one's fist in the first layer to the size of a hen's egg in the second layer, and that there were not over half of the stones in either layer that were crushed. The witness further testified, on cross-examination, that he had said in open meetings of the board of local improvements that he could not find any fault with the improvement, and he concluded by saying: "I haven't found any fault with it now." The witness testified that the road was a good, smooth, hard road, and looked well, but that there were occasional places where he could kick up a cobblestone with his foot. A witness named Lyon had testified in another case, and it was admitted that he would testify the same in the case at bar, and there are objections of the appellant as to the competency of his testimony; but by agreement that, if competent, what he had testified to in the former case might be applied in the case at bar, his evidence in the former case was read, in which he pointed out that the work had not proceeded regularly, and that in some instances the contractor had not rolled the cobblestones until he had put on the bonding course, and that many of the cobblestones were not crushed. The court then viewed the premises, reciting in his order that it was done by agreement of parties, and rendered a judgment adverse to appellant.

We have many times held that on an application for judgment and order of sale the objection that the work was not completed according to the contract could only avail when it was shown that the improvement as constructed was a new and different improvement from that called for by the ordinance; that a mere difference in the quality of the material or a deviation in the workmanship did not amount to a new or different improvement. In the case at bar appellee has filed no brief or argument and therefore makes no contention about it, and when the evidence is looked to it is quite apparent that the identical improvement called for by the ordinance was constructed, and that what is claimed as making it a new or different improvement is a variation from its provision as to the size of the cobblestones. This last matter could not be urged or should not be permitted to prevail in an application for a judgment and order of sale. *Church v. People*, 174 Ill. 366, 51 N. E. 747; *People v. Whidden*, 191 Ill. 374, 61 N. E. 133, 56 L. R. A. 905; *City of Chicago v. Sherman*, 212 Ill. 498, 72 N. E. 396.

The county court erred in its judgment, and it is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

**THOMAS v. SOUTH SIDE ELEVATED
R. CO.**

(Supreme Court of Illinois. Dec. 20, 1905.)

CORPORATIONS—ATTACKING EXISTENCE—EMINENT DOMAIN—CORPORATE POWER—FOREFEITURE.

In condemnation proceedings by a railroad company, the question whether it has forfeited its grant of corporate power by failure to begin the construction of its road within the time prescribed by 3 Starr & C. Ann. St. p. 3238, c. 114, § 26, cannot be raised.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2417, 2504.]

Appeal from Circuit Court, Cook County; Thomas G. Windes, Judge.

Petition of the South Side Elevated Railroad Company against George W. Thomas to condemn land. Judgment for petitioner, and defendant appeals. Affirmed.

George W. Thomas, pro se. Francis W. Walker and Edward C. Nichols (Noble B. Judah, of counsel), for appellee.

BOGGS, J. To the petition of the appellee company for a judgment condemning certain real estate for the use of the company, in virtue of the exercise of the right of eminent domain by the company, the appellant entered his motion to dismiss the petition, on the alleged ground that the company had not, within two years after its articles of incorporation had been filed and recorded, in accordance with the provisions of section 2 of chapter 114 (3 Starr & C. Ann. St. p. 3225), begun the construction of its road, nor had it expended thereon 25 per cent. of the amount of its capital stock within five years after the date of its organization, as required by section 26, par. 28, of said chapter 114, and that by reason of such alleged failure to comply with the provisions of said section 26, par. 28, the appellant urged that the corporate existence and the power of the appellee company to exercise the right of eminent domain had ceased. The motion was overruled. The rule in Illinois is that, whether the alleged failure of a railroad company to proceed to the construction of its railway, in compliance with said section 26, shall operate to defeat the grant of corporate power can only be determined by a direct proceeding instituted in behalf of the state (*Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, 38 N. E. 1062; *Morrison v. Forman*, 177 Ill. 427, 53 N. E. 73; *Illinois State Trust Co. v. St. Louis, I. M. & S. R. Co.*, 208 Ill. 419, 70 N. E. 357), and cannot be raised and urged by a private individual. The motion to dismiss should not have prevailed.

The judgment must be and is affirmed. Judgment affirmed.

WAKEFIELD v. VAN TASSELL.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. EJECTMENT — IMPROVEMENTS — OCCUPYING CLAIMANT'S ACT.

Only persons evicted from land for which they can show a plain, clear, and connected record title, without actual notice of an adverse record title, can claim the benefit of the occupying claimant's act (2 Starr & C. Ann. St. 1896, pp. 1626-1629, c. 45, §§ 52-61), providing for allowances to occupants of land for improvements made by them in certain cases.

2. SAME.

Under the occupying claimant's act (2 Starr & C. Ann. St. 1896, pp. 1624-1626, c. 45, §§ 43-48), where a successful plaintiff in ejectment files a suggestion of a claim for mesne profits, the value of the use of improvements placed on the premises by defendant cannot be allowed to him, and defendant may set off any improvement up to the amount of plaintiff's claim; but if plaintiff does not claim mesne profits, he is entitled to the improvements placed upon the land by defendant, unless the latter can bring himself within the provisions of the act.

3. SAME.

Where an occupant of premises placed improvements thereon with full knowledge that the title depended upon a condition subsequent, for breach of which the estate was afterwards forfeited, he could not recover for improvements made by him, either under the occupying claimant's act (2 Starr & C. Ann. St. 1896, pp. 1624-1626, c. 45, §§ 52-61) or under a petition in the nature of bill in equity.

4. EQUITY — MAXIMS — NECESSITY OF DOING EQUITY—APPLICATION.

Where the real owner of a tract of land seeks the aid of equity to establish his right to the property itself, and it appears that the estate has been substantially benefited by improvements, he will be required to make compensation for such improvements.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 188-190.]

Appeal from Appellate Court, Second District.

Action by Robert Van Tassell against James E. Wakefield and another, in which William Wakefield was substituted as defendant and petitioned for an allowance for improvements under the occupying claimant's act. From a judgment of the Appellate Court, reversing a judgment granting the prayer of the petition, defendant appeals. Affirmed.

Barnes & Boulware and George B. Foster, for appellant. Arthur Keithley, for appellee.

CARTWRIGHT, C. J. The appellee, Robert Van Tassell, recovered a judgment in an action of ejectment against James E. Wakefield and Adam J. Best for the possession of four lots in the town of Princeville, in the county of Peoria, and the judgment was affirmed by this court. *Wakefield v. Van Tassell*, 202 Ill. 41, 66 N. E. 830, 65 L. R. A. 511, 95 Am. St. Rep. 207. A writ of possession was issued, and the plaintiff was put in possession of the property, after which the cause was redocketed in the circuit court, and the appellant, William

Wakefield, who had acquired the rights of the original defendants, was substituted as defendant. On his motion the court appointed seven commissioners to assess the value of all such lasting and valuable improvements as had been placed on the property prior to the receipt of notice of the plaintiff's claim of title, in pursuance of the occupying claimant's law, which is now sections 52 to 61 of chapter 45 of the Revised Statutes. 2 Starr & C. Ann. St. 1896, pp. 1626-1629. The commissioners valued the improvements at \$5,755, but on a hearing of exceptions to the report the court decided that the claim of defendant did not come within the provisions of the occupying claimant's law. The appellant then filed a petition in the nature of a bill in equity, setting up that his claim to the improvements was of an equitable nature, and praying for an order to go upon the premises and remove the improvements unless the plaintiff should elect to pay the sum of \$5,755 therefor. The plaintiff was ruled to answer the petition instant, and upon a failure to answer was defaulted. The court thereupon entered an order or decree finding that the defendant was the equitable owner of the improvements, and ordering that plaintiff should have an option to pay \$5,755 for the improvements within 10 days, or to elect to do so and give bond, with security, for payment within one year, with interest at 5 per cent., and that, in default of such payment or election and giving a bond, defendant should have the right to enter upon the premises and remove the improvements. From that order plaintiff prosecuted an appeal to this court, which was dismissed for want of jurisdiction. *Van Tassell v. Wakefield*, 214 Ill. 205, 73 N. E. 340. A more complete statement of the facts will be found in the opinion then delivered. Appellee sued out a writ of error from the Appellate Court for the Second District, and that court reversed the order. From the judgment of the Appellate Court this appeal was prosecuted.

It is contended that the court erred in sustaining plaintiff's exceptions to the commissioners' report made and filed under the occupying claimant's law. All that is said in the argument on that question is that there is an inconsistency between the decision of the court upon the commissioners' report and the final order granting substantially the same relief as is given by the occupying claimant's law. It is true that there is such an inconsistency, but it does not follow that the first decision sustaining the exceptions was wrong. We are of the opinion that it was right. The provisions of the occupying claimant's law apply only to one who may be evicted from land for which he can show a plain, clear, and connected title in law or equity, deduced

from the record of some public office, without actual notice of an adverse title in like manner derived from record. On that subject the court said, in the case of *Ross v. Irving*, 14 Ill. 171: "It will be observed that the statute is of an equitable character; that it does not provide for compensating the occupant in any and all cases for the improvements which he may have made upon the land of another, but only in cases where he entered peaceably on the land, having a clear, connected title of his own, and made the improvements before receiving notice of the title of his adversary." Defendant's title was a fee simple upon a condition subsequent, which was annexed to the estate in the conveyance by plaintiff to Adam J. Best. Defendant had full notice of the condition, and the estate was forfeited for a breach of it. He did not have the title specified in the statute, and the court did not err in sustaining the exceptions.

Although the defendant did not bring himself within the terms and conditions of the occupying claimant's law, the court, by its order or decree, found that he was the equitable owner of the improvements, and gave him leave to remove them unless the plaintiff should pay \$5,755 within 10 days or elect to pay the same and give bond, with security, for such payment; and in so doing the court erred. If that could be done the statute would be entirely superfluous, and it would make no difference whether a defendant in ejectment came within the rule prescribed by the Legislature or not. Where there is a recovery in an action at law, the whole subject is governed by the statute. If a successful plaintiff chooses to file a suggestion of a claim for mesne profits, the value of the use of improvements placed on the premises by the defendant cannot be allowed to him, and the defendant may set off any improvements up to the amount of plaintiff's claim. Rev. St. c. 45, §§ 43-48; 2 Starr & C. Ann. St. 1896, pp. 1624-1626. In such a case the improvements are only available as a set-off against the claim for mesne profits. It is true that if the real owner of land seeks the aid of a court of equity to establish his title or to recover land, he may be required to do equity by compensating the occupant for improvements to the extent that they have enhanced the value of the property, if the improvements have been put on the property in good faith and through innocent mistake. 3 Pomeroy's Eq. § 1241. What was said in the case of *Cable v. Ellis*, 120 Ill. 136, 11 N. E. 188, on the subject of an allowance to a bona fide purchaser or owner for value in a court of equity is to be understood in that sense. That was a suit in equity, and the true rule was accurately stated in *Lagger v. Mutual Union*

Loan Ass'n, 146 Ill. 233, 33 N. E. 946, where it was said that if the real owner seeks the aid of equity to establish his right to the property itself, and it appears that the estate has been substantially benefited by the improvement, he will be required to make compensation, for the reason that he who seeks equity must do equity. Where the owner recovers his land in an action at law, a defendant can only be allowed for improvements by bringing himself within the terms of the statute, which was regarded in *Ross v. Irving*, supra, as covering the entire subject and establishing a definite rule. The court said that, independent of any statute, the application of equitable principles to cases provided for by the statute would require an allowance for improvements, and that "the statutory remedy affords relief for the same thing according to a rule prescribed by legislative, instead of judicial, power." If the matter were not regulated by statute, a court of equity would not, under the circumstances of this case, have given relief to the defendant on his petition when evicted in an action at law. The parties who placed the improvements upon the premises, and the defendant, had notice of the nature of the title and the condition upon which it was granted, and in such a case the one making the improvements would have no claim upon a court of equity to be reimbursed.

The judgment of the Appellate Court, reversing the order of the circuit court, is correct, and is affirmed.

Judgment affirmed.

(218 Ill. 530)

HATHAWAY et al. v. MERCHANTS' LOAN & TRUST CO.

(Supreme Court of Illinois. Dec. 20, 1905.)

EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATE.

Administration Act (Laws 1871-72, p. 94), § 70, as amended by Laws 1903, p. 3, fixing the time for filing claims against an estate, is not retroactive, so as to reduce the time for filing claims against an estate on which letters testamentary were granted before the act took effect.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 767.]

Error to Appellate Court, First District.

In the matter of the estate of Charles A. Morrill. From an order allowing the claim of the Merchants' Loan & Trust Company, which allowance was affirmed by the Appellate Court, Charles Hathaway and others bring error. Affirmed.

On December 31, 1902, Charles A. Morrill died testate. On January 13, 1903, letters testamentary were issued by the probate court of Cook county to the Merchants' Loan & Trust Company, the defendant in error, being the executor named in the will. The March term, 1903, of the probate court of Cook county was selected as adjustment

term for all claims against the estate. The claim of Charles Hathaway & Co., plaintiffs in error, in the sum of \$38,789, was allowed on June 25, 1903. On May 15, 1903, an amendment to section 70 of chapter 3 of Hurd's Revised Statutes was passed by the Legislature, which went into effect on July 1, 1903 (Laws 1903, p. 3), and required all claims against estates to be filed within one year from the date of the issue of letters testamentary, instead of within two years, as formerly required. On May 2, 1904, the defendant in error filed its claim in the probate court against the estate of Morrill, based upon eight notes, and on July 25, 1904, the claim was allowed in the sum of \$41,065.77 of the seventh class. Plaintiffs in error appealed from this judgment to the circuit court, and on August 28, 1904, upon a hearing before the court without a jury, the claim was allowed for the sum of \$42,088.83. It was contended by the plaintiffs in error that the claim should not have been allowed, because it was not filed in the probate court within one year from the granting of letters testamentary. This contention was presented to the circuit court by three propositions of law, all of which were refused. From the judgment of the circuit court an appeal was prosecuted to the Appellate Court for the First District, where the judgment was affirmed, and the case is brought to this court by writ of error.

Merrick & Ramsay and Millard & Hale, for plaintiffs in error. McCulloch & McCulloch, for defendant in error.

WILKIN, J. (after stating the facts). The sole question is whether the claim of plaintiffs in error is barred by the amendment of May 15, 1903, it not having been filed within one year from the date of the issue of letters testamentary, or whether the statute which existed prior to the amendment was in force as to such claims, entitling the claimant to two years from the date of the issue of letters in which to file its claim. On April 11, 1903, the Legislature amended section 7 of chapter 148, entitled "Wills" (Laws 1903, p. 355), reducing the time from two years to one year within which a bill could be filed to contest a will. In the case of *Sharp v. Sharp*, 213 Ill. 332, 72 N. E. 1058, we held that this amendment applied to all bills filed after the act took effect, notwithstanding the wills contested were probated before that time. It is insisted by plaintiffs in error that the two acts are in pari materia and will be construed alike, and that, as we held that the amendment to the statute of wills applied to all bills filed after its enactment we should also hold that the amendment to section 70 of chapter 3 (Laws 1903, p. 3) applied to all claims filed after its enactment, and hence the claim of defendant in error should be held barred.

There is a material distinction between a statute conferring jurisdiction and fixing

a time within which it may be exercised, and a statute of limitations. A court of equity has no power to entertain a bill to set aside a will independently of statutory enactment conferring such jurisdiction. When jurisdiction is thus conferred, it can only be exercised in the manner and under the limitations prescribed by the statute. The time within which a bill may be filed under the statute by any person interested is not a limitation law, and the statute in force at the time of the filing of the bill is the statute conferring jurisdiction, and must govern. *Spaulding v. White*, 173 Ill. 127, 50 N. E. 224; *Sharp v. Sharp*, supra. We have held in many cases that section 70 of chapter 3 is not a statute conferring jurisdiction, but is a statute of limitations, governed by the laws and rules applicable to such statutes. *Baird v. Chapman*, 120 Ill. 537, 12 N. E. 73; *Roberts v. Flatt*, 142 Ill. 485, 32 N. E. 484; *Snydacker v. Swan Land Co.*, 154 Ill. 220, 40 N. E. 466. While it is undoubtedly within the power of the Legislature to pass a statute of limitations or to change the period of limitation previously fixed and to make such statute or changes applicable to existing causes of action, yet such a statute is not to be readily construed as having a retroactive effect, but is generally deemed to apply merely to causes of action arising subsequent to its enactment, and the presumption is against any intent on the part of the Legislature to make the statute retroactive. 19 Am. & Eng. Ency. of Law (2d Ed.) p. 174; *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870; *Spaulding v. White*, supra. The statute will only be given a retroactive effect when it was clearly the intention of the Legislature that it should so operate. *Fisher v. Green*, 142 Ill. 80, 31 N. E. 172. And even where this intention clearly appears, it will not be given effect, if to do so would render it unreasonable or unjust. If a reasonable time is given for bringing a suit or filing claims after the amendment takes effect, it may be valid and binding. *Ryhiner v. Frank*, 105 Ill. 326; 19 Am. & Eng. Ency. of Law (2d Ed.) 168, 169; *Walker v. People*, 202 Ill. 34, 66 N. E. 827, quoting from Wood on Limitation of Actions, p. 28, by mistake printed as "Thompson on Limitation of Actions." Prior to the death of Morrill the defendant in error had a right of action against him upon the eight notes held by it, but upon his death the right became fixed and vested. Subject to certain conditions the defendant in error acquired a right to share in his estate together with his heirs. One of these conditions was that it should file its claim in the probate court within two years from the date of the issue of the letters testamentary, which were issued on January 13, 1903. Under the act then in force this claim might have been filed up until January 13, 1905. On July 1, 1903, by amendment, the time was cut down to one year, or until

January 13, 1904. The claim was filed May 2, 1904. The presumption is that the Legislature did not intend this law to be retroactive unless the contrary clearly appears. There is nothing in the amendment to indicate such an intention on the part of the Legislature, and therefore the presumption must prevail that it was not to be retroactive.

The plaintiffs in error contend that, as there were about 8 months after the act was approved and 6 months and 13 days after it took effect within which the defendant in error could have filed its claim, this was a reasonable time, and that the new limitation should prevail. The act must be applied generally to all claims and to all estates. A single claim or a single estate cannot be pointed out in which the act applies, and then say it does not apply to any other claim or to any other estate. If an estate had been pending for more than one year at the time the amendment went into effect, then all outstanding claims which had not been filed in the probate court would be entirely cut off, as far as the statute is concerned, without any opportunity to recover against the estate unless an equitable rule was applied. If an estate had been pending less than a year at the time the amendment went into effect, then the time within which claims might be filed would be cut down all the way from one day to one year. Applying the rule of uniformity to this amendment, we cannot say that a reasonable time was left creditors in which to file claims, or that it was the intention of the Legislature that the amendment should be retroactive. The views above expressed are in conformity with the decisions of the courts of last resort in other jurisdictions holding that similar amendments are not retroactive. *King v. Tirrell*, 68 Mass. 331; *Hildreth v. Marshall*, 73 Mass. 167; *West Feliciana Railway Co. v. Stackett*, 21 Miss. 395. Section 4 of chapter 131 (Hurd's Rev. St. 1903, p. 1800) provides that no law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any right accruing or claim arising under the former law, or in any way whatever to affect any right accrued or claim arising before the new law took effect, etc. The right of defendant in error, as a creditor of Morrill, to exhibit its claim against his estate, accrued when the letters testamentary were issued, and therefore was a right accruing under the law in effect at the time the letters were issued. Section 4 in express terms provides that no new law shall be construed to affect any right accruing or claim arising under the former law. Construing these two acts together, the amendment, if retroactive, would be in conflict with the provisions of section 4.

We find no reversible error, and the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(218 Ill. 585)

ROHRHOF v. SCHMIDT et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MORTGAGES — FORECLOSURE — SUFFICIENCY OF EVIDENCE.

A bill for the foreclosure of a trust deed alleged the existence of the indebtedness, the making of the trust deed, which conveyed a fee-simple title, and that the title passed by mesne conveyances to defendant. Defendant answered, admitting that he was the owner of the premises at the time the bill was filed and was occupying the same. Complainant introduced the trust deed, conveying a fee-simple title in the premises, in evidence, and made proof of a default in the conditions of the deed. Defendant offered no evidence in rebuttal. *Held*, that a decree of foreclosure was warranted.

2. APPEAL — RESERVATION OF EXCEPTIONS — NECESSITY OF OBJECTIONS.

Where exhibits introduced in evidence were withdrawn, to the injury of defendant, he should have made his objections, demanded a ruling thereon, and preserved proper exceptions; and, failing so to do, he could not, on appeal, take advantage of any error in withdrawing the exhibits.

3. MORTGAGES — FORECLOSURE — SOLICITOR'S FEES.

Where a trust deed provides for a solicitor's fee of \$200 on foreclosure, and there is evidence that the fee is reasonable and no evidence to the contrary, such fee may be properly allowed.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 1669-1675.]

Appeal from Appellate Court, First District.

Suit by Henry J. Schmidt against Julius J. Rohrhof and others. From a decree of the Appellate Court, affirming a decree in favor of complainant, defendant Rohrhof appeals. Affirmed.

Harrison D. Paul, for appellant. George W. Barker, for appellees.

WILKIN, J. On May 28, 1903, appellee Henry J. Schmidt filed his bill in the superior court of Cook county against appellant, Julius J. Rohrhof, and others, to foreclose a certain trust deed executed on March 31, 1897, by Robert Grosser and Maria Grosser, his wife, to John C. Ahrensfeldt, as trustee, to secure the payment of \$2,500. After several amendments had been made to the bill, and upon answer being filed by Rohrhof, the cause was referred to the master to take the evidence and report the same, together with his conclusions of law and fact. The master's report recommended a decree in accordance with the prayer of the bill. Objections were filed to the report, which were overruled, and they were renewed as exceptions in the superior court. The exceptions were overruled, and a decree of foreclosure entered. An appeal was perfected to the Appellate Court, where the decree was affirmed, and a further appeal has been prosecuted to this court.

Appellant became the owner of the real estate in controversy by mesne conveyances from Robert and Maria Grosser, the grantors in the original trust deed. It is first

insisted that the bill does not allege, nor the proof show, that Robert and Maria Grosser were the owners in fee simple of the property at the time they executed the trust deed, or that they had any right to make the incumbrance, or that appellant acquired any title or interest from them, or that the title of appellant was not acquired from an entirely different and superior source, so as to render it prior to the trust deed. The bill alleges that on March 31, 1897, Robert and Maria Grosser, being indebted in the sum of \$2,500, executed their notes for the same; that to secure the payment of these notes they executed a deed of trust to John C. Ahrensfeldt, conveying to him in fee simple the real estate in controversy; that on December 31, 1899, Robert and Maria Grosser, by a warranty deed, conveyed their interest in the premises to Ulysses B. Kellogg; that by mesne conveyance the title finally vested in the appellant, Julius Rohrhof, who was the owner at the time the bill was filed. The answer of Rohrhof admits he was the owner of the premises at the time the bill was filed and was occupying the same as his homestead. Upon the hearing before the master the trust deed, duly acknowledged by the grantors, was offered in evidence, conveying and warranting the fee-simple title in the premises. Proof was made of the default of the conditions in the trust deed. Those allegations of the bill, the admission of the answer, and the proof offered were sufficient to make out a prima facie case in favor of appellees. Appellant offered no proof in rebuttal of appellees' prima facie case. If the bill had simply alleged title in appellant, the nature of which was unknown to the complainant, but which was subsequent to appellees' rights, it would have been sufficient, and would have rendered it necessary for appellant to set forth the nature and character of his interest and prove the same; and, if he failed to do so, his claim would have been barred. *Kehm v. Mott*, 187 Ill. 519, 58 N. E. 467.

It is next insisted that the exhibits offered in evidence before the master were withdrawn from the files, and the court had no right to enter a decree upon the master's report without the original exhibits, upon which the finding was based, being on record. We have diligently searched the record for any proof of this contention and fail to find it. In the ninth finding of the master's report he recommends that complainant's solicitor have leave to withdraw all exhibits; but there is nothing in the record to show that that recommendation was allowed by the court or acted upon by complainant's solicitor. We have also been unable to find any objection made by appellant to such action of complainant's solicitor, even if he did withdraw the exhibits. It certainly will not be contended that appellant could be permitted to sit by and see the court do things which he claims to be injurious to him and

make no objection, and then, upon appeal, assign these same acts as error and have the decree reversed on that ground. If the exhibits were in fact withdrawn, and appellant was injured thereby, he should have made his objections known to the court, demanded a ruling, and preserved proper exceptions thereto. He would then have been entitled to take advantage on appeal of such error, but not otherwise.

It is finally insisted that the solicitor's fee of \$200 allowed was \$50 in excess of the usual and reasonable fee. The trust deed provided for a solicitor's fee of \$200. Evidence was offered to show that that was a reasonable fee, and no evidence was offered to show that it was not.

We find no reversible error, and the decree of the Appellate Court will be affirmed. Decree affirmed.

(218 Ill. 588)

PEOPLE ex rel. TALBOT v. KANKAKEE & S. W. RY. CO.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS — TAX LEVY ORDINANCE—FILING.

Under Hurd's Rev. St. 1903, p. 303, art. 8, § 1, providing that a certified copy of a tax levy ordinance of a city or village must be filed with the county clerk, it is insufficient to file the original ordinance.

2. SAME—AUTHENTICATION.

On application for judgment of sale for taxes, error in filing the original tax levy ordinance, instead of a certified copy thereof, cannot be cured by allowing a certificate of authentication to be attached to the ordinance.

3. SAME—JUDGMENT OF SALE—OBJECTIONS.

On application for judgment of sale an objection that the purported tax levy ordinance was not certified by the county clerk is broad enough to allow the point to be raised that it was not a certified copy of the tax levy ordinance.

4. TOWNS — TAXATION — PROCEDURE UNDER ROAD AND BRIDGE ACT.

Under Road & Bridge Act (Hurd's Rev. St. 1903, c. 121) § 119, in townships having the labor system for road and bridge taxes, the original certificate signed by the highway commissioners must be filed with the county clerk, while under section 16 of the act in townships under the cash system the certificate is to be delivered to the town clerk, who shall certify the items of levy to the county clerk to be extended as other taxes.

5. SAME—SUFFICIENCY OF CERTIFICATE.

A certificate of highway commissioners, showing a levy of 40 cents on the \$100 for roads and bridges, without stating the amount required for each purpose or the total amount of taxes required, is sufficient.

Appeal from Livingston County Court; C. F. H. Carrithers, Judge.

Action by the people, on the relation of Will L. Talbot, county treasurer, against the Kankakee & Southwestern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

R. S. McIlhuff, for appellant. C. C. & L. F. Strawn (John G. Drennan, of counsel), for appellee.

RICKS, J. The county court of Livingston county denied judgment and order of sale in favor of appellant and against appellee for the village taxes of the village of Cullom and the road and bridge taxes for Rooks Creek township, both in said county, for the year 1904, and this appeal is prosecuted from that judgment.

The objection urged against the said village tax by the appellee is that it was "extended from a paper purporting to be a levy ordinance by the village, but not certified to by the village clerk, and the amounts levied for each purpose are not definitely stated." The record discloses that in compliance with the statute the village board passed its appropriation ordinance in apt time, and also passed an ordinance for the levy of the village taxes by proper vote and in apt time. There was filed with the county clerk on September 21, 1904, a writing which on its face purported to be the levy ordinance, but it was not authenticated by the certificate of the village clerk. At the hearing, on motion of appellant, the supposed levy ordinance was amended by allowing the village clerk to attach to it a certificate of authentication. His certificate states "that the annexed ordinance, entitled 'Annual Appropriation Ordinance,' for the levy and collection of taxes for the fiscal year A. D. 1904, signed 'E. D. Brady, President pro tem,' and attested under the seal of said village by me as village clerk, was duly passed at an adjourned meeting of the president and board of trustees of the village of Cullom," etc. It seems that the levy ordinance has the heading "Annual Appropriation Ordinance," but it is readily seen from its terms and provisions that it was in fact a levy ordinance. The paper filed with the county clerk, if it purports to be anything, upon its face purports to be the original ordinance, as the word "Copy" nowhere appears upon it, nor does the village clerk certify, when leave is granted to amend, that the instrument is a copy of the original ordinance. Section 1 of article 8 of the act for the incorporation of cities and villages requires that they shall ascertain annually, on or before the third Tuesday in September in each year, the amount of appropriations for all corporate purposes, and by an ordinance specifying in detail the purposes for which such appropriations are made and the sum or amount appropriated for each purpose, respectively, levy the amount so ascertained upon all the property subject to taxation within the city or village, as the same is assessed and equalized for state and county purposes for the current year. It further requires that a "certified copy of such ordinance shall be filed with the county clerk of the proper county, whose duty it shall be to ascertain the rate per cent. which, upon the total valuation of all property subject to taxation within the city or village as the same is assessed and equalized for state and county purposes, will produce a net amount

of not less than the amount so directed to be levied," etc. Hurd's Rev. St. 1903, p. 308. From the quotation last above it is seen that it is not sufficient, under the terms of the above statute, to file the original ordinance, but the requirement is that a "certified copy of such ordinance shall be filed." This was not done in the case at bar, nor was it attempted by the amendment and addition of the certificate to show that it was actually done.

The exact question now under consideration has been before this court in the case of Cincinnati, Indianapolis & Western Railway Co. v. People ex rel., 218 Ill. 558, 73 N. E. 310. We there said in part (page 561 of 213 Ill., and page 312 of 73 N. E.): "The paper filed did not give to the county clerk any apparent authority to extend the tax, and under the authority of Village of Russellville v. Purdy, 203 Ill. 142, 68 N. E. 1085, the leave to amend was improper. The only authority for extending a tax is some paper which purports to be a certified copy of an ordinance levying a tax." And in that case it is further said on the same page: "But as nothing which purported to be a copy of the ordinance levying the tax had been filed with the county clerk there was nothing in the way of a certificate to be amended." Appellant urges that the objection made by appellee is not broad enough to raise the question, but we are disposed to hold that it is. The objection states that the paper purporting to be the levy ordinance was not certified to by the village clerk. That is true, and when the village clerk, on the trial, did certify to it, it still did not bring it within the requirements of the statute. We regard the case above cited as conclusive of the question as to the sufficiency of this ordinance, and do not deem it necessary to enter into a discussion of the question of its indefiniteness concerning the purposes for which the levies were made.

Two objections were urged against the road and bridge tax for Rooks Creek township. The first was that the certificate was insufficient, in that it showed a levy of 40 cents on the \$100, without stating the amount required for each purpose or the total amount of taxes required; and the second, that said tax was "invalid and not collectible for the further reason that the original levy signed by the highway commissioners was not laid before the board of supervisors of said county." The first objection is not tenable, and we so held in Cincinnati, Indianapolis & Western Railway Co. v. People ex rel., 212 Ill. 518, 72 N. E. 770. The record shows that Rooks Creek township was operating under the labor system, and the tax levied was in attempted compliance with section 119 of the road and bridge act. Hurd's Rev. St. 1903, c. 121. It appears that there was filed with the county clerk during the September meeting of the county board, and laid before and considered by that board,

a supposed copy of a certificate of levy for road and bridge purposes, duly certified to by the town clerk of said township, in which it is stated that a levy of 40 cents on the \$100 is made for said road and bridge purposes. The town clerk, after setting out a levy in sufficient form, containing a copy of the signature of the commissioners of highways, certifies that it "is a true and correct copy of the original thereof, delivered by the commissioners of highways and kept by me, and now remaining on file in the office of the town clerk of said town." In our statute entitled "Roads and Bridges" there are two complete codes of law relative to road and bridge taxes—one applying to such townships as have what is termed "the cash system," under which the district road tax is paid in cash, as other taxes are, and "the labor system," under which the district road tax is paid in labor; and applicable to the townships thus operating under one or the other of these systems is a distinct provision with reference to the road and bridge tax. Under section 16 of the act, which is applicable to townships operating under the cash system, the commissioners are required to make a certificate of the rate per centum agreed upon by virtue of sections 13 and 14 of the act, and to cause such certificate to be delivered to the town clerk, "to be kept by him on file for the inspection of the inhabitants of said town, and the town clerk shall at once certify these two items of levy to the county clerk to be by him extended as one tax upon the collector's book of said town, to be collected as other taxes," etc., while by section 119, which is applicable to the townships having the labor system, the commissioners of highways are required to annually ascertain the amount of tax for road and bridge purposes, "and shall levy a tax on all the real, personal and railroad property in said town, not exceeding forty cents on the \$100; and they shall give to the supervisor of the township, and in Cook county to the county board, a statement of the amount necessary to be raised, and the rate per cent of taxation, signed by said commissioners, or a majority of them, on or before the Tuesday next preceding the annual September meeting of the board of supervisors, or the county board of Cook county, who shall cause the same to be submitted to said board for their action at such September meeting of said board." It will thus be seen that by section 16, which is not applicable to Rooks Creek township, the certificate is to be filed with the town clerk and remain with him, and he is to certify the amount to the county clerk, while under section 119, which is applicable to the tax now in controversy, the statute requires that the original certificate signed by the commissioners shall be delivered to the supervisors and laid before the board.

Many cases arise upon this tax, doubtless, from a confusion of the two provisions,

and a lack of observation on the part of the commissioners of highways and the clerk of the town as to which one of the sections of the road and bridge act is applicable to such town. The question involved in this case has been before this court and decided adversely to the contention of appellant in the case of *Chicago & Northwestern Railway Co. v. People ex rel.*, 184 Ill. 174, 56 N. E. 365. In that case the levy was made, as directed by section 119 of the statute, by the commissioners of highways, and, as in this case, filed with the town clerk, who certified to the county clerk the substance of the certificate of levy for the purpose of the extension of the tax, and it was laid before the county board and the tax directed to be extended. In that case the court below sustained the certificate and gave judgment for the tax, and this court reversed the county court, holding that it was not a compliance with section 119, but that the original certificate signed by the commissioners must be filed with the county clerk. We deem it unnecessary to go into any further or extended discussion of this question, as we regard that case conclusive of this, and have striven to point out the source of the difficulty that seems to confront the road and township officers acting under this law.

The judgment of the county court is in conformity with the views expressed by this court in the cases referred to, and is affirmed.

Judgment affirmed.

(213 Ill. 594)

CITY OF MATTOON v. NOYES.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. APPEAL—DEFENSES NOT RAISED BELOW.

A defense not made in the court below will not be considered for the first time on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1079.]

2. SAME—RECORD—EVIDENCE.

Where, on appeal in a chancery case, the certificate of evidence does not purport to contain all the evidence heard by the chancellor, its sufficiency to establish a certain question cannot be determined.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, §§ 2916, 2917.]

Error to City Court of Mattoon; L. O. Henley, Judge.

Bill by Sara E. P. Noyes against the city of Mattoon and Loomis & Rose. Decree for plaintiff, and defendant city brings error. Affirmed.

Sara E. P. Noyes, the defendant in error, obtained an injunction in the city court of the city of Mattoon against said city and Loomis & Rose, contractors, restraining them from constructing a certain sidewalk, which the city by an ordinance had theretofore ordered laid. The decree rendered by the city court, following the allegations of the bill, finds that on August 13, 1893, one Francis V. Noyes died testate owning a tract of

land in the E. ½ of the N. W. ¼ of section 14, town 12 N., range 7 E., in said city, lying east of the extension of the middle line of Fourteenth street, in said city; that in and by his will he devised said tract to Sara E. P. Noyes and Francis V. Balch in trust, for the support of the former, with full power to sell and convey free from trust and to deal with said land as though they were the absolute owners thereof, and providing that in case of the death of Balch the defendant in error should succeed to all the powers given to the trustees until a successor to Balch should be appointed, also nominating Balch and the defendant in error executors of his will; that the persons named accepted the trust, and on April 2, 1894, in pursuance of the powers vested in them by the will, platted said tract into lots, blocks, and streets; that the plat was accepted by the city and was filed for record in Coles county as "Executor's Subdivision No. 2 of Francis V. Noyes' Estate"; that subsequent thereto Balch died, and thereafter, on September 18, 1901, before any lots or blocks were sold in said platted tract, the defendant in error, as surviving trustee and executrix, properly executed and acknowledged a deed declaring said plat vacated, and filed that deed for record in the recorder's office of Coles county on September 24, 1901; and that said plat was thereby vacated and the public divested of all rights in and to the streets shown thereon. The decree further finds that the city of Mattoon has passed an ordinance for the construction of a sidewalk over said tract and about 45 feet east of the west side thereof without obtaining a right of way therefor, and has let a contract for the construction of the sidewalk to Loomis & Rose, who are threatening to begin the construction thereof notwithstanding the objection of defendant in error; that at the time said ordinance was passed there was no street at the place of the proposed sidewalk, and no right existed in the city to order the construction thereof. The city of Mattoon brings the record to this court by a writ of error. The defense of the plaintiff in error, as set up by its answer in the city court, was that at the time the deed of vacation was executed one Joseph Withington was co-trustee with the defendant in error and that it was necessary for him to join in that deed; also, that prior to the execution of the deed of vacation the defendant in error and Withington, as trustees, had conveyed to John W. Hogue a parcel of land out of said platted tract, and that the deed of vacation was ineffective because he (Hogue) did not execute it. These grounds are also urged in this court for reversing the decree of the city court, and in addition thereto it is contended that executor's subdivision No. 2 is only a part of a plat; that it and executor's subdivision No. 1 of Francis V. Noyes' estate together constitute but one plat, and that lots had been sold in the latter subdivision, fronting on

Fourteenth street (the east half of which street is included in the vacated plat and is the part of the street upon which the sidewalk was ordered), prior to making the deed of vacation; that the owners of the lots so sold should have signed that deed in order to make it effective; that such owners purchased those lots with reference to the plat as a whole; and that defendant in error is now estopped to deny the existence of a street at the place where the sidewalk is proposed to be constructed. The testimony was taken in open court, and defendant in error calls attention to the fact that the certificate of evidence does not purport to contain all the evidence introduced.

Anderson Stewart, for plaintiff in error.
James F. Hughes, for defendant in error.

SCOTT, J. (after stating the facts). It is first urged by plaintiff in error that executor's subdivision No. 1 and executor's subdivision No. 2 of Francis V. Noyes' estate, shown by the plat contained in the transcript of the record, are in fact one and the same subdivision, and that the streets therein were conveyed to the city of Mattoon by one and the same statutory dedication; that various lots in subdivision No. 1 had been sold and conveyed to various persons after the dedication and prior to the filing of the declaration or deed of vacation, and that as these grantees did not join in the deed of vacation that deed was ineffective under the provisions of section 6 chapter 109, Hurd's Rev. St. 1903, which is as follows: "Any such plat may be vacated by the owner of the premises at any time before the sale of any lot therein, by a written instrument declaring the same to be vacated executed, acknowledged or proved, and recorded in like manner as deeds of land; which declaration being duly recorded, shall operate to destroy the force and effect of the recording of the plat so vacated, and to divest all public rights in the streets, alleys and public grounds, and all dedications laid out or described in such plat. When lots have been sold, the plat may be vacated in the manner herein provided by all the owners of lots in such plat joining in the execution of such writing." An examination of the record shows that this contention was not made by the city on the trial in the court below, its insistence in that regard in that court being that one parcel of real estate in executor's subdivision No. 2 had been conveyed to John W. Hogue prior to the execution of the deed of vacation, and that the vacation was erroneous for the reason that Hogue did not join in that deed. It was not suggested in the court below, so far as appears from the record, that the two subdivisions were one and the same, and that it was necessary for owners of lots in subdivision No. 1 to join in the vacation of the plat of subdivision No. 2. A defense not made in the court below will not be con-

sidered in this court when the record is reviewed here. *Ortmeyer v. Ivory*, 208 Ill. 577, 70 N. E. 665; *McDavid v. Sutton*, 205 Ill. 544, 68 N. E. 1064.

It is next contended that Joseph Withington was acting as one of the trustees under the will of Noyes at the time of the execution of the deed of vacation, and that as he did not join with Sara E. P. Noyes in that deed the same was ineffective. Whether or not Withington was at that time one of the trustees is in this case a question of fact. The testimony was taken in open court. There is no recital in the certificate of evidence showing that it contains all the evidence which was introduced in the trial of this cause in the city court. Whether or not the evidence showed that Withington was at that time a trustee we cannot determine, in the absence of a certificate of evidence purporting to present all the evidence heard by the chancellor. *Cooley v. Scarlett*, 38 Ill. 816, 87 Am. Dec. 298; *Allen v. Le Moyne*, 102 Ill. 25; *Allen v. Henn*, 197 Ill. 486, 64 N. E. 250.

The tract of land in executor's subdivision No. 2, conveyed to John W. Hogue, was transferred by a deed dated September 14, 1901, and is described therein by metes and bounds. The deed of vacation was not signed until the 18th of September, 1901, and was filed for record on September 24, 1901. It is contended on the part of defendant in error that this deed to Hogue was not delivered until after the deed of vacation had been filed, so that Hogue never became the owner of the land described in his deed until after the vacation of the plat of the subdivision. The third and last point made by plaintiff in error is upon its assertion that Hogue's deed was delivered before the deed of vacation was filed, and that Hogue was therefore a necessary party to the deed of vacation. This, too, presents a question of fact, viz., was the deed to Hogue delivered before or after the deed of vacation was filed? and this question of fact we cannot determine, for reasons already pointed out.

The decree of the city court will be affirmed.

Decree affirmed.

(218 Ill. 539)

MERRITT v. DEWEY.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. ALTERATION OF INSTRUMENTS—MISTAKE IN CONTRACT—RIGHT TO CORRECT.

Although a written contract does not evidence the actual agreement of the parties, one party has no right, without the consent of the other, to alter the instrument so as to make it conform to such agreement.

2. SAME—EFFECT OF ALTERATION.

The alteration of a note by adding an interest clause after its execution without the consent of one of the joint makers of the note invalidates the instrument, although both joint makers understood that the note was to bear interest.

3. SAME—ACTIONS—BURDEN OF PROOF.

Where, in an action on a note, plaintiff established his case in chief, whereupon defendant introduced evidence showing a material alteration of the note, the burden of proof was shifted to plaintiff; and in the absence of a denial of the alteration he was required to show that such alteration was made under circumstances rendering it lawful or under circumstances which would not preclude a recovery by him.

Appeal from Appellate Court, Second District.

Action by Charles P. Dewey against H. Clay Merritt and another. From a judgment of the Appellate Court (115 Ill. App. 503), affirming a judgment for plaintiff, defendant Merritt appeals. Reversed.

This is an appeal prosecuted by H. Clay Merritt, the appellant, from a judgment of the Appellate Court for the Second District affirming a judgment of the circuit court of Henry county for \$2,111.92 in favor of Charles P. Dewey, the appellee, against the appellant. The action was assumpsit, and the declaration consisted of the common counts and a special count on a promissory note for \$1500, dated January 22, 1898, due one year after date, signed by L. Silverman and H. Clay Merritt, payable to themselves, and indorsed and transferred by them, before maturity, to Charles P. Dewey. Both Silverman and Merritt were made defendants. The former permitted a default to be taken against him. The latter filed the general issue, with an affidavit denying the execution of the note. The evidence for the defendant Merritt tended to show that the note had been materially altered, without his consent, since he signed it; that it had been raised from a note for \$100 to a note for \$1500, either by changing the word "one" before the word "hundred" to the word "fifteen," or, if the word "one" was not there, then by writing the word "fifteen" before the word "hundred"; and that it had been changed from a noninterest-bearing note to one bearing interest at 7 per cent. per annum from date. Plaintiff's evidence in rebuttal tended to show, if the word "fifteen" was not in the note when signed, that it was written in a blank space left, when the note was signed, before the word "hundred," and the plaintiff contends that it appears from Merritt's testimony that he knew and understood, when he signed the note, that it was to draw interest at 7 per cent. per annum. The note was sold to the plaintiff, who was a banker, by an attorney who was acting for Silverman, and the evidence shows that when the attorney received the note from Silverman and when the appellee received it from the attorney it was in the same condition as it was at the time it was introduced in evidence on the trial below.

The appellant contended in the circuit court, and argues here, that the note shows on its face that it has been altered in the particulars testified to by the appellant, and

that the appearance of the note itself was sufficient to put a reasonably prudent man upon inquiry as to its genuineness. The Appellate Court states in its opinion that the original note was certified to that court by the circuit court for inspection, and that the note does not show on its face any evidence of having been changed since it was signed by Merritt. A special interrogatory was submitted to the jury whether the word "one" was written in the body of the note before the word "hundred" when the note was signed by the appellant, which the jury answered by a special finding in the negative. The original note has not been certified to this court. At the close of all the evidence the appellant requested the circuit court to instruct the jury to find the issues for the defendant Merritt, because the declaration counted on a promise only, while the evidence showed the only ground of recovery to be that of negligence on the part of the appellant in leaving blank spaces in the note at the time of signing it. The peremptory instruction so tendered was refused by the court, and its action in this regard is assigned as error. It is also urged that the court erred in giving appellee's instructions numbered 1, 2, 5, 7, 8, 9, and 10, and in refusing to give appellant's instructions numbered 4, 5, 8, 9, 10, 11, 12, and 13, and in modifying certain other instructions asked by appellant.

N. F. Anderson and Wilson, Moore & Faull, for appellant. Allen P. Miller and James K. Blish, for appellee.

SCOTT, J. (after stating the facts). The instrument sued on was, at the time suit was brought thereon, in the words and figures following: "\$1,500.00. Kewanee, Ill., January 22, 1898. One year after date we promise to pay to the order of ourselves, fifteen hundred dollars, at my office, Kewanee, Ill., value received, with seven (7) per cent. interest per annum. L. Silverman. H. Clay Merritt"—on the back of which appears the following: "L. Silverman. H. Clay Merritt." The note was written on a printed blank in which there was no provision for the payment of interest, and Merritt testified that the interest clause, which is in writing and is as follows: "with seven (7) per cent. interest per annum—"was not written there when he signed. These words are written on an imaginary line beginning near the left-hand margin of the note and running to the right. Several of the first words are practically on a line with Silverman's signature. The space to the left of that signature, however, was not long enough to contain all the words of the interest clause, and when the line which the words follow reaches the signature of Silverman it curves upward, so as to pass above that signature. Merritt testified further, however, in these words: "I imagine now that the contract was that the note was to draw 7 per cent. interest. It might be 6

or 7. I am not positive about it either way." Later in his testimony he said that his opinion was that the note was to draw 7 per cent., but that the question never came up; that there was nothing talked about the interest when the note was signed and that he presumed that the interest clause as it now appears in the note was the same as when he signed it, except that when he signed it it did not contain the words, "with seven." While his testimony is somewhat indefinite, it is yet apparent therefrom that, when he signed, either the interest clause was entirely lacking, or the words "with seven" were lacking. No other witness testified on this subject. When the note was delivered to Silverman's attorney it was in the same condition as when suit was brought thereon. No one was present when the note was signed, except Merritt and Silverman. Merritt testified that the alterations made in the note after it was signed were made without his knowledge or consent. Dewey did not call Silverman as a witness on the trial below nor account for his absence.

With the proof in this condition the court modified the sixth instruction asked by Merritt, and gave it as modified, in the words following: "If the jury believe from the evidence that the words 'with seven (7) per cent. interest per annum' were written into the note without Merritt's knowledge, authority, or consent *that the note was to bear interest at 7 per cent. per annum*, after he and Silverman had signed it, then you will find the issues for the defendant, Merritt." The modification consisted in writing in the italicized words. The plaintiff's fifth instruction stated the same proposition in the words following: "Although the jury may believe, from the evidence, that the words 'with seven per cent. per annum' were written upon the note after it was signed by Merritt, yet if they further believe, from the evidence, that Merritt, at the time he signed the note, consented that it was to bear interest at 7 per cent. per annum, then the addition of such words did not change the contract and would not invalidate the note." Merritt questions the action of the court in modifying his sixth instruction and in giving plaintiff's fifth.

These instructions were given on the theory that if the makers of the note had intended, at the time the note was signed, that it should draw interest at 7 per cent., Silverman might thereafter, without the consent of Merritt, insert the interest clause, and that this would not constitute a material alteration, for the reason that it but made the instrument speak as the parties intended it should at the time it was signed. Whether an alteration of a written instrument, after its execution, without the consent of the maker, made for the purpose of making the instrument conform to the actual contract made by the parties, will vitiate the instrument, is a question with reference to which the authorities outside of this state are not unanimous. In

Illinois the question arose in the case of Kelly v. Trumble, 74 Ill. 428. There the obligee in a bond for deed inserted therein, after the execution of the instrument and without the knowledge or consent of the obligor, words granting immediate possession of the premises to the obligor. This court there said: "It is not sufficient to cure this objection to say that the words added expressed the real contract between the parties. This would tend to show that the bond, as drawn, did not truly declare the contract between the parties, but would afford no justification to one of the parties, without the consent of the other, to change its terms. One party to a written instrument has no right, without the consent of the other party to it, to reform its language, however inaccurately it may express the real contract between them. Unless the parties shall mutually consent to such reformation, it can only be effected through the aid of a court of equity."

Courts of last resort in other states, and text writers, have erroneously concluded that this case has been overruled by the case of Ryan v. First Nat. Bank of Springfield, 148 Ill. 349, 35 N. E. 1120, upon which appellee principally relies. A careful examination of the latter case, however, shows that it is not in conflict with the case already cited. In the Ryan Case a promissory note, signed first by two payors, was made payable to the bank, which required the guaranty of a third person, who signed his name just below the signatures of the makers, and the note was so delivered to the bank. Shortly afterwards the third person came to the bank and had his name erased as one of the makers and written in the note as the payee, and at the same time assigned it to the bank and attached his signature to a guaranty of payment on the back of the note. Suit being brought on the note, the original makers interposed as a defense the fact that the note had been so altered after its execution without their consent, and insisted that the alteration discharged them from all liability. This court held, however, that the alteration did not change the legal liability of the makers; that the effect of the third person signing his name on the face of the paper was precisely the same as though he had signed the guaranty on the back which he afterwards did sign; and it was determined by this court that the alterations made neither enlarged nor diminished the rights, duties, or obligations of any of the parties to the instrument. That being true, there was no room for the application of the rule invoked by appellee, and the authority of the Kelly Case is in nowise weakened. The only other Illinois case relied upon by appellee in this regard is that of Vogle v. Ripper, 84 Ill. 100, 85 Am. Dec. 298. That was a bill in chancery to foreclose a mortgage which secured notes drawing interest at 6 per cent. The notes, after their delivery, were altered so that they appeared to draw interest at the rate of 10 per cent. per an-

num. The answers to the bill setting up these alterations did not aver that the alterations were fraudulent. On account of the lack of this averment in the answers the court refused to consider testimony tending to show an improper motive in making the alteration. It is apparent that this case casts no light upon the question now before us.

One party to a written instrument which does not speak the actual contract of the parties does not have the right to alter the instrument to make it accord therewith. If the right to so make such an alteration existed, the jurisdiction and power of a court of chancery to reform written contracts which inaccurately state the undertakings of the parties would be entirely useless. It follows that the court erred in giving plaintiff's fifth and in modifying defendant's sixth instructions.

The plaintiff's instructions in reference to the burden of proof, as given by the court, were erroneous. The first is to the effect, without qualification, that the burden of proving any alteration not apparent on the face of the note in evidence is upon the defendant Merritt. Upon the whole case, the burden of proof was upon the plaintiff to show such a state of facts as would authorize him to recover. Opinion of Mr. Justice Boggs, Conkling v. Olmstead, 63 Ill. App. 649. After the note was admitted in evidence, no alteration appearing from an inspection thereof, the burden of proof was upon Merritt to show a material alteration. Lowman v. Aubery, 72 Ill. 619. We think, however, that an instruction stating that the burden of proof was upon the defendant to show a material alteration, where no alteration is apparent on the face of the note, should have been coupled with a clause stating that this burden rested on the defendant after plaintiff had made his case in chief, so that the fact would not be obscured that the burden of establishing his cause upon the whole evidence rested upon the plaintiff.

The court then further, by plaintiff's instruction numbered 9, advised the jury as follows: "And in this case the burden of proof is upon the defendant to show that the plaintiff did not purchase the note in evidence in good faith, and unless the defendant has shown, by the greater weight of all the evidence, that the plaintiff did not buy the note in good faith, then you will find that the plaintiff acted in good faith in the transaction." This was error. When the defendant had introduced evidence showing a material alteration the burden of proof then shifted to the plaintiff, and it was for him then (where he did not meet such evidence by denial) to show that such alteration had been made under circumstances rendering it lawful or under circumstances which would not preclude a recovery by him. 2 Cyc. 234; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569; Maguire v. Eichmeier, 109 Iowa, 301, 80 N. W. 395; Winter v. Pool, 100 Ala.

508, 14 South. 411; Glover v. Gentry, 104 Ala. 222, 16 South. 88; National Ulster County Bank v. Madden, 114 N. Y. 280, 21 N. E. 408, 11 Am. St. Rep. 633; Gleason v. Hamilton, 138 Ill. 353, 34 N. E. 283, 21 L. R. A. 210; Capital Bank v. Armstrong, 62 Mo. 59; Dewees v. Bluntzer, 70 Tex. 403, 7 S. W. 820.

The other errors assigned are without merit.

The judgment of the Appellate Court and the judgment of the circuit court will be reversed, and the cause will be remanded to the circuit court for further proceedings consistent with the views herein expressed.

Reversed and remanded.

HAND, J., took no part in the consideration or decision of this case.

(218 Ill. 607)

LANDT et al. v. McCULLOUGH.

(Supreme Court of Illinois. Dec. 20, 1903.)

1. ALTERATION OF INSTRUMENTS—EXPLANATION.

In an action against the assignees of a lease for rent, where it was shown that erasures and interlineations in the lease were there when the lease was executed, and that the assignees under the lease were given a copy thereof and had paid rent thereunder, the lease was properly admitted in evidence.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Alteration of Instruments, §§ 54-56.]

2. LANDLORD AND TENANT—LIABILITY FOR RENT—ACTIONS AGAINST ASSIGNEES.

Evidence that an assignment of a lease which named defendants as assignees was recorded, and that defendants paid rent for several years to plaintiff, was sufficient proof that defendants entered into possession under the assignment, in an action against the assignees for rent.

3. SAME—ACTIONS FOR RENT—VARIANCE.

Where, in an action for rent, the lease is set out in terms in the declaration, and there is a provision in the lease authorizing the lessor to pay taxes, and providing that the amount so paid shall be repaid at the next rent day, and the amount claimed in the declaration is laid under a videlicet, the lessor may give in evidence the provisions of the lease, together with a receipt for taxes paid by him, notwithstanding a general objection of variance.

4. TRIAL—DEMURRER TO EVIDENCE.

A demurrer to evidence must be in writing.

5. SAME—WRITTEN INSTRUCTIONS.

Where an oral instruction directing the jury to return a certain verdict is immediately reduced to writing by the court and given to the jury, there is a sufficient compliance with the statute requiring instructions to be in writing.

Appeal from Appellate Court, First District.

Action by James C. McCullough against Charles G. Landt and others. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendants appeal. Affirmed.

See 103 Ill. App. 668.

Upon March 20, 1889, appellee, James C. McCullough, entered into a written lease with James M. Stebins for certain property for a term of 50 years, commencing May 1,

1889, at a yearly rental of \$1,050 for the first 16 years, payable in quarterly installments. The lessee was to pay all taxes before application for judgment was made on the same, but the lessor also had the right to pay such taxes at any time after they became due and add the amount to the yearly rental. The lessee, as security for the rent, taxes, and assessments, was to erect certain buildings on the premises and keep them insured and in repair. At the end of 16 years the ground was to be revalued and the amount of rent fixed upon the basis of the revaluation. The lease was not to be assigned within the first 25 years without the consent of the lessor. On October 12, 1892, the lease was assigned by Stebbins, with the consent of the appellee, to the appellants. The assignment by Stebbins and the consent of the appellee were in writing, duly acknowledged, and recorded in the recorder's office of Cook county on October 17, 1892. On October 21, 1901, appellee began suit against appellants for \$786.50 back rent from November 1, 1900, together with \$216.76 taxes paid by appellee. Upon a hearing before the court and a jury judgment was rendered in his favor for \$1,000, and the same has been affirmed by the Appellate Court.

John S. Huey, for appellants. E. W. Adkinson, for appellee.

WILKIN, J. (after stating the facts). It is first insisted by counsel for appellants that the lease in question was improperly admitted in evidence, because it contained certain erasures, interlineations, and alterations which were not properly explained. Appellee testified that all of these erasures, interlineations, and alterations were made before the lease was signed, and that it was in the same condition when it was offered in evidence that it was when it was signed by the parties; that two copies of it were made at the time of its execution, one being retained by Stebbins and the other by himself; that Stebbins had paid rent under the lease from 1889 until it was assigned, in 1892; that at the time of the assignment one copy was given to the appellants and one copy retained by him, and a copy was filed for record in the recorder's office of Cook county; that appellants paid rent under the assignment until November 1, 1900. This evidence was clearly sufficient to explain any erasures, interlineations, or alterations in the instrument, and, as the evidence was not contradicted in any way, the court committed no error in admitting the instrument in evidence.

It is next insisted that the evidence does not show that the lease was accepted by James M. Stebbins at the time it was made, or that the appellants entered into possession under the assignment. Again, the testimony of appellee shows that the instrument was drawn by Stebbins and the alterations were made by him. He paid rent under it

for several years, and then assigned it, under his hand and seal, to appellants. After all of these acts it is difficult to see how it can seriously be contended that he did not accept the lease. Nor do we see how it can be claimed, under the evidence, that the appellants did not enter into possession of the premises under the assignment. The assignment was special, and specifically named the appellants. It was filed for record, and they paid rent to appellee for several years thereafter. This, of itself, was sufficient proof of their entry under the lease.

It is next insisted that the trial court erred in admitting evidence as to the payment of the taxes for 1900 by appellee. The lease was set out in *hæc verba* in the declaration, and shows that the appellee had the right to pay the taxes at any time after they became due, and in case he did pay them they were to be repaid to him as rent at the next date when the rent became due. The taxes, amounting to \$213.35, were paid by him on May 28, 1901, after they were due, and the receipt for the same was offered in evidence, together with the lease authorizing the payment. There was no variance between the proof and the declaration as to the amount, because the amount was laid in the declaration under a *videllicet*; and, even if there had been, it should have been specifically pointed out to the trial court, where it could have been corrected.

It is further contended that there was no proof as to the amount of rent due appellee. The lease which was offered in evidence shows a yearly rental of \$1,050, payable quarterly on the 1st days of August, November, February, and May of each year. The declaration alleged that \$787.50 of rent was in arrears from November 1, 1900. Counsel for appellee under oath testified that the total amount due was \$1,167, including \$213.35 taxes. This evidence was in no way disputed, nor contradicted, and was sufficient upon which to base the judgment.

After all of the evidence on behalf of appellee had been introduced, counsel for appellants attempted to demur to the evidence verbally. The court asked if they had any evidence to offer in defense. They replied that they had not until the court passed upon their demurrer. The court replied that he had intended to dispose of the demurrer by an instruction, but that he would overrule it. Counsel thereupon elected to stand by their demurrer. It is well settled that a demurrer to evidence must be in writing. Moreover, as we have seen, there was no ground for such a demurrer.

The court instructed the jury to render a verdict for \$1,000, which they did. It is claimed by the appellants that this instruction was given by the court orally, in violation of the statute. There is nothing in the record to indicate that it was not in writing. Even if it was oral in the first place, as claimed, the court immediately prepared one

in writing in the exact words of the alleged oral one, and gave it to the jury. Under these circumstances the statute was sufficiently complied with.

We find no reversible error, and the judgment of the Appellate Court will be affirmed. Judgment affirmed.

(218 Ill. 611)

EDDY et al. v. PEOPLE ex rel. WELTER.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MUNICIPAL CORPORATIONS—POLICE—PENSIONS—ALLOWANCE—CONCLUSIVENESS OF ORDER.

Laws 1877, p. 62, as amended by Laws 1879, p. 72, § 2, constitutes the mayor, chief of police, and certain other officials of cities a board of trustees of the "police and firemen's relief fund"; and section 3 provides that the board of trustees shall have the exclusive custody and management of the fund, and shall hear and determine all applications for relief, and its decisions on such applications shall be final, and not subject to reversal, except by the board of trustees. Section 6 (page 73) provides for the payment of pensions to policemen or firemen disabled in service, or to their widows or infant children. *Held*, that the board of trustees, in passing upon the right of an applicant to participate in the fund as pensioner, exercises quasi judicial power, and its finding, when made, is binding, and cannot be reviewed by it, except upon the ground of want of authority to act or fraud in procuring the pension.

2. SAME—STATUTORY PROVISIONS.

Under the express provisions of Acts 1887, p. 125, § 12, which supersedes, as to the city of Chicago, Laws 1879, p. 72, amending Laws 1877, p. 62, as to police and firemen's pensions, a policeman's widow, who was a pensioner under the act of 1877, as amended by the act of 1879, is entitled to the benefits of the act of 1887, and such right is not abridged by Laws 1903, p. 107.

3. MANDAMUS—PETITION—CONSTRUCTION.

An averment of a petition for mandamus to compel the reinstatement of petitioner's name to the police pension roll that the board of pension trustees found that petitioner's husband died from the immediate effects of an injury received by him in the discharge of duty as a police officer is not overcome by a further averment of the petition that petitioner's husband was stricken down and became physically ill by reason of physical efforts exerted in the discharge of his duty.

Appeal from Appellate Court, First District.

Application by the people, on the relation of Maria Welter, for a writ of mandamus against Arthur J. Eddy and others, as trustees of the police pension fund of the city of Chicago. From a judgment of the Appellate Court, affirming a judgment in favor of the relator, defendants appeal. Affirmed.

John W. Beckwith and John S. Miller (James Hamilton Lewis, Corp. Counsel, and Peck, Miller & Starr, of counsel), for appellants. Chas. L. Daly and Edmund S. Cummings, for appellee.

HAND, J. This was an application in the circuit court of Cook county in the name of the people, upon the relation of Maria

Welter, against the appellants, as trustees of the police pension fund of the city of Chicago, to coerce them to restore the relator's name to the pension roll, from which the petition averred her name had been stricken without lawful authority by the appellants, and to require them to pay her, as beneficiary of her deceased husband, Dominick Welter, a pension. A general demurrer was filed to the petition, which was overruled, and, the appellants having elected to stand by their demurrer, a judgment was rendered in favor of the relator in accordance with the prayer of the petition, and the appellants prosecuted an appeal to the Appellate Court for the First District, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

It appears from the averments of the petition that Dominick Welter, the husband of the relator, became a member of the police department of the city of Chicago on November 22, 1882, and so remained until his death, which occurred on July 8, 1885; that the relator made application to the board of trustees of said relief fund for a pension as widow of said Dominick Welter, under the provisions of an act entitled "An act to amend 'An act for the relief of disabled members of the police and fire departments in cities and villages,' approved May 24, 1877, in force July 1, 1877," approved May 10, 1879, in force July 1, 1879 (Laws 1879, p. 72), and submitted to said board of trustees proof of the death of her husband and that his death was the immediate effect of an injury received by him while in the discharge of his duties as a police officer; that the board of trustees passed upon her application and found that the death of her husband was the immediate effect of an injury received by him while in the discharge of his duties as a police officer, and allowed the relator a pension of \$360 per annum so long as she should remain unmarried; that after the passage of the act of 1887 her pension was increased by the board of trustees of said fund under the terms of that act, which pension was paid to her until October 17, 1903, and that on that date the appellants, acting as such board of trustees, without cause refused to pay the relator her pension and dropped her name from the pension roll, although under the act of 1887 she was entitled to a pension. It appears that the only notice the relator received that the appellants had determined to cease paying her pension was the following letter, written to her by C. F. White, the clerk of said board of trustees: "In accordance with a resolution by the pension board I am instructed to notify you that further payment will be withheld for lack of evidence that death was caused by injury received while in the performance of his duties, as required by law. Please prepare your papers and evidence and present them at this office at once, thus avoiding any unnecessary delay. C. F. White, Clerk."

1012

The first question to be determined upon this record is the force which should be given to the finding of the board of trustees that the relator, under the act of 1877 (Laws 1877, p. 62) as amended in 1879 (Laws 1879, p. 72), was entitled to a pension, and their action in placing her name upon the roll as a pensioner. Section 2 of that act provides that the mayor, the chief of police, the fire marshal, and the chairman of the committee on police and fire and water of the city council, together with the comptroller, if there be one, or city clerk and treasurer, shall constitute and be a board by the name of "the trustees of the police and firemen's relief fund," and that the city treasurer shall be the custodian of the fund, and that the board shall select from their number a president and secretary; section 3, that said board of trustees shall have the exclusive custody and management of said fund, and shall make all needful rules and regulations for the government of said board in the discharge of its duties, and shall hear and determine all applications for relief under said act, and its decisions on such applications shall be final and conclusive, and not subject to review or reversal, except by the board of trustees; and section 6 (page 73), that when, in the judgment of the board of trustees, a sufficient amount shall have accumulated in said fund to justify the application thereof to the use for which the fund is created, if any member of the police or fire department, while in the actual performance of duty, shall become permanently disabled so as to render proper his retirement from membership, a sum not exceeding \$600 per annum, or such less sum as in the judgment of the board the fund will justify, shall be paid to such member out of said fund, or if any member while in the actual discharge of his duty shall be killed, or shall die from the immediate effects of injury received by him while in such discharge of duty, or shall die after 10 years' service in the police or fire department, and shall leave a widow, or, if no widow, any child or children under the age of 16 years, a sum not exceeding \$600 per annum, or such less sum as in the judgment of the board of trustees the fund will justify, shall be paid to such widow so long as she remain unmarried, or to such child or children while under the age of 16 years.

We think it clear, from a consideration of these sections of the statute, that the board of trustees created by said act, in passing upon the right of the relator to participate in said fund as a pensioner, exercised quasi judicial powers, and that their finding, when made, was binding upon all the world and upon the board of trustees, unless the action of the board was subsequently set aside by said board of trustees, and that said board of trustees had no power to review the action of the board which allowed said pension upon the question of the right of the relator to a pension, except upon the ground

that the board which allowed the pension was without authority to act or the relator was guilty of fraud in procuring the pension to be allowed. In *United States v. Arredondo*, 6 Pet. 691, 729, 8 L. Ed. 547, the court said: "It is a universal principle that where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive ([*Marbury v. Madison*] 1 Cranch, 170, 171 [2 L. Ed. 60]), legislative ([*McCulloch v. State of Maryland*] 4 Wheat. 423 [4 L. Ed. 579]; [*Satterlee v. Matthewson*] 2 Pet. 412 [7 L. Ed. 458]; [*Providence Bank v. Billings*] 4 Pet. 563 [7 L. Ed. 939]), judicial ([*Perkins v. Fairfield*] 11 Mass. 227; [*McPherson v. Cunniff*] 11 Serg. & R. 429 [14 Am. Dec. 642], adopted in [*Thompson v. Tolmie*] 2 Pet. 167, 168 [7 L. Ed. 381]), or special, ([*Rogers v. Bradshaw*] 20 Johns. 739, 740; 2 Dow. P. Cas. 521), unless an appeal is provided for, or other revision by some appellate or supervisory tribunal is prescribed by law." It must be conceded that the board of trustees in this case, by virtue of the legislative enactments hereinbefore referred to, had power to make the finding it did, and, as there is no averment in the petition showing fraud upon the part of the petitioner, we think the finding of the board of trustees conclusively shows the relator was entitled to a pension under the act of 1877, as amended by the act of 1879. Section 12, p. 125, of the act of 1887, which act superseded the amendatory act of 1879 as to cities of the class of Chicago, provides that a policeman's widow, who was a pensioner under the act of 1877, as amended by the act of 1879, upon the taking effect of the act of 1887 shall receive no benefit under said amendatory act of 1879, but shall be entitled to the benefits of the act of 1887. As we have seen, the relator was entitled to receive a pension under the act of 1877, as amended in 1879. Her right to a pension under that act was taken away, and in lieu thereof she was made a pensioner under the act of 1887 by the express terms of that act. The amendment passed in 1903 in no way abridged the rights of the relator, and on the 17th day of October, 1903, in our view she was entitled to a pension under said section 12 of the act of 1887. The appellants, therefore, wrongfully struck her name from the pension roll and refused to pay her her pension, and the circuit and Appellate Courts rightfully adjudged that her name

should again be placed upon the pension roll and her pension paid to her from the date when payment to her was wrongfully suspended.

The appellants base their contention mainly upon the ground that the petition filed in this case contains an averment that while the husband of the relator was engaged in the actual discharge of the duties of his position on June 25, 1884, he was stricken down and became physically ill because of physical efforts exerted by him and which were necessary to be exerted in carrying out and performing his duties, and that as a result of said physical ailments and disability so caused the said Dominick Welter died July 8, 1885, from which averment the conclusion is drawn by the appellants that the husband of the relator died from disease, and not from an injury received by him while in the discharge of his duties as a police officer; and it is said section 6 of the act of 1877, as amended in 1879, does not authorize the payment of a pension to a widow whose husband lost his life from disease, even though such disease was contracted by him while performing service in the line of his duty as a police officer, but that said section 6 only allows a pension to widows whose husbands die from the immediate effect of an injury—that is, a physical hurt—received while performing service in the line of duty as a police officer. We do not deem it necessary here to determine whether the widow of a police officer who dies from disease contracted while in the line of his duty is within the scope of said act of 1877, as amended in 1879, as the petition avers the board of trustees expressly found that the husband of the relator died from the immediate effect of an injury received by him while in the discharge of his duty as a police officer, and, this finding being in the language of the statute, if, as the appellants contend, death must have resulted as the immediate effect of a physical hurt, such as a gunshot wound, the finding of the board of trustees covers an injury of that kind, and the finding of the board of trustees not having been impeached for fraud on the part of the relator, and the board of trustees having ample authority to make such finding, such finding is binding upon appellants, and is not impeached by the averment in the petition that he was stricken down and became physically ill, etc.

It is also contended that there is no express averment in the petition that the relator was unmarried at the time the petition was filed. That question does not appear to have been raised in the Appellate Court. It cannot, therefore, be raised in this court. If, however, it were properly raised, we think the petition shows the relator was unmarried at the time the petition was filed.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

75 N.E.—68

CREIGHTON v. ROE.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. DEED—DELIVERY—PRESUMPTION.

Presumption that a voluntary deed to a daughter was delivered, created by the recording thereof by the grantor, is not overcome by evidence that the grantor retained possession of the property and the deed.

2. FRAUDULENT CONVEYANCES — MUTUAL RIGHTS OF PARTIES—CANCELLATION OF INSTRUMENT.

Where a husband, for the purpose of defeating his wife's right to dower and of placing the property beyond her reach, in view of anticipated divorce, conveys certain land, equity will not lend its aid to cancel the deed.

Error to Circuit Court, Vermillion County; M. W. Thompson, Judge.

Bill by Isaac Creighton against Sarah C. Roe. Decree for defendant, and plaintiff brings error. Affirmed.

Plaintiff in error, Isaac Creighton, filed his bill in the circuit court of Vermillion county against his daughter, the defendant in error, Sarah C. Roe, in which he sought to have set aside and canceled the recording of a certain deed executed by him and his wife, Olinda C. Creighton, to his daughter, and which he claimed was never delivered. The evidence shows that when the deed was signed and acknowledged the plaintiff in error, then more than 70 years of age, was living unhappily with his third wife, and a separation and litigation between them were expected. He executed the deed in order, as he expressed it, that he might get in shape to prevent his wife from getting his property in the expected divorce proceedings, or further litigation in which he might be called upon to pay alimony or separate maintenance. Four hundred and ten dollars of his wife's money was then on deposit in a bank in his name, and he induced her to sign the deed by refusing to allow her to have the money until she should sign it. The deed was executed on December 21, 1900, and he retained it in his possession unrecorded, until February 1, 1901, on which date his wife left his home, and on the next day he placed the deed in the hands of the recorder, with instructions to record the same and return it to him by mail. After the deed was recorded it was sent by mail to plaintiff in error, who lived at Armstrong, Ill., and it has ever since remained in his possession. The defendant in error was not a member of his family, but was his daughter, a married woman of mature years, having a home of her own. When the deed was executed and recorded he had the property leased to a tenant, and has ever since retained possession of the same, and enjoyed the rents, issues, and profits, paid all the taxes thereon, and kept the same in repair. Immediately upon the expiration of the period of two years following the date when his wife went away from his home, he filed a bill in the Clark county circuit court against her for divorce, upon

the ground that she had deserted and abandoned him for the period of two years, and on the further ground that she had been guilty of extreme and repeated cruelty. He represented in his bill that he was a resident of Clark county, and obtained a decree on notice by publication, based on an affidavit in which he stated that his wife was a nonresident of the state. He obtained a decree of divorce on March 31, 1903, and on September 11th of the same year filed the bill in the case at bar to expunge the record of the deed. There was testimony to the effect that he had stated in the presence of different witnesses and at different times that he gave the property described in the deed to the defendant in error. Upon issue being joined, the cause was referred to the master in chancery to take the evidence and report the same, together with his conclusions of law and fact. The master found that the deed was executed in pursuance of an intention on the part of the plaintiff in error to make a distribution of his property among his children and to place the title beyond the reach of his wife, to the end that she could have no inchoate dower or other interest therein; that the deed was delivered by the plaintiff in error to the defendant in error, and became operative so as to vest the title in her. The master also found that the plaintiff in error was not entitled to the relief prayed, and that the bill should be dismissed for want of equity. Exceptions were filed to the report, and the same were overruled, and a decree entered in accordance with the finding of the master. To reverse this decree a writ of error has been prosecuted by plaintiff in error.

D. D. Evans and Waldo Carl Evans, for plaintiff in error. O. M. Jones, for defendant in error.

WILKIN, J. (after stating the facts). It is first claimed as a ground of reversal that the deed was never delivered by plaintiff in error, and that this is evidenced by the fact that he always retained the possession of the same, together with the property conveyed. The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative and to pass the title to land has been the subject of much discussion in this court. The deed may be delivered to the grantee or to his agent. No particular form or ceremony is necessary to constitute such a delivery. It may be by acts or words, or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose all control over the deed. *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. The question of delivery is one both of law and of fact. From the details of such facts and attending circumstances is to be determined the legal

question as to whether such acts and declarations constitute a legal delivery. *Shults v. Shults*, 159 Ill. 654, 43 N. E. 800, 50 Am. St. Rep. 188. In cases of voluntary settlement the law makes stronger presumptions in favor of the delivery than in any ordinary case of bargain and sale, for the reason that it is an attempt on the part of the grantor to make a settlement. *Bryan v. Wash*, 2 Gilman, 557; *Cline v. Jones*, 111 Ill. 563. Such settlements, fairly made, are binding on the grantor, unless there be clear and decisive proof that he never parted or intended to part with the possession of the deed, and if he retained it the weight of authority is decidedly in favor of its validity, unless there are other circumstances besides the mere fact of his retaining it to show that it was not intended to be absolute. *Shults v. Shults*, supra; *Otis v. Beckwith*, 49 Ill. 121; *Perry on Trusts*, § 103. It therefore follows that the intention of the grantor is the controlling element.

In the case of *Brady v. Huber*, 197 Ill. 291, 64 N. E. 264, 90 Am. St. Rep. 161, the appellee sought to avoid a deed made to his daughter in fraud of creditors, and on page 294 of 197 Ill., page 265 of 64 N. E. (90 Am. St. Rep. 161), we said: "We think it must be held the deeds were delivered at the time of the making thereof. The evidence shows two deeds from the father to the daughter were executed at the same time, one conveying to her the property here involved—the Alton property, in Madison county, Ill., and the other the land in the county of St. Charles, in the state of Missouri; that the appellee, her father, sent the appellant, the daughter, with the deed to the Missouri land to St. Charles to be filed for record; and that he took the other deed to Edwardsville the county seat of Madison county, and filed it with the recorder to be recorded. Both deeds were duly recorded. The appellee testified the deeds were both returned to him by mail by the respective recording officers, and the appellant, his daughter, swears they were sent to her by such officers. The execution and recording of the deed here involved, by the appellee, raise the presumption in law that he intended to divest himself of title, and unless such presumption is rebutted it must be held the deeds were delivered. 9 Am. & Eng. Ency. of Law (2d Ed.) p. 159, and many cases decided in this court, cited in note 4. In *Union Mutual Life Ins. Co. v. Campbell*, 95 Ill. 267, 284, 35 Am. Rep. 166, we said: "The mere act of recording, alone, as we have seen, is but prima facie evidence of a delivery and liable to be rebutted; and it is successfully rebutted, as all the cases agree, when it is shown that the deed was not in the nature of a family settlement or of a gift to a minor (as to which hereafter), but is intended to confer no benefit upon the grantee, and its execution and recording are wholly unknown to him until after the death of the grantor." In *Weber v. Christen*, 121

Ill. 91, 97, 11 N. E. 893, 896, 2 Am. St. Rep. 68, we said: 'We think, in the case of an adult grantee, the acknowledging and recording of the deed without his knowledge or consent does not, of itself, according to the weight of authority, amount to a delivery.' In *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, we held the presumption of delivery arising from the registration of a deed had been successfully rebutted by proof, among other things, that the grantee was ignorant of the execution and recording of the deed and claimed nothing under it. * * * But here no question of acceptance can arise. It appeared without dispute the appellee, influenced by the fear that his lands might be seized by a creditor, executed a conveyance thereof to his daughter with intent to divest himself of title so that it would be beyond reach of his creditors; that the deed imposed no burden on the grantee, but was without condition or qualification and was beneficial to her; that the daughter, the grantee, well knew of the execution of the deeds and consented that the conveyances should be made to her; and that the grantor, with the knowledge and consent of the grantee, placed the deed upon the public records, with the intent that it should be deemed and taken by his creditors as a completed and effective conveyance of the premises. Under such circumstances the grantor must be deemed concluded by the presumption of delivery which arises from the recording of the deed. *Walton v. Burton*, 107 Ill. 54; *Thompson v. Dearborn*, Id. 87; *Moore v. Giles*, 49 Conn. 570. Manual delivery by the grantor to the grantee is not essential. *Rivard v. Walker*, 39 Ill. 413; *Rodemeyer v. Brown*, 169 Ill. 347, 48 N. E. 468, 61 Am. St. Rep. 176."

From the above authorities and from the evidence in this case we are of the opinion that there was a prima facie delivery of the deed to the defendant in error and such an acceptance of the same by her as to convey title, and that this prima facie case has not been so rebutted as to overcome the presumption. The circuit court was, therefore, not in error in decreeing that the deed was delivered.

There is another good reason why the decree of the circuit court must be affirmed. The bill is a confession on the part of the plaintiff in error that he made the deed which he now seeks to avoid for the purpose of placing his property in such condition that his wife could not secure her dower out of it. He does not, on his own showing, come into court with clean hands, and on that ground alone is not in a position to ask relief in equity. He does not claim in his bill that he was induced by others to form the unlawful purpose, but only that he was taken advantage of in the execution of that purpose. The only lawful means by which he could place his property in a condition so that it would not be charged with the right of dower of his wife was to divest himself

of the title to it by a conveyance made in good faith. That he could not put it out of his hands for the purpose of defeating dower, and when the motive for so doing had ceased invoke the aid of a court of equity to reinvest himself with the title, is too well known for controversy. *Muller v. Balke*, 154 Ill. 110, 39 N. E. 658; *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616, 9 Am. St. Rep. 642.

We find no reversible error, and the decree of the circuit court will be affirmed.

Decree affirmed.

(218 Ill. 625)

KEYES, Sheriff, v. BENNETT.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. BANKRUPTCY—DISCHARGE—RELEASE OF SURETIES—BAIL.

Where the principal in a bail bond is discharged in bankruptcy, the bail is deprived of his right to seize and surrender the principal and is released from liability on the bond, though he did not procure, under Hurd's Rev. St. 1901, c. 16, § 24, a formal exoneretur.

2. SAME—ISSUE OF CA. SA.

After the discharge in bankruptcy of a judgment debtor, the issuance and return of a ca. sa. on the judgment does not fix the liability of bail to the action.

Appeal from Appellate Court, Second District.

Action by Henry Keyes, sheriff of McHenry county, for use of Louise Calbow, against Henry Henk, Sr. On the death of Henk, his administrator, F. B. Bennett, was substituted as defendant. Judgment for defendant was affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

S. A. French, V. S. Lumley, and D. B. Sherwood, for appellant. C. H. Wayne and C. P. Barnes, for appellee.

BOGGS, J. This was an action of debt brought by Henry Keyes, sheriff of McHenry county, for the use of Louise Calbow, against Henry Henk, Sr., upon a bail bond given in a certain action brought by Louise Calbow against one C. Dudley Chewning. Said Henk died, and his administrator, F. B. Bennett, was substituted as party defendant. The appellee pleaded that the said Chewning had, prior to the institution of the action, obtained his discharge as a bankrupt in the United States District Court, that the judgment which the bail bond was given to secure was provable against the bankrupt and was proven and allowed, and that the appellee's intestate had thereby become relieved of all liability to pay the judgment for which the bond was given. Two replications were filed to this plea, and demurrers were sustained to each of them.

The only question arising on the record is as to the correctness of the ruling of the court as to the sufficiency of one of these replications. The replication so brought into question alleged that Chewning, the debtor, did not surrender himself in satisfaction of the judgment, and that the appellee's in-

testate did not surrender him in such satisfaction, and that the appellee's intestate did not procure an exoneretur to be entered of record before the return day of the summons issued in the action of debt against the bail. Section 24, c. 16, Hurd's Rev. St. 1901, entitled "Bail in Civil Cases," provides that any person who had become bond as bail in any civil action, if his principal be discharged, under any bankrupt law of the United States, from all liability to pay the judgment which the bail bond was given to secure, should be entitled to have a formal exoneretur entered upon the records of the court, and that such order should operate as a discharge of the bail in the same manner as if he had surrendered his principal in court or delivered him up to the sheriff. Section 11 of the same chapter provides that it shall be lawful for any bail, if sued on his bond, to surrender his principal at any time before the return day of the process; and section 15 of the act provides that if a surrender be so made the bail shall be discharged from liability upon payment of the costs, etc.

The position of the appellant is that section 24 and sections 11 and 15 of the act should be construed together, and that, as the surety on the bail bond could not surrender his principal after the return day of the process issued in an action on the bond in discharge of his liability, "he can avail himself of the discharge of his principal in bankruptcy only at such time as he may lawfully surrender his principal in discharge of his obligation; and that, when the right to surrender the principal has expired under section 11 of the bail act, the obligation of the surety becomes fixed, and thereafter the creditor may treat the bail as his creditor and the bond as his obligation, and the principal's discharge in bankruptcy does not entitle him to an exoneretur." This view cannot be maintained. Upon the execution of the bail bond said Chewning became the prisoner of the bail, who had legal authority to keep the principal in his custody and terminate his liability at any time by surrendering his prisoner to the court or to the sheriff. Hurd's Rev. St. 1901, c. 16, § 18; *People v. Hathaway*, 206 Ill. 42, 68 N. E. 1053. The judgment entered in the United States District Court discharging Chewning, as a bankrupt, from all liability to pay the indebtedness for which the bail bond was given, deprived the bail of his right of custody of the person of Chewning, and the bail could not seize and surrender Chewning thereafter. The right of custody and the power to seize and surrender his principal is an incident of the relation of bail and principal, and when the right of the bail to seize and surrender his principal has been taken away by the discharge of the principal from all liability to pay the debt which the bail bond was given to secure, the relation of bail and principal is at an end, as is also the liability of the bail. *Mather v. People*, 12 Ill. 9;

People v. Hathaway, supra; 5 Cyc. 32; 3 Ency. of Pl. & Pr. 185.

In some of these authorities it is said the bankruptcy of the principal will discharge the bail at any time before liability is fixed. At the common law, and also by the express provisions of our statute, liability is fixed by the issuance of a *capias ad satisfaciendum* and the return thereof. 3 Am. & Eng. Ency. of Law (2d Ed.) 617; Hurd's Rev. St. c. 16, § 20. Ca. sa. was not issued for Chewning until after he had been discharged as a bankrupt. The ca. sa. could not have been legally enforced by the arrest of Chewning after he had been discharged as a bankrupt, and the issuance and return of the writ had therefore no efficacy to fix the liability of the bail. The facts alleged in the plea relative to the discharge of Chewning as a bankrupt constituted a good defense to the action, and the entry of a formal exoneretur was not essential to the maintenance of that defense. *People v. Hathaway*, supra.

The judgment appealed from must be, and is, affirmed.

Judgment affirmed.

(218 Ill. 623)

LOMAX et al. v. LOMAX et al.

(Supreme Court of Illinois. Dec. 20, 1905.)

WILLS—REAL ESTATE DEVISED—EXTRINSIC EVIDENCE.

Where testator devised certain lands as being in section 24, extrinsic evidence is inadmissible to show that it was intended to say section 14, though the evidence shows that he owned no land in section 24, but did own one tract in section 14 containing the number of acres stated in the will, and that there was no other tract of that exact extent in that township.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, § 1047.]

Appeal from Circuit Court, Cook County; J. W. Mack, Judge.

Bill by James H. Lomax and others against Maria Lomax and others. Decree for defendants, and plaintiffs appeal. Reversed.

James Maher and Lee, Lee & Schuchardt, for appellants. Vall & Pain, for appellees.

MAGRUDER, J. The original and amended bills in this case were filed by the appellants for the partition of certain lands in Cook county, Ill. The interests of the parties are derived through the will of John A. Lomax, deceased, which bore date January 21, 1897, and was admitted to probate in the probate court of Cook county on June 8, 1899. At the time of his decease, the testator, John A. Lomax, was the owner of the S. W. fractional $\frac{1}{4}$ of section 14, township 40 N., range 12 E. of the third principal meridian; but he was not, at the time of his death, the owner of, nor had he at any time been seized or possessed of, the S. W. fractional $\frac{1}{4}$ of

section 24, township 40 N., range 12 E., etc. The testator left a widow, named Maria Lomax, and three sons, to wit, James H. Lomax, George Lomax, and Robert D. Lomax. He owned a large amount of land, and, by the terms of his will devised most of the pieces of land owned by him to his wife and his three sons as tenants in common. One of the paragraphs in his will was as follows: "I give, devise, and bequeath unto my wife, Maria Lomax, and my sons, James H. Lomax, George Lomax, and Robert D. Lomax, as tenants in common, the following described parcels of land, situated in the town of Leyden, county of Cook, Illinois, namely, the southwest fractional quarter of section 24, T. 40 N., R. 12 E. of the 3d P. M., containing about 55.87 acres more or less." The will also contained the following devise: "All the rest, residue, and remainder of my estate, either real, personal, or mixed, whosoever situated and of whatsoever nature, I give, devise, and bequeath unto my sons, James H. Lomax, George Lomax, and Robert D. Lomax, equally between them." One of the provisions of the will was as follows: "The devises and bequests which I have made in this my will to my wife, Maria Lomax, are to be taken by her in lieu of and in full satisfaction of all her dower rights in any of my property whatsoever, and in lieu of all rights to widow's a ward or other claims whatsoever against my estate; and the aforesaid devises and bequests in this will are given expressly upon said conditions and limitations."

The theory of the appellants, who filed the present bill, is that there was no devise whatever by the will of the S. W. fractional $\frac{1}{4}$ of section 14 above described, and that therefore the testator died intestate, so far as the S. W. fractional $\frac{1}{4}$ of section 14 was concerned. It is then contended that, inasmuch as the land in section 14 was not devised by the will, it passed under the residuary clause to the three sons, James H. Lomax, George Lomax, and Robert D. Lomax, equally, and that the widow, Maria Lomax, had no interest therein, inasmuch as, under the clause already quoted, she was given certain devises and bequests in full settlement of all her dower rights, etc., and did not at any time elect to renounce the benefit of the devises and provisions made for her in said will, nor transmit to the probate court any written renunciation of said devises and provisions, as required by law, in case such election should be made. Since the filing of the original bill, a supplemental bill was filed, alleging that, after the filing of the bill, Robert D. Lomax sold and conveyed, by good and sufficient warranty deed, all his right, title, and interest in the land mentioned in the bill to James H. Lomax, and that James H. Lomax is the legal owner of all the interest which said Robert D. Lomax had in and to said parcels of land. This allegation of the supplemental bill is

not denied. The theory of the appellee Maria Lomax is that a mistake was made by the scrivener in drawing the will, and that he wrote the words "section 24," by mistake for "section 14," so that the devise, "I give, devise, and bequeath unto my wife, Maria Lomax, and my sons, James H. Lomax, George Lomax, and Robert D. Lomax, as tenants in common, the following described parcels of land, situated in the town of Leyden, county of Cook, Illinois, namely, the southwest fractional quarter of section 24," etc., should have been "the southwest fractional quarter of section 14." It is true that the testator owned no land at all in section 24 in township 40, but did own land in section 14 in township 40. The appellee Maria Lomax, therefore, claims that she was entitled by the will to an undivided one-fourth part of the said land in section 14, while the appellants claim that, as section 14 was intestate property and passed under the residuary clause to them, they, James H. Lomax, George Lomax, and Robert D. Lomax, became the owners in fee as tenants in common each of an undivided one-third of the premises.

The case was referred to a master in chancery, who found in accordance with the contention of appellants—that is to say, that when the will was made the testator was seised and possessed in fee of the S. W. fractional $\frac{1}{4}$ of section 14, etc.; that the will contains no specific devise of said S. W. fractional $\frac{1}{4}$ of section 14, which was the property of the testator when he died; that said S. W. fractional $\frac{1}{4}$ of section 14 on the death of the testator became vested in fee simple in the three sons above named, as tenants in common, under the residuary clause of the will; that the widow, Maria Lomax, has not elected to renounce, etc., and has no interest in said S. W. fractional $\frac{1}{4}$ of said section 14; that, by virtue of the deed executed by Robert D. Lomax to James H. Lomax the S. W. fractional $\frac{1}{4}$ of section 14, as above described, which passed under the residuary clause to the three sons above named, is now owned in fee, an undivided two-thirds thereof by James H. Lomax, and an undivided one-third thereof by George Lomax. A re-reference was made to the master to take proof upon the subject only as to whether there is any S. W. fractional $\frac{1}{4}$ of land in the township of Leyden, Cook county, Ill., containing approximately 55.87 acres, other than the S. W. fractional $\frac{1}{4}$ of section 14 in said town of Leyden; and the master found that said S. W. fractional $\frac{1}{4}$ of section 14 contains 55.87 acres, and that there is no other fractional quarter section of land in said township, containing approximately 55.87 acres. The court entered a decree, confirming the master's report, except as to his finding that the S. W. fractional $\frac{1}{4}$ of section 14 passed under the residuary clause of the will to James H., George, and Robert D. Lomax, and that

James H. Lomax owned an undivided two-thirds, and George Lomax an undivided one-third thereof. But the court, after finding a conveyance and sale by Robert D. Lomax of his interest to James H. Lomax, found that partition and division ought to be made of the same between James H. Lomax, George Lomax, and Maria Lomax, one-half thereof to James, one-fourth to George, and one-fourth thereof to Maria Lomax. The present appeal is prosecuted from the decree, so rendered.

In order to sustain the decree entered by the court below, it will be necessary to hold that the testator made a mistake and devised land in section 24, instead of land in section 14, and that, as he owned no land in section 24 and made no devise of land in section 14, the land in section 14 passed as intestate estate under the residuary clause to the three sons, and the widow took no interest thereon. But if this court can hold that the testator, or the scrivener who drew his will, made a mistake in writing section 24, instead of section 14, then the land in section 14 passed equally to the widow and the three sons together, so that her interest would be an undivided one-fourth. We are unable to see why this case does not come within the doctrine announced in *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665, and *reindorsed in Bingel v. Volz*, 142 Ill. 214, 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64; *Williams v. Williams*, 189 Ill. 500, 59 N. E. 966, and *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345. In *Kurtz v. Hibner*, supra, a testator devised a "tract of land situate in the town of Joliet, Will county, Illinois, and described as follows: The west half of the southwest quarter, section 32, township 35, range 10, containing eighty acres, more or less," and "all that part or parcel of land described as the south half of the east half of the south quarter, section 31, in township 35, range 10, containing forty acres, more or less"—and it was held that parol evidence was not admissible for the purpose of showing that the testator intended to devise land in different sections from those mentioned in the will, and that the draftsman of the will by mistake inserted the wrong numbers. In that case proof was offered that the testator, at the time of his death, owned but one 80-acre tract, which was in section 33, instead of section 32. Evidence was also offered that the testator by mistake inserted the word "one" after the word "thirty," instead of the word "two," thus devising land in section 31, instead of section 32. This evidence was excluded, and the court, in sustaining the ruling, said (page 519 of 55 Ill. [8 Am. Rep. 665]): "The law requires that all wills of lands shall be in writing, and extrinsic evidence is never admissible to alter, detract from, or add to the terms of a will. To permit evidence, the effect of which would be to take from a will plain and unambiguous language and insert other language in lieu thereof, would violate

the foregoing well-established rule. For the purpose of determining the object of a testator's bounty, or the subject of disposition, parol evidence may be received to enable the court to identify the person or thing intended. In this regard the evidence offered afforded no aid to the court. The devise is certain both as to the object and subject. There are no two objects—no two subjects." So, in the case at bar, parol evidence cannot be introduced for the purpose of showing that a mistake was made by writing "section 24" in the will, instead of "section 14." It is well settled that equity will not entertain a bill to reform a will under the guise of an attempt to construe the will. The terms of the devise here are on their face clear and unambiguous, being a devise of land in section 24. The language describes a tract of land, and one which is capable of being readily identified; and, if the testator had owned it, it would have passed by the terms of the will.

In some cases it has been held that a latent ambiguity arises when extrinsic evidence is applied to such a devise as this, and that such evidence may be resorted to for the purpose of explaining the ambiguity and showing what land the testator intended to devise. It should always be the object of the court to arrive, if possible, at the intention of the testator; but "the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed by the language of the will. While, in attempting to construe a will, reference may be made to surrounding circumstances, for the purpose of determining the objects of the testator's bounty or the subject of disposition, and with that view to place the court, so far as possible, where it may interpret the language used from the standpoint of the testator at the time he employed it, still the rule is inflexible that surrounding circumstances cannot be resorted to for the purpose of importing into the will any intention which is not there expressed." *Bingel v. Volz*, supra. As will be seen by reference to the cases above mentioned, and also to the cases of *Decker v. Decker*, 121 Ill. 341, 12 N. E. 750, and *Huffman v. Young*, 170 Ill. 290, 49 N. E. 570, this is not a case where so much of the description as is false may be stricken out, so as to leave enough in the will, interpreted in the light of surrounding circumstances at the time it was made, to identify the premises devised. *Williams v. Williams*, supra. It was said in *Bingel v. Volz*, supra, as follows (page 225 of 142 Ill., page 16 of 31 N. E. [16 L. R. A. 321, 34 Am. St. Rep. 64]): "Doubtless if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of construction might be adopted. But we are unable to see, and the ingenuity

of counsel has been unable to point out, any way in which that rule of construction can be applied, so as to work out the result sought to be attained. * * * If it be admitted that there are repugnant elements in this description, it is impossible to see what repugnant element can be rejected, so as to leave a description which will apply to the land which the appellant claims." In the case at bar, if we reject the words "section 24," or the figures "24," nothing remains to indicate in what section the land in question lies. The correction of the description, by the insertion of "14" in the place of "24," requires not only that the figures "24" should be stricken out, but that the figures "14" should be inserted. As was said in *Bingel v. Volz*, supra, this "involves more than construction. It requires reformation, and in this state at least courts of equity have persistently refused to entertain bills to reform wills."

For the reasons above stated, we are of the opinion that the decree of the court below is erroneous; and accordingly it is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

(218 Ill. 636)

HEYMANN v. HEYMANN.

(Supreme Court of Illinois. Dec. 20, 1905.)

1. MARRIAGE—COMMON-LAW MARRIAGE.

Statement of a man to a woman: "I give you my word of honor we can stay man and wife. I am your husband, and I am satisfied"—with an assurance, in answer to her expressed doubts, that no other ceremony was necessary, followed by cohabitation, constitutes a marriage at common law.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, §§ 12, 13, 16.]

2. SAME—EVIDENCE.

Evidence of a contract of marriage per verba de presenti, followed by living together as husband and wife, is strengthened by the fact that both parties at the time were competent to marry and that no illicit relations had existed between the parties.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Marriage, § 87.]

Appeal from Appellate Court, First District.

Bill for separate maintenance by Jennie Heymann against Albert Heymann. Defendant appeared and answered. A replication was filed to the answer, and upon a hearing of the cause the court entered a decree in favor of complainant. Defendant took an appeal from the decree entered by the superior court of Cook county to the Appellate Court for the First District. The Appellate Court has affirmed the decree, and the present appeal is prosecuted from such judgment of affirmance. **Affirmed.**

Charles L. Swanson (William J. Stapleton, of counsel), for appellant. D. B. Brillow, for appellee.

MAGRUDER, J. In deciding this case the Appellate Court expressed the following views:

"Appellee contends in her bill and by her own testimony, supported by the testimony of several witnesses and a sworn schedule made by appellant, that there was a marriage contract between appellant and herself per verba de presenti, followed by cohabitation and living together as husband and wife for a period of six years. Appellant, on the other hand, denies any such contract. He denies any intimate relations with appellee, and claims that his presence in the same house or apartment with her was as a roomer or boarder. The issue here is whether the parties were married, no ceremony having been performed. Appellee avers in her bill that she was married to appellant in August, 1896, without a marriage ceremony. In her testimony appellee says that in April, 1896, appellant, having rented a furnished room of her for some time previous thereto, and being about to go to Lake Geneva, where he had an engagement as a musician, proposed marriage to her; that she postponed the matter until he should return from Lake Geneva; that he wrote to her from Lake Geneva repeatedly, and sent her money in letters to rent a flat, and requested her to give up keeping boarders. In accordance with his suggestions she rented a flat at the corner of Wood and Division streets, in Chicago, and moved into it; that appellant returned from Lake Geneva in August, 1896, and the subject of marriage was again talked over between them. In the course of the conversation, and in answer to appellee's question as to the form of marriage in this country, appellant stated to her that it was not necessary to get married, conveying to her the impression apparently that no marriage ceremony was necessary. He said to her: 'I give you my word of honor we can stay man and wife. I am your husband, and I am satisfied.' Appellee then said that they would have to go to a judge, and appellant replied that his word was better than a judge's word. Appellee stated that she knew what marriage was in the old country, but that she supposed what he said was true; that he promised her to be her husband, and she consented. This was the substance of their conversation. Thereupon they occupied the same bed that night, and lived together as husband and wife for six years, until appellant left her.

"The testimony of appellee is supported by five or six witnesses, who testify to various facts and circumstances tending to show that appellant and appellee lived together as husband and wife, treated each other openly as husband and wife, and spoke of each other as sustaining that relation, and that they were so regarded by those who knew them. Within a year after the time appellee claims the contract of marriage was made, a suit was commenced and a judge

ment was recovered therein against appellant and appellee in favor of A. Bernstein before a justice of the peace of Cook county for \$52.75 and costs. An execution was issued thereon and placed in the hands of Phil C. Menard, a constable of Cook county, for service. On June 18, 1897, appellant executed and made affidavit to a schedule, which was given to the constable holding the execution. In this schedule he sets forth the household goods and wearing apparel of himself and Jennie Heymann, his wife, and calls appellee his wife several times, describing her as 'Jennie Heymann, née Oney, his wife.'

"Appellant denies the conversations in regard to marriage, and that he lived with appellee as her husband at any time. He denies that he ever held her out or introduced her as his wife, and states that he never occupied the same room with her, and that his only relation with her at any time was as a roomer or boarder. In regard to the schedule which he made to the constable, he says that appellee advised him to go to an attorney whom she had seen, and that he went with her to the office of Mr. Knaus, who advised him that the only way he could get out of paying an unjust debt was to sign the paper which was presented to him; that thereupon he signed it, stating to Knaus that appellee was not his wife; and that he did not know that he swore to her being his wife in the schedule. [Counsel for appellant admit, however, that sexual relations did exist between appellant and appellee, saying in brief: "It may be urged by counsel for appellee that appellant has denied sexual relations with appellee. This is untrue. While it appears from his testimony that he denied occupying the same room and bed with her, the denial was in every instance coupled with the qualify words 'as husband and wife.'"] Appellant introduced the evidence of several witnesses, who testified that they knew appellee during the period appellant was rooming with her as Mrs. or Miss Oney, and never heard appellant address her as his wife, and that appellant introduced her as Mrs. Oney. Two of the landlords of appellee testified that she rented premises of them, giving the name Mrs. Oney. On the evidence thus briefly outlined, appellee contends that there was a common-law marriage, and appellant insists that there was no marriage, and that the evidence does not show a marriage.

"To enter into an analysis or full discussion of the evidence here would extend this opinion beyond reasonable limits. We have studied carefully the evidence contained in the record, and we think it preponderates in favor of the contention of appellee that there was a marriage contract between appellant and appellee *per verba de presenti*, which was immediately followed by cohabitation as husband and wife. There is no

question in the case of the capacity of the parties to enter into the marriage relation. Nor is there any contention that the parties were living in a meretricious state before August, 1896, the date of the marriage contract and the cohabitation that followed it. While appellant has denied substantially everything that appellee and nearly every witness on her behalf testified to, his evidence does not go to the extent of showing that they at any time lived together in clandestine sexual intimacy. No doubt, therefore, is thrown upon the marriage contract, as testified to by appellee, by reason of the contract having been entered into through the door of a previous illicit intercourse. The proof in this case brings it clearly within the law, as announced by our Supreme Court in *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105, and the authorities there cited. In the above case it is said: 'While our statute prescribes certain formalities to be observed in marriages, and certain steps to be taken to preserve the evidence of their celebration, it does not declare a marriage void which is legal at the common law, merely because not entered into in accordance with its provisions. *Port v. Port*, 70 Ill. 484. A marriage is a civil contract made in due form, by which a man and woman agree to take each other for husband and wife during their joint lives, unless it is annulled by law, and to discharge towards each other the duties imposed by law upon such relation. Each must be capable of assenting, and must in fact consent to form this new relation. If a statute forbids the solemnization of marriage without a license, still, in the absence of a clause of nullity, the marriage will be good, though no license was had.' No particular form of words is necessary to constitute a common-law marriage. If what is done and said evidences an intention by the parties to assume the marriage status, and the parties thereupon enter into the relation of husband and wife, that is sufficient, whatever may be the form of expression used. *Stewart on Marriage and Divorce*, § 86. The clear preponderance and weight of the evidence show all the necessary legal elements of a marriage, as contemplated by the law of this state. This was the view and conclusion of the learned chancellor, who heard the witnesses and observed their character and manner of testifying. His conclusions upon the evidence are entitled to weight. The decree of the superior court accords with the law and the facts of the case, and must be affirmed."

We concur with the views above expressed in the opinion of the Appellate Court, and accordingly the judgment of the Appellate Court is affirmed.

Judgment affirmed.

(218 Ill. 641)

ARMSTRONG v. STEBBINS.

(Supreme Court of Illinois. Dec. 20, 1905.)

**APPEAL — REVIEW — VARIANCE — QUESTION —
HOW RAISED BELOW.**

Any variance between the allegations of a bill and the evidence before the master must be raised by objections or exceptions to the master's report, in order to have that question reviewed on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1221.]

Appeal from Appellate Court, Second District.

Bill by Grant C. Stebbins against Joseph Armstrong. Decree for complainant, and defendant appeals. Affirmed.

Appellee filed a bill for an accounting in the circuit court of LaSalle county, alleging, in substance, that on December 10, 1897, appellee and appellant, Joseph Armstrong, entered into a general copartnership to raise money and purchase judgments which were liens on the property of one Matthew White, and make certain judgments then owned by them in their own right or as assignees, they to advance certain moneys and borrow certain moneys at the bank on their joint note, any amount recovered in satisfying judgments, whether owned by them in their own right or as assignees, to be divided, four-ninths to appellee and five-ninths to appellant; further alleging that said copartnership was carried on for a period of three years; that a large amount of judgments were purchased and redemptions made thereunder, and a large amount of money received by appellant; that appellant redeemed a certain tract of land by virtue of said agreement, and retains the title in himself, appellee alleging that the same is their joint property, and that appellant has refused to come to an accounting with appellee; prays an accounting may be had, and land redeemed by appellant be decreed to be copartnership property, concluding with a general prayer for relief, etc. The answer of appellant denies every allegation of the bill, and alleges that on December 10, 1897, appellant and appellee entered into an agreement that after that time they would make redemptions under certain judgments then owned and controlled by them, appellant to furnish five-ninths and appellee four-ninths of the money for that purpose, and the profits to be divided in like proportions; that appellee wholly failed to perform his part of said agreement, etc., and that March 2, 1899, appellant and appellee stated their mutual accounts, and agreed upon a balance due of \$550, which appellant paid appellee in full settlement of all claims and demands to that date; also alleges that appellee has been guilty of laches. The cause was referred to the master in chancery, to take proofs and make report both of findings of fact and of law. The master found that the complainant was entitled to relief prayed for in said bill, and that defendant was justly indebted to com-

plainant in the sum of \$730.51, with interest at the legal rate thereon from February 23, 1903, to the date of filing the bill. Objections were filed to the master's report by appellant, which stood as exceptions in the circuit court by agreement of parties. The chancellor sustained the finding of the master, and entered a decree accordingly, from which an appeal was prosecuted to the Appellate Court, where the judgment of the circuit court was affirmed, and a certificate of importance granted to this court.

Browne & Wiley, Huttman, Butters & Carr, John H. Armstrong, and I. I. Hanna, for appellant. H. M. Kelly, for appellee.

RICKS, J. (after stating the facts). The facts in the case, as disclosed by the record, are substantially as follows: It appears that in the spring of 1895 one Matthew White failed. Judgments were entered against him in favor of various parties, among them being two in favor of appellee and two in favor of R. S. Parker & Co. Appellant's son, B. S. Armstrong, was a member of the firm of R. S. Parker & Co., and the owner of an undivided one-half interest in the Parker & Co. judgments. White's property was all taken under foreclosure proceedings, and there seemed to be little left for anybody. Benjamin Armstrong, who was at that time residing in Chicago, began a correspondence with appellee, with the view of going together and making some arrangements to redeem the White land from the foreclosure sales, and after there had been some correspondence with them in reference to the matter, Benjamin Armstrong had his father, the appellant, meet Stebbins, and gave his father full power and authority to make any deal with Stebbins that appellant desired. After appellant and appellee had talked the matter over, it was agreed to form a partnership, and use their own judgments and any other judgments they could buy or use in any manner to redeem, and to make as much as they could by such redemption; with the understanding that, regardless of whose judgments might be used, they would share the profits and the proceeds of the amount recovered on a four-ninths and five-ninths basis, appellant to get five-ninths and appellee four-ninths. Pursuant to this agreement, appellant and appellee went to the National City Bank, and borrowed \$5,000, giving their joint note, and made redemption of a certain tract of land which had been sold under mortgage. The evidence discloses that at the time of the first redemption appellee did not have a sufficient amount of money with which to make the redemption, and was informed by Armstrong that it would make no difference; that he would put up the amount required above the \$5,000 for that redemption, and Stebbins could send him his part of the money in the near future. The redemption was

made under the Benjamin Armstrong judgment. They next entered into an agreement with R. S. Parker that he should assign to them the judgment held by him, on the condition that they give him one-third of what they recovered on the judgment. They then redeemed a 255-acre tract from one Allen, who had foreclosed a mortgage, and the amount required to redeem this 255-acre tract was \$5,872.34. In their negotiations to obtain the Parker judgment, both the parties actively participated; appellee having gone to Chicago for that purpose. In this transaction they also used the \$5,000 that was gotten from the bank on their joint note. After making the redemption of the 255-acre tract, it was put up for sale, and bid in by another party, who paid the Parker judgment, together with costs and interest, and \$500 in addition, to be applied on a judgment in favor of appellee, on an agreement that they would not again redeem from that sale. The amount, as shown, that was realized under this transaction was \$3,148.88. Appellant took the profits under these judgments and retained them, and refused to account to Stebbins. It appears that afterwards appellant and appellee entered into a written agreement on the 18th of March, 1898. The contract was solely in reference to money realized out of a 327-acre tract of land sold March 18, 1898, and the manner in which the money was to be distributed. It was entirely distinct from the transactions had under the verbal agreement.

It is first insisted that there is a variance between the allegations of the bill and the proof, and that therefore it was error to enter the decree as entered by the chancellor. No objection or exception to the master's report raised any question of variance as to the allegations of bill and proof, which was necessary in order to have that question reviewed in this court. *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *Crone v. Crone*, 170 Ill. 494, 49 N. E. 217.

Appellant contends that there was no partnership relation existing between them concerning the transactions in which \$5,000 was borrowed at the bank; but the evidence discloses that both parties signed the note at the bank, and that appellee paid the interest on the note at two different times, and the money was afterwards used in other transactions in which there was no question but that both parties were interested. The master found, as a matter of fact, that appellee was interested in the second transaction, and that appellant should account to him for the profits realized out of the same. The record discloses that appellee is sustained by all the documentary evidence produced, which consists of various letters written by appellant, and is also corroborated by disinterested witnesses. We think the record fairly discloses that there was a partnership existing between

them in reference to the transaction, and while certain money was sent appellant by appellee shortly after the contract was entered into, to apply on the first redemption, it was returned, with instructions to retain it, and obtain other money for the purpose of making other redemptions; and from appellant's letters it was apparent that he had secured sufficient money to carry the deal through on his own accord, yet there was nothing said in the letters that would lead appellee to believe that appellant had changed his mind in reference to allowing appellee his share of the profits that might be realized out of the transaction. The master and chancellor refused to allow appellee any benefit or share of profit in the first transaction, and, as he assigned no cross-error, we are not called upon to consider it.

Appellant insists, further, that a settlement was had of all their transactions, in which he paid appellee \$550 in full settlement of all their controversies; but the evidence discloses that the settlement was in fact a settlement only of a single transaction had under a written contract between them, entered into on March 18, 1898, and in which the transaction in controversy was not mentioned, and nothing was said or done by either party to lead appellee to believe, or that should satisfy a court, that it was a settlement of all matters between them.

After a careful examination of the record, we are of the opinion that the decree of the circuit court is equitable between the parties and sustained by the evidence. Other propositions raised by the answer of appellant are not argued, and therefore considered waived. The judgment of the Appellate Court is therefore affirmed.

Judgment affirmed.

(36 Ind. App. 536)

HARRINGTON v. HARRINGTON.

(No. 5,514.)

(Appellate Court of Indiana, Division No. 2.
Nov. 17, 1905.)

DIVORCE — TEMPORARY SEPARATION — CROSS-COMPLAINT.

Act Feb. 28, 1903 (Acts 1903, p. 114, c. 43), provides for separations from bed and board for a limited time. Section 3 provides that obtaining such a temporary separation shall not bar a suit for absolute divorce by either party. Section 4 (page 115) makes the practice and proceedings the same as in case of absolute divorce. Burns' Ann. St. 1901, § 1052, provides that in a divorce suit the defendant may file a cross-complaint for divorce. *Held* that, in an action for temporary separation, the defendant may file a cross-complaint for absolute divorce, though the act of 1903 makes no provision for filing cross-complaints.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 11.]

Appeal from Superior Court, Marion County; Vinson Carter, Judge.

Action by Kate Harrington against Thom-

as Harrington. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Hefron & Harrington, for appellant. Harvey, Pickens, Cox & Kahn and Henry, Crane & Miller, for appellee.

WILEY, C. J. Appellee brought this action against appellant for "a separation from bed and board for a limited time," under the act approved February 28, 1903 (Acts 1903, p. 114, c. 48). Appellant filed a cross-complaint, and also an answer in denial to appellee's complaint. Upon appellee's motion in writing, the trial court struck from the files the cross-complaint. The reason assigned in said motion was that "the said cross-complaint and the filing thereof in this action is wholly unauthorized by law." Upon the issue joined by appellee's complaint, and the answer in denial, the cause was submitted to the court, resulting in a finding and decree for appellee. In her complaint appellee asked for alimony, and the court allowed her the sum of \$1,000. The order of the court was that the parties "be separated from bed and board for a period of two years," and that the appellant pay to appellee the sum of \$1,000 as and for alimony. Appellant moved for a new trial upon two grounds: (1) Because the court erred in sustaining the motion to strike out the cross-complaint; and (2) because the decision of the trial court is not sustained by sufficient evidence. This motion was overruled. Striking out the cross-complaint and overruling the motion for a new trial are assigned as errors.

The first question discussed by counsel relates to the action of the court in striking out appellant's cross-complaint. It is contended by appellee that the filing of a cross-petition for an absolute divorce is not authorized by the act of 1903, *supra*; that the power to grant divorce is of statutory and not of common-law origin, and that the appellant had no common-law right to file a cross-complaint. Section 3 of that act (Acts 1903, p. 115, c. 48) is as follows: "This act is not intended to, and shall not repeal or affect any existing law as to granting absolute divorce, and the obtaining of a temporary separation, under this law, shall not be a bar to the entering of a suit for absolute divorce by either party," etc. Section 4 of that act is as follows: "In granting separation from bed and board for a limited time, the same length of residence and proof thereof and the practice and proceedings of the court shall be the same as in cases of absolute divorce." Under section 3, *supra*, it is clearly manifest that, where a temporary separation has been decreed, such decree is not a bar to a suit for an absolute divorce by either party. It necessarily follows that at any time after the decree in this case either party had the right to bring his or her action for an absolute

divorce. It is true, aside from the divorce statute there is no statutory provision for filing a cross-complaint or petition. While the Code generally does not provide for a cross-complaint, the chancery practice of determining the rights of contending parties has long been recognized by our decisions; and in such cases the rule of pleading and the practice in chancery courts, as modified by the spirit of the Code, govern. *Heaton v. Lynch*, 11 Ind. App. 408, 38 N. E. 224. Section 1052, Burns' Ann. St. 1901, specifically provides that a defendant in a divorce suit may file a cross-complaint for divorce. It is expressly provided by section 3 of the act of 1903, *supra*, that such act does not repeal or affect any existing law as to granting absolute divorces.

It is almost a waste of time to even refer to the familiar rule that both law and equity favor the settlement and adjudication of all controversies germane to the subject-matter in a single proceeding between litigants. There is no provision of the act of 1903, *supra*, which prohibits, either expressly or impliedly, the filing of a cross-complaint for an absolute divorce in a suit for temporary separation. We know of no statute, rule of practice, or reason by which this cannot be done. It is certainly germane to the question involved, and where a defendant in such a case applies to the court by cross-bill for an absolute divorce, and brings himself within the provisions of the statute under which such divorce may be granted, the issue thus presented is entitled to be submitted to the court for decision. We are clearly of the opinion that it was error to strike out appellant's cross-complaint. As the judgment must be reversed for this reason, the questions presented and discussed under the motion for a new trial are left undecided.

Judgment reversed, and the trial court is directed to grant a new trial, to overrule appellee's motion to strike out the cross-complaint, and for further proceedings not inconsistent with this opinion.

(36 Ind. App. 453)

MERICA et al. v. BURGETT. (No. 5,447.)
(Appellate Court of Indiana, Division No. 1,
Nov. 3, 1905.)

1. APPEAL—ASSIGNMENTS OF ERROR—SUFFICIENCY.

The Code of Procedure does not recognize a motion that the court restate its conclusions of law, and an assignment that the court erred in overruling such a motion presents no question for review.

2. CONTRACTS—CONSTRUCTION—SURROUNDING CIRCUMSTANCES.

If the language of a contract is ambiguous or indefinite, the court will look to the nature of the instrument and the conditions under which it was made, the situation of the parties, the nature of their business, and the interests to be protected, to effectuate the intention of the parties.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 730, 752.]

3. GOOD WILL—SALES—BREACH OF AGREEMENT.

An agreement by the vendors of a bank to quit the banking business and not to start another bank in the same town so long as their vendee continues to own the bank sold to him is broken in such a manner as to render both the vendors liable for damages by the act of one of the vendors in subscribing to stock in a new bank started in the same town and actively participating as assistant cashier in the business of such bank during the continuance of the vendee's ownership of the bank sold to him.

4. DAMAGES—LIQUIDATED DAMAGES—CONSTRUCTION OF STIPULATION—INTENTION OF PARTIES.

Whether a fixed sum, stipulated as damages for the breach of an agreement, is to be regarded as a penalty or as liquidated damages, is to be determined from the intention of the parties as gathered from the whole case and the tenor of the contract, aided by general principles for inferring such intention, and the designation of the sum by the contract as a penalty or as liquidated damages is not conclusive.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 156, 157.]

5. SAME—CERTAINTY AS TO ACTUAL DAMAGE.

Where damages for breach of an agreement can be accurately ascertained, a stipulated sum fixed by the agreement to be paid in case of such breach will, as a rule, be considered as a penalty, regardless of the expressions used in, or the nature of, the contract.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 164-169.]

6. SAME—VARIOUS STIPULATIONS.

Where a contract contains various stipulations, for the breach of some of which the damages would be uncertain, and for the breach of others certain and susceptible of easy proof, a sum mentioned in the contract to secure the performance thereof will be regarded as a penalty, and not as liquidated damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 165.]

7. SAME.

A stipulation, in a contract of sale of a banking business, for a forfeiture of \$1,000 in case of a failure of either party to fulfill the same, the vendors having agreed to quit the banking business and not to start another bank in the town as long as the vendee owned the bank in question, and the vendee having agreed to pay for the bank with notes due on certain dates, constitutes an agreement for liquidated damages, and not for a penalty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 160, 163.]

Appeal from Circuit Court, White County;
T. F. Palmer, Judge.

Action by John W. Burgett against Alex Merica and another. From a judgment for plaintiff, defendants appeal, and plaintiff assigns cross-errors. Reversed.

Henry A. Steis and Spencer & Hammond, for appellants. Foltz & Spittler, E. B. Sellers, and C. W. Barker, for appellee.

MYERS, P. J. This action was begun by appellee against appellants, and was tried in the court below upon an amended complaint in two paragraphs, and the issue joined by each of the appellants filing separate general denials. The facts were specially found and conclusions of law stated thereon,

and judgment entered in favor of appellee for \$500.

The facts as found by the court are, in substance, as follows:

That in December, 1899, appellants were engaged in the business of banking in the town of Francesville, in Pulaski county, Ind., as partners under the firm name and style of the "Bank of Francesville." They owned a safe, set of books, office fixtures, and furniture, then used by them in said town in carrying on said business. Appellee at that time was a farmer living in Jasper county, Indiana. That during the said month of December appellants and appellee entered into the following contract:

"Articles of Agreement."

"This article of agreement made and entered into between the firm of Merica & Bledsoe, of Francesville, Indiana, party of the first part, and John W. Burgett, of Pleasant Grove, Jasper county, Indiana, party of the second part, witnesseth: That for the consideration hereinafter mentioned the party of the first part sell to the party of the second part the safe, furniture, and fixtures of the Bank of Francesville, and agree to quit the banking business, March 5, 1900, and further agree to not start another bank in the town as long as said John W. Burgett owns the Bank of Francesville. Party of the second part agrees to pay party of the first part for said safe, furniture, and fixtures, etc., as follows: with four notes for one thousand (\$1,000) dollars each dated March 5th, 1900, and due, respectively, in 6, 12, 18, and 24 months from date, with 7 per cent. interest, payable semiannually, with approved security, and it is further agreed between the parties to this contract that a failure of either party to fulfill this contract forfeits to the other party one thousand (\$1,000) dollars.

"In witness whereof, we have this day signed this contract.

"Merica & Bledsoe,
"John W. Burgett."

That appellants continued said business until March 5, 1900, "when, in pursuance of said written contract, the said Merica & Bledsoe turned over to said Burgett all of the property of said firm in said banking house, together with the cash then on hand and the notes which had been by them discounted. That the plaintiff on the 5th day of March, 1900, began and continued to carry on said Bank of Francesville and doing a banking business in said town and continued to own said Bank of Francesville until after the beginning of this suit. That prior to the 22d day of September, 1902, there was no other bank or persons doing a banking business in said town of Francesville. That the plaintiff on said March 5, 1900, paid the full amount of the purchase

money for said contract agreed to be paid, and complied and performed fully all the conditions thereof which were to be by him performed. That on said 5th day of March, 1900, the said firm of Merica & Bledsoe dissolved, and the defendant Bledsoe has not since been engaged in the banking business, nor has he taken any part in starting any bank or banking institution in said town of Francesville. That on the 22d day of August, 1902, the defendant Merica agreed with one J. T. Beesley to take stock in and accept an employment as assistant cashier in a bank to be organized under the laws of the state of Indiana as a state bank, and to be known as the 'State Bank of Francesville, Indiana.' That afterward, about the 12th day of September, 1902, the defendant Merica subscribed for 12 shares of stock in the proposed State Bank, signed the article of association, and said defendant Merica became and was one of the incorporators of the said bank, subscribing as aforesaid and paying full for 12 shares of stock of \$100 each, which he subscribed and took in his own name for his own use, and held the same as his own property and did so in pursuance of said agreement made between him and the said Beesley, by which he was so employed as assistant cashier and became a stockholder and one of the original incorporators in said new bank." That on the 18th day of September, 1902, written articles of association were filed in the office of the Auditor of the state of Indiana, and signed by the appellant Alex Merica and others, stating the purpose of the organization to be the business of banking under the laws of the state of Indiana, designating the name of the association to be the "State Bank of Francesville," and its location in the town of Francesville, county of Pulaski, and state of Indiana, where its operation of discounts and deposits are to be carried on, fixing its capital, etc. A charter was granted, and on September 22, 1902, the State Bank of Francesville began business, with Ab Whittaker as president and J. L. Beesley as cashier, and the appellant Merica assistant cashier. That the business of said bank has been ever since conducted in a building situated in said town of Francesville and across the street from appellee's place of business. That on September 22, 1902, said Merica entered upon the discharge of his duties as assistant cashier of said bank, and has continued so to do ever since. That he has given much of his time and influence to the promotion of the business of said State Bank, and has, since he began his duties of assistant cashier, solicited business for said bank. That upon the organization of said State Bank many of the depositors and patrons of appellee's bank immediately, and within a very short period thereafter, transferred their deposits

and patronage from the appellee's bank to said State Bank, and have since continued to patronize the last-named bank. That at the time the contract was entered into between the said Beesley and Merica, and at the time the State Bank was organized, with said Beesley as cashier and the said Merica as assistant cashier, the said Beesley was unacquainted with the financial standing of the farmers and business men in that community. That Merica was experienced in the banking business in that community and was acquainted with the financial business of many of the persons who did business with appellee's bank. That the appellant Merica since the organization of the State Bank assisted in keeping the books of the bank, received deposits, issued drafts, bills of exchange, discounted paper, advised as to and approved all notes offered the bank for discount, and, together with Beesley, has conducted the business of said bank, and that he carries one of the keys to the room in which said bank does business, and assists in the custody and the care of the property of said bank. That on September 29, 1902, appellee, through his attorney, demanded of the appellant Merica the sum of \$1,000, mentioned in said written contract. That Merica refused to pay said sum, and during the first week in October, 1902, disposed of his stock in said Bank of Francesville to one Carl Fox, and has not since had any stock in said bank in his own name, but has continued in said employment and active participation in the business of said bank ever since.

Upon these findings of fact a conclusion of law was stated as follows:

"That there is due and unpaid to plaintiff from the defendants, on account of the cause of action averred in the complaint, the sum of \$500, and that plaintiff is entitled to recover judgment for that amount, to wit, \$500, from defendants."

Appellant Merica and appellee each separately excepted to the conclusion of law. Appellee then, in writing, moved the court to restate its conclusions of law, so as to conclude there was due appellee \$1,000. This motion was overruled and appellee excepted, and the court thereupon rendered judgment. Appellant Merica in this court presents the single error "that the court erred in its conclusions of law on the findings." Appellee assigns cross-errors: (1) The court erred in its conclusions of law on the findings. (2) The court erred in overruling appellee's motion to restate its conclusions of law, so as to render judgment in favor of appellee for \$1,000.

The second cross-error presents no question. The motion upon which it is based is not recognized by our Code of Procedure. *Maynard v. Waidlich*, 156 Ind. 562, 90 N. E. 343; *Wolverton v. Wolverton*, 163

The remaining assignments of error present two and the same questions, and will be considered together.

1. Do the special findings of fact show a breach of the contract on the part of appellants? The special findings show, and there seems to be no contention but that appellee performed his part of the contract to the letter, so our inquiry is to be directed to the obligations assumed thereunder by appellants. The rights of parties, plainly set forth in a contract, are not to be extended or lessened by construction; but, if its language be ambiguous, uncertain, or indefinite, then the court will look to the nature of the instrument and the conditions under which it was made, the situation of the parties, the nature of their business, and the interests to be protected, not for the purpose of applying it, but for the purpose of effectuating their intention. *Diamond Plate Glass Co. v. Tennell*, 22 Ind. App. 132, 52 N. E. 168; *Consolidated Coal, etc., Co. v. Mercer*, 16 Ind. App. 504, 44 N. E. 1005; *Maryland v. Railroad Co.*, 22 Wall. 105, 22 L. Ed. 713; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. Ed. 315; *Seymour & Co. v. Butler*, 8 Iowa, 304; *Emerick v. Clemans*, 26 Iowa, 332; *More v. Bonnett*, 40 Cal. 251, 6 Am. Rep. 621; *White v. Booker*, 4 Metc. (Ky.) 267; *Long v. Towli*, 42 Mo. 545, 97 Am. Dec. 355; *Montgomery v. Fireman's Ins. Co.*, 16 B. Mon. 427; *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 680, 39 Atl. 923. The contract plainly provides that Merica and Bledsoe were to quit the business of banking in the town of Francesville March 5, 1900. At the time of making this contract the Bank of Francesville was the only institution of that character in the town, and it continued to be until the organization of the State Bank of Francesville. The principal contention here arises upon the construction to be given to the following stipulation in the contract, viz.: "And we further agree not to start another bank in the town as long as said John W. Burgett owns the Bank of Francesville." The language "and to quit the business and not to start another bank, etc.," may seem a little indefinite, and permit a difference of opinion as to its true meaning; but in the light of all the facts here presented, and measured by the settled rules of law for the construction of contracts, where ambiguity appears, we are of the opinion that the intention of the parties was that Merica and Bledsoe should quit the banking business at the time mentioned, and not thereafter engage in such business in said town while appellee owned the bank they sold him. While it appears that Merica and Bledsoe did quit the business at the time mentioned in the contract, yet in our opinion, from the facts found, the appellant Merica since September 22, 1902, has been actively

business in said town, and not start another bank together constitute the good-will feature of the transaction, and was certainly one of the inducements held out to appellee, and no doubt entered into the consideration for the purchase of appellant's bank fixtures, books, etc. The facts as found by the trial court, relative to the acts and doings of the appellant Merica, clearly bring him within the business of banking, as defined in the case of *First National Bank of Richmond v. Turner*, 154 Ind. 456, 460, 57 N. E. 110, 112. "The business of banking, as defined by law and custom, consists of the issuing of notes payable on demand, intended to circulate as money where the banks are banks of issue, in receiving deposits payable on demand, in discounting commercial paper, making loans of money on collateral security, buying and selling bills of exchange, negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations." The definition above quoted, taken from the case of *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, has been adopted in the following cases: *First National Bank v. County of Chehalis*, 6 Wash. 64, 32 Pac. 1051; *Bressler v. Wayne County*, 32 Neb. 834, 49 N. W. 787, 13 L. R. A. 614; *Richards v. Incorporated Town of Rock Rapids (C. C.)* 31 Fed. 505, 509.

Appellee claims a breach of the good-will feature of this contract. The authorities seem to support his contention. The rule as stated in 24 Am. & Eng. Ency. of Law, 860, supported by the case of *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650, is that, "where the vendors of the business stipulated that they will not engage in the same business in the same place, neither of them has the right to take stock in or help to organize or manage a corporation formed to compete with the purchasers." It has been held that an agreement not to engage in a particular line of business within a specified territory is broken when the covenantor becomes a member of a firm engaged in a similar business within the prescribed limits. *Greenfield v. Gilman*, 140 N. Y. 168, 35 N. E. 435. *Greenhood on Public Policy*, p. 736, lays down the rule that "the spirit of covenants to abstain from trade forbids the transaction of such business as agent for others, especially when the compensation is depending upon the amount of profits, or by one when the covenant is made by him, or by a partnership when one of the firm is the covenantor." An agreement not to do any business of a certain kind within a certain territory is broken by the seller engaging in such business for other persons on a commission. *Richardson v. Peacock*, 28 N. J. Eq. 151. Appellants at the time of entering into the contract with appellee were acquainted with the people

in and about the town of Francesville. They knew the patrons and customers of the bank. They were more or less acquainted with the business methods and financial condition, peculiarities, characteristics, and financial secrets of the bank's customers. The business of the bank thus established was more or less the fruit of the good will they had established for the institution and their influence with the people of that vicinity with whom they, as bankers, had dealt. To use this knowledge and power thus obtained in the interest of a rival institution, as the facts here show was done by the appellant Merica, as also his affirmative acts in starting the new bank, constituted an actionable breach of the contract, for which both Merica and Bledsoe became legally liable in damages to appellee. Upon the general principle here involved, and supporting our conclusion, we cite: *Duffy v. Shockey*, 11 Ind. 70, 71 Am. Dec. 348; *Baker v. Pottmeyer*, 75 Ind. 451; *Esiel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Johnson v. Gwinn*, 100 Ind. 466; *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 222, 19 N. W. 981, 20 N. W. 545, 52 Am. Rep. 811; *Norris & Cochran v. Howard*, 41 Iowa, 508; *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 34 L. R. A. 389, 56 Am. St. Rep. 650; *Beal v. Chase*, 31 Mich. 490; *Applegate v. Jacoby*, 39 Ky. 206.

2. Is the stipulated sum of money in the contract to be regarded as liquidated damages or as a penalty? So far as we have been able to discover from adjudicated cases, no positive rules have been deduced as an absolute guide in all cases by which it may be determined whether a contract providing for a stipulated sum for its breach is to be regarded as a penalty or liquidated damages, for it has been held to so designate a fixed sum in an agreement as a penalty or liquidated damages will not be conclusive to show that it should be thus regarded. *Whitfield v. Levy*, 35 N. J. Law, 149; *Noyes v. Phillips*, 60 N. Y. 408; *Keck v. Bleber*, 148 Pa. 645, 24 Atl. 170, 33 Am. St. Rep. 846; *Wilhelm v. Eaves*, 21 Or. 194, 27 Pac. 1053, 14 L. R. A. 297. Therefore it may be said that the answer to the question here propounded will be the conclusion reached upon determining the intention of the parties from the whole case and tenor of the contract, aided by a few established general principles for inferring such intention. It has been held that "where the sum named is declared to be fixed as liquidated damages is not greatly disproportionate to the loss that may result from a breach, and the damages are not measurable by any exact pecuniary standard, the sum designated will be deemed to be stipulated damages." *Jaqua v. Headington*, 114 Ind. 308, 16 N. E. 527; *Bird v. St. John's Episcopal Church*, 154 Ind. 138, 147, 56 N. E. 129; *Chicago & S. E. Ry. Co. v. McEwen* (Ind. App.) 71 N. E. 926; *Magee v. Benner*, 34 Ind. App. 176, 70 N. E. 823; *Kelso v. Reid*, 145 Pa. 606, 23 Atl. 323,

27 Am. St. Rep. 716; *Waggoner v. Cox*, 40 Ohio St. 539; *Streeter v. Rush*, 25 Cal. 67; *Mason v. Callender*, 2 Minn. 350 (Gil. 302) 72 Am. Dec. 102.

Where a stipulated sum has been inserted in a contract for a breach of an agreement to sell, the weight of authority seems to hold such sum to be liquidated damages, upon the theory that the damages sustained in almost all cases are uncertain and difficult to estimate. *McCormick v. Mitchell*, 57 Ind. 248; *Gobble v. Linder*, 76 Ill. 157; *Morse v. Rathburn*, 42 Mo. 594, 97 Am. Dec. 859; *Yetter v. Hudson*, 57 Tex. 604; *Berinkott v. Traphagen*, 39 Wis. 219; *Burk v. Dunn*, 55 Ill. App. 25. Also for a breach of a contract not to engage in any particular profession or business within certain prescribed limits. *Duffy v. Shockey*, supra; *Miller v. Elliott*, 1 Ind. 484, 50 Am. Dec. 475; *Martin v. Murphy*, 129 Ind. 464, 28 N. E. 1118; *Johnson v. Gwinn*, supra; *Esiel v. Hayes*, supra; *Beatty v. Coble*, 142 Ind. 329, 41 N. E. 590; *Boyce v. Watson*, 52 Ill. App. 361; *Lange v. Werk*, 2 Ohio St. 519; *Kelso v. Reid*, supra; *Hoagland v. Segur*, 38 N. J. Law, 230. But, where damages can be accurately ascertained, a stipulated sum will, as a rule, be considered as a penalty, regardless of the expressions in or the nature of the contract. *Squires v. Elwood*, 33 Neb. 126, 49 N. W. 939; *Tiernan v. Hinman*, 16 Ill. 400; *St. Louis, etc., Ry. Co. v. Shoemaker*, 27 Kan. 677; *Hahn v. Horstman*, 12 Bush, 249. It is said in *Harris v. Miller* (C. C.) 11 Fed. 118: "(1) Whenever it is at all doubtful whether the sum mentioned was intended as stipulated damages or a penalty to cover actual damages, the law, which always favors the latter as against the former, declares that the sum was intended as a penalty. (2) When the contract is explicit that the sum mentioned shall be considered as liquidated damages, the contract is to be enforced according to its terms, unless qualified by some other circumstances, as when one agrees to pay a larger sum upon the failure to pay a smaller one, or when the damages resulting from a failure to perform the contract are certain, or can be reasonably ascertained by a jury. But whenever the contract is for the doing or not doing a particular act or acts, and there is no certain pecuniary standard by which to measure the damages resulting from a breach thereof, an agreement to pay a stipulated sum as damages for such breach will be enforced literally."

In the consideration of this case we are not unmindful of the established principle that "if a contract contains various stipulations for the breach of some of which the damages would be uncertain, and as to others certain and easily shown by the evidence, then the sum mentioned in an obligation to secure the performance of the contract is regarded as a penalty, and not as liquidated damages." *Carpenter v. Lockhart*, 1 Ind. 435; *East Moline Co. v. Weir Plow Co.*, 95

ell, 37 Fla. 147, 20 South. 249. In the latter case it is said "that a sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty." Therefore, and upon the holdings of the cases last cited, appellant insists that the parties to the contract in suit intended the lump sum mentioned therein as a penalty. We are not persuaded to agree to this conclusion. If we were to consider the language "agree to quit the banking business March 5, 1900, and further agree not to start another bank in the town as long as said John W. Burgett owns the bank of Francesville," as two stipulations, we cannot see how they are widely different in importance, as they both and each of them have reference to the one general object and purpose, that of preventing competition by appellants with appellee in the banking business after March 5, 1900, in the town of Francesville.

The whole subject-matter of the contract was plainly a matter about which they had a right to contract and fix by stipulation the measure of damages for its breach, and, having understandingly done so without fraud, and the contrary does not appear, they should be held to their agreement, if the stipulated sum has reference to uncertain damages. The time for appellants to quit was fixed in the contract. It is presumed they contracted with reference to that time, and not that they should continue the business for a month or a year, or that they might start an opposition bank. To measure by any exact pecuniary standard the amount of damages, if any, appellee might suffer by reason of Merica and Bledsoe continuing the business for a longer time than that mentioned in the contract or in starting an opposition bank, was a matter they no doubt fully considered at the time of entering into the agreement. It seems to us for Bledsoe and Merica, or, as we have said, for either of them, to continue the business, or afterwards engage in such business or start another bank in the same town within the time limited by the contract, there is no exact pecuniary standard by which appellee's damages, if any, could be ascertained. If by reason of their breach of the contract any of the customers of the bank withdrew their deposits, by what pecuniary measure can the damages be fixed for such loss? The question would at once arise, how much business did the bank lose? how much did they do, or would they have done, had they remained customers of the bank? and whether the business would have been done at a profit or loss to the bank; and many other questions might arise, rendering it impossible from extrinsic evidence

to ascertain the actual damages. Structures, books, furniture, etc. Just what proportion of this sum was paid for the tangible property and what proportion was paid for the business thus established by the vendees does not appear, nor does it appear that the sum fixed in the contract, in case of a breach, is unreasonable, and not in proportion to the breach provided against in either stipulation. Nor do the findings show that the amount of damages claimed is unjust or oppressive or that the amount claimed is disproportionate to the damages that might result from a breach of the agreement. Controlled by the facts found, and adhering to the principles of law which obtain in this case, it is our opinion that the stipulated sum in the contract should be construed as liquidated damages.

Appellant insists that there is no special finding showing the amount of actual damages suffered by appellee, and for that reason the cause ought to be reversed. It will answer no good purpose to extend this opinion in order to pass upon this question, for it is apparent from our conclusions that the judgment must be reversed on the cross-errors.

The judgment is therefore reversed, with instructions to the trial court to restate its conclusions of law so as to conclude there is due appellee from appellants the sum stipulated in the contract, together with interest thereon from the time of the demand, and to render judgment accordingly.

(38 Ind. App. 530)

UNION MUT. LIFE INS. CO. OF PORTLAND, ME., v. ADLER. (No. 5,186.)¹
(Appellate Court of Indiana, Division No. 2, Nov. 3, 1905.)

On petition for rehearing. Overruled.
For former opinion, see 73 N. E. 835.

John E. Iglehart and Edwin Taylor, for appellant. E. C. Henning, S. H. Esarey, and C. A. Weathers, for appellee.

COMSTOCK, J. In this cause it appears, from the view taken by the majority opinion of the facts as presented by the record, that an attempt is made to enforce a contract without complying with its terms, and without the performance of the conditions upon which it is based. The petition for rehearing is overruled.

We cite the cases of *Sharpe v. New York Life* (Neb.) 98 N. W. 66; *New York Life Ins. Co. v. Meinkens*, Adm'r (Ky.) 80 S. W. 175, to which our attention had not been called when the opinion was written.

ROBY, J. (dissenting). It is averred in the first paragraph of amended complaint that the defendant is a corporation organized under the laws of the state of Maine, and that on July 31, 1903, it executed its policy of insurance upon the life of plaintiff's de-

¹ Transfer denied.

cedent for the sum of \$3,000, for the consideration of the payment of the premium of \$97.80 annually for a period of 20 years, unless death should sooner occur; that, as a further consideration, it was agreed that, should the assured pay three annual premiums in cash before lapse in the payment of premiums, then such policy would be secure for 7 years 235 days, without any further payment. By virtue of said agreement the policy sued on, which is made an exhibit, was in force at decedent's death, on December 20, 1901; he having paid the first three premiums thereon.

Much has been said in argument about the "Maine nonforfeiture law." The theory of the complaint is that the appellee company contracted to extend the obligation of its policy for the time named, if a lapse in payment occurred after three full premiums had been paid. The contract is in writing. It is to be construed as other contracts of insurance, and where the language used is susceptible of different interpretations, or is doubtful, that meaning which affords the greatest indemnity and is in the interest of the assured must be adopted. *Union, etc., Ins. Co. v. Jones*, 17 Ind. App. 600, 47 N. E. 342; *Union, etc., Ins. Co. v. Woods*, 11 Ind. App. 335, 37 N. E. 180, 89 N. E. 205; *Franklin Ins. Co. v. Wallace*, 93 Ind. 11. In construing this contract, the laws of Indiana are applicable. *Kline v. National, etc., Ass'n*, 111 Ind. 466, 11 N. E. 620, 60 Am. Rep. 703; *Franklin, etc., Ins. Co. v. Wallace*, 93 Ind. 11, 17; *Northwestern, etc., Ins. Co. v. Little*, 56 Ind. 504; *Supreme Lodge K. of P. v. Meyer*, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1146. It may be that the terms of the policy were selected by the appellant because of the law of that state in which it is incorporated, or it may have been led to make such selection by the necessities of competition, but the reason, whatever it may have been, is immaterial; the rights of the parties being determinable by the terms of the contract which they have made.

The policy contains a table, of which the following is a copy:

Number of years premium paid in cash before lapse.	Maine Nonforfeiture Law.	
	Insurance under this policy secured for	
	Years.	Days.
3	7	235
4	10	116
5	13	6

The object of the table is to notify the assured in advance of the length of time during which his insurance is effective after a lapse in payment of premiums. So long as premiums are paid, the insurance is in force without reference to any table. After the payment of three premiums the assured who ceases to pay is given protection for a length of time fixed by reference to the amount

paid by him in excess of the value of the protection which has been furnished prior to his failure to thus pay. The amount of such excess is determined by reference to the tables of mortality. Courts take judicial notice of both mortality and multiplication tables, and the time of extension in any given instance becomes, therefore, a matter of mere computation. The assured paid altogether \$298.40, as averred in the first paragraph of complaint. This amount was paid in three annual installments on a 20-payment life policy. At the end of the third year the reserve due to him was \$153.96, allowing \$26.01 out of each premium for the expenses of the company, made necessary by handling this business, an allowance which is no doubt excessive. The sum of \$153.96 buys and pays for a nonparticipating paid-up \$3,000 life insurance policy for the term of 6 years 111 days. If the term specified in the table had been stated as 6 years 111 days, it would be exactly in accordance with the above computation, including the amount set aside for expenses. Whatever amount less than \$26.01 per year was deducted from expenses in making the actual computation upon which the table referred to is based would swell the fund available to buy paid-up insurance, and a very slight reduction in that item would result in extended insurance from the end of the third year of 7 years 235 days. The deduction for expenses was fixed by the company, and I am not disposed to attribute to it the segregation of a larger amount than its figures render necessary. The purpose of the table is to convey information to the person insured, or proposing to insure, relative to the term of extended insurance. It is not stated in the policy whether the extension dates from the end of the year for which payment is made or from the time the policy was written, except as the purpose of printing the table of necessity implies carrying beyond the end, an inference which accords with the custom of life insurance companies in printing such tables. The terms of the contract are, to say the least, ambiguous and uncertain in this regard. It therefore becomes the duty of the courts to construe it, and such construction, under the familiar rule above stated, requires that the extension be dated from the end of the third year. The table as printed, if otherwise construed, is upon its face misleading and deceptive, and calculated to operate as a fraud upon the insured. No one is permitted to take advantage of his own wrong, nor will acute distinctions be drawn to aid in undoing the unwary; but a construction is always preferred which is according to the nature and intent of the thing. The assured departed life 5 years 155 days after the end of the third year. Something has been said about the unreasonableness of this extension. Results reached by mathematical computations based upon the multiplication and

mortality tables are not usually put aside by the courts upon the mere statement that they are unreasonable. Indeed, the impressions of uninformed individuals are sometimes corrected by figures.

The second paragraph of complaint avers the payment of four cash premiums. The answer denies the payment in cash of the fourth premium, and avers the execution of a note therefor dated July 15, 1896, and due three months after date, containing the provision that "this note is given on account of said policy, and unless paid when it becomes due said policy then lapses as for nonpayment of premium when due," that thereupon the said insurance was carried for a period of three months previous to the maturity and nonpayment of said note, and that said note has never been paid. Forfeitures are not favored. They must be clearly and explicitly stipulated, and will not be inferred. *Home Ins. Co. v. Marple*, 1 Ind. App. 411, 27 N. E. 638; *Glass v. Murphy*, 4 Ind. App. 536, 30 N. E. 1097, 31 N. E. 545; *Bell v. Hiner*, 16 Ind. App. 184, 44 N. E. 576; *Phenix v. Lorenz*, 7 Ind. App. 268, 33 N. E. 444, 34 N. E. 495; *Union Central Ins. Co. v. Jones*, 17 Ind. App. 598, 47 N. E. 342. There is no provision in the policy under consideration for its forfeiture on account of nonpayment of premium, or for any other reason. In the light of the principles enunciated by the above authorities, no provision for such forfeiture can be read into it by any one. *Ohio Farmers v. Stowman*, 16 Ind. App. 205, 44 N. E. 558, 940. The note only provides for such lapse as is previously specified in the policy; and, there being no such specification, the provision in the note is inoperative, nugatory, and of no avail. *Insurance Co. v. Hardie*, 37 Kan. 674, 16 Pac. 92; *Drury v. Ins. Co. (Ky.)* 74 S. W. 663, 61 L. R. A. 714, 103 Am. St. Rep. 351.

The answers are drawn upon the evident theory that the failure of the assured to pay the note at maturity de facto released appellant from all liability upon the policy. This theory does not accord with the facts exhibited. If the note is valid in appellant's hands, then it cannot deny the receipt of the fourth annual premium. *McEvoy v. Nebraska, etc., Ins. Co.*, 46 Neb. 782, 65 N. W. 888. Collection of this note from Adler's estate would fix the company's liability on the policy. *Phenix Ins. Co. v. Dungan*, 37 Neb. 468, 55 N. W. 1069; *Phenix Ins. Co. v. Lansing*, 15 Neb. 494, 20 N. W. 22; *Schoneman v. Ins. Co.*, 16 Neb. 404, 20 N. W. 284; *Phenix Ins. Co. v. Rollins*, 44 Neb. 745, 63 N. W. 46. It appears from the averments of the answer that the appellant, in consideration of said note, carried the insurance for three months. This being the case, there is no failure of consideration, and the appellee's estate has been at all times liable for the payment of said sum. Even if the policy had contained a provision for forfeiture and the recital in the note therefore been effective it would still have been competent for

appellant to retain and collect the note. *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84, 25 N. E. 126, 9 L. R. A. 317, 21 Am. St. Rep. 203. Where the policy contains no provision for a forfeiture, and the note in itself is not effective to that end, mere nonpayment does not supply such provision of the policy.

I have thus stated a few of the numerous reasons why there should be a rehearing granted in this case.

(36 Ind. App. 539)

RITCHEY v. McKAY et al. (No. 5,426.)
(Appellate Court of Indiana. Nov. 17, 1905.)

On rehearing. Denied.

For former opinion, see 75 N. E. 161.

PER CURIAM. Upon consideration of the petition of appellees for a rehearing and their application for a modification of the mandate, it is concluded by the court that the petition for rehearing be overruled, and that the mandate be, and it hereby is, modified so as to read as follows: "The judgment is reversed, and the cause remanded, with instructions to sustain the motion of the appellant for a new trial."

(189 Mass. 431)

J. G. BRILL CO. v. NORTON & T. ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 27, 1905.)

1. CORPORATIONS—ACCOMMODATION INDORSEMENT—ULTRA VIRES.

A corporation was not liable on an accommodation indorsement in the hands of one taking with notice, though such an indorsement was authorized by the directors and a majority of the stockholders.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, § 1831.]

2. SAME—ACCOMMODATION INDORSEMENT—NOTICE.

Where plaintiff accepted certain notes bearing the indorsement of defendant corporation, made payable to the order of and indorsed by the maker, for a debt due to plaintiff from the maker, the indorsement by the corporation was prima facie an accommodation indorsement, of which plaintiff was charged with notice.

3. SAME—RENEWAL CONSIDERATION.

Where, in an action on certain notes against a corporation indorser, it was not shown that renewal notes for which the notes sued on were given were in fact given to secure the cancellation of the prior notes without regard to their validity, the cancellation of such prior notes did not constitute a sufficient consideration for the defendant's indorsement.

Exceptions from Superior Court, Bristol County; Lemuel Le B. Holmes, Judge.

Action by the J. G. Brill Company against the Norton & Taunton Street Railway Company. A judgment was rendered in favor of defendant, and plaintiff brings exceptions. Exceptions overruled.

Warren & Garfield and Irvin McDowell Garfield, for plaintiff. Hall & Hagerty, for defendant.

LORING, J. This is an action on two promissory notes, indorsed in the name of the defendant corporation by Charles E. Bibber, treasurer. The defendant corporation is a consolidated corporation made up of four constituent corporations, one of which was the Mansfield & Easton Street Railway Company. The consolidation was authorized by the railroad commissioners, under Rev. Laws, c. 112, by an order dated July 20, 1899. Deeds from each of the four constituent companies to the consolidated company were dated and apparently were delivered on August 1, 1899. Each of these deeds contained this clause: "In consideration of the foregoing conveyances, as well as by force of the statute above referred to [namely, Acts 1897, p. 241, c. 269], the grantee hereby assumes and agrees to pay and discharge all the funded and unfunded debts and obligations of, and all lawful claims and demands now outstanding or hereafter at any time arising against the grantor." An organization meeting of the consolidated company was held on August 1, 1899, and adjourned to August 15, 1899, and it was on the latter day, as we understand the bill of exceptions, that by-laws were adopted providing that the treasurer should issue no notes until they had been approved on the face of the same by at least two of the executive committee, and that notes otherwise issued should be void.

The notes sued on did not comply with that provision. One of them, for \$2,000, was issued on August 14, 1899, the day before that by-law was adopted. The other, for \$3,000, on September 16, 1899, a month after it was adopted. Each was made by the Bibber-White Company, payable to the order of "ourselves," and indorsed first by the Bibber-White Company and second by the defendant Charles E. Bibber, treasurer. It appeared that the Bibber-White Company were street railway contractors, who had a contract for building the Mansfield & Easton Street Railway Company and the railways of the three other companies, which by consolidation became the defendant corporation, and that four cars were sold to the Bibber-White Company by the plaintiff corporation, which received therefor two notes of that company, each for \$3,750, made by the Bibber-White Company, payable to the order of "ourselves" and indorsed, first, by the Bibber-White Company, and, second, by the Mansfield & Easton Street Railway Company, by E. D. Hewins, treasurer. These original notes were given in the winter of 1898-99, and were renewed from time to time by similar notes. The last of these renewal notes for which the \$2,000 note here sued on was given was for \$2,200, dated June 15, 1899, payable in two months; \$200 being paid at its maturity. The last of the renewal notes for which the \$3,000 note here sued on was given was for \$3,000, dated July 20, 1899, and payable in two months. The difference between \$3,750, for which the original notes were given, and the sums of \$2,200 and \$3,000 had been paid

by the Bibber-White Company at the maturity of the original notes for \$3,750 each, or of renewals thereof.

Charles E. Bibber, who indorsed the notes sued on in the name of the defendant corporation, was the president of the Bibber-White Company and general manager of the Mansfield & Easton Street Railway Company. The plaintiff's treasurer testified that he sold the four cars to the Bibber-White Company and forwarded them on their order, two to one company and the other two to another company. He also testified that the plaintiff got "their note indorsed by two companies which were specifically called for in the contract," and that his company sold the cars to the Bibber-White Company, "understanding that" Charles E. Bibber "was an official of the railway company."

At a meeting of the stockholders of the Mansfield & Easton Street Railway Company held on March 12, 1898, it was voted "that a committee of three be elected, to consist of Franklin Mead, Douglas A. Brooks, and George H. Swasey, with full powers to contract for the financing and construction of the road, together with the necessary power and equipment." There was evidence that the members of this committee knew of the indorsement by the treasurer of the Mansfield & Easton Street Railway Company. This vote was ratified by the directors on March 18, 1898. There were seven directors of the Mansfield & Easton Street Railway Company, and there was evidence that four of the seven knew of these indorsements. There was no vote of the directors authorizing them. There was evidence that of the four cars paid for by the two notes for \$3,750 each two were originally delivered on the order of the Bibber-White Company by the plaintiff to the Mansfield & Easton Company, and subsequently were moved over to the tracks of another of the four constituent companies, and that the other two never came to the Mansfield & Easton Company.

The plaintiff requested the following rulings:

"(1) That upon all the evidence the plaintiff is entitled to recover upon the two notes in suit, together with interest and costs. (2) That the indorsements upon the notes in suit, being given in consideration of the cancellation of prior notes indorsed by a street railway company, the obligations of which the defendant has assumed, were given for a valuable consideration, and the indorsements are not accommodation indorsements. (3) That, as the Mansfield & Easton Street Railway Company received the cars for which notes bearing its indorsement were given, said indorsements of the Mansfield & Easton Street Railway Company upon said notes were not accommodation indorsements, but were indorsements for a valuable consideration. (4) That the treasurer of the Mansfield & Easton Street Railway Company had authority to indorse the notes of which the

notes in suit are renewals. (5) That the treasurer of the Norton & Taunton Street Railway Company had authority to indorse the notes in suit. (6) That the acts of the treasurer of the Mansfield & Easton Street Railway Company in continuing to give the indorsements of said company upon notes, of which the notes in suit are renewals, was such that the directors of said company could have known of said indorsements, and that the failure of the directors to object thereto amounted to a ratification of the giving of said indorsements upon the part of said directors. (7) That the treasurer of the Norton & Taunton Street Railway Company had implied authority to indorse the notes in suit. (8) That the treasurer of the Mansfield & Easton Street Railway Company had implied authority to indorse the notes of which the notes in suit are renewals. (9) That the treasurer of an electric street railway company in the process of construction has implied authority to indorse notes given for the purchase of cars adapted for street railway purposes and actually used by said street railway company. (10) That in selling the cars, for which the notes indorsed by the Mansfield & Easton Street Railway Company were given, the plaintiff relied upon the credit of the Mansfield & Easton Street Railway Company, in part at least. (11) That the Norton & Taunton Street Railway Company was a corporation organized on or about August 1, 1899, by the consolidation of the Mansfield & Norton, Mansfield & Easton, Norton & Attleborough, and Norton & Taunton Street Railway Companies, and that the treasurer of said Norton Street Railway Company, so organized, had implied authority to indorse notes given in renewal of notes indorsed by any one of said four roads from the consolidation of which it was formed."

These requests were refused, and Mr. Justice Holmes, before whom the case was tried without a jury, ruled for the defendant, filing with his finding the following:

"In view of the evidence that the terms and conditions under which these cars were originally supplied by the plaintiff to the maker of the notes were the subject of a written agreement entered into by Brill Company, the Bibber-White Company, and the Mansfield & Easton Company (see answer to twelfth interrogatory, deposition of O. E. Bibber), and that such agreement was not put in evidence or notified to be produced, I do not think there is any evidence that the plaintiff was entitled to an indorsement by the Mansfield & Easton Company of the notes of Bibber-White Company for cars sold to the latter. Without this evidence, all that appears is that Charles E. Bibber, acting for the Bibber-White Company, arranged to purchase for that company certain cars for the purpose of selling them to certain of the four street railway companies; that before or after the plaintiff supplied the cars—and it did not appear whether it was before or after—Bib-

ber, with the knowledge and assent of Mead, Brooks, and Swasey, got Hewins to indorse, as treasurer, the Mansfield & Easton's name to the notes which were not payable to the Brill Company, but to the order of the Bibber-White Company; that the four cars which the Bibber-White Company had purchased of Brill were at first run on to the tracks of the Mansfield & Easton Company, and were after transferred to the tracks of the other companies; and upon the evidence, in view of the close connections existing between these four companies and the relation of Charles E. Bibber to them all while he was also the representative of the Bibber-White Company, I cannot find that the four cars were specially assigned to the Mansfield Company as its property. While the executive committee of Mead, Brooks, and Swasey were by the stockholders of the Mansfield & Easton Company on March 12, 1898, given 'full powers to contract for the financing and construction of the road, together with the necessary power and equipment,' it does not appear that the treasurer had authority to indorse notes—the by-laws, while they undertake quite fully to enumerate his powers, do not give him the power either to sign or indorse notes—and, further, it does not appear that the committee did anything prior to May 18, 1898. The action of the directors in ratifying or confirming the vote of the stockholders of March 12th added nothing to the powers of the committee, and does not purport to confirm any acts already done, if any there were, of the committee. The by-laws gave the directors power to elect a finance or executive committee, but the committee so elected had no power to make contracts, only to carry out those that might be made by the directors on March 18, 1898, because the stockholders by an express vote authorized the giving of corporation notes not to exceed \$100,000. Assuming that this power to give notes authorized the indorsement of the notes of third persons not payable to the corporation, still the power was not in the treasurer alone, but was to be executed both by the treasurer and president and for the purpose of borrowing money. The corporation had thus expressly provided for paying for its equipment and had limited the amount to be expended, and there does not seem to have been any necessity to commit the corporation to any such obligation or the indorsement of Bibber-White Company's notes, payable to the order of that company. In view of this, I do not think the treasurer of the Mansfield & Easton Company had any implied power to indorse. It is not necessary, perhaps, to decide whether the indorsement, if authorized, would have been an accommodation indorsement, though it would seem, if the Mansfield & Easton Company were to get no cars by it, its only purpose would be to help the credit of Bibber-White Company with the Brill Company, plaintiff. If it be assumed that a street railway corporation is subject to the same law as trading corpora-

tions (*Monument Bank v. Globe Works*, 101 Mass. 57, 3 Am. Rep. 322), still there must have been authority from the directors to make the indorsement, and the directors of the Mansfield & Easton Company never authorized it. The whole transaction was that of a committee. The directors did not act. Nor do I find that there was any holding out by the repeated transactions of the treasurer in indorsing sufficient evidence to imply any consent on the part of the directors. No funds of the corporation were paid out in the notes. It is true that the four of the seven directors, viz., Brooks, Mead, Swasey, and Bibber, knew what was going on, but, as already stated, it was the committee who undertook to act, not the directors. I am therefore of opinion and rule that the indorsement did not bind the Mansfield & Easton Company, and was not an obligation of that corporation at the time of consolidation. But, if this were not so, the treasurer of the Norton & Taunton Company, the defendant, had no authority to indorse notes given in renewal of any obligation of the Mansfield & Easton Company. The by-laws of the defendant expressly prohibited it. Notes of the defendant could only be issued on the authority of both the president and treasurer. Both must sign. If the power to indorse notes of third persons was included in this power, still the president never signed this indorsement and the directors never authorized it, nor was there as to the defendant corporation any repeated transactions. The notes in suit were the only ones. There were no renewals.

"Upon the whole evidence I am of opinion, and so rule, that the plaintiff is not entitled to recover, and I refuse all the rulings requested by the plaintiff, that are attached to this memorandum, and find for defendant."

The plaintiff duly excepted.

It is settled by *Usher v. Raymond Skate Co.*, 163 Mass. 1, 39 N. E. 418, and the cases there cited, that a corporation is not liable on an accommodation indorsement in the hands of one who takes with knowledge of that fact. Such an indorsement is *ultra vires*. That means that the corporation would not be liable on it, even if it had been authorized by all the directors and the majority of the stockholders. Nevertheless, when a person takes a negotiable note before maturity signed by a corporation in due course of business from one who apparently has received it for a debt due from the corporation, the defense that it is, in fact, an accommodation note cannot be set up. Such were the cases relied on by the plaintiff in his argument here. *Monument Bank v. Globe Works*, 101 Mass. 75, 3 Am. Rep. 322; *Merchants' Bank v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083, 38 Am. St. Rep. 453. The same is true of *Craft v. South Boston Railroad*, 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641, which the plaintiff seeks to distinguish. There the note was made by the corporation and was made

payable to the plaintiff. But a payee may be a bona fide purchaser in due course of a note payable to himself. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 428. If the note sued on in such a case is signed by the treasurer, and there being no evidence of actual authority, the implied authority of a treasurer to sign notes has to be considered. But in the case at bar, by the terms of the note and the fact that it is taken by the plaintiff for a debt due, not from one to whom it appears to have been negotiated, but from one for whose accommodation it appears to have been indorsed, no such question arises. For it is settled that where a note is taken from the payee, in payment of a debt due from him, indorsed by a third person, the indorsement is *prima facie* an accommodation indorsement, and the person who takes it is chargeable with knowledge that the indorsement is an accommodation indorsement. *National Bank of the Commonwealth v. Law*, 127 Mass. 72. See, also, *Harrington v. Baker*, 173 Mass. 488, 53 N. E. 903. In the case at bar the plaintiff having taken the original notes for \$3,750 each from the Bibber-White Company for a debt due from that company, the indorsement of the Mansfield & Easton Street Railway Company, in the absence of evidence to the contrary, was an accommodation indorsement, and the plaintiff was chargeable with knowledge of that fact. The plaintiff left the case there and did not show, as was shown in *Beacon Trust Co. v. Souther*, 188 Mass. 413, 67 N. E. 845, that as between the Bibber-White Company and the Mansfield & Easton Railway Company those notes were in fact the obligations of the railway company given for a debt due from it.

The plaintiff has argued that the cancellation of the prior notes is a good consideration, even if the indorsements of the Mansfield & Easton Company were void. Assuming, without deciding, that this might be so, if it were shown that the renewal notes were in fact given to secure the cancellation of the prior notes without regard to their validity, the answer here is that no such case was in fact made out, or attempted to be made out, at the trial. For these reasons, none of the rulings requested should have been given.

As there was no evidence on which a finding could be made in favor of the plaintiff, it is not necessary to go further.

Exceptions overruled.

(189 Mass. 529)

CHAMBERS v. WAMPANOAG MILLS.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 29, 1905.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—ACTIONS—EVIDENCE OF NEGLIGENCE—SUFFICIENCY.

In an action for injuries to a servant, evidence held sufficient to show, in support of the issue of defendant's negligence, that the guard

rail of a loom which plaintiff was operating was too long.

2. SAME—DUTY OF MASTER TO INSPECT.

Failure of a master to promulgate a system of inspection in its mills is evidence of negligence, in case of injury to a servant through want of inspection.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 235-242.]

3. SAME—ASSUMPTION OF RISK—QUESTION FOR JURY.

Whether a weaver employed to run looms, who was injured by being struck in the eye by a shuttle which flew upwards from one of the looms, assumed the risk, which was not an obvious one, *held*, under the evidence, a question for the jury.

4. SAME—NEGLIGENCE OF MASTER.

A servant does not assume the risk of negligence on the part of the master in the furnishing of instrumentalities for doing the work.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 547, 552.]

5. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a weaver employed to run looms, who was injured by being struck in the eye by a shuttle which flew upwards from one of the looms, was guilty of contributory negligence in not knowing of a defect in the shuttle guard, *held*, under the evidence, a question for the jury.

Exceptions from Superior Court, Bristol County; Wm. Schofield, Judge.

Tort for personal injuries by Charles C. Chambers against the Wampanoag Mills. In the superior court there was a verdict for plaintiff, and defendant excepted. Exceptions overruled.

Elisha Greenhood, for plaintiff. Richd. P. Borden and Robt. C. Davis, for defendant.

LATHROP, J. This is an action of tort for injuries sustained by the plaintiff while in the employ of the defendant. At the trial in the superior court the jury returned a verdict for the plaintiff; and the case is before us on the defendant's exception to the refusal of the presiding judge to rule that there was no evidence which would warrant a finding for the plaintiff.

The plaintiff was employed to run eight looms, four in a row on each side of a narrow alley. While at work at the fourth loom in one row, he was struck in the eye by a shuttle with the usual pointed metallic end, which flew upwards between the hand rail and the shuttle guard of his second loom; the shuttle guard being so swollen or "bellied out" from the face of the hand rail, or "reed cap," as the front of the lathe sword is called, that the guard failed to fulfill its sole function of preventing a shuttle from leaving its proper course, flying upwards, and striking the operative. Both the plaintiff and the defendant knew that, from one cause or another, a shuttle sometimes leaves, or attempts to leave, a loom in operation, and that the function of the guard, which is placed on all looms, is as above stated. The guard consists of a piece of metal, about one quarter of an inch in diameter and of the length of the path of the shuttle between the two

shuttle boxes, which length is practically the width of the body of the loom. The guard is parallel with the hand rail, and, when of proper length and construction and in proper position and adjustment, is for most of its length nearly the width of a shuttle distant from the hand rail; but toward each end it turns at right angles to the hand rail, then runs closer to and parallel with the hand rail toward the ends of the loom, and at each end a loop is formed to receive a bolt which runs through the hand rail and is tightly fastened by a nut. Often there is a leather strap around a guard at its centre screwed to the hand rail. The guard should be directly over the outer portion of the path of the shuttle as it flies along the race board from one side or shuttle box of the loom to the other.

The plaintiff contends that at some time prior to the accident the old guard became broken, and, the plaintiff having called the attention of the loom fixer of his section to the fact, the loom fixer put a new shuttle guard on the loom, from which the shuttle flew which caused the accident, and that such new guard was too long, and for that reason "bellied out." On direct examination the plaintiff testified that he was 28 years old; that he learned to weave when 14 years old, then worked as a weaver about a year, and subsequently about 10 months before the accident, resumed the occupation on the eight looms above mentioned. At the request of his counsel, using a model, he explained the names and functions of some of the parts at the front of a loom, illustrating its forward and backward movements and the way in which a shuttle ordinarily travels. He also testified that the average speed of a loom was about 180 or 190 picks a minute, a pick corresponding to a single movement of the shuttle across the loom, the shuttle being struck by one picker, and then being struck by the other, returning; that there never is occasion for taking off a shuttle guard unless it is broken or improperly put on; that it is a permanent part of the machine, a part with which he, as a weaver, had nothing to do; that it was not part of his work to put it on, or to assist in putting it on, or to examine it in any way; that a man called a loom fixer has charge of a section of looms, and it is the fixer's business to keep the looms in his section in repair; that when a fixer goes to a loom to fix anything, the weaver is supposed to run his other looms, giving no assistance or directions, and it was not a part of his work to examine anything the fixer has done when the fixer has finished—"I wouldn't know anything about it anyway"; that there were about 600 looms in the room in which he worked, being three sections and a part of another; that the shuttle guard and the lathe go back and forth all the time except when the loom is stopped; that each loom stops about every three minutes throughout the day because the fill-

ing runs out, that is, the shuttle becomes empty of yarn, and it is the work of the weaver to fill and replace the shuttle as soon as possible, "which takes only a couple of seconds, unless there is a thread out to draw in," during which operations the weaver's mind is upon getting the loom started as soon as possible; that he had to walk backwards and forwards from one loom to another, starting them up and keeping the shuttle filled and the looms running all the time. The plaintiff further testified that it is no part of a weaver's work, when the loom stops at these intervals, to examine any of its parts; that about three or four weeks, perhaps two, before his injury, the old shuttle guard broke right on the end where the bend is; "I think it was broke right where it had been struck a time or two with the shuttle or something like that"; that he called the fixer in charge of that section, whose duty it was "to receive reports of the breaking of things, including the shuttle guard, and to remedy or replace the broken part," and called his attention to the broken guard; that the fixer then put on a new guard; that while this was being done, he (the plaintiff) kept his other looms going, and did not superintend nor have charge of the fixer while he was putting on the guard, and did not examine his work after he had finished; that after the accident he did not examine the guard and knew nothing about the condition of the guard, except what may have been since told him by others; that he had not examined the guard before the accident, and had been given no knowledge, information, or caution that there was anything wrong about it; that guards "are about as high as his waist," and are of different lengths for different breadths of looms; that with the guard on rightly the shuttle cannot fly up. The plaintiff's work at the loom consisted of tying broken threads, changing the filling, by which is meant putting a new cop on the shuttle, and keeping the loom running. When anything happened to a loom the plaintiff called the loom fixer to attend to it, and worked on his other looms while the loom fixer was at work.

One McFarlane, a witness for the plaintiff, corroborated the testimony given by the plaintiff, and further testified that the proper distance between the hand rail and the shuttle guard is about an inch and a half or an inch and three quarters, about a quarter of an inch narrower than a new shuttle. "When a shuttle guard breaks and a necessity for a new one thus arises, it is the duty of the loom fixer to go to the machine shop and get a new one of the same kind and bolt it through the old holes in the hand rail, seeing that it comes square and that it is of the right length. If he selected or was given one longer than the old one, if he simply put it on through the old holes and did nothing else to it, it would spring in the centre, what loom fixers call 'bellying.' It would belly

out. While the fixer is putting on a new guard, the weaver goes along working on his other looms, not assisting the fixer in any way. When through, the fixer starts the loom and goes away." He further testified that after the accident he went to the loom in question; that he "noticed the guard being opened out and space enough for the shuttle to come through it"; and that "it is the business of the loom fixer to know if a guard is of the right length." This witness, who had been a loom fixer for 18 years, also testified that if the guard rail was too long it would belly out, and that he saw none belly out, "unless they were too long"; that the guard rail was a permanent part of the machine, and that it was not taken out except when it was broken; and that it was no part of the weaver's work to examine the shuttle guard. Ford, who was the loom fixer of the defendant in the section where the plaintiff worked at the time of the accident, was called by the plaintiff, and in some respects corroborated the testimony of McFarlane; in other respects, as the defendant contends, he gave evidence more favorable for the defendant. It is unnecessary to repeat it here.

The defendant contends that there was no evidence of the defendant's negligence, that the plaintiff assumed the risk, and that the plaintiff was not in the exercise of due care. We are of opinion that, upon the evidence, the judge properly refused to take the case from the jury; and that it could not have been ruled, as matter of law, that there was no evidence which could have warranted a verdict for the plaintiff. On the question of the defendant's negligence, the only contention of its counsel is that there was no evidence that the guard rail was too long, and it is suggested that the bend in the guard rail might have been caused by the plaintiff's taking hold of the hand rail to pull the loom forward, or the guard might have been bent by being struck by a shuttle shortly before the accident. It cannot be said that there was no evidence that the guard rail was too long, when a loom fixer of 18 years' experience testified as we have above stated. As to the suggestion that the accident might have been caused by the plaintiff's taking hold of the hand rail to pull the loom forward, there is no evidence that he did so, and the testimony of the plaintiff is to the contrary. As to the other suggestion, the answer is that this, if true, would show that the guard rail had become bent by shuttles striking it, which might have been discovered on proper inspection by the defendant or the officers to whom it had intrusted the duty of inspection. So far as the evidence discloses, there was no system of inspection in the mills of the defendant, and this would be evidence of negligence, if for want of inspection an employé was injured. *Toy v. United States Cartridge Co.*, 159 Mass. 313, 84 N. E. 461.

The next contention of the defendant is that the plaintiff assumed the risk; but we are of opinion that, on the evidence, the question was for the jury. The risk was not an obvious one. The rule of law as to assumption of the risk does not apply where there is negligence on the part of the master in furnishing suitable instrumentalities for doing the work. *Boucher v. Robeson Mills*, 182 Mass. 500, 85 N. E. 819, and cases cited.

The last contention of the defendant is that the plaintiff was not in the exercise of due care. We are of opinion that this question was for the jury. The plaintiff testified that he did not know that there was anything wrong about the shuttle guard. This is not a case where it can be said that the plaintiff, in the exercise of reasonable care, must have known of the defect in the guard. It was undisputed that he had charge of eight looms, each loom making 180 or 190 picks a minute; that the shuttle in each loom had to be taken out and supplied with a new cop once in three minutes; and that other details, such as the breaking of threads, also required his care. All these facts show that the plaintiff's time was occupied in various matters, and it could not be ruled as matter of law that the plaintiff was not in the exercise of due care.

Exceptions overruled.

(188 N. Y. 55)

BALDWIN et al. v. RICE et al.

(Court of Appeals of New York. Nov. 21, 1905.)

1. EXECUTORS AND ADMINISTRATORS—ANCILLARY ADMINISTRATION—PETITION.

Under Code Civ. Proc. § 2695, providing that, where a will of personal property made by a nonresident has been admitted to probate in a foreign country or state, the Surrogate's Court must, upon an application, accompanied by a copy of the will and of the foreign letters, record the will and foreign letters and issue ancillary letters, a petition for ancillary letters of administration must be accompanied by a copy of the will and a copy of the foreign letters, if any were issued, in order to confer jurisdiction on the surrogate to issue ancillary letters.

2. SAME.

Under Code Civ. Proc. § 2697, providing that, where an executor has received letters testamentary in a foreign jurisdiction, ancillary letters must be issued to him on his application, unless another person applying therefor shall file with his petition an instrument, executed by the foreign executor, authorizing the petitioner to receive such ancillary letters, the surrogate has no jurisdiction to issue to another letters ancillary to letters testamentary issued to the executor in a foreign state, unless the petitioner for such ancillary letters files with his petition an instrument, executed by the executor, authorizing him to receive them.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Adele Baldwin and others, as administrators of the estate of Elizabeth B. Rice, deceased, against William M. Rice, Jr., and others, as executors of William M. Rice, deceased. From a judgment of the Appellate

Division (100 App. Div. 241, 91 N. Y. Supp. 1086), modifying and affirming a judgment in favor of defendants (89 N. Y. Supp. 788), plaintiffs appeal, and from the modification of the judgment defendants appeal. Affirmed.

Cross-appeals from a judgment of the Appellate Division of the Supreme Court in the First judicial department, entered February 8, 1905, modifying, and affirming as modified, a judgment in favor of defendants, entered upon a dismissal of the complaint by the court on trial at Special Term by striking therefrom the words "on the merits." The defendants appeal from the modification, and to this extent only there are cross-appeals. This action was brought by the plaintiffs, claiming, by appointment of the surrogate of the county of New York, to be administrators with the will annexed of Elizabeth B. Rice, against the executors of her deceased husband. The plaintiffs claim that at the time of the marriage of Mr. and Mrs. Rice they were residents of Texas; that by virtue of the "community law" of that state, which, according to the plaintiffs' construction, undertook in effect to constitute the husband and wife partners with respect to property acquired by either during marriage; that by her will the wife bequeathed, among others, certain legacies aggregating \$235,000; that the husband, who survived the wife, had, at the time of her death and at the time of his death, community property of the value of \$6,000,000 and upwards, which was then in the custody of the Surrogate's Court of New York county pending the settlement and distribution of the estate; and that all legatees of the wife, except those claiming the legacies of \$235,000 had settled their claims against the husband's estate. The complaint prays judgment for the said sum of \$235,000 with interest.

The material facts are as follows: Mr. and Mrs. Rice were married at Houston, in the state of Texas, in June, 1867. Mrs. Rice died in Wisconsin in July, 1896. Mr. Rice died in the city of New York September 23, 1900. Mrs. Rice left a last will and testament, in which she made bequests aggregating about \$1,945,000. She named Oran T. Holt, of Houston, Tex., as her executor. This will was admitted to probate in Texas in March, 1897, and letters testamentary issued to the executor named therein. Oran T. Holt, as executor, began a suit against William M. Rice, the husband, in which he sought to recover the wife's share of the community property. William M. Rice began suit against Holt, as executor of Elizabeth B. Rice, in which he sought to have it adjudged that the claims of Holt as such executor to a community interest in the property constituted a cloud upon his title and were wholly without foundation and void. Each of these suits was pending and undetermined at the time William M. Rice died in the city of New York on September 23, 1900. Testimony had been taken in both of these suits.

but neither had been tried at the time of Rice's death. William M. Rice left a last will and testament, which, after prolonged litigation, was admitted to probate, and the defendants received letters testamentary thereunder in the Surrogate's Court of the county of New York. Horace B. Rice received permanent letters of administration from the county court of Harris county, Tex., as administrator of William M. Rice in the state of Texas. In February, 1902, Holt, as executor of Elizabeth B. Rice, and Horace B. Rice, as the Texas executor of William M. Rice, entered into an agreement of settlement and compromise. The details of this agreement are not important on this appeal, except to say that all the persons in interest were settled with, save the seven legatees whom the plaintiffs claim to represent.

John Brooks Leavitt, Jared F. Harrison, and Arthur B. Turnure, for appellants, John Byrnes and Charles A. Boston, for respondents.

BARTLETT, J. (after stating the facts). After proceedings in the Surrogate's Court of the county of New York, the validity and effect of which are involved in this action, letters of administration with the will annexed were issued to the present plaintiffs by the Surrogate's Court of New York county on January 30, 1903. This action was begun February 3, 1903. Thereafter, and pursuant to the provisions of the compromise agreement, in the case of *Rice v. Holt* in the Circuit Court of the United States for the Southern District of Texas, hereinbefore referred to, proceeded to judgment adverse to Holt. The defendants interposed two separate defenses, to wit, that the Surrogate's Court of New York county had no jurisdiction to issue the letters of administration under which the plaintiffs claim to act; that the decree in the action of *Rice v. Holt* in the Circuit Court of the United States for the Southern District of Texas is a bar to this action. The case was tried before Mr. Justice Scott at Special Term. After the record of plaintiffs' appointment and the record of the Texas judgment in *Rice v. Holt* had been admitted in evidence, the court interrupted the progress of the trial, suspended the taking of further evidence, and expressed a desire to hear argument on the two questions raised by the defendants. Arguments and briefs were submitted, and after due consideration the court decided that the plaintiffs were without legal capacity to sue, and that the said Texas decree in *Rice v. Holt* was an "impregnable bar" to this action. The complaint was thereupon dismissed on the merits. On appeal, the Appellate Division handed down a memorandum as follows: "The judgment should be affirmed on so much of the opinion of the court below as holds that the plaintiffs have no standing in court to maintain this action, but the judgment should not have been on the merits. Judgment modified, by striking

out 'on the merits,' and, as so modified, affirmed, with costs."

We agree with the learned Appellate Division that the plaintiffs have no standing in court, no legal capacity to sue, and therefore it is unnecessary to pass upon the question whether the decree in the Texas suit is a bar. The question whether the plaintiffs, standing on the letters of administration issued to them by the Surrogate's Court of New York county, can maintain this action, was argued before us with great elaboration and detail, both orally and in the printed briefs. This question, as we view it, is a very simple one, and readily disposed of under the plain provisions of the Code of Civil Procedure applicable to Surrogates' Courts. The Code of Civil Procedure provides for admitting domestic and foreign wills to probate in chapter 18, tit. 3, art. 1, embracing from sections 2611 to 2646, both inclusive, and the form of procedure is essentially the same in both cases. Section 2611 provides in part as follows: "A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property, executed by a person not a resident of the state, according to the laws of the testator's residence, may be proved as prescribed in this article." Chapter 18, tit. 3, art. 7, embracing from section 2694 to section 2704, both inclusive, provides for the issuing of ancillary letters testamentary or of administration where a will has been admitted to probate in a foreign jurisdiction. An examination of the procedure in this latter proceeding renders it very clear that the letters of administration under which the plaintiffs claim to act are ancillary letters, although not so denominated therein, and the question presented for determination is whether the statutory steps essential to obtaining the issuing of such letters have been taken:

The first defect in the proceedings pointed out by the counsel for the defense is a failure to observe one of the provisions of section 2695, which section reads as follows: "Where a will of personal property made by a person who resided without the state at the time of the execution thereof, or at the time of his death, has been admitted to probate within the foreign country, or within the state, or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the Surrogate's Court, having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in this article, record the will and the foreign letters, and issue thereupon an-

cillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires." It will be observed that this section provides that the application must be accompanied by a copy of the will and of the foreign letters. The petition was not accompanied by a copy of these letters.

The next and more serious defect in plaintiffs' proceedings, and the one relied upon by the courts below, is a failure to observe one of the provisions of section 2697, which provides to whom ancillary letters shall be granted. In brief and without reciting this entire section, it provides that where the executor named in the will has received letters testamentary in a foreign jurisdiction, letters ancillary must be issued to him here on his application, unless another person applying therefor shall file "with his petition, an instrument, executed by the foreign executor or administrator, or person otherwise entitled as aforesaid; * * * and also acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, authorizing the petitioner to receive such ancillary letters; in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him." The plaintiffs failed to produce this instrument of consent executed by the Texas executor in the manner above provided. It is not claimed by the plaintiffs that any such instrument formed a part of their application papers in the proceedings resulting in the issuing of their letters, and it follows that their appointment by the Surrogate's Court as administrators with the will annexed is absolutely void. It is a statutory condition precedent that, before any third party can procure ancillary letters of administration on the will of Mrs. Rice probated in Texas, the executor in that state should indicate in the manner specified his willingness to have ancillary letters issued to another. If the foreign executor refuses to execute this instrument, and also declines or neglects to apply to the Surrogate's Court of New York county for ancillary letters in order to protect the estate in this jurisdiction, then other proceedings can be taken in the premises.

The object of this statutory provision is very clear. It is fair to assume in the first instance that the testatrix selected a thoroughly competent person, satisfactory to her, to carry out the provisions of the will, and that the Texas probate court on formal application for letters testamentary found him a proper person. It would be unseemly if the Surrogate's Court of New York county should proceed to appoint an administrator to carry out the provisions of the will of the testatrix other than a person she had selected, unless he renounced his privilege, or negligently refused or failed to act in the premises. The learned counsel for the plaintiffs seeks to avoid the difficulty in which his clients find themselves by suggestions that are certainly ingenious, but have no legal founda-

tion, in view of the clear statutory scheme of the Code of Civil Procedure, to which we have briefly alluded. The proceedings to probate a will and those to obtain ancillary letters testamentary or of administration are, as we have said, entirely distinct, and an examination of the papers on which plaintiffs' letters were issued shows that the sole object of the proceedings was to obtain an order from the Surrogate's Court of the county of New York that a copy of the will of Elizabeth B. Rice, together with the proofs of the decree adjudging probate thereof in Texas, be recorded in the Surrogate's Court of New York county, and that the proper steps be taken to obtain ancillary letters of administration with the will annexed.

The judgment of the Appellate Division, modifying the judgment of the Special Term, and affirming the same as so modified, should be affirmed, with costs to the defendants.

CULLEN, C. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment affirmed.

(188 N. Y. 78)

KUELLING v. RODERICK LEAN MFG. CO.

(Court of Appeals of New York. Nov. 21, 1905.)

1. FRAUD—SALE OF DEFECTIVE MACHINERY—CONCEALMENT OF DEFECTS—LIABILITY FOR INJURIES CAUSED THEREBY.

A vender of a machine, which he knows to be dangerous because of concealed defects, is liable in damages to any person, including one not in privity of contract with him, who is injured by reason of such fraudulent concealment.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 15.]

2. SAME.

Neither a manufacturer of a machine nor one to whom he has sold it can sell the machine as sound and safe, knowing any fact as to a concealed defect therein, intending it to be used by any one into whose hands it might come, when the consequence of such defect would naturally be an injury to the person so using it.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Fraud, § 15.]

3. SAME.

A manufacturer of a land roller, constructed the tongue of cross-grained wood, with a knot in it and a knothole, and plugged up the hole and by means of paint and putty concealed the defects. Held, that he was liable in an action for damages for injuries sustained in consequence of such defects by a person purchasing the machine from one who had purchased it from the manufacturer, in an action for fraud and deceit.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Rinehart Kuelling against the Roderick Lean Manufacturing Company. From a judgment of the Appellate Division (88 N. Y. Supp. 1105, 94 App. Div. 613), overruling plaintiff's exceptions and denying a

new trial, and directing judgment for defendant on a nonsuit, plaintiff appeals. Reversed.

Charles Van Voorhis, for appellant. Cogswell Bentley and S. D. Bentley, for respondent.

BARTLETT, J. This action has been twice tried. The first trial resulted in a verdict for the plaintiff in the sum of \$3,040. The judgment entered on this verdict was reversed and a new trial ordered. The second trial resulted in a nonsuit, the trial judge ordering the plaintiff's exceptions to be heard in the first instance by the Appellate Division. The latter court overruled the exceptions, denied motion for a new trial and ordered judgment for the defendant upon the nonsuit. The Appellate Division wrote no opinion, but rested its decision on the opinion of McLennan, P. J., handed down on the first appeal. 88 App. Div. 309, 84 N. Y. Supp. 622.

The plaintiff is a farmer, residing in East Penfield, Monroe county, in this state. The defendant is a foreign corporation, organized under the laws of the state of Ohio and engaged in the manufacture and sale of farming implements; its manufactory being located at Mansfield, in that state. A few weeks prior to April, 1902, the defendant sold to the firm of Weaver, Palmer & Richmond, who were engaged in the business of selling agricultural implements in the city of Rochester, a certain road roller, with a tongue to which was attached a team of horses when in use. A few days after this sale the purchasers sold the roller to the firm of Fuller & Barnhart, dealers in agricultural implements at Fairport, Monroe county, in this state. In April, 1902, the plaintiff purchased the road roller of the firm of Fuller & Barnhart, used it a short time in the spring on his farm, stored it in a covered shed until about the 1st day of the following September, when he had occasion to use it again in the conduct of his ordinary farm work, and while so engaged, with two horses attached thereto, the tongue broke, precipitating him from a seat which was attached to the rear end of the tongue immediately over the roller, causing the horses to run away. Plaintiff clung to the reins for a short distance, was compelled to release his hold, and the roller, weighing some 700 pounds, passed over him, inflicting severe injuries.

This action was brought by the plaintiff against the defendant as the manufacturer of this roller, and is based upon the allegation that in constructing it the defendant "intentionally, willfully, maliciously, negligently, and fraudulently" put into it a tongue made of cross-grained black or red oak, which was unfit for that purpose; that the tongue had a knot in it, and in addition a large knothole, just in front of the point at which the evener and whiffletrees were at-

tached; that the defendant concealed this knothole with a plug of soft wood nailed in, and then the knot, the plug, the hole, the cross-grain of the wood, and the kind of wood used were covered up and concealed by the defendant with putty and paint so that the defects could not be seen by inspection; that the tongue was placed in the roller, so that the knot and plug were on the underside; that the roller, by reason of these defects, was dangerous to the life and limbs of any person who should use it; and that the defects aforesaid made the tongue so weak that it broke as before stated at the time of plaintiff's injury and was the cause thereof.

A rather unusual state of affairs is presented in the history of this litigation. This action is based upon the allegation that the defendant "intentionally, willfully, maliciously, negligently, and fraudulently" placed in this roller a tongue containing certain defects and concealing the same, as stated. It appears, however, that at the first trial the case was tried upon the theory of negligence, and the jury passed upon no other question. The jury rendered a verdict for the plaintiff in the sum of \$3,040. The Appellate Division, on reviewing the judgment entered upon this verdict, stated in its opinion written by McLennan, P. J., as follows: "The case was submitted to the jury purely and simply as an action for negligence. While in the complaint it was alleged that the defendant 'willfully, maliciously, negligently, and fraudulently' put the defective tongue into the roller in question, intending that such implement should be sold in the open market, and concealed such defect, knowing that, when used, it would break and probably occasion injury to the person using it, that question was not left to the jury for determination. The learned trial court charged the jury in substance that no contractual relation or privity existed between the plaintiff and the defendant, that 'the basis of the action is negligence,' and that in order to recover the plaintiff was only required to establish, by a fair preponderance of evidence, that the accident was caused through the negligence of the defendant and without negligence on the part of the plaintiff. The court also charged that in order to establish defendant's negligence and entitle the plaintiff to recover it was necessary for the jury to be satisfied upon the evidence that the land roller in question, with the defective tongue, was a machine or implement imminently dangerous to human life, but charged, as matter of law, that a land roller was not intrinsically thus dangerous, but was an implement in ordinary and everyday use and of simple construction. The jury determined each of the questions submitted in favor of the plaintiff."

The learned judge in his able opinion dealt only with the issue of negligence submitted to the jury. On the present appeal the coun-

sel for the appellant presents what we deem the controlling question, the willful and fraudulent act of the defendant as alleged in the complaint. We will assume for the purposes of this case that this roller was not a machine imminently dangerous and likely to injure any person using it. We express no opinion as to the liability of the manufacturer or seller of a machine or vehicle to third parties in case of negligence, in the absence of fraud or deceit, whether the machine or vehicle be in its original state imminently dangerous to human life or made so by the subsequent act of the manufacturer or seller. The case at bar, in the view we take of it, does not involve the law of negligence, but is controlled by considerations resting upon the law applicable to willful and fraudulent deceit and concealment.

In England the Court of King's Bench in 1789 in the case of *Paisley v. Freeman*, 3 Durnford & East, 51, held that a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit or that he should collude with the person who is. In *Upton v. Vail*, 6 Johns. 181, 5 Am. Dec. 210, Chief Justice Kent, in commenting upon the case cited, said: "I have carefully examined the reasoning of the judges in that case and in the subsequent cases which go to question or support the soundness of that decision, and I profess my approbation of the doctrine on which it was decided. The case went, not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." We have here the recognition of the general principle upon which this and similar actions must rest, to wit, that fraud or deceit with damage is a good cause of action.

In many of the cases presented to the courts under this principle of law the litigation is confined to the original parties concerned in the transaction. In the case before us we have a third party seeking damages by reason of the willful and fraudulent act of the defendant. The right of recovery under conditions similar to those now presented is established in this and other jurisdictions. In this state the principle is fully recognized in *Brackett v. Griswold*, 112 N. Y. 454, 20 N. E. 376. This was an action brought by one who purchased notes issued by the Iron Mountains Company of Lake Champlain, a corporation, against its directors for alleged fraud and conspiracy to induce the public, by means of false representations as to its financial condition, to purchase its stock and paper. This court held that there was no evidence that the purchaser in

making the purchase relied upon any representations made by defendant, but, on the contrary, it affirmatively appeared that he was at the time wholly ignorant of the alleged fraudulent scheme, or of any acts or representations of the defendant or other parties to the alleged conspiracy. Judge Andrews, writing the opinion for the court, said: "This cause of action was substantially one for fraud and deceit by means of false pretenses, and the right of recovery is governed by the principles applicable to actions of that character. That this is the nature of the action was decided in the case of *Arthur v. Griswold*, 55 N. Y. 400, which was also an action against the present defendant and others, the complaint in which set forth a cause of action similar to that alleged in the third count of the complaint in this action. The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The gravamen is fraud and damage and not the conspiracy. The means by which a fraud is accomplished are immaterial except so far as they tend, in connection with the damage suffered, to show an actionable injury. * * * The question in this case turns upon the point whether the evidence proved or tended to prove a cause of action against the defendant for false and fraudulent representations within the rules governing the common-law action for fraud and deceit. There is no doubt or question as to what elements are requisite to sustain an action for false pretenses. The essential constituents of such an action have been understood from the time such actions were first maintained. They are tersely stated by Church, C. J., in *Arthur v. Griswold*, *supra*, viz.: 'Representation, falsity, scienter, deception, and injury.' There must have been a false representation, known to be such, made by the defendant, calculated and intended to influence the plaintiff, and which came to his knowledge, and in reliance upon which he in good faith parted with property or incurred the obligation which occasioned the injury of which he complains. All of these circumstances must be found to exist, and the absence of any of them is fatal to a recovery. It is not necessary that the false representation should have been made by the defendant personally. If he authorized and caused it to be made, it is the same as though he made it himself. Nor is it necessary that it should have been made directly to the plaintiff. If it was made to the public at large, for the purpose of influencing the action of any individual who may act upon it, any person so acting upon it and sustaining injury thereby may maintain an action. * * * In order to recover in an action for fraud and deceit the fraud and injury must be connected. The one must bear to the other the relation of cause and effect, not, perhaps, in so close a sequence as in actions on contract. But, nevertheless,

it must appear in an appreciable sense that the damage flowed from the fraud as the proximate and not the remote cause. * * *

The case of *Peck v. Gurney*, L. R. 6 E. & I. Appeals, 377, applies with great stringency the rule that to sustain an action for fraudulent representations, a close relation must be shown between representations and the injury claimed, and also that the representations must have been made to influence the conduct of the plaintiff or of a class of persons in which he was included." In this case the plaintiff succeeded below, but the judgment was reversed in this court for the reason that he failed to bring himself within the rule as stated. The proof failed, but the principle was fully recognized.

While the case just cited is one of false representations, it involves the precise principle invoked in the case before us. The charge is that the defendant and others made false and fraudulent representations that induced this plaintiff, as one of the general public, to purchase its stock and paper. In other words, it holds that a person guilty of the fraud is liable even to third parties if they have relied and acted upon it. In the case cited we have the charge of affirmative false representations. In the case at bar we have, not only fraudulent deceit and concealment, but what amounts to an affirmative representation that the tongue of the roller was sound, as the manufacturer, by filling the defect with putty and painting the entire surface, so that the eye could not detect any weakness by reason of the knot, knothole filled up, the kind of wood employed, and the fact that it was cross-grained, must be held to have represented that the roller as offered for sale was in a perfectly marketable condition.

In *Helzer v. Kingsland & Douglass Mfg. Co.*, 19 S. W. 630, 15 L. R. A. 821, 33 Am. St. Rep. 482, it was held by the Supreme Court of Missouri that the explosion of the cylinder of a threshing machine, by which a person engaged in operating it is injured, will not render the manufacturer liable in the absence of any privity of contract between them, unless the manufacturer knew the machine was defective, although he was guilty of negligence in manufacturing and testing the machine. Black, J., writing for the court, said: "The distinction between negligence and intentional wrong is important in tracing down liability for the consequences arising therefrom. This distinction is pointed out with clearness in an article in 16 Am. & Eng. Ency. of Law, pp. 392, 434. Had the defendant sold this machine to Ellis, knowing that the cylinder was defective, and for that reason dangerous, without informing him of the defect, then the defendant would be liable even to third persons, not themselves in fault. * * * As said in *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64: 'It is well settled that a man who delivers an article which he knows to be dan-

gerous or noxious to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result therefrom, to that person or any other who is not himself in fault.' " The learned judge then stated in substance that the defendant, in the case under consideration, was not proved to have any knowledge of the dangerous condition of the cylinder, and that the plaintiff's case tended to show nothing more than negligence.

In the case of *Wellington v. Downer Kerosene Oil Co.*, supra, it was held that a declaration that the Downer Kerosene Oil Company, knowing one Chase to be retailer of fluids to be burned in lamps for illuminating purposes, and naphtha to be explosive and dangerous to life for such a use, sold and delivered naphtha to him, knowing that it was his intention to retail it in his business; that in ignorance of its dangerous properties he retailed a pint of it to the plaintiff, Wellington, to be burned in his lamp for illumination; and that, while the plaintiff in like ignorance was so burning it, it exploded and injured him and his property, sets forth a good cause of action at common law.

In *Lechman v. Hooper*, 52 N. J. Law, 253, 19 Atl. 215, the defendant, a mason, had erected a building as a contractor, and one wall was in a dangerous condition. The defendant had full knowledge of the fact. The plaintiff, who had entered the building engaged in another branch of work entirely distinct from that of the mason, was injured by a portion of the wall falling upon him. The defendant was held liable. Chief Justice Beasley said, in the course of his opinion: "The defendant had erected this wall, and therefore the law imposed on him the duty to put it in a safe condition, or to give warning of its unsafe condition, and this was a duty he owed to each individual person who should lawfully come upon the premises."

In *Lewis v. Terry*, 111 Cal. 89, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146, the defendant was sought to be charged for having placed upon the market a folding bed that was so imperfectly constructed, a fact well known to the defendant, that at times, when any weight was placed on the bed, the heavy upright frame would be precipitated with such force upon the lower portion as to wound and even kill a person lying thereon. The defendant was held liable, and the court said that the fact "that such articles are in general not dangerous would seem to enhance the wrong of representing one to be safe for use, when known to be really unsafe, for the danger is thus rendered more insidious."

In *Woodward v. Miller & Karwisch*, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188, the Supreme Court of Georgia dealt with this same question as late as March, 1904. The headnote reads: "The manufacturer of a buggy, who sells it to a municipal corporation for the use of one of

and in good condition, but knowing that it is in fact defective, the defect being so concealed by the use of paint and grease that the purchaser cannot detect it, is liable in damages to the person whose use of the buggy was contemplated at the time of the sale for injuries caused by such defect; and this is so, notwithstanding there was no privity of contract between the plaintiff and the defendant in the sale of the buggy."

In *Derry v. Flitner*, 118 Mass. 131, 133, Morton, J., said: "The rule is well settled and is constantly applied in this Commonwealth that one who commits a tortious act is liable for any injury which is the natural and probable consequence of his misconduct. He is liable, not only for those injuries which are caused directly and immediately by his act, but also for such consequential injuries as, according to the common experience of men, are likely to result from his act. And he is not exonerated from liability by the fact that intervening events or agencies contribute to the injury. * * * *Hoadley v. Northern Transportation Co.*, 115 Mass. 304 [15 Am. Rep. 106]; *Metallic Compression Casting Co. v. Fitchburg Railroad*, 109 Mass. 277 [12 Am. Rep. 689]; *Salisbury v. Herchenroder*, 106 Mass. 458 [8 Am. Rep. 354]; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64; *Carter v. Towne*, 98 Mass. 567 [96 Am. Dec. 682]; *McDonald v. Snelling*, 14 Allen (98 Mass.) 290 [92 Am. Dec. 768]."

The cases establish the legal principle that one who sells an article, knowing it to be dangerous by reason of concealed defects, is guilty of a wrong, without regard to the contract, and is liable in damages to any person, including one not in privity of contract with him, who suffers an injury by reason of his willful and fraudulent deceit and concealment.

The judgment of the trial court and of the Appellate Division should be reversed, and a new trial ordered, with costs to the plaintiff in all the courts, to abide the event.

VANN, J. (concurring). One who carelessly labels a deadly poison as a harmless medicine and puts it on the market in that condition is liable to any person who without notice of its dangerous character uses the same to his injury. *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. The manufacturer of a machine not inherently dangerous to human life, but with a defect therein which he pointed out to one who purchased it for his own use, and at his request attempted to remedy the defect, and then painted it over, is not liable to one who was injured while using the same with the consent of the purchaser. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513. The first case is typical of those which permit the user of a machine, appliance, or article that is inherently dangerous to recover dam-

without notice, and the second of those which deny relief when the machine is not inherently dangerous to human life.

We now have a case before us with a new element, that of deceit on the part of the manufacturer, who intentionally so concealed a defect in a machine not intrinsically dangerous as to thereby make it dangerous, and without notice sold it to one who, as he knew, intended to sell it to any purchaser he could find. The deceit, as the jury might have found, consisted in the complete concealment of a defect, not necessarily dangerous if unconcealed, but dangerous when concealed, and putting the implement in this condition on the market, without notice to any one, with the intention that it should be sold and used as a safe implement. The natural result of this conduct was to injure whoever might use the implement, whether he was the original purchaser, or any subsequent purchaser, or one who simply used it with the consent of the owner. A manufacturer has the right to sell a defective machine, if he gives notice of the defect to the purchaser, who in turn has the same right. Neither has the right, however, with furtive intent, to completely conceal the defect and sell the machine as sound and safe, intending it to be used as such by any one into whose possession it might lawfully come, when the natural result would be the infliction of an injury upon any person who used it. By giving currency to the implement as safe, with the intent to deceive, not only the purchaser, but any user, and yet so covering up the defect as to entirely conceal it, the defendant was guilty of an actionable wrong, as the jury might have found. While the machine was not inherently dangerous, that fact is not controlling; for the danger was in the concealed defect in an implement sold as sound, and which not only appeared to be sound, but the maker caused it to so appear with intent to deceive.

It would be illogical to hold the maker of a poisonous medicine, who negligently, but unintentionally, labeled it as an innocent remedy, and sold it, liable to any one who used it without notice of its character, but not to hold him liable if he intentionally created a danger in a machine apparently safe, which might be as fatal as poison, and, after concealing it in such a way as to prevent detection, put it on the market. While the danger in the one case is not so great as in the other, still, if the natural result would cause bodily harm to a human being, that regard for the safety of life and limb which the common law is so careful to shield should hold the wrongdoer liable in both. A land roller is an implement not ordinarily dangerous, but one with a defective tongue, when the defect is thoroughly concealed for the purpose of making a better sale, may turn out to be as dangerous as a

cartridge loaded with dynamite, instead of gunpowder. Liability in this case rests on the simple extension of the well-established principle that the maker of an article inherently dangerous, but apparently safe, who puts it on the market without notice, is liable to one injured while using it, to the maker of an article, not inherently dangerous, who made it dangerous by his own act, but so concealed the danger that it could not be discovered, and put it on the market to be sold and used as safe. The extension is logical and consistent with the authorities; for if the implement is not inherently dangerous, but the use thereof is made dangerous by a defect wrongfully concealed, the result is the same and the motive worse. I concur for reversal.

CULLEN, C. J., and HAIGHT and WERNER, JJ., concur. GRAY, J., concurs with BARTLETT, J., only. O'BRIEN, J., absent.

Judgment reversed, etc.

(183 N. Y. 92)

**CHEMICAL NAT. BANK OF NEW YORK
v. KELLOGG.**

(Court of Appeals of New York. Nov. 21, 1905.)

**1. HUSBAND AND WIFE — ACCOMMODATION
NOTE — ESTOPPEL.**

Where a married woman at her residence in New Jersey indorses in blank, for the benefit of her husband, his promissory note, dated and payable in New York, where it is discounted in good faith, without notice that the indorsement was in fact made in New Jersey, she is estopped from denying that the indorsement is a New York contract and from claiming that the indorsement is void as a New Jersey contract, the laws of which state do not permit a married woman to become an accommodation indorser.

2. BILLS AND NOTES — INDORSEMENT — PRESUMPTIONS.

Where a note is dated and payable in the state of New York, an indorsement in blank thereon is presumed, under the common law and Laws 1897, p. 731, c. 612, § 76, to have been made in New York, and one discounting the note in good faith can rely on such indorsement.

Appeal from Supreme Court, Appellate Division, First Department.

Action by the Chemical National Bank of New York against Amy H. Kellogg. From a judgment of the Appellate Division (87 App. Div. 633, 84 N. Y. Supp. 1121), affirming a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought upon a promissory note, of which the following is a copy: "\$1,500. New York, June 7th, 1898. Four months after date I promise to pay to the order of myself Fifteen Hundred Dollars, at No. 4 Warren Street, New York. Value received. [Signed] D. M. Kellogg." Indorsed: "D. M. Kellogg. Amy H. Kellogg." The defendant is an accommodation indorser, who indorsed the note at her residence in Oak Tree, N. J., at the request of the maker, her

husband, and there delivered the same to him, solely for his benefit. The plaintiff, a banking corporation in the city of New York, discounted the note in the ordinary course of business, without notice that the indorser was a nonresident or that the indorsement was made in another state, and used the proceeds to take up a prior note held by it. The defendant "did not authorize said note to be negotiated in New York state, and had no knowledge that it was to be used in that state." By the laws of the state of New Jersey a married woman is not liable as an accommodation indorser, guarantor, or surety, unless it appears that she or her separate estate has derived some benefit from the contract. Upon these facts, which were found or stipulated, the trial court held the defendant liable on the ground that her indorsement was a New York contract. The Appellate Division unanimously affirmed, and the defendant came here.

Frederick H. Kellogg and P. A. Hargous, for appellant. William D. Tyndall, for respondent.

VANN, J. (after stating the facts). Each indorsement of a promissory note is a separate contract, standing apart from that made by the maker or any other indorser. *Spies v. National City Bank*, 174 N. Y. 222, 225, 66 N. E. 736, 61 L. R. A. 193. The validity of a contract of indorsement is ordinarily determined by the law of the place where the indorsement is made. *Union National Bank v. Chapman*, 169 N. Y. 538, 543, 62 N. E. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614. As the note in question was indorsed by the defendant in the state of New Jersey, where she resided, under ordinary circumstances she would not be liable thereon, because the laws of that state do not permit a married woman to become a simple accommodation indorser. The laws of the state of New York, however, authorize a married woman to contract, even with her husband, the same as if she were unmarried; and it is insisted that the defendant is estopped from denying that her indorsement is a New York contract, inasmuch as the plaintiff in good faith purchased the note for value, before maturity, without notice of anything to put it on inquiry and in reliance upon the fact that it was dated and made payable in the state of New York, with nothing on the face of either the note or the indorsement to suggest that the contract was made in the state of New Jersey. We think this position is sound. Whoever conceals facts, required by good faith and fair dealing to be disclosed, acts inequitably, and will not be permitted to assert those facts to the injury of one misled by such conduct. The defendant could not make her coverture a trap to catch innocent persons. She could not deliberately give the appearance of validity to her contract, and then, as against a bona fide holder, plead that it was invalid. She knew that

and that the presumption from those facts was that it was indorsed there. She also knew that, if she delivered the note in this condition to her husband to enable him to negotiate it, any one who acted on such presumption, as he lawfully might in the absence of notice, would be injured if she should plead her coverture and that she actually indorsed it in New Jersey. It was therefore her duty, if she wished to act honestly toward others, to attach some notice to her indorsement, or give notice in some other way, so that innocent third parties might not be harmed by relying upon appearances which she had aided in creating. If she had written after her name, "Oak Tree, New Jersey," her place of residence, the plaintiff would have been put upon inquiry as to the validity of such a contract made in that state. With no attempt to give notice, by her indorsement in blank she gave currency to the note as one made and indorsed in New York. Pleading her indorsement as a New Jersey contract under these circumstances would be an attempt to take advantage of her own wrong, which the law will not permit.

The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the state, for it tends to derange trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel in pais as to the validity of commercial paper. The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation in that condition, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchanges. While it was unnecessary that the defendant should describe herself as a guarantor, by adding the word "Surety" to her signature, for possession by her husband, who was prior in order of liability to herself, was notice that she did not indorse in the ordinary course of business, still, if she regarded her indorsement as a New Jersey contract, she should have given notice of that fact in some way, so that a purchaser in good faith might know that it was not what it appeared to be, a New York contract. *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 54 N. E. 40, 45 L. R.

where the common-law disabilities of married women have not been wholly removed, her indorsement would be enforced as a New York contract. *Thompson v. Taylor*, 66 N. J. Law, 253, 49 Atl. 544, 54 L. R. A. 585, 88 Am. St. Rep. 485.

Independently of the statute which will be cited presently, the argument in favor of an equitable estoppel rests mainly on the presumption that a note dated and payable in New York was made and indorsed in that state. While this question has seldom been before the courts, Mr. Daniel, in his useful work on *Negotiable Instruments*, says it is the law, and the authorities support the assertion. *Daniel's Neg. Inst.* (5th Ed.) § 728; *Maxwell v. Vansant*, 46 Ill. 58; *Towne v. Rice*, 122 Mass. 67; *Belford v. Bangs*, 15 Ill. App. 76; *Lennig v. Ralston*, 23 Pa. 137; *Snaith v. Mingay*, 1 M. & S. 87; *Edwards on Bills*, etc., § 378; *Tiedeman on Bills & Notes*, § 91. Even if the question were entirely new, sound reasoning would lead to that conclusion. While the contract made by an indorser is independent of that made by the maker, in the sense that it is of a different nature and can be separately enforced, still it is dependent on the promise of the maker, because it is an agreement to perform his promise, upon certain conditions, if he does not. Therefore the place where the maker promised, as stated in the note itself, must with all the other provisions thereof be read into the promise of the indorser, and it thus becomes by fair presumption, in the absence of notice to the contrary, the place where the indorser promised also. The purchaser has no other guide as to a fact which may involve the validity of the contract, and hence it is a commercial necessity that both contracts, so closely connected that the second cannot exist without the first, should be presumed to have been made at the same place, unless the one with power so to do rebuts the presumption by timely notice.

The learned counsel for the defendant seems to recognize the existence of this presumption, as he says in his points that, "if we examine the note alone, then the negative inference might possibly arise that the defendant intended the note should be governed by the laws of another state." He insists, however, that as the plaintiff stipulated the facts at the trial, it knew the defendant did not so intend. The rights of the parties do not depend on what the plaintiff knew at the time of the trial, but on what it knew when it discounted the note, and at that time, owing to the absence of notice, which was the defendant's fault, it had no information but what the note gave. The defendant knew that her husband could use the note in any state, and the place of date and payment indicated the state where he expected to use it. Unless she intended that it should be used in a state where her indorsement would

bind her, she must have intended to defraud, and hence is estopped.

But, to clinch the argument, we have only to refer to the negotiable instruments law, which provides that: "Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated." Laws 1897, p. 731, c. 612, § 76. This statute was prepared for uniform action in all the states, and it has already been adopted in many. It is regarded as simply declaratory of the common law upon the subject under consideration. *Eaton & Gilbert on Commercial Paper*, § 66. Therefore, when the note was presented for discount in New York, the plaintiff had the right under the statute to presume that it was indorsed in the state where it was dated, because nothing appeared to the contrary. The defendant, by her indorsement, aided in the negotiation of a note carrying with it that presumption, both at common law and according to the statute, and after the plaintiff had acted on the presumption she cannot be heard when she attempts to say that she indorsed in a state where her indorsement is not binding, and that she did not intend to be bound by her promise when she made it.

The judgment should be affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment affirmed.

(123 N. Y. 104)

IN RE WILKIN.

(Court of Appeals of New York. Nov. 21, 1905.)

1. WILLS—CREATION OF TRUST.

A bequest to an executor of a sum of money, to be invested and to be paid over, together with the increase thereof, to testator's son, or to his wife or children, at such times and in such sums and in such manner as the executors may deem best to the interests of such son, creates a valid trust in the principal and interest of the fund, which the executor, in the exercise of a sound discretion, is authorized to carry out according to its terms.

2. SAME—RESIGNATION OF TRUSTEE—POWERS OF SUCCESSOR—EXERCISE OF DISCRETION.

Where a will creating a trust appointed the executor as trustee, and provided for the appointment of two named persons to execute the trust in case the executor should cease to act as such, and the executor resigned, and one of the two named persons renounced, the other of such persons, on being appointed by the Surrogate's Court to succeed the original executor, was entitled to exercise discretionary powers given as part of the trust.

3. SAME—MANAGEMENT OF FUND—PAYMENTS OF PROPERTY.

Where a will creating a trust authorizes the trustee to invest the trust fund and to pay the same over, together with the increase thereof, to a son of testator, or to his wife or children, at such times and in such sums and in such manner as the executor as trustee may

deem best, the trustee, acting in good faith, is entitled to pay any part of the principal trust fund to testator's son, but should be charged for any payment made by him in bad faith.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Proceeding for a judicial settlement of the accounts of Anna M. C. Wilkin, as trustee under the will of James Cunningham, deceased. From a judgment of the Appellate Division (91 N. Y. Supp. 1118, 100 App. Div. 509), affirming a decree of the Surrogate's Court surcharging the account of the trustee, Charles E. Cunningham appeals. Reversed.

James Cunningham, a resident of the city of Rochester, died on the 15th of May, 1886, leaving several children, a large estate, and a last will and testament, by which, after providing for his other children, he made the following provision for his son Charles: "Ninth. I give, devise, and bequeath unto the executor of this my last will and testament, hereinafter to be nominated and appointed, the sum of \$146,000, in trust, however, to be by him invested, and to be paid, together with the increase thereof, to my son, Charles E. Cunningham, or to his wife or children, at such time or times, in such sums, and in such manner as such executor may deem best for the interest of said Charles E. Cunningham. And I hereby authorize him, if from any cause he deems it best so to do, at any time after ten years from my death, to give the whole sum of this devise and bequest then remaining in the hands of such executor (if any part shall then remain), or any part thereof, in equal proportions to the children of said Charles E. Cunningham, then living, to whom, in that event, I give, devise, and bequeath the same." By the tenth clause he gave the residue of all his real and personal property absolutely to his four children, including the said Charles, to be divided between them, share and share alike. The thirteenth clause of the will is as follows: "In case my son, Joseph T. Cunningham, shall at any time prior to the full completion of the trust I have imposed upon him as executor of this will, for any cause cease to act as such executor, I hereby, in that event, nominate and appoint Anna M. Cunningham and Rufus K. Dryer to be and act as executors in his stead." By the last clause he appointed his son Joseph T. Cunningham as executor. The date of the will was February 9, 1883. Two codicils, one dated June 26, 1884, and the other November 12, 1885, made unimportant changes, which have no bearing upon the questions involved in this controversy.

Upon the probate of the will in June, 1886, Joseph T. Cunningham was appointed executor, and he administered the trust fund of \$146,000 until February, 1898, when, upon his own petition, his letters were revoked and Anna M. Cunningham, who had in the meantime become by marriage Anna M. Wilkin, was appointed "trustee of the trust aforesaid," pursuant to the thirteenth clause of the

will; the said Rufus K. Dryer, who is still living, having renounced his right to serve. The old trustee, after accounting, was discharged, and the trust fund was turned over to the new trustee, who paid the income to Charles until 1901, but during that year and the year following she paid him all the principal; the last payment of \$130,000 having been made on the 14th of February, 1902. Thereupon she commenced this proceeding to account, making Charles, his wife, and their eight children parties. The wife and children appeared and opposed the allowance of any part of the principal so paid, on the ground that the trustee had no power to make such payments, and also because she acted in bad faith and with full knowledge that Charles, by reason of dissipation, was unfit to do business or have control of the fund. The surrogate overruled the objections and allowed all the payments, but upon appeal his decree was reversed by the Appellate Division upon the law and the facts. 90 App. Div. 324, 86 N. Y. Supp. 360. On the second hearing no payment of principal was allowed, because the surrogate held that he was concluded by the judgment of the Appellate Division on the question of power, and for this reason he refused to admit any evidence as to the competency of Charles or the bad faith of the trustee. Both the trustee and the beneficiary appealed to the Appellate Division, where the decree of the surrogate was affirmed by a divided vote, and thereupon they appealed to this court. With the consent of all concerned \$140,000 of the fund has been paid into court to await the final determination of this proceeding.

James Breck Perkins, for appellant Wilkin. Eugene Van Voorhis and Herbert Leary, for appellant Cunningham. James M. E. O'Grady, for respondent Cunningham and others. John Desmond, for respondent Moran.

VANN, J. (after stating the facts). As we read the ninth clause of the will, the first sentence creates a trust and the second a power in trust. Since the trust covers personal property only, it is not so restricted as a trust of real estate, for it may embrace "any purpose not unlawful, subject only to the law of perpetuity." *Cochrane v. Schell*, 140 N. Y. 516, 534, 35 N. E. 971; *Gilman v. Reddington*, 24 N. Y. 12; *Gott v. Cook*, 7 Paige, 521. The trust has one purpose and the power another, and both involve the exercise of discretion by the trustee. The trust is to invest the sum in question and to pay it over, "together with the increase thereof," to Charles, or to his wife or children, "at such time or times and in such manner as such executor may deem best for the interest of the said Charles." There is the same right to pay over principal that there is to pay over income. Neither is to be paid unless the trustee deems it best for the interest of Charles, and the time and manner of

paying either, as well as the person to whom either is to be paid, whether to Charles, or to his wife, or to his children, are subject to the sound discretion of the trustee. There is no distinction between principal and interest, for the authority to pay the one is given by the same words which authorize the payment of the other. The object of the trust is "the interest of the said Charles," which is to be effected by the payment of principal, or interest, or both, but when, how, or, within the limits named, to whom, is intrusted to the judgment of the trustee. The power in trust is limited to the principal, and it could not be exercised until after the lapse of ten years from the death of the testator. It authorizes the trustee, after the expiration of that period, to divide the principal then left, if any, between the children of Charles in equal proportions, "to whom, in that event," as the testator finally says, he gives and bequeaths the same. The power contemplates that some part, or even the whole, of the principal, may be paid over pursuant to the trust before the time arrives when the power may be exercised; for the will speaks of the "whole sum" of the bequest "then remaining, * * * if any part shall then remain."

The power is of narrower range than the trust, for it is limited to the children as beneficiaries, whereas the trust extends to Charles and his wife, as well as his children. The power does not subvert the trust, or take its place after the lapse of ten years, but leaves it in full force. Nothing can be done under the power that could not be done under the trust, and its purpose seems to be suggestive and confirmatory, and as if added from abundance of caution.

Aside from the mere investment of the fund, the trust could not be executed in any particular without the exercise of discretion, which is an essential and inseparable part of the trust. Whoever the trustee may be, he is powerless for all practical purposes except as he uses his discretion. He cannot make the smallest payment, even of income, to relieve the necessities of Charles, unless he does it under the discretionary power given him by the trust, as distinguished from the power in trust. For ten years the provision for Charles and his family, and after ten years the provision for Charles and his wife, independent of their children, could be of no effect without the discretionary power in the trust itself. The entire purpose of the testator, as expressed in the ninth clause of his will, depends for fulfillment upon that feature of the trust. The decision of this controversy depends wholly upon the trust, and in no respect on the power in trust, which was never exercised, as no division was made among the children to whom the power in trust is limited. By the terms of the bequest the legal title to the fund was in the trustee for the purposes

of the trust, and in the disposition made by her she exercised no power or authority that was not an inherent part of the trust proper. A trustee with power to invest money and to pay over the increase is entitled to receive the income from the investment, and thus take the legal title, and would, even if the subject were real estate. Real Property Law, Laws 1896, pp. 571, 572, c. 547, §§ 77, 80.

In 1897 the ninth clause of the will was construed by a decree of the Supreme Court, all persons interested being parties and no one appealing, in an action brought by Joseph Cunningham for the construction of the will in question. The court decided that "the ninth clause of the said will is valid and that it created a valid trust in favor of" Charles, his wife and children, "to continue during the life of Charles unless sooner terminated by the trustee in the manner specified"; that "the executor and trustee has the right under the terms of the said will, in his discretion, to give to the defendant Charles E. Cunningham, or to his wife, the defendant Mary E. Cunningham, or to their said children, the whole of the said trust fund, or any part thereof, or of the income thereof, at such time or times, in such sums, and in such manner as the said trustee and executor may, in the exercise of a sound discretion, deem best for the interests of the said Charles E. Cunningham." The court, having thus construed the trust, next took up the power in trust and treated it as follows: "The ten years having elapsed since the death of the said testator, the said executor and trustee has the power under the said will, if for any cause he deem it best so to do, to give the whole of the said trust fund and accumulations thereof to, and to distribute the same in equal shares among, the children of said Charles E. Cunningham living at the time of such distribution." This decision stands as the law of the will in question and is binding upon courts as well as parties. We have followed it as far as it goes, and have so amplified it as to cover other grounds not considered or presented for consideration in the action in which the decree was made.

The discussion, therefore, of what may be done under a power in trust, the execution of which is intrusted to two or more persons, is foreign to the subject in hand. The rule in that regard, either at common law or under the statute, does not now perplex us. Whether the new trustee, acting alone, could or could not exercise the discretion conferred by the power in trust upon herself and Mr. Dryer, is not before us, for there was no attempt to exercise that power. All that was done was done under the trust. The terms of the trust measure the authority of the trustee, so far as it has been exerted, and to the trust only must we look to see whether she exceeded that authority. As the trust is limited to personal property, it

is valid, for it does not violate the law against perpetuities or the policy of the law against immoral or other unlawful purposes. Its validity is in no wise dependent upon the rule governing trusts of real estate, which provides that a trust of realty that does not come within the four purposes for which such a trust may be created is valid only as a power in trust, the trustee taking no title. Real Property Law, § 79. We therefore have a trust of personal property that cannot be executed without the exercise of discretion. The testator, apparently anxious to avoid the effect of improvidence on the part of one of his children, created a trust for his benefit, clothing the trustee with power to act according to circumstances and do what was best, in his sound judgment, for the interest of that child. Discretion in paying over was uppermost in his mind, for there was no absolute direction to pay either principal or income in any amount, or in any manner, at any time, or to any person. Discretion was of the essence of the trust, for without it the trust was barren and nothing could come from it. With it, an improvident son with a large family could be properly cared for, and if the passing years brought good judgment and good conduct, which was evidently hoped for, that son could receive the inheritance intended for him, the same as the other children of the testator. There was nothing, however, for any one, until the discretion of the trustee came into action, for discretion was requisite to the execution of the trust.

Under these circumstances, to hold that the new trustee, selected by the testator, could not exercise the inherent discretion given by the will, as a part of the trust, because the one named with her did not qualify, is to hold that the trust could not be executed at all. It would defeat the intention of the testator and abrogate the trust. The discretion belonged to the position of trustee, and the trust would be paralyzed were it otherwise. The resignation of the old trustee and the renunciation of Mr. Dryer, which, as the testator is presumed to have known the law, he must have had in contemplation as possible, were not intended by him to strangle the trust if those events should happen. Whatever the law may be in relation to the execution of a power in trust, no statute or controlling decision prevents the execution of a trust pure and simple, such as the one under consideration, by the only acting trustee out of several nominated by the testator. The discretion of the trustee was not absolute, but it was a sound discretion, to be exercised according to her best judgment and in the best of faith, which is always true of such authority, unless stated in terms to be otherwise. Discretion may excuse honest errors of judgment, but it never excuses bad faith, which violates the fundamental principle upon which every trust rests, for a trust implies confidence

and confidence excludes bad faith. The practice of bad faith by a trustee is treason to the law of his existence.

The respondents alleged in their answer "that said Charles E. Cunningham was and is not a fit person to have the custody and control of the said trust fund and the proceeds thereof, and was not a fit person to have its custody and control at the time the alleged payments from said principal of said trust fund, or any one of them, were made by said trustee; that the said Charles E. Cunningham is now and has been for more than 20 years an habitual drunkard, by reason whereof he is now and has been during that time incapacitated for properly transacting business or to have control of said fund, all of which facts were well known to said trustee; that in paying the principal of said trust fund to said Charles E. Cunningham said trustee acted in bad faith, and with the knowledge on her part that he would waste and squander the same." The issue thus tendered was not tried by the surrogate, who, on the objection of the trustee, excluded the evidence offered to sustain the allegations of the respondents in relation to her bad faith. The ruling of the surrogate was founded on the conclusion reached by the Appellate Division on the first appeal that in no event was the new trustee authorized to pay any part of the fund to Charles E. Cunningham. A new trial is therefore necessary to determine the issue above referred to, and, as it becomes necessary on account of the objection of the trustee, the fact will doubtless be given due consideration upon the final award of costs. We think that the trustee, as the executive officer of the trust, was authorized in her sound discretion to pay over the principal of the trust fund to Charles E. Cunningham, that all payments by her made in good faith should be allowed, but that every payment made in bad faith should be disallowed, and restitution required.

The order of the Appellate Division and the decree of the surrogate should be reversed, and a new trial granted, without costs of this appeal to either party.

CULLEN, C. J., and GRAY, BARTLETT, and HAIGHT, JJ., concur. WERNER, J., not voting. O'BRIEN, J., absent.

Order reversed, etc.

(183 N. Y. 114)

PEOPLE ex rel. CONINE v. STEUBEN COUNTY et al.

(Court of Appeals of New York. Nov. 21, 1905.)

1. COUNTIES—OFFICERS—FEES.

Under Laws 1877, p. 404, c. 436, providing that county treasurers shall receive as compensation for their services an actual salary, to be fixed by the board of supervisors, and shall not receive any fees or other compensa-

tion, except in proceedings for the sale of lands for unpaid taxes, as amended by Laws 1880, p. 858, c. 233, providing that the treasurers of the several counties of the state in which the treasurer is a salaried officer may retain for the benefit of their counties the same compensation for receiving and paying money belonging to the state as is allowed by law where the treasurer is not a salaried officer, which acts were in force until repealed by County Law, Laws 1892, p. 1743, c. 686, the fees in counties where the treasurer was a salaried officer were to be retained by him for the benefit of the counties, but in counties in which he was not a salaried officer he retained such fees for his own compensation.

2. SAME — COMPENSATION OF TREASURER — RIGHT TO FEES.

Under Laws 1892, p. 1748, c. 686, § 12, subd. 5, requiring the board of supervisors to fix the salaries and compensation of county treasurers, and section 141, subd. 5 (page 1775), requiring county treasurers to pay over the state taxes to the State Treasurer, retaining the compensation to which they may be entitled, the salary and compensation fixed by the board of supervisors in counties in which the treasurer is a salaried officer under the general laws, is in full of all compensation allowed such treasurers for their official duties pertaining to their office, including their services for collecting and paying over state, school, and court moneys; and a county treasurer, whose salary is duly fixed by the board of supervisors, is not entitled, in addition to his salary, to collect and receive fees for collecting and paying over state, school, and court funds.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Application by the people on the relation of Gamaliel T. Conine, for a peremptory writ of mandamus to compel the board of supervisors of Steuben county to audit a claim of relator against said county and to compel the county treasurer to pay the same. From an order of the Appellate Division (87 N. Y. Supp. 1144, 98 App. Div. 604), affirming an order of the Special Term (85 N. Y. Supp. 244) denying the application, relator appeals. Affirmed.

Monroe Wheeler and Charles H. McMaster, for appellant. William W. Clark, for respondents.

HAIGHT, J. The relator, Gamaliel T. Conine, was the county treasurer of Steuben county for two terms, commencing on the 1st day of January, 1895, and ending on the 31st day of December, 1900. During that period he received as fees for the collecting and paying over of the state taxes the sum of \$2,650.23. He also received as fees for the disbursing of the school moneys, the sum of \$918.18, and for trust funds paid into court, the sum of \$1,267.75; making a total of \$4,836.16. All of which he left in the general fund upon his retirement from office and turned the same over to his successor. In November, 1890, the board of supervisors of Steuben county fixed the salary of the county treasurer at \$1,200 per annum, which sum was paid to the relator each year during his term of office. He now claims that he was entitled to the fees aforesaid, in addition to his salary, and it is this claim that he sought

to have audited and allowed by the board of supervisors and paid by the treasurer.

Under the Revised Statutes it was made the duty of county treasurers to receive all moneys belonging to the county, from whatever source they may be derived, and all moneys belonging to the state which by law were directed to be paid to him, and pay and apply the same in the manner required by law. He was authorized to retain as commissions 1 per cent. on every dollar which he should receive and pay out, to wit, one-half for receiving and the other half for paying. 1 Rev. St. 369, §§ 20-26. By Laws 1846, p. 214, c. 189, it was provided that the county treasurers of this state "shall hereafter receive for their services instead of the fees now allowed by law, such compensation as shall be fixed by the respective boards of supervisors of their respective counties, not exceeding the half of one per cent. for receiving, and the half of one per cent. for disbursing, and in no case to exceed the sum of five hundred dollars per annum." The counties of New York and Kings were excepted from the provisions of this act, and all laws inconsistent with its provisions were repealed. In 1863 (Laws 1863, p. 666, c. 393, § 5) the Legislature provided that "it shall be the duty of the several county treasurers of this state, on or before the first day of April in each year, to pay to the treasurer of this state the amount of state tax raised and paid over to them respectively, retaining the compensation to which they may be entitled, and which compensation shall not exceed the amounts now authorized by law, and shall not in any case exceed the sum of two thousand dollars." In 1871 (Laws 1871 p. 227, c. 110) the law of 1846, above referred to, was amended so as to read as follows: "The several county treasurers of this state shall hereafter receive for their services, instead of the fees now allowed by law, such compensation as shall be fixed by the respective boards of supervisors of their respective counties, not exceeding the half of one per cent. for receiving, and the half of one per cent. for disbursing all moneys belonging to their said counties respectively. In addition to such compensation so fixed as aforesaid, they shall be entitled to retain a commission of one per centum on every dollar belonging to the state which they shall receive and pay over, to wit, one-half of one per centum for receiving, and one-half of one per centum for disbursing, but in no case to exceed the sum of five hundred dollars." The counties of New York, Kings, Albany, Otsego, Onondaga, Erie and Westchester were excepted from the provisions of this act. By Laws 1877, p. 494, c. 436, § 5, it was provided: "Every county treasurer hereafter elected or appointed shall receive as compensation for his services an annual salary, to be fixed by the board of supervisors. He shall not receive to his use any interest, fees or other compensation for his services, except in pro-

ceedings for the sale of lands for unpaid taxes as may be now provided for by law." The counties of Monroe and Seneca were excepted from the provisions of this act, and subsequently a number of other counties were also excepted from its provisions. This act was amended in 1880 (Laws 1880, p. 353, c. 233) by adding thereto section 10, as follows: "Nothing in this act shall be construed as preventing the treasurers of the several counties of this state, in which the treasurer is a salaried officer, from retaining for the benefit of their said counties, respectively, the same compensation for receiving and paying the money belonging to the state every year, as that now allowed by law, where such treasurer is not a salaried officer, and the Comptroller is hereby authorized to allow to the said treasurers, for the benefit of their respective counties, on state taxes hereafter received and paid over by them, where not already allowed, the compensation now allowed by law, where such treasurer is not a salaried officer." There are a number of special acts pertaining to different counties to which we have not alluded, for the reason that none of them pertain to the county of Steuben.

It is contended that under the act of 1846, as amended in 1871, the salary provided for to be fixed by the boards of supervisors of their respective counties only had reference to the compensation awarded the treasurer for his services in collecting and paying over the county funds, and that he still had the right, in addition thereto, to collect and receive to his own use the fees allowed for the collecting and paying over the state, school and court funds. But, however that may be, it is apparent that in all the counties where the treasurer was a salaried officer, which were not excepted from the provisions of the act of 1877 as amended in 1880, or controlled by special laws, the fees collected by the treasurer belong to the county, except such as he was authorized to retain for the sale of lands for unpaid taxes; and inasmuch as the act of 1880, to which we have alluded, was passed subsequent to the adoption of section 3321 of the Code of Civil Procedure, it follows that the fees allowed under the provisions of that section also belonged to the counties. The legislation upon the subject evidently contemplates counties in which there was no salary fixed for the county treasurer, counties in which the treasurer was a salaried officer, and still other counties in which the compensation of the treasurer was regulated by local statutes. This was the condition of the law existing at the time of the adoption of chapter 686, p. 1743, of the Laws of 1892, known as the "County Law." Under the provisions of that act the board of supervisors was required to fix the salaries and compensation of the county treasurers. Section 12, subd. 5 (page 1746). By section 141, subd. 5 (page 1775), the county treasurers were required, "on or before the fifteenth

day of April in each year to pay to the treasurer of the state one-half of the state tax raised and paid over to him; and on or before the fifteenth day of May, the other half, retaining the compensation to which he may be entitled, which shall not in any case exceed the sum of two thousand dollars." This act specifically repealed the laws of 1877 and 1880 alluded to. We thus have the recognition of the right of the county treasurer to retain from the Treasurer of the state the fees to which he may be entitled by law for the receiving and paying over the state taxes, not, however, to exceed the sum of \$2,000; and at the same time we have the mandatory duty imposed upon the board of supervisors of fixing his salary and compensation.

We think the rights of the relator are to be determined by the construction that should be given to the county law. In determining its true intent and meaning we must bear in mind that it is a general law, that it was reported by the commissioners for revision of statutes, and that it was intended to revise and take the place of the laws of 1877 and 1880, to which we have referred. As we have seen, under the statutes then in force in counties where the treasurer was a salaried officer, the fees were to be retained by him for the benefit of the counties, but in the counties in which the treasurer was not a salaried officer he retained the fees for his own compensation. It is possible that under the county law all treasurers were intended to be made salaried officers, except those provided for by special laws. But this question we do not deem it necessary to now determine, for we are clear that in the revision of the statute it was intended that the counties of the state in which the treasurers were salaried officers under general laws should be continued as such under the county law, and that the salary and compensation which the board of supervisors was required to provide for them were intended to be in full of all compensation allowed them for every official duty pertaining to their office, including their services for the collecting and paying over the state, school, and court moneys. This construction, we think, is required under the decision of this court in the case of Board of Supervisors of Erie County v. Jones, 119 N. Y. 339, 23 N. E. 742. The compensation of the treasurer of Erie county was fixed by the provisions of Laws 1881, p. 797, c. 557. It provided that the treasurer should receive, "as compensation for his services, an annual salary of not less than five thousand dollars, to be fixed by the board of supervisors of said county before he shall enter upon the duties of his office." In construing the provisions of that statute for the purpose of determining whether the treasurer was entitled to receive for his own use the fees collected for paying over the state funds, it was held that the salary provided for was in lieu of all fees and that those received by him belonged to the county. Finch, J., in delivering the

opinion of the court, after referring to the law of 1877, as amended by law of 1880, reached the conclusion that the salary provided for meant full, complete, and entire compensation for all services. He then proceeded to discuss the special statute of 1881, saying that "the chief ground of his [the defendant's] contention is that the act of June, 1881, does not in express terms forbid the receipt of fees by the county treasurer, or repeal by implication the laws under which, before 1877, the county treasurers were entitled to receive them. But I think that this is a very narrow interpretation and more nice than wise. If the statute of June, 1881, stood alone, it would, by the force of its own terms, substitute an annual salary for fees. When it declares that the county treasurer shall receive 'as compensation for his services' an annual salary, it very plainly implies that such salary is to be his sole and only reward. 'For his services' means for all his services, for the entire and complete performance of his official duties, and a specific compensation awarded for those services implies the full and entire compensation to which he is entitled. But this natural interpretation of the language becomes conclusive when the statute is read in connection with the legislation on the same subject. The act of 1877 defined the phrase 'as compensation for his services' so fully and explicitly as to leave no possible room for doubt. The later legislation on the same subject repeats the phrase, which must retain the meaning attached, and not bear a new and different one. The inference from the statutes, read together and in the light of the evil they were intended to remedy, becomes irresistible."

All that has here been said with reference to the law of 1881 applies with equal force to the provisions of the county law, which is a revision of the general laws of 1877 and 1880, alluded to in the opinion to which we have referred. The county law must be read in connection with the general law which it revises. It is both salary and compensation which the board of supervisors is required to fix, and it seems to us, therefore, that the decision of this court alluded to is controlling upon the question now presented. The case of Upham v. State of New York, 174 N. Y. 336, 66 N. E. 987, had reference to an entirely different question, involving the construction of other provisions of the statute, and we therefore do not deem it in point upon the question here presented.

In November, 1890, the board of supervisors of Steuben county appointed a committee to fix the salary of the county treasurer. This committee reported to the board, in substance, that under the statute the fixing of a salary operated to deprive the treasurer of all compensation, from the state and otherwise, in the way of fees, and that such fees were received and paid into the treasury to the credit of the county; that the salary that

had theretofore been paid to the treasurer, together with his compensation by way of fees, amounted to the sum of \$1,200, and they therefore recommended that his salary be fixed at that sum per annum. This report appears to have been adopted by the board, and that amount the relator has received each year during his term of office. It therefore appears that the salary was fixed under a proper construction of the statute then in force, and that it was intended to include the fees which the treasurer was authorized to collect. The relator has, therefore, received from the county all that the board of supervisors intended to pay him. He has suffered no harm, and, as we understand the county law, he has received all that he was entitled to under the statute.

The order of the Appellate Division should be affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order affirmed.

(183 N. Y. 123)

MILLER v. NEW YORK & N. S. RY. CO.
(Court of Appeals of New York. Nov. 21, 1905.)

1. EMINENT DOMAIN—REMEDIES OF PROPERTY OWNERS—ACTIONS FOR INJUNCTION—FINDINGS.

Code Civ. Proc. § 1022, prior to amendment in 1903, permitted a court or referee to file a decision in short form, stating concisely the grounds upon which the issues have been decided. In an action by an abutting owner to restrain the construction of a street railway in front of her premises, on the ground that she was the owner in fee to the center of the street, the trial court found that plaintiff was the owner in fee of the land mentioned in the complaint, describing it by metes and bounds, one of which was the street in front of the premises; but no finding was made as to whether plaintiff's title extended to the center of the street or not. *Held*, that the finding did not authorize a judgment dismissing the complaint.

2. APPEAL—REVIEW—PRESUMPTIONS AS TO FINDINGS.

Where a judgment of the trial court is unwarranted by any aspect of the finding contained in its decision, which is in short form as authorized by Code Civ. Proc. § 1022, prior to its amendment in 1903, the Court of Appeals is not bound to assume that the trial court found all the facts warranted by the evidence and necessary to support the judgment, although such judgment has been unanimously affirmed by the Appellate Division.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Elizabeth D. Miller against the New York & North Shore Railway Company. From a judgment of the Appellate Division (86 N. Y. Supp. 1141, 92 App. Div. 613), affirming a judgment in favor of defendant entered upon a dismissal of the complaint, plaintiff appeals. Reversed.

This action was brought to restrain the defendant from building and operating its

electric street railway in front of plaintiff's premises, which are situated on the southerly side of Fulton street, borough of Queens, city of New York. At the place in question, Fulton street was formerly known as the "Hempstead and Jamaica Turnpike Road." Plaintiff's premises have a frontage of about 537 feet on this highway, commencing at a point about 756 feet easterly from the intersection of its southerly side with the easterly side of Springfield road. The defendant, the New York & North Shore Railway Company, was organized in 1897 for the purpose of constructing and operating a street surface railroad in the borough of Queens, city of New York. It is the successor in interest of the Long Island Electric Railway Company, which was organized in 1894 and authorized to operate a similar railroad in the county of Queens. Two causes of action are set forth in the complaint. The first is founded upon allegations to the effect that the plaintiff is the owner in fee to the center of Fulton street, and that her title therein has never been acquired by the defendant. The second proceeds upon the theory that the defendant has never obtained the consents required by law, either from the local authorities or the abutting property owners.

Alfred A. Wheat and James A. MacElhinny, for appellant. George F. Hickey and William E. Stewart, for respondent.

WERNER, J. (after stating the facts). The first cause of action set forth in the complaint is founded upon the plaintiff's alleged ownership of the fee in the southerly half of Fulton street in front of her premises. If she is such owner, she can restrain the building of the defendant's railroad in front of her premises, unless she has consented thereto or her title to the street has been acquired by the defendant. *Peck v. Schenectady Ry. Co.*, 170 N. Y. 298, 63 N. E. 357; *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 70 N. E. 213.

The decision of the trial court is in the short form, under section 1022 of the Code of Civil Procedure as it stood before its amendment by chapter 85, p. 237, of the Laws of 1903. As bearing upon the first cause of action, the learned court found that the plaintiff is the owner in fee of premises situate on the southerly side of Fulton street, in the borough of Queens, New York city, described as "all that certain piece or parcel of land, with the building and improvements thereon, situated, lying, and being in the town of Hempstead, Queens County, state of New York, * * * described as follows, to wit: * * * Beginning at the main road leading from Jamaica to Hempstead; from thence southerly * * *; thence easterly (and by various metes and bounds * * * to a certain fence); thence along said fence as it now stands for a division fence along said William Martins and Widow Highe's land to the main road aforesaid;

thence along the main road to the place of beginning, containing 35 acres, be the same more or less." This is the only finding contained in the decision in any way relating to the first cause of action. When this finding is examined in the light of section 1022 of the Code of Civil Procedure, as that section stood before its amendment in 1903, it is evident that the learned trial court either failed to make any decision whatever upon the first cause of action, or, on the contrary, arrived at a conclusion of law directly at variance with the fact found. The so-called "short form" decision was authorized by that part of section 1022 which permitted a court or referee to "file a decision stating concisely the grounds upon which the issues have been decided." It will be observed that the decision before us simply affirms the plaintiff's ownership of her premises according to the description given, but it is silent upon the all-important question whether her title extends to the center of the street or not. If this silence is to be regarded as a failure on the part of the trial court to pass upon that question, then the judgment must be reversed because the plaintiff is entitled to have it decided and to have the grounds of the decision concisely stated. If on the other hand, the finding of the description in *hæc verba* is to be treated as the equivalent of a finding that the plaintiff is the owner in fee of the southerly half of Fulton street in front of her premises, subject only to the easement of the public therein, then the judgment is unauthorized, because the conclusion of law upon which it rests is irreconcilable with the fact found. The description as set forth in the decision carries the plaintiff's title to the center of the highway. "In this state, as between grantor and grantee, the conveyance of a lot bounded upon a street carries the land to the center, and there is no distinction in this respect between the streets of a city and country highways. The rights of the public in a street or highway are no higher or other than those of a mere easement, and the proprietors on each side presumptively own the soil in fee to the center thereof." *Paige v. Schenectady Ry. Co.*, 178 N. Y. 102, 111, 70 N. E. 213, citing *Bissell v. N. Y. C. R. R. Co.*, 23 N. Y. 61; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 528, 529; *White's Bank of Buffalo v. Nichols*, 64 N. Y. 65, 71; *Wallace v. Fee*, 50 N. Y. 694; *Holloway v. Southmayd*, 139 N. Y. 390, 84 N. E. 1047, 1052.

The learned counsel for the respondent invokes the rule that, when a judgment entered upon a short decision has been unanimously affirmed by the Appellate Division, this court is bound to assume that the trial court found all the facts warranted by the evidence and necessary to support the judgment. *Amherst College v. Ritch*, 151 N. Y. 321, 45 N. E. 876, 37 L. R. A. 305; *People ex rel. Manhattan Railway Co. v. Barker*, 152

N. Y. 435, 46 N. E. 876. This rule has no application to the case at bar. As we have already stated, the court either decided the question of plaintiff's title to the bed of the southerly side of the street, or it failed to decide that question. If it failed to make a decision upon that essential element of the case, it is obvious that this unanimous affirmance rule cannot be applied for the purpose of giving effect to a judgment that is void upon its face; and so, on the other hand if we treat the question as having been decided, the unanimous affirmance rule is equally inapplicable. The description of plaintiff's premises contained in the decision of the court presumptively carries plaintiff's title to the center of the street. The trial court has found no facts which tend to rebut the presumption that the plaintiff owns to the center of the street. In the absence of such a finding, the trial court's conclusion of law, to the effect that the complaint should be dismissed, is not warranted by the facts found. The case of *Kennedy v. Mineola, H. & F. Traction Co.*, 178 N. Y. 508, 71 N. E. 102, is not in conflict with the views here expressed. In that case there was an affirmative finding that the plaintiff was not the owner of the highway in front of his premises, and it was therefore properly held that this court could not look into the record to ascertain whether there was any evidence to support that finding.

The judgment herein should be reversed, and a new trial granted, with costs to abide the event.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. O'BRIEN, J., absent.

Judgment reversed, etc.

(183 N. Y. 129)

MULLINS v. SIEGEL-COOPER CO.

(Court of Appeals of New York. Nov. 21, 1905.)

1. MASTER AND SERVANT—INDEPENDENT CONTRACTORS—DANGEROUS WORK.

Where the dangerous condition of a sidewalk was caused by the act of the owner of the abutting premises in employing others to do certain work upon the premises and to do carting therefrom, so that the work itself created such dangerous condition, the abutting owner was liable for injury resulting to a person walking on the sidewalk, although the actual doing of the work was intrusted to independent contractors.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1259.]

2. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALK — LIABILITY OF ABUTTING OWNER.

Permitting one flagstone on a sidewalk to rest upon another, thereby raising it three inches above the level of the walk, and further permitting the sidewalk to remain in such condition for several months, renders the walk so dangerous as to authorize a recovery against the abutting owner, who is responsible for the condition of the walk, for injuries sustained

by a traveler on the sidewalk, who stumbles and falls over the raised flagstone on a dark night.

3. TRIAL—INSTRUCTIONS.

In an action against an abutting owner for injuries caused by a defect in a sidewalk, the evidence showed that the dangerous condition of the sidewalk resulted from work authorized to be done by the abutting owner and which was actually done by independent contractors. Defendant requested the court to charge that it was not liable, unless plaintiff showed that "defendant or its agents" caused the obstruction, etc. The court had previously given a substantially similar charge, except that the charge given embraced the element of independent contractors. *Held*, that the requested charge was properly refused.

4. STIPULATIONS—EVIDENCE.

Where, in an action against an abutting owner for injuries caused by a defective sidewalk, it was stipulated that previous to the injuries work had been done on the premises by independent contractors, who furnished their own teams, etc., the stipulation was properly admitted in evidence over an objection that it had not been connected with defendant and did not show that defendant was responsible for the acts mentioned therein.

Gray and Haight, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Mary Mullins against the Siegel-Cooper Company. From a judgment of the Appellate Division (88 N. Y. Supp. 737, 95 App. Div. 234), affirming a judgment in favor of plaintiff and an order denying a new trial, defendant appeals. Affirmed.

George Gordon Battle and Frederick E. Fishel, for appellant. Warren C. Van Slyke, for respondent.

BARTLETT, J. This is a negligence action, in which the plaintiff seeks to recover damages of the defendant corporation, the Siegel-Cooper Company. The complaint alleges that at the times involved in this action the defendant was the owner of certain premises on Broadway, near Henderson avenue, in West New Brighton, Richmond county (Staten Island), and that the defendant occupied and used the premises as a stable for its horses and wagons. This stable building is two stories high and built out to or very near the sidewalk line. On one side of this building there is a lane upon the premises of the defendant leading to the rear, where there is another stable. At the time of the accident, March 16, 1903, the entire frontage of the defendant, including the lane in question, was occupied by a sidewalk laid with flagging stones. During the summer of 1902, some months before the accident to the plaintiff, the flagging in front of the lane became disturbed and out of position by reason of heavily-laden wagons and trucks passing back and forth over the same on entering and leaving said premises.

It is charged in the complaint that the defendant "negligently, carelessly, and knowingly" permitted the said unsafe condition of the sidewalk to remain, without any effort to repair the same and make a safe passage

for the public. The jury were justified by the evidence in finding that the unsafe condition of the sidewalk consisted of one flagstone overlapping the other and raised to a height of three inches above the level of the sidewalk.

The plaintiff, a woman in middle life, testified that the accident happened between the hours of 7 and 8 o'clock in the evening, and it was dark; that when reaching the point in question she stumbled and knocked her foot against the raised flagging, and in trying to balance herself moved the other foot against it also, and she was thrown heavily to the ground, suffering a broken wrist and other injuries. She further testified as follows: "That flagging was a little above the center of the driveway, in the driveway. I did not see what I fell over until I fell. Then I noticed some flagging. I think it was raised somewhere about two inches above the surface of the sidewalk. Whether it was simply overlapped or not I could not tell. I was in too much pain." On cross-examination she testified: "I was not walking so rapidly; not so very briskly; my usual walk. At this place where I fell, opposite this driveway, there was no light there at all."

The plaintiff's son was sworn, and testified that he was in the opera house, the building next door to the stable, and was summoned to assist his mother. He swore: "I subsequently examined the sidewalk, and I saw this flag was raised above another one at a height of about two or three inches. It was overlapping. This stone was south of the middle gate in the driveway, right opposite this driveway, on the south side. I examined the stone closely that night. It was loose. When you put your foot on it, it would give a rocking click or sound." This witness further testified that at the time the stable building was erected the entire sidewalk in front was considerably broken up, and a new flagging was thereafter laid in front of the stable and the lane. He further testified: "I remember one morning of an occasion, during the month of July, 1902, seeing a wagon loaded with stone going into this lane. I came over in that direction to take the car to go to my work, and I was walking down Broadway towards the opera house, and I was held up by a wagon crossing into that lane, a wagon filled with stone, and I saw the front wheels turn over a flagging, and I saw the flagging on the south end come down and the front end raise up. When the wagon went by, the stone fell back a little bit onto the other ahead of it. * * * I am in the vicinity every day. I noticed, whenever the wagon was going across that particular place, that when the wagon would go over it, it would raise the flag up, and it kept getting worse all the time. It got so that it would raise, I should judge, from 2½ to 3 inches. * * * This particular flag was right in the wheel track,

They had to go over the edge of this flag; not over the raised end, the detached end. Prior to March 16, 1903, I have seen other people stumbling over this same flag. From November up to the accident I have seen, on Wednesday and Saturday nights, maybe 25 or 30 people tripping over it."

A witness named Kenney was sworn for the plaintiff, and testified that he was the official stenographer of the Richmond County Surrogate's Court. He swore: "I am familiar with the condition of the sidewalk there, and was prior to March 16, 1903, in front of the Siegel-Cooper premises. I saw a flagging on the southerly side of the driveway on the Siegel-Cooper Company's premises on Broadway extending on one end about two inches above the flag next to it; probably about the latter part of November until some time in March. I noticed it first in November; about that time—November or December. It projected on one end about two inches above the one adjoining it, the northerly side of the stone. The other side was depressed." On cross-examination this witness testified: "I noticed people tumbling over it. I had been walking along there before, sir. I had not noticed it up to that time. * * * I saw people going to basketball games tumbling over it. I noticed it right up to the very night of the accident. I am a member of the fire company there; a friend of Mr. Mullins. I am not related to him; just a friend; that is all."

During the trial it was stipulated on the record as follows: "First. That the stone wall was built on the rear of the Siegel-Cooper premises during the month of June, 1902. Said period of work on the stone wall took three weeks. Second. That the work on said wall was done and was performed by contractors under contract with the Siegel-Cooper Company, the contractors furnishing the materials, teams, wagons, and employing their own workmen. Third. That during the year 1901, from the time of the building of the stable and during the year 1902, and down to the present time, Siegel-Cooper Company have sold manure to various persons under contract, providing for their carting away such manure from the Siegel-Cooper Company premises in their [the various contractors'] own wagons, drawn by their own employes; and, on an average, there was one wagon so loaded up and driven out of said premises each week."

One Reilly was sworn as a witness for plaintiff, and testified that he was a member of the engine company in the immediate vicinity, and was also a member of the Young Men's Catholic Union, which met frequently in the opera house adjoining the stable. He testified: "I have seen wagons going in and out of this lane prior to March 16th. During the year of the construction of the wall in the rear of the stables of the Siegel-Cooper there were stone wagons, and also wagons loaded with cement. I have also seen some manure

wagons going in out and out, and I have also seen garbage wagons."

The defendant swore its stable manager, a hostler, and a watchman. The substance of their testimony was that after severe rains the flagging became unsettled in places and was immediately repaired. The defendant's manager testified that the flagstone opposite the driveway had been replaced by cobblestones and that they did not get out of order.

The jury rendered a verdict for the plaintiff of \$1,100, and the judgment entered thereon was affirmed by a divided court; one justice dissenting. There is an abundance of evidence justifying the verdict of the jury, and it remains to determine whether there are questions of law presented by the exceptions which call for a reversal of the judgment of the Appellate Division. At the close of the plaintiff's case the defendant moved to dismiss the complaint upon the ground that the plaintiff had failed to show that the defendant had been guilty of any negligence; also upon the ground that the plaintiff had failed to show that the defendant had been guilty of any negligence by which the injuries sustained by the plaintiff were caused; that the plaintiff has failed to show that the plaintiff herself was free from contributory negligence; that it appears from the testimony that the wagons which passed over this driveway were wagons of independent contractors, except empty wagons of the Siegel-Cooper Company, which were being pushed in, and the plaintiff has not proved, nor has there been any attempt to prove, that these wagons of the Siegel-Cooper Company in any wise caused the irregularity in the flagstone, and therefore the defendant is not responsible for this condition of the pavement. The trial judge denied this motion, and the defendant excepted. At the close of defendant's case this motion was renewed on all the grounds previously stated, and the trial judge again denied it, and the defendant again excepted. There are also several exceptions to the charge of the trial judge, which will be presently considered.

The principles of law applicable to the obligation of abutting owners on city streets to keep the sidewalk in a safe condition for pedestrians are well settled. The abutting owner is not bound to keep the sidewalk in repair, unless by virtue of the requirements of the statute, and is not responsible to travelers for defects therein not caused by himself. *Dillon on Municipal Corporations*, § 1012, and cases there cited; *City of Rochester v. Campbell*, 123 N. Y. 405, 417, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760. In the case at bar the defendant has not set up in its answer the defense that the accident in question was due to the act of an independent contractor, but it raises the point in the motion to dismiss the complaint. "The general rule is that the owner of property is not liable for the negligent acts of an independent contractor with whom he has an

agreement for the performance or prosecution of work. But to this rule there is an exception. If the work itself creates the danger or injury, then the ultimate superior or proprietor is liable to persons injured by a failure to properly guard or protect the work, even though the work is intrusted to an independent contractor." *Downey v. Low*, 22 App. Div. 460, 461, 48 N. Y. Supp. 207; *Storrs v. City of Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Vogel v. Mayor, etc., of New York*, 92 N. Y. 10, 44 Am. Rep. 349; *Water Co. v. Ware*, 16 Wall. (U. S.) 566, 21 L. Ed. 485. Assuming that the dangerous condition of the sidewalk was caused solely by the wagons of the independent contractors, who constructed the stone wall that was built on the rear of the premises during the month of June, 1902, it is clear that this case falls within the above exception, and that the work itself created the danger and injury, and the defendant is consequently liable to respond in damages if the judgment of the trial court is sustained. There was also evidence as to the wagons of the defendant and those of the persons who removed the manure weekly from the rear premises which would have justified the jury in finding that the unsafe condition of the sidewalk was due in part to them. Assuming, however, that the contractors who built the stone wall on the rear of the premises and the contractors who removed the manure weekly were solely responsible for the unsafe condition of the sidewalk, it is clear that the defendant is liable under the rule already stated. The defendant, in its brief submitted to this court, insists that the testimony failed to show that the dangerous condition of the sidewalk was caused by any act of the appellant, and that the trial court erred in charging the jury that there was some evidence that the appellant itself, or through its employes, caused the bad and defective condition of which complaint is made. This contention and the criticism of certain portions of the charge to the jury constitute the position of the defendant on this appeal.

We come, therefore, first to the narrow question whether, in the sidewalk of a public and much-traveled street, if one flagstone rests upon another and is raised three inches above the level of the walk, it constitutes such a dangerous situation on a dark night as to warrant a recovery on behalf of a person who stumbles and falls over the same, receiving serious injury. To this may be added the facts that this condition was allowed to exist from the summer of 1902 until March, 1903, and that the place was not lighted. There is evidence permitting the jury to find that this obstruction was three inches high. It would seem to require no argument to establish the fact that this condition was in the highest degree dangerous; that a person passing along at an ordinary

gait in the darkness was liable to serious injury in passing over this obstruction. It has been repeatedly held that a wayfarer, passing along a public street in the night, in the absence of lights or any warning, is entitled to assume that his way is normal and safe. *Chisholm v. State of New York*, 141 N. Y. 246, 36 N. E. 184. In *Harris v. Uebelhoer*, 75 N. Y. 175, Chief Judge Folger remarked: "A public highway may be used in the darkest night—a night so dark as the keenest and clearest vision might not be able to detect obstacles and defects. In such a case any man traveling upon it is practically a blind man." See, also, *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; *Weed v. Village of Ballston Spa*, 76 N. Y. 329; *Brusso v. City of Buffalo*, 90 N. Y. 679.

It is argued that the case of *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, lays down a rule that prevents a recovery in the case at bar. The decision cited is undoubtedly a border case, but is wholly unlike the one before us. In that case a young woman, walking along one of the principal streets of the city of Yonkers in the morning, carrying an umbrella over her head, it being a stormy day in the month of February, fell and broke her leg. She brought suit against the municipality to recover damages, and succeeded in the trial court and at General Term. The condition of the sidewalk causing the accident is thus described in the opinion of this court: "The plaintiff was walking upon a sidewalk of stone flagging, 8 feet in width, constructed of two courses of flags 4 feet wide. At the point in this walk where the accident occurred and at the joint where two of the flags were united the edges of the stone were broken off and the broken parts removed. This left an uncovered depression in the center of the walk of the same depth as the thickness of the flags, which was about 2½ inches. The surface area of this depression was about 2 feet 2 inches in length by 7½ inches in width. * * * The walk in this condition had been used by the public for years, and it appears that no accident had resulted from such use before." It is quite impossible for me to see the slightest similarity between the condition of the sidewalk in the case cited and the situation presented in the case at bar. The accident in the case cited occurred in broad daylight. The depression in the sidewalk was more than 2 feet in length, 7½ inches in width, and 2½ inches deep, presenting an opening in which the human foot could be inserted without danger of being caught and held, as in an aperture only large enough to receive it. I regard the Yonkers Case as a border one, as already stated; but, be that as it may, it has no application to the case we are considering. The plaintiff approached the spot in question on a dark night and the place was unlighted. In her path was a solid

stone obstruction, as the jury were entitled to find, 3 inches in height, and against which it was highly probable that the foot of a pedestrian might strike in passing. The fact is that this record discloses that there had been a large number of accidents at this point. This court has recently passed on a similar obstruction. In *Fordham v. Gouverneur Village*, 160 N. Y. 541, 55 N. E. 490, the headnote reads in part: "On the trial of an action against a village for damages for the death of the plaintiff's intestate, it appeared that at the time of the accident the village was laying a water pipe under the sidewalk of a bridge, and for the purpose cut holes in the planking; that, the walk not having been finished on the day the holes were cut, they were each covered at nightfall with a plank one to two inches thick; that before this the walk had a smooth surface; that no light or signal was placed on the bridge. * * * Held, that the evidence sufficed to take the case to the jury upon the question whether the injury (the plaintiff had fallen at this point in the darkness) was caused by stumbling over the planking, and upon the questions of the defendant's negligence and of the plaintiff's intestate's freedom from contributory negligence."

It remains to consider the two exceptions taken to the refusal of the trial court in declining to charge the requests of appellant's counsel. The first request reads: "I ask your honor to charge the jury that the defendant in this case is not liable unless the plaintiff has shown by a fair preponderance of the proof that the defendant, or its agents, caused the obstruction or contributed towards the cause of the obstruction or unevenness in the sidewalk over which the plaintiff claimed to have fallen." The court said: "I decline in that language." This qualified refusal was proper, for the reason that it only included the defendant or its agents, and left out the element of independent contractor. Furthermore, the court was justified in refusing to adopt the language of this request, as it had fully charged the request in substance, with the addition of the element of independent contractor. The jury were told in plain terms that the defendant was liable if it created the obstruction itself, or through its employés, or by an independent contractor. The second request reads: "I ask your honor to charge that the defendant was not responsible for the acts of the manure contractors or the contractors for the stone wall in driving over the sidewalk over which the plaintiff claims to have fallen." The court ruled: "I decline in that language. I repeat what I said before in that regard as to their liability." This request was properly refused, for the reason, already stated, that the point was fully covered by the main charge.

The appellant makes the additional point that the court erred in the reception of illegal evidence over the objection and exception of the defendant. This exception refers to the stipulated facts in evidence, to which reference has already been made. Prior to stipulating these facts in evidence, the defendant's counsel stated that he admitted the facts, but objected to their being offered as evidence against the defendant, and after the stipulation was spread upon the record he objected upon the ground that it was incompetent, for the reason that it had not been connected with this defendant, and it does not show that the defendant was in any way responsible for the acts mentioned in the stipulation. It is a sufficient answer to this objection that it was conceded that the contractors who built the stone wall on the premises in the month of June, 1902, and the contractors who removed the manure from the defendant's premises, were engaged in the work under a contract with the Siegel-Cooper Company.

I am of opinion that the judgment and order appealed from should be affirmed, with costs.

CULLEN, C. J., and VANN and WERNER, JJ., concur. GRAY and HAIGHT, JJ., dissent, on authority of *Belts v. City of Yonkers*, 148 N. Y. 67, 45 N. E. 401. O'BRIEN, J., absent.

Judgment and order affirmed.

(123 N. Y. 141)

FOX v. VILLAGE OF MANCHESTER et al.
(Court of Appeals of New York. Nov. 21, 1905.)

1. MUNICIPAL CORPORATIONS — TELEPHONE WIRES—INJURY TO TRAVELER—LIABILITY.

A city is not responsible for the death of a traveler, arising from fallen telephone wires which had come in contact with a powerful electric light wire, where it had no notice of the obstruction and the danger was not obvious.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1641, 1644.]

2. ELECTRICITY—ACTIONS FOR INJURIES—EVIDENCE.

Plaintiff's intestate was killed by coming in contact with the end of a telephone wire hanging between the sidewalk and the roadway, which lay across an electric light wire in such a manner that a powerful electric current passed from the light wire through the telephone wire. Held, in an action against a village, an electric light company, and the owner of a telephone line, it was error to permit plaintiff, in order to show notice to the trustees of the village of the dangerous condition of the wire, to read the evidence of the trustees of the village at the coroner's inquest.

3. SAME.

In an action against a village, an electric light company, and a telephone company to recover for the death of plaintiff's intestate, caused by coming in contact with the end of a telephone wire lying across an electric light wire where the insulation was worn away,

in order to charge defendants with knowledge of the dangerous condition, it was error to prove that several months before the accident, at a place nearly a quarter of a mile distant from the place of the accident and beyond the point where the electric wire terminated, a piece of telephone wire hung down from a pole, and several persons had received shocks therefrom, and the trustees caused the wire to be cut off.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Elizabeth S. Fox, administratrix of Ernest Fox, against the village of Manchester and others. From a judgment of the Appellate Division (91 N. Y. Supp. 1094, 100 App. Div. 512), affirming a judgment for plaintiff entered on a verdict and an order denying a new trial, defendants appeal. Reversed.

George Raines and E. A. Griffith, for appellant village of Manchester. Frank Rice, for appellant Ontario Light & Traction Co. E. A. Kuntzsch, for respondent.

CULLEN, C. J. The action was brought to recover damages for the alleged negligence of the defendants, by which was caused the death of the plaintiff's intestate under the following circumstances: The principal street of Manchester, a village with about 700 inhabitants, runs north and south. The line of wires of the light and traction company entered the village at the intersection of the right of way of the Lehigh Valley Railroad, and was carried north along the street in front of a cemetery as far as a church, for which it furnished light. There had been also along the main street telephone wires, which were strung on the poles of the traction company as far as the church, and from that point north to the center of the village on another set of poles. The telephone wire had not been in use for some time. On the occasion of the accident, which occurred about half past 8 in the evening, the deceased, crossing the street, seized hold of or came in contact with a piece of wire that hung down from a tree to the ditch between the sidewalk and carriageway, and received an electric shock by which he was immediately killed. The point at which the accident occurred was in front of the cemetery and between the church and the railroad crossing, where the light and traction company maintained its line. An examination the next morning showed that the telephone wire lay across the light wires, and that the insulation on the wires had worn away, and that the hanging wire was a part of the telephone line. How long this piece of wire had been hanging down was a matter of controversy on the trial. That the current which caused the death of the deceased came from the light wire, through the telephone wire, is conceded. The plaintiff charged that the light company was negligent in permitting its wires to remain in a dangerous and unprotected condition, and that the village was negligent in allowing that condition to remain

by which the safety of travelers on the highway was imperiled. A verdict was recovered against both the defendants, and the judgment entered thereon has been affirmed by the Appellate Division by a divided court.

The contributory negligence of the deceased was a question of fact for the jury. It was not negligence as a matter of law to cross the street at a point other than the crosswalk. Nor was deceased necessarily negligent in having seized hold of the wire. It may have come in contact with his person, or he may have seized it to remove it from his way. The negligence of the village was also a question for the jury, to be determined with reference to the length of time they might find the wire had been hanging down, whether the village authorities knew or should have known of its condition, and also to the place at which it was hanging, whether it was likely at that point to be dangerous. There were, however, errors committed on the trial which require a reversal of the judgment.

To establish notice to the trustees of the dangerous condition of the electric wire, the plaintiff, over the objection and exception of the village, was allowed to read in evidence the testimony of the trustees taken at the inquest held by the coroner on the body of the deceased. That the declaration of an agent or that of an officer of a corporation is not evidence against his principal, except when made in the course of his agency or in the discharge of his official duties, is settled law. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181. It is contended, however, that a different rule applies to declarations the only object of which is to show knowledge of or notice to the person making them, and in support of that claim two decisions of the Appellate Division are cited. *Shaw v. Town of Potsdam*, 11 App. Div. 508, 42 N. Y. Supp. 779; *Vandewater v. Town of Wappinger*, 69 App. Div. 325, 74 N. Y. Supp. 699. It may be that declarations of a village official as to the condition of a highway, made not only before the occurrence on which it is sought to charge the village with liability, but sufficiently long before to have made it the duty of the village, with the knowledge which the declaration imports, to repair the highway, are competent evidence. In such a case a declaration would not be competent as an admission, but as evidence of the state of the knowledge of the person making the declaration. Such was the case in *Shaw v. Town of Potsdam*, supra. The knowledge of the officer or agent after the transaction is of no materiality whatever, and his declaration then made of his previous knowledge is as purely hearsay as a declaration of any previous act. The doctrine of *Vandewater v. Town of Wappinger*, supra, is manifestly erroneous and cannot be upheld. The respondent contends that this error was rendered harmless by the subsequent testimony

of the trustees. It is asserted that the trustees on the trial of this action testified substantially to everything that they had testified to before the coroner. This claim is not wholly justified. Smith, one of the trustees, testified positively that he did not see the wire which killed the deceased hanging down from the tree, and that he had made no statement before the coroner to that effect. It is true that the testimony given before the coroner would have been competent for the purpose of contradicting Smith's testimony on the trial; but this would not authorize its use as affirmative evidence to show that the trustees of the village had notice of the dangerous condition of the pendent wire.

For the purpose of charging the defendants with the knowledge of the dangerous condition of the wires, the plaintiff was allowed to prove, over the objection and exception of the appellants, that eight or ten months previous to the accident to the deceased a piece of telephone wire in front of a bakery, at a point nearly a quarter of a mile from the scene of the accident and far to the north of the church, where the light wires terminated, hung down from a pole nearly to the ground, and that several children and one grown man had received shocks therefrom. It appeared that promptly on this occurrence the trustees caused the wire to be cut off at the top of the pole, and that thereafter there was no trouble. We think this occurrence was too remote in time and in distance to be competent evidence, and that its admission was erroneous. It is contended that the fact that persons had received shocks from the telephone wire at this point should have apprised the trustees that the telephone wire and the light wires must at some point to the south have been in contact, and therefore dangerous, and that the trustees should thereupon have inspected the two lines, and either had the telephone line removed or the position of the wires changed. This view was substantially accepted by the trial court, which charged, over the exception of the defendant village, that the law imposed on the officials of the municipality the duty of making an inspection from time to time to see whether the wires, if dangerous, had been remedied or removed. We are of a different opinion. Nobody had received substantial injury by the hanging wire at the bakery. The children had played with it and thus received the shocks. It is true one man is said to have been knocked down, but it appears that he was intoxicated at the time. The trustees discharged their duty when they cut off and removed the pendent wire. There was nothing so alarming in the fact that children playing with the wire had received shocks from it, in no case with serious results, that rendered it necessary or the duty of the trustees to inspect the whole length of the wires to examine their insulation and

see that at all points they were in proper condition. Though the law authorizes the construction of electric light lines, power lines, telephone lines, and similar structures along the streets and highways, that does not relieve the municipality from its duty to see that the streets and highways are kept reasonably safe and secure for the public using them. But this doctrine is not to be carried to the extent of holding that the obligation of the municipality is coextensive with that of the company which maintains the line. Principally the duty of a municipality is to see that its streets and highways are kept safe and secure for passage over the surface, for the primary object of highways is to enable the public to travel thereon. Therefore it must always be alert to prevent or guard obstructions in the highways. Where, however, the danger to the traveler is not in the nature of an obstruction, but proceeds from the negligence of a third party in the use of the highway in a manner authorized by law, the municipality should not be held liable for that negligence unless it has notice thereof, or the condition is apparent and the danger obvious. The municipality may well be held to the same degree of responsibility with regard to electric light poles, telegraph poles, and the like that is imposed upon it with reference to awnings, gratings, and similar incumbrances on the street, and so, also, as to fallen or hanging wires obstructing the street and likely to strike or come in contact with the traveler. To go further, however, and impose upon a municipality the duty of inspecting the insulation of the wires, the position in which they are strung, and similar matters involving technical knowledge, unless in the case of an obvious danger or exceptional occurrence, would place upon it a very onerous and unfair burden. The company maintaining the line of wire is primarily liable for its negligent or defective condition in these respects, and should be solely so unless in the cases suggested of obvious danger or exceptional circumstance. It follows that, not only was the evidence of the shocks received from the fallen wire at the bakery improperly received, but the learned trial court erred in charging the jury that by reason of that occurrence it was the duty of the municipality to inspect the lines to see that the telephone wire had been removed or that the wires were no longer in contact. The case of *Twist v. City of Rochester*, 37 App. Div. 307, 55 N. Y. Supp. 850, affirmed 165 N. Y. 619, 59 N. E. 1131, is not in point. There it was a line of wire maintained and used by the defendant that caused the injury for which a recovery was had. The defendant's liability was predicated, not on the failure of its duty as a municipality to keep its streets safe, but on its negligence as the owner and operator of a telephone line, in which character its responsibility was just the same as that of a telegraph, telephone, or electric light corporation.

The appellant, the Ontario Light & Traction Company, contends that it was in no way responsible for the condition of the telephone wire, and that therefore the motion to dismiss the complaint as far as that defendant was concerned should have been granted. In support of this claim reliance is placed on two cases. *Holmes v. Union Telegraph & Telephone Company* (Sup.) 16 N. Y. Supp. 563, affirmed on opinion below, 139 N. Y. 651, 35 N. E. 207, and *Quill v. Empire State T. & T. Company*, 159 N. Y. 1, 53 N. E. 679. Each of these cases presented the question of the liability of the corporation owning the line of poles for injuries resulting from the wires or appliances of another corporation strung on the poles by consent of the owner. In the first case the wire had fallen into the street, causing injury to a traveler who tripped on the fallen wire. In the second case a traveler on the street was injured by the fall of a glass insulator. In each case the corporation owning the line of poles was held not liable, on the ground that it was the negligence of the corporation operating and maintaining the line of wire which caused the injury. The present case differs essentially from those cited. There the injury was caused solely by the act or omission of a third party, to which the defendant in no way contributed except by the license given the third party to use the poles. Here it was the current of electricity developed by the traction company and conducted over its wires that caused the death of the deceased. Electric light wires, of all wires in common use, carry the most powerful currents. The intensity of the current conducted through that defendant's wire, as shown by the evidence in this case, was about 2,000 volts, the shock from which would be fatal to human beings. It was, therefore, the duty of that defendant to insulate its wires and guard against the electric current becoming a source of danger and injury to travelers on the highway or third persons, so far as reasonable care could accomplish that result. It was the owner and in possession of the poles, and it was not justified in granting permission to third parties to string wires so near light wires as to become dangerous to the public (*Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321), much less to allow those wires to come in contact with its own and destroy the insulation which should have prevented the escape of the current. It also owed the duty of reasonably inspecting its lines to see that its insulation was preserved intact and that the line had not become dangerous by contact with other wires. There is evidence in the record tending to show that the original construction was faulty on account of the proximity of the two lines of wire, and also that inspection would have shown their dangerous state and the defect in the insulation. The motion for a nonsuit by this appellant was, therefore, properly denied; but on account of the error already

pointed out, in the admission of the evidence as to the occurrences at the bakery the year previous to the accident, the judgment against it must also be reversed.

The judgment should be reversed as to both appellants, and new trial granted, costs to abide the event.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment reversed, etc.

(133 N. Y. 151)

PRATT INSTITUTE v. CITY OF NEW YORK.

(Court of Appeals of New York. Nov. 21, 1905.)

1. TAXATION — EXEMPTIONS — REPEAL OF SPECIAL ACT.

An educational corporation, under its charter, granted by special act, was exempt from local taxation on its leased real estate. *Held*, that General Tax Law, Laws 1896, p. 797, c. 908, § 4, subd. 7, as amended, exempting so much of the real estate of educational institutions as is used exclusively for carrying out the corporate purposes, repeals the provisions of the special act granting such exemption to the educational corporation.

2. CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — EXEMPTION FROM TAXATION.

The repeal of an exemption granted an educational corporation of its leased real estate from local taxation by its charter, granted by special act, is not a violation of the constitutional provisions forbidding the impairment of the obligation of contracts, as Const. 1846, art. 8, § 1, Const. 1895, art. 8, § 1, and 1 Rev. St. p. 600, pt. 1, c. 18, tit. 3, § 8, provide for the repeal or alteration of any general or special act creating a corporation, and the provisions of the Constitution and of the statute must be read into any subsequent charter, rendering the same irrevocable.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 303, 408.]

Gray and Haight, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by the Pratt Institute against the City of New York. From a judgment of the Appellate Division (91 N. Y. Supp. 136, 99 App. Div. 525), affirming a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

The object of this action was to set aside an assessment as a cloud upon the title to certain real estate belonging to the plaintiff in the city of Brooklyn, on the ground that such property is exempt from taxation except for state purposes. The case made by the complaint was in substance as follows: The Pratt Institute is an educational institution organized by special act and located in the city of Brooklyn. Laws 1887, p. 497, c. 398. Its general object is the instruction of persons of either sex in such branches of useful and practical knowledge as are not generally taught in the public or private schools. Its special object is to afford opportunities for

persons "to become acquainted with what is best in manufactured materials, fabrics, wares and arts, and so to educate the eye and hand in the practical use of tools and machinery that students may be encouraged to emulate the best models and be enabled to accomplish the best possible work in one or more branches of art or manufacture, either useful or ornamental." It maintains a free circulating library of art and science, and also a reading room for general use accessible at all reasonable hours. "All income from tuition and all revenues of every kind" are "devoted solely to the purposes of the Institute." Section 10 of its charter is as follows: "For the uses and purposes aforesaid the said corporation is authorized to take by grant, devise, bequest, gift or otherwise, and to hold, lease, sell and convey any real and personal property, and to erect all necessary and suitable buildings, and any property in the city of Brooklyn actually occupied and used for the purposes aforesaid, or the revenues of which are exclusively devoted to the purpose aforesaid, shall not be subject to local taxation. * * * " After its incorporation the institute was generously endowed by the founder, Mr. Charles Pratt, who conveyed to it a large amount of real estate, and also gave it personal property of substantial value. Other persons have since given it property, both real and personal, and by means of its endowment it has erected suitable and commodious buildings in Brooklyn, wherein the various branches of its work are carried on. It is thus "engaged in performing a work of public utility for the benefit of the citizens of the state of New York." In 1902 the plaintiff owned five lots of land in the city of Brooklyn, each with a dwelling house thereon. This property was not used "for carrying out thereupon one or more" of the objects of the corporation, but it was leased and the net rents used exclusively in its educational work. During the year aforesaid a tax was assessed upon the said real estate in due form of law, amounting upon the valuation of \$18,400 to the sum of \$433.04. Of this amount only \$19.88 was for state purposes, which, as the plaintiff alleged, it was ready and willing to pay, but the defendant had refused to receive it. The assessment became an apparent lien upon the property affected and constituted a cloud upon the title of the plaintiff, which it sought to remove by this action, upon the ground that all its real estate in the city of Brooklyn, whether actually occupied and used for its corporate purposes or not, is exempt from local taxation, both city and county. The facts thus stated were alleged in the complaint, to which the defendant demurred upon the ground that the allegations were not sufficient to constitute a cause of action. The demurrer was sustained at Special Term, and, as the plaintiff did not ask leave to amend, final judgment was entered dismissing the complaint, and from the judgment of affirm-

ance rendered by the Appellate Division this appeal is brought.

John G. Milburn and Edmund L. Baylies, for appellant. John J. Delany, Corp. Counsel (George S. Coleman and E. Crosby Kindlerberger, of counsel), for respondent.

VANN, J. (after stating the facts). The Pratt Institute is a noble charity, carrying on a work of great usefulness, strictly within the lines of its charter and in accordance with the beneficent purpose of its founder. To the average mind such a charity appeals strongly for relief from the usual burdens resting upon property, because, as it may well be claimed, it discharges its duty to the public by devoting all that it has to the public welfare. It is, however, for the Legislature to decide what property should be taxed and what should be exempt, and considerations which might control that department of government can have no force with the courts. It is our duty to enforce the command of the law without regard to what we may think of its policy.

The subject of taxation has been a great embarrassment to legislative bodies throughout the history of the world. Special interests clash with general interests, and seek relief, wholly or in part, from the public burden which is essential to the protection of property and the preservation of order. Claims for exemption multiply, and, when the Legislature yields to the pressure of special interests, the precedent breeds a multitude of special statutes and brings confusion into the law. Such was the situation that confronted the Legislature of 1889, which set out to meet the difficulty by an act authorizing the appointment of commissioners to revise and consolidate the statutes relating to different subjects, and among them to "the assessment and collection of taxes and exemption of property from taxation throughout the state." Laws 1889, p. 357, c. 289. The first bill reported did not become a law, and another effort was made in 1892, through an act providing for the appointment of two counsel to "examine the laws of this and other states relating to taxation and to report to the next Legislature" the result of their investigations, "with recommendations as to legislation relating to assessment and taxation in this state." Laws 1892, p. 1216, c. 660. Counsel were appointed accordingly, but the bill reported by them was not passed. Finally, the commissioners of statutory revision reported in substance the present tax law, which went into effect on the 15th of June, 1896. Laws 1896, p. 795, c. 908. In their report to the Legislature they stated that they had "gone over the entire field of statutory law relating to taxation," and, without intending to effect radical changes, they had been compelled to make various alterations in order to "eliminate inconsistencies and reduce the subject

to a harmonious and systematic whole." They further said that there had been no revision of the tax laws since the Revised Statutes of 1828, and that about 100 supplemental acts had since been passed, including many which increased "the exemptions of property from taxation." Having thus stated the history and purpose of the tax law, we will next examine the provisions thereof relating to exemption, and compare them with the special exemption in the plaintiff's charter, in order to determine whether the latter was impliedly repealed by the former.

Section 3 (Laws 1896, p. 797, c. 908) provides that "all real property within this state and all personal property situated or owned within this state, is taxable unless exempt from taxation by law." The next section makes liberal provision for exemption from taxation, but we are now concerned only with the seventh paragraph thereof which provides that "the real property of a corporation or association organized exclusively" for specific charitable, religious, and educational purposes, and "used exclusively for carrying out thereupon one or more of such purposes, and the personal property of any such corporation shall be exempt from taxation." Thus the Legislature made all property taxable, except such as is exempt, and in declaring what is exempt it covered the case of educational institutions, such as the plaintiff, exempting all their personal property absolutely, and so much of their real estate as is used exclusively for carrying out thereon one or more of the corporate purposes, but not exempting real estate held as an investment only, even if the income was used for a corporate purpose. A general rule of taxation and exemption was laid down, after the revisers, as they expressly declared, had gone over the entire field of statutory law relating to the subject. It was the apparent purpose of this legislation to define the status with reference to taxation or exemption from taxation of every parcel of real property and every article of personal property in the state. It furnished a plain and simple rule for all assessors, by which they could at once determine whether property within their district was subject to taxation or not, without searching the statutes for nearly 70 years for special exemptions. It is a codifying act, designed to reduce all statutes relating to taxation into a complete and harmonious system. A codifying act is presumed to exhaust the subject to which it relates, unless a different intention appears on the face of the statute, or is an irresistible inference from special circumstances. The new enactment is substituted in the place of all statutes previously existing and becomes the sole rule of action.

As an author, who is held in high esteem by the courts, has said: "Revision of statutes implies a re-examination of them. The

word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects within its purview. * * * Will a revision repeal by implication previous statutes on the same subject, though there be no repugnance? The authorities seem to answer emphatically, Yes. * * * In the cases of repeal by revision, the absence of express words of repeal is unimportant. The purport of the numerous cases cited is that where a statute is revised, or a series of acts on the same subject are revised and consolidated into one, all parts and provisions of the former act or acts that are omitted from the revised act are repealed." Sutherland on Statutory Construction (Lewis' Ed.) §§ 269, 270. In *King v. Cornell*, 106 U. S. 395, 27 L. Ed. 60, Chief Justice Waite declared that, "while repeals by implication are not favored, it is well settled that where two acts are not in all respects repugnant, if the later act covers the whole subject of the earlier and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal"—citing *U. S. v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. The same court had previously said: "It was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the latter as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of the opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law, embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other laws on the subject embraced within it. The authorities on this subject are clear and uniform." *Murdock v. City of Memphis*, 87 U. S. 590, 617, 22 L. Ed. 429. The last utterance of that high court upon the subject, so far as we are advised, is as follows: "It is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both and to prescribe the only rules in respect to that subject that are to govern." *Tracy v. Tuffy*, 134 U. S. 206, 223, 10 Sup. Ct. 527, 33 L. Ed. 879. "A subsequent statute, revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must, on the principles of law, as well as in reason and common sense, operate to repeal the

former." *Bartlet v. King*, 12 Mass. 537, 545, 7 Am. Dec. 99. "If a revising statute embraces all the provisions of antecedent laws on the same subject and reduces them to one system, such statute virtually repeals the statutes revised without any expression to that effect, and though there is no repugnancy between them." *State v. Wilson*, 43 N. H. 415, 419, 82 Am. Dec. 163. See, also, *People ex rel. Ross v. City of Brooklyn*, 69 N. Y. 605; *Excelsior Petroleum Co. v. Embury*, 67 Barb. 261, 264; *Dexter & Limerick Plank Road Co. v. Allen*, 16 Barb. 15; *Sedgwick on Statute Law*, 124, 125; *Dwarris on Statutes*, 674.

The latest expression of opinion upon the question is in a decision by ourselves, speaking through our late associate, of revered memory, Judge Landon. *Matter of Huntington*, 168 N. Y. 399, 61 N. E. 643. We then had under consideration the tax law now before us and two special acts, one incorporating the "Roosevelt Hospital in the City of New York," and the other for the relief of the "Children's Aid Society of the City of New York." Laws 1864, p. 3, c. 4; Laws 1868, p. 980, c. 468. The earlier act strongly resembled that which incorporated the plaintiff, and, after creating the corporation, it enacted that all its property, real and personal, should be exempt from taxation. The later act dealt with a corporation already in existence by relieving its necessities through a generous appropriation of money and at the same time exempting all its property from taxation. Both corporations had the same noble purpose of benefiting mankind as the plaintiff, not in the same way by educating in special lines, but in the case of the hospital by relieving those suffering from wounds and disease, and in the case of the Children's Aid Society by providing a lodging house for friendless and homeless boys in the city of New York. Judge Landon, after referring to the history of the tax law and the report of the commissioners who prepared it, held that it was such a revision and substitute for all former statutes, general and special, upon the subject of exemption from taxation, as to supersede and repeal them by implication, and that it thus repealed, among others, the provisions of the special acts exempting the property of the two corporations mentioned. He alluded to the constitutional amendment of 1875, which provided that the Legislature should not pass a private or local bill "granting to any private corporation, association or individual any exclusive privilege, immunity or franchise whatever," but authorizing the passage of general laws providing for such cases and others. He declared that the tax law "was evidently intended to harmonize with the constitutional and legislative policy thus indicated. Article 12 of the tax law contains a schedule of 153 acts and parts of acts which are expressly repealed by the tax law. This schedule does not mention the special

acts exempting either the Roosevelt Hospital or the Children's Aid Society, or, so far as our examination extends, any act in which a corporation designated by name is exempted." After quoting subdivision 7 of section 4 of the general statute, he continued: "With such a general statute the corporations and associations enumerated in the subdivision need no special statute, unless, as is not here suggested, they used their property for purposes foreign to those for which they were organized. Unless they do so use it, there is no question of repugnancy or inconsistency between the general and private statute. Conceding a repugnancy to the extent that a private enterprise, masked under charitable privilege, should not be exempt, and we have a stronger reason for the repeal by implication of the exemptions which the special acts granted in this respect. The greater act seems to include all the less. Nor is there any suggestion that the private statute has some special fitness to the peculiar condition of any of these corporations designated by name in such statute which the general statute does not embrace. * * * In our opinion the Legislature intended by the tax law of 1896 to provide, pursuant to the Constitution, for this particular class of immunities from taxation, and to cover, as the act constituting the commissioners of statutory revision required, the whole field of 'the collection and assessment of taxes and exemption of property from taxation throughout the state,' so far, at least, as their view of the subject extended. * * * The general rule of the liability to taxation of all property within the state was preserved, and the exemptions classified in such comprehensive phrase as to make all prior private and special exemptions unnecessary so far as the general act conferred the same exemptions as the special and private acts, and repugnant and inconsistent so far as the special and private acts conferred greater immunities and exemptions than the general act. If these views are correct, it was not necessary to search out the many private statutes conferring exemptions and to enumerate them in the schedule of repealed statutes. In the construction of a statute of so much moment, enacted as the result of long experience, much discussion, and great consideration, the rule that effect must be given to the intent of the Legislature, if the language of the enactment will permit, is of commanding force"—citing *Matter of Dobson*, 146 N. Y. 357, 40 N. E. 988; *People ex rel. Fleming v. Dalton*, 158 N. Y. 175, 52 N. E. 1113; *Matter of Thrall*, 157 N. Y. 48, 51 N. E. 411; *People ex rel. Catholic Union v. Sayles*, 32 App. Div. 203, 53 N. Y. Supp. 65, affirmed on opinion below 157 N. Y. 679, 51 N. E. 1092. In *People ex rel. Catholic Union v. Sayles*, supra, we adopted the opinion of the Appellate Division, which was also written by Judge Landon. In that case a corporation organized ex-

clusively for benevolent purposes and owning real estate, not directly used for any corporate purpose, which had been taxed, claimed exemption under a special law, but the claim was overruled upon two grounds—first, that the special act had been repealed by another act not now important; and, second, because it was repealed by the general tax law. Upon the second point Judge Landon said: "We also think that it was repealed by the general tax law; that the intention of the Legislature was influenced by the mass of special legislation upon the subject of exemptions and by the need of a uniform system; and that, as may be gathered from the statute itself, it was to establish a system which should place exemptions of the real property of charitable corporations upon a basis of clearly defined equity, free from the unsystematic partialities of special favoritism, and free from the danger of hazarding their usefulness by embarking in outside enterprises. We think the statute apt in its provisions to accomplish such a result."

Two decisions, each directly in point, made within the last 10 years ought to settle the question; but the appellant claims that they have both been overruled by a later case decided without an opinion. *People ex rel. Cooper Union v. Wells*, 180 N. Y. 537, 72 N. E. 1147. When a decision is made upon full consideration, and judgment is rendered upon well-defined grounds, it cannot be regarded as overruled by a subsequent case in which no opinion was written and no ground of action stated. We do not overrule important authorities sub silentio, and it was not our intention to overrule either of the cases named. No such suggestion was made at our consultation table, and no such result follows from the *Cooper Union Case*, as it is clearly distinguishable. We are asked to distinguish the *Huntington Case* from that of the plaintiff, because the statute incorporating the latter and conferring the special exemption "has some special fitness to the peculiar condition" of the Pratt Institute. This is impossible upon any logical ground, for the argument founded on special fitness applies with no more force to the plaintiff than it did to the *Roosevelt Hospital* or the *Children's Aid Society*.

It is argued that the tax law, if so construed as to impliedly repel the exemption clause in the plaintiff's charter, violates the federal Constitution by impairing the obligation of a contract. This argument is answered by that clause of the Constitution of 1846, and continued in our present Constitu-

tion, which provides that "all general laws and special acts passed" for the creation of corporations "may be altered from time to time or repealed." Const. 1846, art. 8, § 1; Const. 1895, art. 8, § 1. The Revised Statutes also provided that "the charter of every corporation, that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." 1 Rev. St. p. 600, pt. 1, c. 18, tit. 3, § 8. Thus, before the plaintiff received its charter from the Legislature, the right to alter or repeal it had been expressly reserved by that body and irrevocably reserved by the Constitution. The reservation became a part of the charter of every corporation subsequently organized, whether under a general act or by special statute. An argument like that now advanced by the appellant in this case was made by the appellant in a case recently before the Supreme Court of the United States, and this is the answer that it received: "When the proposition relied upon is plainly stated and its import clearly apprehended, no reasoning is required to demonstrate its unsoundness. In effect, it is that the contract was not subject to repeal, although the contract itself in express terms declares that it should be so subject at the will of the legislative authority. The elementary rule is that if, at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter, or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of a contract, because the reserved power deprives the contract of its irrevocable character and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to repeal, alter, or amend is by implication read into a subsequent charter and prevents it from becoming irrevocable." *Citizens' Savings Bank v. Owensboro*, 173 U. S. 636, 644, 19 Sup. Ct. 571, 43 L. Ed. 840.

The order appealed from should be affirmed, with costs.

BARTLETT and WERNER, JJ., concur. CULLEN, C. J., concurs in the opinion of VANN, J., on the constitutional question, and concurs in result on the ground that the decision in *Matter of Huntington*, 168 N. Y. 390, 61 N. E. 643, is controlling. GRAY and HAIGHT, JJ., dissent. O'BRIEN, J., absent.

Order affirmed.

1. MORTGAGE — DEFAULT IN INTEREST — OPTION TO DECLARE DEBT DUE—ELECTION.

A mortgage provided that the principal and interest should become due at the option of the mortgagee on default in the payment of interest, and gave the mortgagor the right after a specified date to pay the principal before maturity on payment of a bonus of \$1,000. *Held*, that the bringing of foreclosure on default in the payment of interest before the time when the mortgagor could pay the principal constituted an irrevocable election to treat the mortgage as due.

2. PAYMENT—INVOLUNTARY—RECOVERY.

Where a mortgage provided that on default of interest the mortgagee could treat principal and interest as due, and on such default he brings suit for foreclosure, it constitutes an election to treat the mortgage as due; and when the mortgagor tenders the amount of the mortgage and interest, and the mortgagee then states that the foreclosure suit has been discontinued and insists on the payment of \$1,000, which the mortgage provides for in case the mortgagor elects to pay the amount of the mortgage before it is due, and the mortgagor, to procure the discharge of the mortgage, pays such bonus, the payment is involuntary, and may be recovered in an action for that purpose.

Cullen, C. J., and Gray, J., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by James Kilpatrick against the Germania Life Insurance Company. From the judgment of the Appellate Division (88 N. Y. Supp. 628, 95 App. Div. 287), affirming a judgment for defendant on dismissal of the complaint, plaintiff appeals. Reversed.

This action is brought to recover the sum of \$1,000 alleged to have been wrongfully exacted from the plaintiff by the defendant as a bonus on the payment of a mortgage; this sum being in excess of the principal and interest called for by the plaintiff's bond. On August 28, 1899, the plaintiff executed and delivered to the defendant his bond for \$80,000, with a mortgage to secure the payment of the same, covering premises in the borough of Manhattan, in the city of New York, at 6 per centum per annum until the buildings on the mortgaged premises should be fully completed, and with interest thereafter at 5 per centum per annum, payable semiannually on February and August 1st, with the privilege to the plaintiff of paying the principal sum secured by the bond and mortgage, with accrued interest thereon, at any time after August 28, 1900, and prior to August 1, 1901, upon the payment, in addition to the principal sum and interest, of the further sum of \$1,000. The mortgage contained a covenant that upon default in the payment of interest, or any part thereof, on any day whereon the same was payable by the terms of the bond and mortgage, the principal sum, with all arrears of interest should, at the option of the defendant, become and be due and payable immediately.

and payable August 1, 1900. The defendant thereupon commenced an action to foreclose the mortgage, claiming the whole amount of principal to be due by reason of the default in payment of interest. The summons and complaint were filed in the office of the clerk of the county of New York August 7, 1900, and the defendant was served with the summons and complaint about August 10, 1900. On August 22, 1900, an order was entered by the defendant, *ex parte*, discontinuing the action and cancelling the *lis pendens*, without costs. The plaintiff became aware of this discontinuance two or three days before the 28th of August, 1900. On August 28, 1900, the plaintiff paid to the defendant the principal sum of \$80,000 secured by the bond and mortgage, together with interest, and also \$1,000 bonus. This action was brought to recover the \$1,000 bonus so paid by the plaintiff to the defendant on the ground that such payment was involuntary, and that the plaintiff was wholly under duress, and strenuously objected to the payment thereof, alleging that the same was wholly unwarranted both in law and equity. The plaintiff embodied in his complaint a second cause of action for money had and received by defendant to its use, and that no part thereof had been paid. The action was tried at a jury term, and the complaint dismissed at the close of the plaintiff's case. The judgment entered upon this decision was affirmed with a divided court; Presiding Justice Van Brunt and Justice Hatch dissenting.

E. R. Root and Addison Allen, for appellant. J. Brewster Roe, for respondent.

BARTLETT, J. (after stating the facts). A very narrow question is presented on this appeal. We have a mortgage given on the 28th of August, 1899, payable August 1, 1901. The interest was payable semiannually on February and August 1st. The privilege was accorded the plaintiff of paying the principal sum and interest at any time after August 28, 1900, and prior to August 1, 1901, upon the payment, in addition to the principal sum and interest, of the further sum of \$1,000. The mortgage contained the usual covenant that upon default in the payment of interest the principal sum, with all arrears of interest, should, at the option of the defendant, become due and payable immediately. The plaintiff defaulted in the payment of his interest due August 1, 1900. The plaintiff, represented by his nephew, called upon the counsel for the defendant prior to the time he was served with the summons and complaint and sought to make some arrangement as to the payment of the interest, but was informed that counsel had been instructed to foreclose. A day or two later the plaintiff was served with the summons and complaint in the foreclosure ac-

tion. Some time later the plaintiff's nephew again called on counsel for the defendant to notify him that they would be ready to pay the amount of the bond and mortgage, with interest, within the next day or two, and informed him that they had arranged for a new loan of \$95,000 on the same premises covered by the defendant's mortgage. The defendant's counsel then informed the plaintiff's nephew and representative that he was very sorry, but his client had withdrawn its foreclosure suit and proposed to sue for the interest only, and that they would not receive payment of the principal sum due under the bond and mortgage unless plaintiff paid the additional sum of \$1,000. This was some three or four days before the 29th of August, 1900, when the parties met, and plaintiff paid the principal, interest, and \$1,000 bonus, protesting at the same time that the latter was an illegal exaction and was money not due the defendant.

The sole question presented is whether the payment of this bonus of \$1,000 was, under the circumstances, voluntary or exacted when the plaintiff was under duress. It will be observed that at the time when the defendant saw fit to avail itself of the covenant contained in the mortgage providing that default in payment of interest should, at its option, make the principal sum and interest due and payable immediately, the time had not yet arrived when the plaintiff was permitted to exercise his option to pay the principal sum, interest, and said bonus at any time after August 28, 1900, and prior to August 1, 1901. At this time, on August 1, 1900, it was for the defendant to decide whether it would elect to treat the mortgage debt as due. It so elected, and instituted an action of foreclosure. From the moment of this election the mortgage debt became due, and the plaintiff was practically warned that he must take measures to protect himself. It is undisputed that before the discontinuance of the foreclosure action the plaintiff had changed his position, had obligated himself to make a new loan on the mortgaged premises, and necessarily had contracted financial obligations in that connection. After these negotiations for the new loan had proceeded to a point when the plaintiff was advised as to the time when he might expect the money thereon, he notified the defendant that on a day certain he would pay the mortgage and interest. Thereupon the defendant's counsel stated to the plaintiff that the foreclosure action had been discontinued and that an action would be begun to recover the interest only, and that the plaintiff would not be permitted to discharge the mortgage debt and interest unless he also paid the bonus.

The defendant having placed the plaintiff in this position, it had no power, by discontinuing the foreclosure action, to restore the status of the parties as existing on August 1, 1900, when plaintiff made default in the payment of interest. The election made by de-

fendant at that time to treat the mortgage debt as due became final and irrevocable after plaintiff's change of position and assumption of legal obligations, the direct result of that election. Thenceforward the right to exact the bonus, so called, of \$1,000 departed from the defendant, because it had voluntarily waived it by bringing suit to foreclose the mortgage and expressly alleging its election in the complaint. It could not again elect by withdrawing its previous election. It could not say, "I waive my waiver." The election, once made, was final, and not subject to change at the option of the defendant. Notwithstanding this, the defendant insisted upon the payment of the bonus before it would satisfy the mortgage, and in addition threatened to sue for the interest. Having no right to the bonus, it still insisted on the payment thereof before it would do its legal duty. The plaintiff, in view of the way business is done in giving a new mortgage to pay off the old one, could not wait to make a tender and take legal action, and he was not obliged to. He could submit to the exaction, and pay the bonus, and sue to recover it back, because such a payment is not voluntary. In effect the defendant held plaintiff's property in its grasp through its lien thereon and would not surrender it until the unlawful exaction was complied with. The payment was made to free the property from the duress as much as if it had been a chattel and the defendant had it in his possession under a pledge, refusing to part with it unless the bonus was paid. Under these circumstances the compulsion was illegal, unjust, and oppressive, and the plaintiff, having submitted under protest, had the right to recover according to the authorities. The refusal of the defendant to accept the mortgage debt and interest, unless the bonus was paid, placed the plaintiff in a position where he was compelled to submit to the exaction in order to receive a satisfaction of the defendant's mortgage and secure the money on the new loan which would protect him in the emergency.

The distinction between a voluntary and involuntary payment is very clearly pointed out in many cases. In *Tripler v. Mayor*, etc., of N. Y., 125 N. Y. 617, 625, 28 N. E. 721, Judge Peckham states: "The very word used to describe an involuntary payment imports a payment made against the will of the person who pays. It implies that there is some fact or circumstance which overcomes the will and imposes a necessity of payment in order to escape further ills." In *Scholey v. Mumford*, 60 N. Y. 498, Judge Rapallo remarks (page 501): "To constitute a voluntary payment the party paying must have had the freedom of exercising his will. When he acts under any species of compulsion the payment is not voluntary." In *Bates v. New York Ins. Co.*, 3 Johns. N. Y. Cas. 238, Justice Thompson states (page 239): "The equitable extension of this kind of action [money had and received] has of late been so liberal that it will be

extortion, imposition, oppression, or taking an undue advantage of his situation. In the present case there was at least an undue advantage taken of the plaintiff's situation. * * * The money being inequitably demanded of him, he must be presumed to have paid it, relying on his legal remedy to recover it back." In *Buckley v. Mayor, etc.*, of N. Y., 30 App. Div. 463, 465, 52 N. Y. Supp. 452, 454, Justice Barrett states: "There is no ironclad rule which confines an involuntary payment to cases of duress of person or restraint of goods. Money compulsorily paid to prevent an injury to one's property rights comes within the same principle. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287." This case was affirmed without opinion in 159 N. Y. 553, 54 N. E. 1089. In *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409, Mr. Justice Field states: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, * * * there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, for which the latter has no other means of immediate relief than by making the payment." In *Adams v. Irving National Bank*, 116 N. Y. 606, 610, 23 N. E. 7, 8, 6 L. R. A. 491, 15 Am. St. Rep. 447, Judge Brown, referring to the old common-law rule applicable to this subject, states: "This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain goods wrongfully detained; excessive fees when taken under color of office; excessive charges collected for performance of a duty, etc. In all such cases there was a moral coercion which destroyed the contract." See, also, *Briggs v. Boyd*, 56 N. Y. 239; *Stenton v. Jerome*, 54 N. Y. 480; *Baldwin v. Liverpool & G. W. Steamship Co.*, 74 N. Y. 125, 30 Am. Rep. 277.

We are of opinion that the plaintiff was under duress when making the payment of the bonus of \$1,000 and is entitled to recover judgment for that sum with interest.

The judgments and orders of the Appellate Division and Trial Term should be reversed, and a new trial ordered, with costs to the appellant in all the courts to abide the event.

GRAY, J. (dissenting). The plaintiff seeks to recover back from the defendant a sum of money which, as he claims, was wrongfully exacted from him by the defendant upon his payment of the principal of a bond given to secure a loan of money to him. His right to it must depend upon whether the money was paid under compulsion: for if the payment was voluntary, with no duress of the

was neither misrepresentation nor mistake; for the payment was pursuant to an agreement, and I am unable to perceive in the circumstances disclosed any ground for the recovery. The plaintiff had borrowed \$80,000 from the defendant, and had given his bond, secured by mortgage of real estate in New York, for the repayment. The loan was to be paid in two years. If default was made in the payment of interest, the principal sum became due immediately. Each instrument contained the following clause: "That the said James Kilpatrick shall have the privilege of paying said principal sum of \$80,000, with accrued interest thereon, at any time after August 28, 1900, and prior to August 1, 1901 [the due date of the bond], upon payment to said company, in addition to said principal sum and interest, of the further sum of \$1,000." Presumably, the \$1,000 represented an indemnity to the company for the shifting of so large a loan and the temporary loss of the investment. The plaintiff failed to pay his interest on August 1, 1900, and within a few days the defendant commenced a suit in foreclosure of the mortgage; but a few days later, and before any appearance or answer, voluntarily discontinued it, without costs. After the commencement of the foreclosure action, the plaintiff claims to have arranged to obtain the loan of \$95,000 upon the mortgaged property; but the time or terms of the arrangement do not appear, nor does it appear that the defendant knew anything of the arrangement at the time when it discontinued the foreclosure suit. What does appear is that a nephew of the plaintiff, after the foreclosure suit was begun, spoke to the defendant's attorney and requested a little more time than the 20 days to answer, as he thought that they would be able to obtain another loan. At a later interview the defendant's attorney informed him that the foreclosure action had been discontinued, and that his client would sue for the interest due, and would not take payment of the principal without the additional payment of the \$1,000 stipulated for. Thereafter, on August 28, 1900, the plaintiff paid the amount of the principal of his bond, with the additional \$1,000.

It seems to me clear that the payment was, in law, voluntarily made. The defendant abandoned its foreclosure suit and decided to allow the loan to remain. The plaintiff could then have paid the interest; but he preferred to pay off the existing loan and to borrow a larger sum upon the property. This he had the right to do; but he could only exercise it by complying with the stipulation of his bond, in paying the \$1,000 for the privilege. If it should be considered that the defendant, by its commencement of the foreclosure action, had forfeited or compromised its rights, then the plaintiff should have made a tender of the moneys due upon his bond, in which event, upon the

defendant's refusal to accept them, he could have appealed to the courts to compel the discharge of the mortgage. See *Kortright v. Cady*, 21 N. Y. 343, 347, 78 Am. Dec. 145. The two courses were open to him, to continue the existing loan or to pay it off, and he chose the latter, which was to his convenience and advantage, as enabling him to borrow a larger amount. If the bargain shall be said to have been a hard one, the agreement was willingly entered into, and I do not think it should be avoided upon the vague theory of some coercion in fact. It cannot, as I think, well be held that there was any duress, which coerced the plaintiff to make payment. There was no obligation upon him, at the time, to pay the principal, though there was an advantage, which he wished to seize upon, in his ability to borrow more upon his property. If the defendant had placed itself in a position where it was bound to take the principal sum, it had withdrawn from that position, and the plaintiff, as I have pointed out, made no tender in discharge of his indebtedness, upon which to predicate a right to have the satisfaction thereof decreed in equity. The utmost he can urge is that the defendant compelled him to abide by the strict terms of his agreement. That was not illegal, and no circumstances are shown which warrant the court in granting relief, whether upon the ground of fraud, or of duress of the person or of goods, or to prevent injury to property rights.

For these reasons, and for those stated by Mr. Justice Patterson in the Appellate Division, I advise the affirmance of the judgment.

HAIGHT, VANN, and WERNER, JJ., concur with BARTLETT, J. CULLEN, C. J., concurs with GRAY, J. O'BRIEN, J., absent.

Judgment reversed, etc.

MEMORANDUM DECISIONS.

AMERICAN ICE CO., Appellant, v. CATSKILL CEMENT CO., Respondent. (Court of Appeals of New York. Oct. 17, 1905.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (99 App. Div. 81, 80 N. Y. Supp. 801), entered November 29, 1904, which reversed an order of Special Term continuing pendente lite an injunction theretofore granted restraining the defendant from so operating a cement mill as to cause ashes, cinders, and dust to fall upon the ice fields and premises of the plaintiff. The following questions were certified: "First. Before the enactment of chapter 749, Laws of 1904, had the defendant the right to carry on a lawful manufacturing business upon lands bordering on the Hudson river, if in so do-

ing, smoke, cinders, dust, or soot was discharged from its mill into the air and carried by the winds over and upon ice formed in said river, to the injury of such ice, provided the defendant's mill was properly constructed and operated with due care? Second. Before the enactment of chapter 749, Laws of 1904, had the plaintiff the right to restrain and prevent the defendant from operating its said mill for the reason that in so doing smoke, cinders, dust, or soot was discharged from said mill into the air and carried by the winds over and upon ice formed in the Hudson river, to the injury of such ice, although the defendant's mill was properly constructed and operated with due care in carrying on a lawful manufacturing business? Third. Is chapter 749 of the Laws of 1904 of this state constitutional?" A. T. Clearwater, for appellant. Frank H. Osborn and John J. Linson, for respondent.

PER CURIAM. Appeal dismissed, with costs, upon the ground that none of the questions certified to this court was passed upon by the Appellate Division and the order is silent as to the ground of reversal.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

In re BOSSARD'S ESTATE. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (105 App. Div. 640, 94 N. Y. Supp. 1140), entered June 9, 1905, which affirmed an order of the New York county Surrogate's Court directing the executors herein to pay to the respondent a certain sum of money on account of his interest in the estate of August Bossard, deceased. Francis J. Kuerzi, for appellants. Joseph A. Arnold and Leon Lauterstein, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

BRADY, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment, entered July 7, 1904, upon an order of the Appellate Division of the Supreme Court in the Second Judicial Department (95 App. Div. 632, 88 N. Y. Supp. 1093), which reversed a judgment in favor of defendant, entered upon an order of the court at a Trial Term setting aside a verdict in favor of plaintiff and directing a dismissal of the complaint, and directed judgment in favor of plaintiff upon the verdict. I. R. Oeland and George D. Yeomans, for appellant. Thomas F. Magner, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

BRISTOW, Respondent, v. NATIONAL WALL PAPER CO., Appellant. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (95 App. Div. 194, 88 N. Y. Supp. 704), entered June 10, 1904, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial. Louis Marshall, for appellant. James C. Cropsey, F. W. Catlin, and Charles H. Kelby, for respondent.

1228
PER CURIAM. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. **O'BRIEN, J.,** absent.

BROWNING, Respondent, v. STILWELL, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 618, 87 N. Y. Supp. 1129), entered July 11, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court and an order denying a motion for a new trial. William Warburton Scrugham, for appellant. Clarence E. Thornall, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re BUNTING'S ESTATE. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (98 App. Div. 628, 90 N. Y. Supp. 1090), made November 11, 1904, which affirmed a decree of the New York county Surrogate's Court finally settling the accounts of Elizabeth M. Bunting, as executrix of Ella F. Bunting, deceased, and dismissing the objections thereto. Edward L. Blackman and Alfred B. Cruikshank, for appellant. Herbert Parsons, for respondent.

PER CURIAM. Appeal dismissed, without costs.

CULLEN, C. J., and BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. **GRAY and O'BRIEN, JJ.,** absent.

CHURCH et al., Respondents, v. RANDALL, Appellant. (Court of Appeals of New York. Oct. 10, 1905.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (105 App. Div. 636, 93 N. Y. Supp. 1123), entered May 17, 1905, which affirmed a judgment of the Schenectady County Court in favor of plaintiff entered upon a verdict. The motion was made upon the ground that the Court of Appeals had no jurisdiction to entertain the appeal; permission to take the same not having been granted. W. W. Wemple, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

CITY OF NEW YORK, Respondent, v. METROPOLITAN ST. RY. CO., Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (90 App. Div. 66, 85 N. Y. Supp. 693), entered February 10, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Bayard H. Ames, F. Angelo Gaynor, and Henry A. Robinson, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Terence Farley, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. **GRAY, J.,** not sitting.

CITY OF NEW YORK, Respondent, v. TUCKER, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (91 App. Div. 214, 86 N. Y. Supp. 609), entered March 2, 1904, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. Lawson Purdy, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and George S. Coleman, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

CITY OF ROCHESTER, Appellant, v. ROCHESTER RY. CO., Respondent. (Court of Appeals of New York. Oct. 17, 1905.) No opinion. Motion for reargument denied. Motion to amend remittitur granted, so as to strike out the provision for a new trial and to direct the Supreme Court to award final judgment for the amount claimed in the complaint and for interest and costs, and motion to amend in other respects denied. See 182 N. Y. 90, 74 N. E. 953.

CONGDON, Respondent, v. DELAWARE, L. & W. R. CO., Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (93 App. Div. 606, 87 N. Y. Supp. 1130), entered May 3, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. W. S. Jenney, for appellant. P. C. J. De Angelis, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and WERNER, JJ., concur. **VANN, J.,** not voting.

In re COOKSEY'S ESTATE. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 182 N. Y. 92, 74 N. E. 880.

CRANE CO., Respondent, v. SMYTHE, Appellant, et al. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 53, 87 N. Y. Supp. 917), entered May 6, 1904, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at Special Term and granting a new trial. Thomas Baines, for appellant. Curtis Fitz Simons, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for defendant on the stipulation, with costs, on opinion below.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

DAVIDS, Appellant, v. BROOKLYN HEIGHTS R. CO., Respondent. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 182 N. Y. —, 74 N. E. 1116.

DENNIS-WICKERS, Respondent, v. VILLAGE of ELMIRA HEIGHTS, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (88 App. Div. 617, 84 N. Y. Supp. 1123), entered November 17, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. George McCann, for appellant. Judson A. Gibson, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion in *Dennis v. Village of Elmira Heights*, 59 App. Div. 404, 70 N. Y. Supp. 812.

GRAY, BARTLETT, HAIGHT, and VANN, JJ., concur. CULLEN, C. J., and O'BRIEN and WERNER, JJ., dissent.

In re DEVINE. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (107 App. Div. 618, 85 N. Y. Supp. 1125), entered July 12, 1905, which modified, and affirmed as modified, an order of the Special Term directing the appellant herein to pay to the petitioner certain moneys collected by said appellant as attorney for said petitioner and retained by him. Lawrence F. Minge and Edward Schenck, for appellant. James A. Delehanty, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

DINGER, Respondent, v. CITY OF NEW YORK, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (101 App. Div. 202, 86 N. Y. Supp. 577, 92 N. Y. Supp. 1120), entered January 31, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. John J. Delany, Corp. Counsel (James D. Bell, of counsel), for appellant. Charles Coleman Miller, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

DINGER, Respondent, v. CITY OF NEW YORK, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (101 App. Div. 202, 86 N. Y. Supp. 577, 92 N. Y. Supp. 1120), entered January 31, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. John T. Delany, Corp. Counsel (James D. Bell, of counsel), for appellant. Charles Coleman Miller, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

DOWNS v. DOWNS et al. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (107 App. Div. 628, 85 N. Y. Supp. 1128), entered August 31, 1905, which affirmed an

order of the Suffolk County Court in surplus money proceedings. M. Casewell Heine and George F. Stackpole, for appellants. Richard L. Swezey, for respondent.

PER CURIAM. Order affirmed, with costs. **CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.**

DRAKE, Appellant, v. LAUER et al., Respondents. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (93 App. Div. 86, 86 N. Y. Supp. 986), entered March 16, 1904, affirming a judgment in favor of defendants entered upon the report of a referee. Eugene Van Voorhis, for appellant. John Desmond, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, and VANN, JJ., concur. HAIGHT, J., not voting. WERNER, J., not sitting.

ENGEL, Appellant, v. UNION SQUARE BANK, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 244, 87 N. Y. Supp. 1070), entered May 18, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial. David Steckler and Sol. Levi, for appellant. J. L. Weinberg, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

GOETZ, Appellant, v. STATE, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department (90 App. Div. 616, 85 N. Y. Supp. 739), entered May 16, 1904, affirming a judgment in favor of plaintiff entered upon an award of the Court of Claims. George L. Lewis, for appellant. Julius M. Mayer, Atty. Gen. (James G. Graham, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

GOLDBERG, Respondent, v. MARKOWITZ et al., Appellants. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment, entered May 17, 1904, upon an order of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 237, 87 N. Y. Supp. 1045), reversing a judgment in favor of defendants entered upon a verdict directed by the court and directing judgment in favor of plaintiff. Abraham H. Sarasohn, for appellants. Herbert Goldmark and George C. Coffin, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

1150
330
K. 2.

GORETH, Respondent, v. SHIPHERD, Appellant. (Court of Appeals of New York. Oct. 10, 1905.) Motion to dismiss an appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (92 App. Div. 611, 88 N. Y. Supp. 849), entered March 4, 1904, which affirmed an order of Special Term denying a motion to vacate certain orders theretofore granted in the action. The motion was made upon the ground that the Court of Appeals was without jurisdiction to review the order appealed from, permission to take the said appeal not having been obtained. Charles H. Strong, for the motion.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

GRIDLEY et al., Respondents, v. EINBIGLER et al., Appellants. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (98 App. Div. 160, 90 N. Y. Supp. 721), entered December 1, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. Jerome Eisner and Benjamin F. Einbiger, for appellants. William B. Ellison and Duncan A. MacIntyre, for respondents.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

HALE, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 613, 87 N. Y. Supp. 1135), entered May 25, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Edward W. S. Johnston, for appellant. John J. Delany, Corp. Counsel (Theodore Connolly and Arthur Sweeny, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

JONES, Appellant, v. NEW YORK CENT. & H. R. R. CO., Respondent. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 179 N. Y. 539, 71 N. E. 1132.

JONES et al. v. ROCKWELL et al. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (97 App. Div. 639, 90 N. Y. Supp. 1101), entered November 2, 1904, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial. Peter A. Hendrick and Henry M. T. Beekman, for appellants. Richard T. Greene and John M. Jones, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

KELLY, Respondent, v. HOME SAVINGS BANK of CITY of ALBANY et al., Appellants. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (103 App. Div. 141, 92 N. Y. Supp. 578), entered March 8, 1905, which reversed a judgment in favor of defendants entered upon a dismissal of the complaint by the court at a Trial Term and granted a new trial. M. H. Merwin and William P. Rudd, for appellants. Andrew J. Nellis, for respondent.

PER CURIAM. Appeal withdrawn on payment of costs of appeal in this court.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

KLEIN, Respondent, v. EAST RIVER ELECTRIC LIGHT CO. et al., Appellants. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion to amend remittitur or for reargument denied, without costs. See 182 N. Y. 27, 74 N. E. 495.

KRUEGER, Respondent, v. BARTHOLOMAY BREWERY CO., Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 58, 87 N. Y. Supp. 1054), entered May 17, 1904, which reversed a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and an order denying a motion for a new trial and granted a new trial. William A. Sutherland, for appellant. George H. Harris, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and VANN, JJ., concur. WERNER, J., not sitting.

In re LYONS CEMETERY ASS'N. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (105 App. Div. 628, 94 N. Y. Supp. 1152), entered June 6, 1905, upon an order which affirmed an order of Special Term confirming the report of commissioners in condemnation proceedings. E. W. Hamn, for appellant. Frank Rice, for respondent.

PER CURIAM. Judgment affirmed, with costs.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. CULLEN, C. J., not voting. O'BRIEN, J., absent.

MCCARTHY, Respondent, v. R. G. PACKARD CO., Appellant. (Court of Appeals of New York. Oct. 17, 1905.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (105 App. Div. 436, 94 N. Y. Supp. 203), entered June 20, 1905, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint. The following question was certified: "Does the complaint state facts sufficient to constitute a cause of action?" E. G. Benedict, for appellant. James McBrien and Frank M. Hardenbrook, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below. Question certified answered in the affirmative.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

McGEE, Appellant, v. BARBER ASPHALT PAVING CO., Respondent. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (85 App. Div. 620, 82 N. Y. Supp. 1103), entered November 14, 1903, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Henry A. Monfort, for appellant. Joseph N. Tuttle, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

MOILVAINE v. STEINSON et al. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion to vacate order dismissing appeal and for a reargument of motion denied, with \$10 costs. See 182 N. Y. —, 74 N. E. 1118.

McMAHON, Appellant, v. CRUCIBLE STEEL CO. OF AMERICA, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (93 App. Div. 607, 87 N. Y. Supp. 1140), entered April 20, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. W. J. McClusky, for appellant. James G. Tracy, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, and WERNER, JJ., concur. VANN, J., absent.

MAWSON, Appellant, v. WERMUTH, Respondent. (Court of Appeals of New York. Oct. 10, 1905.) No opinion. Motion for reargument denied, with \$10 costs. See 182 N. Y. 234, 74 N. E. 823.

In re MEIGHAN et al. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (106 App. Div. 599, 94 N. Y. Supp. 1153), entered September 7, 1905, which affirmed an order of Special Term denying the application of the petitioners for the determination and enforcement of a lien for their services as attorneys for the plaintiff in the action of Joseph Watkins, on behalf of himself and other stockholders of the American Grass Twine Company, plaintiff, against Darius O. Mills et al., defendants, John A. Garver, for appellants. George Welwood Murray and Charles P. Howland, for respondents.

PER CURIAM. Order affirmed, with costs. CULLEN, C. J., and GRAY, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

BARTLETT, J. (dissenting). This record discloses a state of facts entitling the petitioners

to a lien on the fund restored by the directors to the treasury of the company. In my opinion the vital error of the decision below is the failure to recognize the fact that the plaintiff, Watkins, sued on behalf of himself and all other stockholders similarly situated, making the company a party defendant after requesting it to bring the action and its failure to do so within a reasonable time. The company is the real party plaintiff. I concur in the dissenting opinion of the Appellate Division.

MILLER, Respondent, v. WARREN, et al., Appellants. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 192, 87 N. Y. Supp. 1011), entered May 21, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. David Thornton, for appellants. Eugene V. Daly, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

MONCK, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (97 App. Div. 447, 90 N. Y. Supp. 818), entered October 14, 1904, reversing a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term and granting a new trial. John B. Stanchfield, I. R. Oeland, and George D. Yoemans, for appellant. Isaac M. Kapper and Thomas E. Pearl, for respondent.

PER CURIAM. Order affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs.

CULLEN, C. J., and BARTLETT, VANN, and WERNER, JJ., concur. GRAY and HAIGHT, JJ., dissent. O'BRIEN, J., absent.

(182 N. Y. 569)

MUHLER v. NEW YORK & H. R. CO. et al. (Court of Appeals of New York. Oct. 24, 1905.) Motion for leave to move for reargument. See 173 N. Y. 549, 66 N. E. 558. The motion was made upon the grounds that the Court of Appeals had not considered the following contentions of the defendant upon the original appeal: "(1) That it was erroneous to hold the legal consequences resulting from the respective titles of the plaintiff, the defendants, and the city of New York, in relation to Park avenue in front of the premises in suit, to be the same as those passed upon in the case of Lewis v. N. Y. & Harlem R. R. Co., 162 N. Y. 202, 56 N. E. 540. (2) That the admission of evidence as to condition and courses of values, on streets, other than Park avenue, in the vicinity of the premises in suit, was erroneous. (3) That the allowance of interest on rental damages from February 16, 1897, was erroneous."

PER CURIAM. The alleged errors for which the defendants ask for a reargument of the case in this court were considered by us before our decision of the appeal, and none of them deemed tenable or of sufficient importance to justify a reversal of the judgment below. This statement is subject to one qualification. There does seem to have been an error in the date from which the trial court allowed interest upon the damages awarded by it. No point, however, was made as to this error by the defendants on the hearing of the appeal, nor can we find any ex-

of this error, which does not involve a very large sum, they must seek such relief by application to the Supreme Court. Motion for reargument denied, with \$10 costs.

OAKLAND CEMETERY, Respondent, v. CITY of YONKERS, Appellant. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (63 App. Div. 448, 71 N. Y. Supp. 783), entered August 10, 1901, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. Francis A. Winslow, for appellant. William W. Scrugham, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. **GRAY, J.,** not voting. **O'BRIEN, J.,** absent.

O'CONNOR, Respondent, v. MORCH, Appellant. (Court of Appeals of New York. Oct. 10, 1905.) Motion to dismiss an appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (106 App. Div. 611, 95 N. Y. Supp. —), entered June 15, 1905, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. The motion was made upon the ground that the Court of Appeals had no jurisdiction to review the judgment and order appealed from; said judgment unanimously affirming a judgment of damages for a personal injury, and no permission to appeal therefrom having been granted. John P. Donnelly and K. C. McDonald, for the motion. Thomas C. Whitlock, opposed.

PER CURIAM. Motion granted, and appeal dismissed, with costs and \$10 costs of motion.

PEOPLE, Appellant, v. DEGENFELDER, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (97 App. Div. 641, 90 N. Y. Supp. 1108), entered October 17, 1904, affirming a judgment in favor of defendant entered upon a verdict directed by the court. Julius M. Mayer, Atty. Gen. (Horace McGuire, of counsel), for the People. William B. Reading, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE, Respondent, v. LANNEN, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (89 App. Div. 618, 85 N. Y. Supp. 1140), entered December 17, 1903, affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. William B. Reading, for appellant. Julius M. Mayer, Atty. Gen. (Thomas C. Burke, of counsel), for the People.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

INGS & LOAN ASS'N. In re GOOD et al. (Court of Appeals of New York. Oct. 3, 1905.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (103 App. Div. 153, 92 N. Y. Supp. 689), entered March 15, 1905, which affirmed an order of Special Term confirming the report of a referee denying the claims of the appellants herein for preference upon the distribution of the assets of the Metropolitan Mutual Savings and Loan Association. The following questions were certified: "(1) Are the claimants holding shares in said corporation, known as 'Class E,' entitled to the rights of creditors or preferred shareholders of said corporation, after its dissolution, as relating to any of the installment stocks in said corporation, and entitled to the payment by the receiver on the final distribution of the assets of the corporation, to the extent of the par value of such stock, in preference and prior to any payment being made by said receiver to holders of shares of any such installment stocks? (2) Are the claimants holding shares in said corporation, known as 'Class K,' entitled to the rights of creditors or preferred stockholders of said corporation, after its dissolution, as relating to any of the installment stocks in said corporation, and entitled to the payment by the receiver on the final distribution of the assets of the corporation, to the extent of the par value of such stock, in preference and prior to any payment made by said receiver to holders of shares of any such installment stocks? (3) Are the claimants holding stock in said corporation, known as 'Class H,' entitled to the rights of creditors or preferred shareholders of said corporation, after its dissolution, as relating to any of the installment stocks in said corporation, and to the payment by the receiver on the final distribution of the assets of the corporation, to the extent of the paid-up value of such stock, in preference and prior to any payments being made by said receiver to claimants holding shares of any of the installment stock in said corporation?" Irving W. Cole, Fred Greiner, Charles R. Wilson, Philip S. Smith, Martin Clark, Stephen Lockwood, S. T. Lockwood, and Bertrand W. Nye, for appellants. Clark H. Timmerman, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion below, and the questions certified answered in the negative.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

PEOPLE ex rel. A. J. TOWER CO., Respondent, v. WELLS et al., Tax Com'rs, Appellants. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (98 App. Div. 82, 90 N. Y. Supp. 813), entered January 13, 1905, which reversed an order of Special Term dismissing a writ of certiorari to review the proceedings of the defendants in assessing the capital of the relator for the purpose of taxation and directed that such assessment be vacated and set aside. John J. Delany, Corp. Counsel (George S. Coleman and E. Crosby Kindleberger, of counsel), for appellants. Henry B. Twombly, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion below.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. **CULLEN, C. J.,** not voting. **O'BRIEN, J.,** absent.

PEOPLE ex rel. **McCABE**, Appellant v. **SNEDECKER** et al., Town Auditors, Respondents. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department (100 App. Div. 89, 94 N. Y. Supp. 819), entered July 24, 1905, which confirmed, on certiorari, the determination of the defendant rejecting a claim of the relator against the town of White Plains. **L. Lafin Kellogg** and **Alfred C. Petté**, for appellant. **H. T. Dykman** and **Charles Wesley**, for respondents.

PER CURIAM. Order affirmed, with costs.
CULLEN, C. J., and **GRAY**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.
O'BRIEN, J., absent.

PEOPLE ex rel. **VILLAGE OF CHATHAM**, Respondent, v. **BOARD OF SUPRS OF COLUMBIA COUNTY**, Appellant. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (105 App. Div. 637, 93 N. Y. Supp. 1144), entered May 29, 1905, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant board of supervisors to reconvene and ascertain the tax rate of the several tax districts in the county of Columbia. **J. Rider Cady**, for appellant. **Sanford W. Smith**, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion of Appellate Division in *People ex rel. Village of Kinderhook v. Board of Supervisors of Columbia Co.*, 105 App. Div. 319, 93 N. Y. Supp. 1093.

CULLEN, C. J., and **GRAY**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.
O'BRIEN, J., absent.

PEOPLE ex rel. **VILLAGE OF KINDERHOOK**, Respondent, v. **BOARD OF SUPRS OF COLUMBIA COUNTY**, Appellant. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (105 App. Div. 319, 93 N. Y. Supp. 1093), entered May 20, 1905, which affirmed an order of Special Term granting a motion for a peremptory writ of mandamus to compel the defendant board of supervisors to reconvene and ascertain the tax rate of the several tax districts in the county of Columbia. **J. Rider Cady**, for appellant. **Frank S. Becker**, for respondent.

PER CURIAM. Order affirmed, with costs, on opinion below.

CULLEN, C. J., and **GRAY**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.
O'BRIEN, J., absent.

PRUYN v. **MCOREARY**, Sheriff, et al. (Court of Appeals of New York. Oct. 24, 1905.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department (105 App. Div. 802, 93 N. Y. Supp. 995), entered May 12, 1905, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the complaint. The following questions were certified: "(1) Has the Supreme Court jurisdiction of the person of the defendant **Charles C. Black**, as receiver of the *Ecuador Company*? (2) Has the Supreme Court jurisdiction of the subject of the action?" **Theodore L. Frothingham**, for appellant. **Charles A. Collins** and **John L. Wells**, for respondent.

PER CURIAM. Order affirmed, with costs. Questions certified answered in affirmative.

CULLEN, C. J., and **GRAY**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.
O'BRIEN, J., absent.

ROBERTS, Respondent, v. **COOK**, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (98 App. Div. 634, 90 N. Y. Supp. 1112), entered November 28, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the Erie County Court on trial without a jury. **Irving W. Cole**, for appellant. **Clark H. Timmerman**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY**, **O'BRIEN**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.

ROBERTS, Respondent, v. **CRONK**, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 171, 88 N. Y. Supp. 103), entered May 28, 1904, affirming a judgment in favor of plaintiff entered upon a decision of the Erie County Court on trial without a jury. **Irving W. Cole** and **B. W. Nye**, for appellant. **Clark H. Timmerman** and **Lincoln A. Groat**, for respondent.

PER CURIAM. Judgment affirmed, with costs, on opinion below.

CULLEN, C. J., and **GRAY**, **O'BRIEN**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.

ROCHESTER TRUST & SAFE DEPOSIT CO., Respondent, v. **TRUESDALE**, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (94 App. Div. 612, 88 N. Y. Supp. 1115), entered October 12, 1904, affirming a judgment in favor of plaintiff entered upon the report of a referee. **George Truesdale**, in proper. **Edgerton R. Williams, Jr.**, and **Wm. N. Cogswell**, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY**, **O'BRIEN**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.

RODGERS, Appellant, v. **CITY OF NEW YORK**, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (100 App. Div. 516, 91 N. Y. Supp. 1111), entered February 9, 1905, affirming a judgment in favor of plaintiff as to the first, in favor of defendant as to the third, and dismissing the second, fourth, and fifth causes of action, entered upon a verdict, and also affirming an order denying a motion for a new trial. **L. Lafin Kellogg** and **Alfred C. Petté**, for appellant. **John J. Delany**, Corp. Counsel (**Theodore Connolly** and **Terence Farley**, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and **GRAY**, **O'BRIEN**, **BARTLETT**, **HAIGHT**, **VANN**, and **WERNER**, JJ., concur.

SCHMIEG, Respondent, v. UNION RY. CO. OF NEW YORK CITY, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (87 App. Div. 633, 84 N. Y. Supp. 1145), entered December 3, 1903, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. Bayard H. Ames and Henry A. Robinson, for appellant. Don R. Almy, J. Arthur Hilton, and Henry C. Brooks, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

SCHREYER v. SCHREYER et al. (Court of Appeals of New York. Oct. 17, 1905.) Appeal by permission from an order of the Appellate Division of the Supreme Court in the First Judicial Department (101 App. Div. 456, 91 N. Y. Supp. 1065), entered February 16, 1905, affirming an interlocutory judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. The following question was certified: "Did the deed executed by James L. Lowry on the 4th day of August, 1891, terminate the trust theretofore existing and vest a good and valid title in fee simple in the said premises in the said Henrietta Guldenkirch, free and clear of any trust?" Algernon S. Norton and Carlos C. Alden, for appellants. Alexander Thain, for respondent.

PER CURIAM. Interlocutory judgment affirmed, with costs, on opinion below. Question certified answered in the affirmative.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

STACKPOLE, Appellant, v. WRAY, Respondent. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (99 App. Div. 262, 90 N. Y. Supp. 1045), entered December 19, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term. Everett V. Abbot, for appellant. Eugene Lamb Richards, Jr., for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

STEINHARDTER et al., Respondents, v. HOWE et al., Appellants. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (100 App. Div. 515, 91 N. Y. Supp. 1115), entered January 19, 1905, affirming a judgment in favor of plaintiffs entered upon a verdict and an order denying a motion for a new trial. James C. De La Mare and J. Homer Hildreth, for appellants. Justin S. Galland, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

THOMPSON, Respondent, v. ERIE R. CO. Appellant. (Court of Appeals of New York. Oct. 24, 1905.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department (105 App. Div. 628, 94 N. Y. Supp. 1165), entered June 3, 1905, which affirmed an order of Special Term granting a motion to amend a judgment, theretofore entered in the above-entitled action at a Trial Term, at which the justice who granted the Special Term order presided, by striking therefrom a clause making it a judgment on the merits, and inserting instead the words "ordered a nonsuit." The following question was certified: "Had the Special Term the power, under the facts in this case, to make the order complained of?" Adelbert Moot and Joseph A. Wechter, for appellant. George C. Riley, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

In re TILT'S ESTATE. (Court of Appeals of New York. Oct. 17, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (107 App. Div. 616, 95 N. Y. Supp. —), entered July 22, 1905, which affirmed an order of the New York county Surrogate's Court fixing a transfer tax upon the estate of Albert Tilt, deceased. William G. Wilson, for appellants. George M. Judd and Edward H. Fallows, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and HAIGHT, VANN, and WERNER, JJ., concur. GRAY and BARTLETT, JJ., dissent. O'BRIEN, J., absent.

TUDOR, Appellant, v. EBNER, Respondent. (Court of Appeals of New York. Oct. 24, 1905.) Appeal, by permission, from an order of the Appellate Division of the Supreme Court in the First Judicial Department (93 N. Y. Supp. 1067), entered July 8, 1905, which affirmed an interlocutory judgment of Special Term overruling a demurrer to the answer. The following question was certified:

"Is an action, wherein the plaintiff is, and at the time of the accrual of the cause of action was, a resident of the state of Massachusetts, and the defendant is, and at the time of the accrual of the cause of action was, a resident of the district of Alaska, to recover damages incurred by plaintiff by reason of false and fraudulent representations made to him by the defendant, whereby he was induced to purchase personal property, which was of a value less than would have been the case had the representations been true, and also less than the purchase price, an action 'for any injury to the person or rights of another not arising in contract and not herein especially enumerated,' within the meaning of those words as they are used in an act of the Congress of the United States, entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' which was duly approved and became a law on the 6th day of June, 1900 (31 Stat. 334, c. 786), in title 2, c. 2 thereof, sections 3, 4, and 8 of which read as follows:

"Sec. 3. Civil actions shall only be commenced within the periods prescribed in this title after the cause of action shall have accrued. * * *

"Sec. 4. The periods prescribed in section three of this act for the commencement of actions shall be as follows: * * *

"Sec. 8. Within two years, First. An action for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not herein especially enumerated. Second. An action upon a statute for a forfeiture or penalty to the United States?"

H. B. Closson and Herbert Frazier, for appellant. Henry W. Clark, Albert B. Boardman, and Frank H. Platt, for respondent.

PER CURIAM. Order affirmed, with costs. Question certified answered in the affirmative.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

VON SCHUCKMANN, Respondent, v. HEINRICH, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (93 App. Div. 278, 87 N. Y. Supp. 673), entered April 23, 1904, modifying, and affirming as modified, a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. David B. Simpson, for appellant. Addison Gardner and James A. Speer, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

In re WALLACE. (Court of Appeals of New York. Oct. 24, 1905.) Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department (105 App. Div. 642, 94 N. Y. Supp. 1166), entered June 13, 1905, which affirmed an order of Special Term directing the appellant herein to pay to the petitioner certain moneys collected by said appellant as attorney for said petitioner and retained by him. Emanuel Jacobus, for appellant. Herbert Peake, for respondent.

PER CURIAM. Order affirmed, with costs.

CULLEN, C. J., and GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

WILLETS et al., Respondents, v. HAINES, Appellant, et al. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (96 App. Div. 5, 88 N. Y. Supp. 1018), entered July 22, 1904, affirming a judgment in favor of plaintiffs entered upon a verdict directed by the court. John

J. Cunneen and William W. Niles, for appellant. Wilson M. Powell, for respondents.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

WILLINSKY v. GREGORY et al. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the First Judicial Department (94 App. Div. 620, 88 N. Y. Supp. 1119), entered May 27, 1904, affirming a judgment in favor of plaintiff entered upon a verdict and an order denying a motion for a new trial. L. Sidney Carrere, for appellants. Louis Steckler and J. Brownson Ker, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

WUEST, Appellant, v. CITY OF NEW YORK, Respondent. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (89 App. Div. 262, 85 N. Y. Supp. 933), entered January 8, 1904, affirming a judgment in favor of defendant entered upon a dismissal of the complaint by the court at a Trial Term without a jury. Francis A. McCloskey, for appellant. John J. Delany, Corporation Counsel (James D. Bell, of counsel), for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

YOUNG, Respondent, v. BARRY, Appellant. (Court of Appeals of New York. Oct. 3, 1905.) Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (102 App. Div. 620, 92 N. Y. Supp. 1151), entered March 11, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term. S. M. Coon, for appellant. F. T. Cahill, for respondent.

PER CURIAM. Judgment affirmed, with costs.

CULLEN, C. J., and GRAY, O'BRIEN, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur.

